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RETHINKING CONSENSUAL HARM DOING

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I INTRODUCTION

My aim in this paper is to examine the moral limitations of consent as a defence to criminal wrongdoing. Positive morality alone is not sufficient for the purposes of rejecting consent as a defence, because consent provides an objective (critical moral) reason for excusing wrongful harm doing to others. However, the consent defence can be overridden by other critical moral considerations of greater importance. In this paper, it is argued that consent does not excuse inflicting irreparable harm of an extraordinary grave kind on others. Nor does it excuse serious reparable harm doing to others. This paper examines whether *R. v. Brown* [1993] 1 A.C. 212. (where the majority rejected consent as a defence to assault involving serious harm) and *R. v. Konzani*¹ (where the majority asserted that fully informed consent would have provided the HIV transmitter with a defence) are reconcilable with critical morality. Fair and principled criminalisation can only be determined by referring to critical moral standards.² I have argued elsewhere,³ that criminalisation is fair and just when it is deserved and when deservedness is

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¹ [2005] EWCA 706.

² Most of us are familiar with the debate Hart/Devlin debate. Devlin famously held that conduct could be criminalised so long as it violated community norms, as homosexuality did in the 1950s. Hart responded by arguing that conduct could only be criminalised when critical (objective moral) justifications are produced to show that it is fair to invoke the criminal law. Herbert Hart, *Law, Liberty and Morality*, (1963) 17. A detailed discussion of the distinction between critical and positive morality is beyond the scope of this paper. I generally adopt Wiggins' approach. See David Wiggins, *Ethics, Twelve Lectures on the Philosophy of Morality*, (2006) at chapters 11 & 12 (2006). See also Hilary Putman, "The Meaning of 'Meaning,'" in *Mind, Language, and Reality*, (1975); Andrei Marmor, *Positive Law and Objective Values*, (2001). See more generally the illuminating essays in Brian Leiter, *Objectivity in Law and Morals*, ((2001). Feinberg's harm principle provides a critical justification for invoking the criminal law: Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others*, Vol.,I, (1984).

³ Dennis J. Baker, "The Moral Limits of Criminalising Remote Harms", [2007] 10(3) *New Criminal Law Review* 371. See also Baker, below note 41. The lawmaker has to produce sound reasons to justify criminalisation. A core justification for criminalisation is *culpable* harm doing: wrongful harm doing shows why those being criminalised deserve (penal sanction: imprisonment etc.) censure and hard treatment. A criminal conviction not only results in stigma, but often results in hard treatment. The punishment should be deserved. It is deserved when it is proportionate to the defendant's culpability and the harmfulness of her actions. See generally Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles*, (2005) 4. See also J. R. Lucas, *Responsibility*, (1993) 57-108; J. R. Lucas, *On Justice*, (1980).

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determined according to objective⁴ moral standards such as harm doing and culpability. It would be unjust and unfair to criminalise people merely because a majority of the community do not approve of their lifestyles.⁵ In his *magnum opus* on criminalisation, Feinberg persuasively argues that under a liberal scheme for criminalisation ‘the Harm and Offence Principles, duly clarified and qualified, between them exhaust the class of good reasons (critical moral justifications) for criminal prohibitions’.⁶

In Feinberg’s two later volumes he makes it explicitly clear that ‘legal moralism’ and ‘legal paternalism’ are insufficient grounds for criminalising conduct.⁷ This paper does not engage with that debate. But it is worth noting that *R. v. Brown* was not decided entirely on paternalistic grounds, because the criminalised conduct was harmful to others. I fully agree with Feinberg’s views on paternalism. Paternalism does not provide a critical moral justification for criminalisation. If a person chooses to shorten her life by smoking, to risk her life by skydiving or by having unprotected sex with lots of strangers, and so on, she risks harming herself in a grave way. Nevertheless, criminalisation is not appropriate in such cases as it can only harm the harmed party further. Criminalisation results in censure and hard treatment and is only deserved when a person violates the rights of others. If a person subjects herself to hard treatment (harm) the State should offer guidance, but it should not inflict further hard treatment on that person by subjecting her to undeserved⁸ penal sanction.

Ashworth argues that *Brown* supports the principle of paternalism, because criminalisation in such circumstances invades ‘the realm of personal autonomy where

⁴ Dworkin also provides a convincing defence of critical morality (that is, of the “objectivity of morality”). See Ronald Dworkin, ‘Objectivity and Truth: You’d Better Believe It,’ (1996) *Philosophy and Public Affairs* 87. Notwithstanding Hart’s contribution to principled criminalisation, I think, per contra, his reflections on the objectivity of morality were of little value. In particular, see his remarks in the Postscript to the 2nd edition of *The Concept of Law*, (1994).

⁵ See generally Andrew von Hirsch and Andrew Simester, *Incivilities: Regulating Offensive Behaviour*, (2006).

⁶ Joel Feinberg, *The Moral Limits of the Criminal Law: Offence to Others*, Vol. III, (1985) xiii.

⁷ Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing*, Vol. IV, (1988) 323-324; Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self*, Vol. III, (1986).

⁸ Punishment is not deserved because the self-harmer has not harmed the interests of others.

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each competent, responsible adult should reign supreme'.⁹ According to the idea of personal autonomy a person should be free to do as she pleases so long as her actions do not wrongfully harm others. Likewise, Feinberg argues that even though the consenters are harmed in such cases, they are not wronged because they are personally autonomous and can choose to be treated in such a way. Feinberg argues that the harm is not nullified, but that it is not wrongful harm as consent nullifies the wrongdoing involved.¹⁰ *Per contra*, it is argued that respecting personal autonomy is fundamentally different from respecting human beings as ends¹¹ in themselves (rational autonomy: dignity). One cannot alienate her right to be treated with a *minimum* degree of respect as a human being merely by being irrational.¹² Personal autonomy does mean that consent is a defence to trivial and ephemeral harms such as tattooing, ear piercing and so forth. However, once the harm crosses a certain threshold, it degrades the consenters' dignity to an unacceptable degree and is properly criminalisable. The controversy comes when one tries to draw a line in those cases involving borderline harm. Night is different from day, but there is no clear line for determining when night starts and day ends. Likewise, there is no clear line for deciding when harm to a human being treats her with an unacceptable lack of respect and consideration as a human being. Some suggestions are made below, but obviously it is not possible for me to provide mathematical like formula for solving these types of hard cases.

Meanwhile, Simester and Sullivan¹³ suggest that consent in *Brown* was limited for legal moralistic reasons. They note that: '[i]n *Brown* the House of Lords held that, in the

⁹ Andrew Ashworth, *Principles of Criminal Law*, (2006) 41. John Stuart Mill recognized the right to personal autonomy as both a limitation on the power of the government and as principle of preminent deference to the individual.

¹⁰ Feinberg, Vol. III, above note 7, 20. It is important to note that in Feinberg's scheme mere harm doing does not provide a justification for criminalisation. The harm must also be wrongful.

¹¹ Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy*, (1989) 53-54, 66.

¹² *Ibid.* See also Onora O'Neill, 'Public Health or Clinical Ethics: Thinking beyond Borders,' 16(2) (2002) *Ethics & International Affairs* 35, 36-37. Rational autonomy in the Kantian sense differs from personal autonomy, as it only allows 'one set of principles which people can rationally legislate and they are the same for all. Nobody can escape [his or her] rule simply by being irrational and refusing to accept them. Personal autonomy, by contrast, is essentially about the freedom of persons to choose their own lives': Joseph Raz, *The Morality of Freedom*, (1986) 371.

¹³ Andrew Simester, and Graham Sullivan, *Criminal Law: Theory and Doctrine*, (2nd revised edn. 2004) 16.

context of sadomasochistic sexual activity, the infliction of actual bodily harm upon a consenting adult “victim” was an offence. From the perspective of the Harm Principle, there is no wrong to V since the activity occurs with V’s consent. But from the perspective of *legal moralism* (the subjective whims of the majority), D’s conduct may be regarded as inherently wrong—and therefore legitimately criminalisable. Indeed, V’s consent simply makes V, too, a participant in the offence’. It is argued below that the majority in *Brown* did not *have* to rely on legal moralism to justify their decision, because the degree of harm doing provided the lawmaker with a critical moral reason for invoking the criminal law, not to punish the consenters but to prevent the harm-doers from relying on consent to degrade the dignity of the consenters.

II CONSENTING TO GRAVE HARM

Feinberg’s harm principle allows a person to consent to all kinds of gross harms. For instance, a person might consent to slavery, death, gross violence and so forth. Feinberg postulates that wrongdoing is nullified by consent in the case of euthanasia and gladiatorial battles, but holds that these activities are criminalisable because of the difficulty in determining the genuineness of the consent that may have been given. Feinberg argues that: ‘To the extent that B’s consent is not fully voluntary, the law is justified in intervening “for his sake”’.¹⁴ In those cases where it is not difficult to ascertain the authenticity of the consent (sadomasochism, HIV transmission), Feinberg allows consent to override the *prima facie* case for criminalisation. Is it morally right to let people consent to *irreparable* injury of an extraordinarily grave kind such as blinding? The claim made in this paper is that consent does not nullify the wrongdoing involved in practices that involve purposeless or irreparable harm doing of an extraordinarily grave kind.

¹⁴ Feinberg argues: ‘Given the uncertain quality of evidence on these matters, and (in the case of slavery) the strong general presumption of non-voluntariness, the state might be justified in presuming non-voluntariness conclusively in every case as the least risky course’. In the case of euthanasia Feinberg notes that: ‘the only possible reason for maintaining the present absolute prohibition is that it is necessary to prevent mistakes and abuse’: Feinberg, Vol. III, above note 7.

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Those who consent to being infected with HIV or to blinding and so forth are irreparably harmed, but are they wrongfully harmed? How much harm can we inflict whilst relying on consent as a defence? In certain paradigm cases involving an alienation of a person's humanity, Kant's¹⁵ second formulation of the Categorical Imperative can be invoked to limit the scope of consent. Duff¹⁶ has argued that Kant's idea of respect for humanity could be invoked to limit consent in such cases. However, Duff does not develop his argument. Nor does he consider the distinction between disrespect for humanity as an end in itself, and the deeper concept of humanity (a person's whole freedom—powers of choice) being inalienable. It is one thing to tolerate trivial or a limited degree of disrespect for your personhood (that is, consenting to being used as a mere means) and something entirely different to alienate your entire humanity. A person can alienate her humanity fully or partially. Firstly, she might alienate human dignity partially by permitting others to use her as a mere means, blinding her with acid, unnecessarily amputating her legs and so forth. Secondly, she could alienate her human dignity fully by alienating her right to life. Consent will not nullify the wrongfulness of a person alienating her right to life or liberty, as a person cannot do so without also forfeiting her humanity.

The critical moral force of this argument comes from both the idea that a person cannot alienate her humanity and the normative weight that is attached to the *irreversible* (or severe) harmful consequences of harming others in such circumstances. The consequences are simple, the consenter may change her mind a month later, but it is too late to reverse the harm as it is irreparable. In those cases where grave reversible harm is inflicted without some overriding moral justification, it is the violation of the consenter's inalienable right to be treated with a minimum degree of respect and consideration as a human being that provides the critical justification for denying consent as a defence. It is

¹⁵ H. J. Paton, *Kant's Groundwork of the Metaphysic of Morals*, (1948), 96. I invoke the second formulation of the Categorical Imperative in a wide dual sense to explain the wrongfulness of consenting to death, slavery and gross physical violations

¹⁶ Anthony Duff, 'Harms and Wrongs,' [2001-2002] 5 *Buffalo Criminal Law Review* 13 .

this neo-Kantian approach alone that explains why the wrongdoers in *R. v. Konzani* and *R. v. Brown* cannot rely on consent as a defence. In *R. v. Konzani* the consenting victim, in deontological terms, alienates her inalienable right to personhood. In consequential terms, she consents to irreparable harm. Because of the gravity and irreparable nature of the harm, it is not permissible for another person to take advantage of consent in such circumstances.

R. v. Brown is more controversial as the victims do not *entirely* alienate their rights to life (rational autonomy: dignity). Thus, a wider normative analysis is required in this type of borderline case. The critical moral argument for limiting consent in the *R. v. Brown* situation is somewhat weaker. Nevertheless, a weak case can be made by focusing on the gravity of the normative harm involved. A case might be made for limiting consent as a defence in the *Brown* situation based on the degree of the disrespect for humanity involved, the *purposelessness* (i.e., the lack of overriding moral justification) of *practice* of sadomasochism which involves repeated harm that is inseparable from sadomasochism's legitimate pleasure seeking aims, and the gravity of the harm involved. It is argued below that it is the normative links and the degree of disrespect and inconsideration for the consenters in *Brown* that is the basis of the case for rejecting consent as a defence.

III THE MORAL LIMITATIONS OF CONSENT *R. v. KONZANI*

Let us look at the detail of the aforementioned arguments. *R. v. Konzani* involved moral wrongdoing as the right to life and liberty (not selling oneself into slavery)¹⁷ are inalienable.¹⁸ According to Kant, one owes oneself the same respect as one owes others.¹⁹ Kant states that:²⁰

¹⁷ For example, a person could not contract to be a slave because she alienates her humanity: Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, translated from the German by William Hastie, *The Philosophy of Law*, (1887) 19.

¹⁸ Similarly, a Kantian might argue that a person cannot release others from the obligation to refrain from killing him: consent is no defence against a charge of murder. To accept principles of this sort is to hold that rights to life and liberty are, as Kant believed, rather like a trustee's rights to preserve something valuable

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

Hence, when x allows y to infect her with a deadly disease x not only allows y to use (wrong) her as a mere means, but also alienates her humanity—she ceases to be a person. ‘The foundational assumption in Kantian morality is that human freedom has unconditional value, and both the *Categorical Imperative* and the *Universal Principle of Right* flow directly from this fundamental normative claim: the Categorical Imperative tells us what form our actions must take if they are to be compatible with the universal value of freedom, and the universal principle of right tells us what form our actions must take if they are to be compatible with the universal value of freedom, regardless of our maxims and motivations’.²¹ The *Universal Principle of Right* holds: ‘Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every other man by virtue of his humanity’.²² Freedom is about having the power to choose. A person is free if she is independent from being compelled by the choices of others. A person alienates her humanity if she rids herself of the capacity of choice. A person is free if she is able to use her powers to make choices. Maintaining humanity is about retaining a sufficient degree of your freedom and powers to set and pursue your own purposes. ‘You need more than the ability to pursue purposes you have

entrusted to him: he has not only a right but a duty to preserve it’: Thomas Hill, *Autonomy and Self-Respect*, (1991) 15. See also Terrence McConnell, *Inalienable Rights: The Limits of Consent in Medicine and Law*, 31 *et seq* (2000).

¹⁹ John Rawls, *Lectures on the History of Moral Philosophy*, (2000) 191-192

²⁰ Mary Gregor, *Practical Philosophy*, (1999) 557.

²¹ Mark Timmons, ‘Motive and Rightness in Kant’s Ethical System,’ in Mark Timmons, *Kant’s Metaphysics of Morals: Interpretative Essays*, (2002) 286.

²² Gregor, *supra* note 20, 393.

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set; you also need to be able to decline to pursue purposes unless you have set them. When I usurp your powers, I violate your sovereignty precisely because I deprive you of that veto'.²³ When a person consents to death or slavery she allows her powers of choice to be put to an end.²⁴

Consent will not override the *prima facie* wrongdoing involved, as the moral duty to maintain your humanity is absolute. Hill²⁵ notes that there may be no specific range of inalienable rights, but that there is at least one cardinal right that cannot be waived. That is, the right to be respected as a rational being. Hill holds that: 'No matter how willing a person is to submit to humiliation by others, they ought to show him some respect as a person... [T]his respect owed by others would consist of a willingness to acknowledge fully, in word as well as action, that person's basic equal moral status as defined by his other rights'.²⁶ To waive this right would render the moral agent as servile.²⁷ Hill does refer to servility, but I put a deeper emphasis on the idea of a person alienating her humanity—that is consenting to harm that deprives her of her personhood—alienates her whole freedom. I make a distinction between consenting to disrespect generally and consenting to disrespect that rids you of your powers of rational choice. The degrading treatment of the victims in *R. v. Brown* did not remove the victims' ability to make decisions—their whole freedom: humanity. However, they were used as mere means, as objects or tools, but this alone does not override consent as a defence, as it does not usurp the victims' entire powers of choice. Some might argue that this ignores the victims' personal autonomy choices. After all, they choose the harm doing for the sake of gaining sexual pleasure. But these types of personal autonomy choices do not override the need to preserve a person's rational autonomy: dignity. Likewise, a person's consent based on a personal autonomy choice does not allow others to degrade her humanity beyond all limits. It is not the mere gravity of the harm that provides the justification for invoking

²³ Arthur Ripstein, 'Beyond the Harm Principle,' (2006) 34(3) *Philosophy & Public Affairs* 215, 234-235.

²⁴ *Ibid.*

²⁵ Hill, above note 18, 15-16.

²⁶ *Ibid.*

²⁷ *Ibid.*

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the criminal law, but rather it is its direct impact on humanity that makes it criminalisable. A person may consent to having you home burned to the ground even though she has no income or anywhere else to live, but she cannot waive her right to maintain a certain degree of humanity. The victims in *R. v. Brown* did not cease to be persons, but their personhood was diminished. Hence, the type of harm doing in both *Brown* and *Konzani* combined with its impact on the humanity of the victims provides a sufficient basis for limiting consent as a defence in such cases.

You may be free to end you freedom (for example, suicide is morally wrongful but not criminalisable as it is self harm), but you cannot use *another agent* to end your freedom. Some rights are so cardinal and *constitutive* of humanity, that a person is not permitted to waive or exchange them ‘*no matter how good* the expected consequences of striking a bargain’.²⁸ A sex worker from a third world country such as India might argue that it is worth trading her humanity (*i.e.*, by working as a sex slave in an illegal Western brothel), for something of merely relative value: the benefits of living in the West. By selling herself into sex slavery she renders herself servile. The sex trader cannot trade consenting women to gain a living: sell them like books, because this would not only use them as a mere means to his end of gaining a living—as a tool (a sex vending machine), but would also deprive them of their humanity. The pimp cannot argue that the prostitute’s consent (whether genuine or not) is sufficient to warrant using her in a way that alienates her entire capacity for choice. As regards the sex trader’s (pimp) possession of them, they are only bound to her in so far as she has a legitimate and fair contract for their services.²⁹ But his right to use them as employees in her bordello does not allow her to ‘conduct herself towards them as if she was their proprietor or owner (*dominus servi*); because they are only subjected to his power by Contract, and by a Contract under certain definite restrictions. For a Contract by which the one party renounced his *whole freedom* for the advantage of the other, *ceasing thereby to be a person* and consequently having no duty even to observe a Contract, is self-contradictory, and is therefore of itself null and

²⁸ Arthur Kiflik, ‘The Utilitarian Logic of Inalienable Rights,’ (1986) 97 *Ethics* 75.

²⁹ Hastie, above note 17, 119.

void'.³⁰ A happy slave 'may willingly live a life in which a sufficient range of choices is available, and yet be stripped of [rational choices] dignity'.³¹

The crucial distinction between merely treating someone as a mere means and killing her is that the dead victim ceases to be a person—she renounces her whole freedom. A person cannot alienate her *powers*—she cannot give her self up for another's cannibalistic purposes, etc., as this forfeits her humanity. But it is possible to use others as a mere means without destroying their personhood. For example, when an experimenter lies to her subjects about the true nature of the experiment, she uses them for her own purpose of gaining scientific results. She fails to respect their choices as persons worthy of respect but does not destroy their personhood merely by deceiving (using them as a mere tool to gain results) them about her aims.

Likewise when a man infects a woman with HIV,³² consent would not be sufficient to nullify the wrongdoing involved because the victim eventually ceases to be a person—her powers are eventually put to an end. Her whole freedom (humanity) is not alienated immediately, but the long-term result is that she puts her powers to an end by consenting to the transmission of a disease that science shows causes premature death. The deliberate transmission³³ of the disease that serves no legitimate purpose (lacks and overriding moral justification) should be prevented. In some cases there may be critical moral reasons for tolerating deliberate transmission. For example, a loving couple may be in a situation where one of them has contracted the virus by accident, but wish to have a child. In such circumstances, there would obviously be a fairly weighty moral

³⁰ *Ibid.* Cf. Feinberg, Vol. III, above note 7, 5.

³¹ Meir Dan-Cohen, 'Defending Dignity,' *Boalt Working Papers in Public Law*, University of California, Berkeley, Paper 99, (2002) 158-162; Hastie, above note 17, 193-194.

³² See *R. v. Konzani* [2005] EWCA 706 where it was 'emphasised that there was a critical distinction between taking a *risk* as to the various potentially adverse and possibly problematic consequences of unprotected consensual sexual intercourse, and the giving of informed consent to the *risk* of infection with a fatal disease. For consent to the risk of contracting HIV to provide a defence, the consent had to be an informed consent'. See also *R. v. Dica (Mohammed)* [2004] EWCA Crim 1103 and *R. v. Barnes (Mark)* [2004] EWCA Crim 3246.

³³ We are not talking about the loving couple where the husband or wife contracts HIV via a blood transfusion and accidentally passes it on by trying to have another child, *etc.* We are talking about deliberate and wanton transmission.

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countervailing consideration for allowing the uninfected partner to consent to the risk of the harm that is likely to transpire if infection occurs. Nevertheless, in cases where people consent to the risk of contracting a deadly virus for no reason other than to have intercourse without a prophylactic, the State would have a legitimate interest in criminalising the harm-doers' wanton use of his fellow human being. It is wanton, because failing to take the trivial precaution of using a prophylactic for the sake of preventing the risk of serious harm (scilicet, to take a simple precaution in order to treat a fellow human being with basic respect and consideration as a person) would be to use her wantonly. The harm doing should have an overriding legitimate purpose if it is to avoid criminalisation. For example, if it is necessary to amputate the leg of a consenting man trapped in a burning car to save his life, then the overriding purpose is to preserve humanity. The man will suffer long-term harm, as having a leg amputated results in permanent disability, but greater harm has been prevented. However, whether a particular purpose is legitimate or not does not depend on the subjective wishes of the parties involved. Instead, it is determined by considering all the countervailing objective moral considerations.

It is not a case of euthanasia, but rather it is a wanton use of another human being. Even a genuine case of euthanasia (assisting a terminally ill patient to kill herself) is not permissible because it also puts the victim's powers of choice to an end. In the HIV cases non-violent means are used to inflict grave harm, but this does not alter the wrongfulness of infecting others with deadly diseases. A person might use slow acting poison that does not involve any violence to kill someone, but that does not alter the fact that the victim ceases to be a person. It does not matter that death may take some time to occur, although a time delay of years could justify labelling the offence as something less than murder. Those who infect others with HIV do not cause immediate death, but the victim's life (humanity—powers of choice) is shortened considerably.

A real problem with the H.I.V. cases is that it is not possible to predict the eventual harm with any exactitude. The current treatment for H.I.V. infection is a highly active

antiretroviral therapy. This treatment is reasonably effective and offers increased life expectancy for many H.I.V. sufferers. Research in the United States suggests that current treatment methods could give many sufferers a life expectancy 32.1 years from the time of infection, if treatment was started soon after the patient became infected.³⁴ However, the highly active antiretroviral therapy does not always achieve optimal results, and in some situations it has had a success rate of below fifty percent, as some patients are intolerant to the medication and there are drug-resistant strains of H.I.V.³⁵ Thus, it is not possible to predict with any certainty the eventual outcome of being infected with H.I.V. But is it safe to say that the carrier's will probably be shortened and that, barring medical advances, she will have to undergo regular treatment for the rest of her life. The consentor may change her mind after the moment of passion has passed. It is one thing to consent to reversible or curable harm; it is something entirely different to consent to irreparable harm of an extraordinarily grave kind.

IV THE MORAL LIMITATIONS OF CONSENT *R. v. Brown*

It is important to recognise that the Categorical Imperative is not equivalent to the so-called Golden Rule, *Quod tibi non vis fieri*.³⁶ Kant held that there is no equivalence between this precept and his Categorical Imperative, because the Golden Rule can only provide moral guidance if one presumes a prior moral judgment: the judgment of how others should treat oneself.³⁷ The convicted criminal could say to the judge: 'If you were me you would not want to be sentenced, therefore *etc.*' The Golden Rule does not provide a basic justification for moral judgments, but rather provides a means of converting self-regarding moral judgments (judgments about how others should treat the moral agent) into other-regarding judgments (judgments about how the agent should treat others).

³⁴ Bruce Schackman, *et al.*, 'The lifetime cost of current H.I.V. care in the United States,' 44(11) (2006) *Medical Care* 990.

³⁵ Stephen Becker, *et al.*, 'Young H.I.V.-infected adults are at greater risk for medication non-adherence,' 4(3) (2002) *Medscape General Medicine* 21.

³⁶ Do unto others as one would have others do unto you.

³⁷ Rawls, above note 19, 198-199.

The sadomasochist (who wishes to be harmed) could not derive the principle of non-maleficence from the Golden Rule. In fact the sadomasochist could draw the opposite conclusion, that is, that she ought to harm others. She could harm them as she is only doing what she is asking them to do to her. The Golden Rule would allow for such a conclusion. Deriving a principle of non-maleficence requires the moral condemnation of the masochist's self-regarding desire that others harm her. Kant argued that the universal law formulation of the Categorical Imperative requires no presumed moral judgments. Kant's Categorical Imperative can be invoked, as it does not require self-regarding moral judgments as the basis of other-regarding moral judgements. Furthermore, the Golden Rule cannot be used to derive judgments concerning one's moral duties to oneself. One such duty, Kant argued, was that of not committing suicide. Suicide contradicts the fundamental desire of self-preservation just as the act of intentionally killing another does.³⁸

Kant's³⁹ second formulation of the Categorical Imperative can be invoked in certain paradigm cases to demonstrate that the wrongdoing involved in inflicting grave harms on others cannot be negated by consent, not even if the consent is fully informed and the harm is a source of great pleasure for the victim. But disrespect for humanity only provides a partial solution unless the victim has forfeited her humanity. Duff⁴⁰ rightly notes that harm-doers in *R. v. Brown* treated their victims with a lack of respect as persons. However, Duff overlooks the fact that a very wide range of conduct involves disrespect for humanity. For instance, mere false promising and common assault would treat those affected with a lack of respect as persons. I have argued elsewhere, that a core problem with using Kant's Categorical in criminalisation decisions is that it cannot be

³⁸ 'What is wrong with the Golden Rule (in both its positive and negative versions) is that as stated it allows natural inclinations and the special circumstances to play an improper role in our deliberations. But in saying this Kant implies that the Categorical Imperative procedure specifies the proper role': *ibid* 192-191.

³⁹ Gregor, *supra* note 20.

⁴⁰ Duff, *above* note 16.

used to distinguish trivial wrongdoing from gross wrongdoing.⁴¹ The wrongfulness of false promising and rape is equal according a literal application of Kant's second formulation of the Categorical Imperative.

Hence, serious physical injury and trivial physical injury to humans is equally wrongful according to the Categorical Imperative. Nevertheless, in *R. v. Brown* majority held that consent is a valid defence in cases where the harmful consequences are trivial. In *R. v. Brown*⁴² a group of homosexual sadomasochists voluntarily and enthusiastically committed acts of violence against each other, because they achieved sexual gratification from being subjected to immense violence and pain. The *gravity* of the harm influenced the decision in *Brown*, as this was not merely a case of a common assault.⁴³ The appellants had committed abominable acts against each other including nailing their prepuces and scrota to a board, inserting hot wax into their urethrae, burning their penes with candles and incising their scrota with scalpels, which caused the exudation of blood and put them at risk of contracting septicaemia and H.I.V.⁴⁴

Duff⁴⁵ does not tell us how Kant's second formulation of the Categorical Imperative could be used to justify criminalising the activities in *Brown*, while at the same time allowing consent to act as a defence to mere common assault where the harm is trivial. I argue that the difference is to be found by considering the independently normative, but consequential aspect of inflicting severe purposeless harm; which allows the legislature to measure its wrongfulness, as the deontological factors alone fail to provide any measure or guidance to justify limiting consent as a defence. It is important to remember that we are looking for critical reasons for either limiting or justifying consent as a defence. I agree with Ashworth, to the extent that he rejects conventional morality considerations as a reason for limiting consent. However, the critical moral justification

⁴¹ Dennis J. Baker, 'The Harm Principle vs. Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation,' (2008) 33 *Australian Journal of Legal Philosophy*

⁴² [1993] 1 A.C. 212.

⁴³ Cf. *Reg. v. Orton* (1878) 39 L.T. 293.

⁴⁴ *R. v. Brown* [1993] 1 A.C. 212 at p. 246.

⁴⁵ Duff, above note 16.

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for limiting consent in such cases is that it is possible to seek sexual gratification without inflicting violence on your fellow humans. The participants have legitimate reasons for engaging in such conduct as it satisfies their sexual desires, but such an aim is not sufficient to outweigh the harm to the consenters. It cannot be achieved without the consenter's personhood also being violated in a significant way. *R. v. Brown* may be a borderline case, but if we look at a more extreme example we can see why such conduct is unacceptable. In a recent German case, a man consented to being murdered and eaten by a cannibal because this gave him sexual gratification.⁴⁶ The participant's purpose was to seek sexual gratification, but he had to die to achieve this. It was not possible for him to achieve the particular sexual gratification involved without also waiving his right to life, because it was the idea of being killed and eaten that gave him the pleasure. Likewise, it was not possible for the participant's in *Brown* to achieve sexual gratification without also alienating their rights to maintain a certain degree of human dignity: maintain their personhood. The violence in *Brown* was borderline, but it does cross the line. Furthermore, the overriding aim of seeking sexual gratification does not override the case for criminalisation as there are other less violent ways for sadomasochists to achieve such an aim.

Thus far, it has been argued that the right to dignity is inalienable and that dignity can be lost either fully or partially. In the latter case we need to be able to measure dignity losses, as best as possible, if we are to demarcate the limits of consent as a defence. While the Categorical Imperative does not distinguish the wrongfulness of trivial injury from gross injury to persons, I propose a wider normative argument that does. The *volenti non fit injuria* doctrine does pull some weight and validly provides a defence for less serious harm done to others. Nevertheless, it has to be reconciled with the more fundamental concept of humanity as an end in itself. I am ripping Kant's Categorical Imperative out of its original context by using consequences as a way of *measuring* disrespect for humanity.

⁴⁶ . For recent case of a person consenting to being killed and eaten for sexual gratification see Ray Furlong, 'Frenzy builds for German "cannibal" trial,' Article from BBC News: <<http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/3258226> (published: 12/02/2003)>.

But such an approach is feasible and necessary if we are to give the legislature guidance and justification for limiting consent. In the current context, I argue, that criminalisable disrespect for humanity is disrespect that violates the victim's inalienable right to maintain a minimal degree of physical wellbeing. It is not only disrespect for humanity that adds normative weight to the case for criminalisation, but also the independent concept of 'harm'. It is not the disrespect in itself that makes the conduct in *R. v. Brown* criminalisable, but the *degree* of disrespect. We measure the degree of disrespect by evaluating the gravity of the harm-doing involved. Respect at this level means that when harm and wrongdoing goes beyond a certain cut-off point consent will not be sufficient to override the *prima facie* case of criminalisation. This will be so even if the wronged party considers the harm to be a benefit (masochist) rather than a setback to interests.

Some of you may say, what about self-harmers? Masochism is not a case of paternalism, because we are not criminalising the victim and the victim is harmed by the actions of another. The issue is whether *x* can harm and wrong *y* when *y* freely consents to the wrongdoing. It is not merely about *y* using herself as a mere means to an end, but about a second party using her as a mere means to an end. Serious wrongs against others such as serious bodily harm (limb amputation, blinding *etc.*) degrade humanity in a normatively intolerable way. If *x*, a sadomasochist, consents to *y* (who is also a sadomasochist) breaking her bones, she has not only used herself as a mere means, but has also allowed *y* to use (wrong and harm) her to a grave degree. *Y* has used *x* as a mere means and is criminally liable for wrongfully harming her without excuse or justification. In effect sadomasochists and gladiators wrong not only themselves, but also each other. Conversely, the apotemnophilic⁴⁷ or suicidal manic merely wrongs herself.

The Government is entitled to prevent people from harming and wronging others when the harm is exceptionally grave and is likely to be *repeated* as a part of a ritual or practice. The lawmaker is not entitled to criminalise self-wronging, but is entitled to

⁴⁷ An apotemnophilic is one who self-harms. A common case is where the apotemnophilic keeps cutting his or her arms. See generally, Russell Shafer-Landau, 'Liberalism and Paternalism,' (2005) 11 *Legal Theory* 169, 170.

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criminalise gross harm to others regardless of whether informed consent has been given.⁴⁸ The Harm Principle provides an important limit here, because suicide and self-harm also involves gross moral wrongdoing. It may be morally wrong to attempt suicide, but self-harm falls outside the purview of the Harm Principle.⁴⁹ The Harm Principle limits criminalisation to those situations where a person *wrongfully harms* others. We are all morally bound to respect humanity in our own person as well as in the persons of others, but that does not mean that those who consent to being harmed by others (the 'victim' of a failed euthanasia or of sadomasochism) or those who harm themselves should be criminalised. It means we ought to criminalise those who inflict the harm in those cases.

The degree of moral wrongdoing involved in serious self-harm and serious harm to others is equal, but self-wrongs are not criminalisable because they do not wrong or cause harm to others. It is morally wrongful to harm oneself in a grotesque way or to commit suicide and this might give the lawmaker reasons for taking protective action. But suicide and apotemnophilia are not criminalisable under the Harm Principle, because it limits criminalisation to those cases where others are wrongfully harmed. The legislature could use civil measures to incarcerate the self-harmer for treatment. In the case of the sadomasochism the consentor (wronged party) is the victim and the harm-doer is the wrongdoer. The party inflicting the wounds would be subject to the criminal law and the victim would, at the very most, be compelled to seek medical treatment (*i.e.*, a civil order could be issued to compel the victim to seek psychotherapy, *etc.*). Once the victim reciprocates the harm, then she too would be criminally liable. But reciprocation and mutual participation differs from paternalism, because criminalisation is only available

⁴⁸ Some may argue that it is a semantic point to say that you can harm yourself, but you can't harm others who consent. But the point is that criminalisation is about censure and hard treatment (penal sanction). Paternalism is not a legitimate form of criminalisation because it punishes those who have already punished themselves (self-harmed). The appropriate response is to provide therapeutic options to assist those self-harmers who can be treated from engaging in further self-harm. But there is nothing wrong with punishing those who take advantage of consent to seek and opportunity for inflicting violence on their fellow human beings.

⁴⁹ Feinberg presents a powerful case against criminalising harm to self. Feinberg, Vol. III, above note 7.

when one party harms another. It is important to remember that Feinberg's⁵⁰ formulation of the harm principle only criminalises wrongful (culpable) harm. It does not criminalise mere harm doing. The argument for criminalising the harm doing in *R. v. Brown* is that it involves both wrongdoing and harm. If we rely on Feinberg's formulation the culpability (wrongfulness) requirement is overridden by consent, but I override that theory of wrongdoing by invoking the Kantian theory of wrongdoing that is based on human dignity. It is the wrongfulness of violating another human being's human dignity and the consequential harm that provides the basis for invoking the criminal law in the above situations. The harmful consequences are also useful for determining whether the wrongful violation of the consentor's dignity is sufficient for the purposes of invoking the criminal law. A trivial violation would not result in the type of dignity loss that is required for overriding personal autonomy.

V THE WIDER NORMATIVE IMPLICATIONS OF LIMITING CONSENT

The threshold for overriding consent has to be very high. As we have seen, harm to humanity is not the only consideration. The physical wounds involved in unnecessary plastic surgery could be worse than those witnessed in *R. v. Brown*, but other critical moral factors might militate against its criminalisation. Should a person be able to consent to dangerous plastic surgery that is not necessary, such as a facelift? The benefits of this sort of unnecessary plastic surgery are not as valuable as life-saving surgery or surgery that is needed to correct disfigurement. At best one would argue that this kind of cosmetic surgery merely provides psychological benefits that are associated with vanity. What makes plastic surgery morally permissible? Surgery involves intentional violence that may cause serious bodily harm, but the purpose of the surgery is to advance the patient's long-term interests, rather than set them back. Any long-term harm is a mere side-effect of the surgery, which is aimed at advancing the patient's interests. In the case of tattooing, ear piercing, football *etc.* the purpose (*telos*) is not to cause a setback to

⁵⁰ See generally Feinberg, Vol. I, above note 2.

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interests. In the case of football, there is a minimal risk that player may be harmed in the long-term, but this would be a mere side-effect of playing a risky sport. Football is not designed to intentionally harm the participants—any harm is only a side-effect. We do not criminalise accidents. If a surgeon is grossly negligent the criminal law could be invoked. Similarly, if a football player deliberately harms another player the criminal law could be invoked.

However, a legitimate *telos* alone will not excuse the conduct from being criminalised. In the case of sadomasochism the overall aim is to seek sexual gratification which is no doubt a legitimate aim. Likewise in a boxing match the aim is to play a recreational game and win, which is no doubt a legitimate aim. We might also argue, like the plastic surgeon, that participants in boxing and sadomasochism do not aim to cause any long term injury. However, unlike sadomasochism and boxing, plastic surgery usually serves some greater purpose than the ephemeral joys of the moment. Plastic surgery is also based on a body of proven science and is carefully regulated. In the case of everyday emergency and corrective surgery the doctor would be acting to preserve humanity. Furthermore, it usually involves a one-off procedure that is aimed at serving some long-term *purpose*. However, this does not mean that people should be able to consent to all kinds of unnecessary and clearly damaging plastic surgery.⁵¹ If plastic surgery is to be permitted, then it is the greater weight of necessary surgery (surgery to help those with low self-esteem *etc.*) that provides the overriding moral justification for tolerating consent in such cases. Arguably, the joys achieved from boxing and sadomasochism (which have to be repeated each time the participants want to seek the enjoyment) is less compelling than improving a person's psychological well-being.

⁵¹ I do not want to open up this debate in this paper. But I am referring to necessary plastic surgery for those that are almost certain to get a long-term *necessary* psychological benefit from the surgery. There are many forms of surgery that are *unnecessary* and *damaging* (where the risks are well known to the surgeons) that need closer regulation. In some cases it would be legitimate limit consent as a defence and invoke the criminal law as some patients are *addicted* to unnecessary and damaging surgery.

Coupled with this, the *telos* of participant's activities in sadomasochism is to inflict harm to achieve pleasure: it is the harm *per se* that produces the pleasure. The harm has to be repeated each time the recipient wants to receive sadomasochistic pleasure. The *telos* of the *practices* of boxing and sadomasochism is to repeat the harm-doing over and over. *Per contra*, a medical operation short-term aim can be distinguished from its long-term aim. Surgery's *telos* is to provide a long-term benefit, rather than a mere short-term benefit. The *telos* of sadomasochism (or of transmitting HIV through unprotected sex) is to inflict gross harm at the same time as allegedly providing pleasure. In these cases the aim of achieving pleasure is inseparable from the aim of inflicting gross harm, as both the benefit and the harm are ephemeral. Furthermore, it is arguable that those who engage in boxing and sadomasochisms can find reasonable alternatives. It is not only the fact that the harm has to be repeated each time the participants want to achieve their goal that makes the conduct criminalisable; it is the fact that the harm is rather *grave*. Repeated trivial harm might be acceptable as it would not degrade the dignity of the consentor sufficiently to justify invoking the criminal law. For example, those who obtain regular Botox injections really only gain an ephemeral benefit, as the injections have no permanent effect. Nevertheless, the harm does not risk infection, is less severe than nailing a person's bodily parts to a plank, and therefore would be permissible.

VI CONCLUSION

The overriding consideration in those cases where there is a legitimate purpose for inflicting harm doing is to ask: does the harm result in the consentor being treated with an unacceptable lack of respect and consideration as a human being. In conclusion, I assert that there are critical moral reasons for criminalising the actions in *R. v. Brown* and *R. v. Konzani*. I would go as far as to argue that boxing falls within the purview of the criminal law along with certain forms of plastic surgery.⁵² It is arguable that the level and

⁵² Surgeon's who rely on consent to perform unnecessary and damaging plastic surgery on patients that are clearly addicted (we only need to think of many celebrities) should be brought within the purview of the criminal law. However, this is an argument for another paper.

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type of harm inflicted in those cases is sufficient to nullify any consent. But the case for limiting consent in these types of cases is weaker, as the harm done is reparable and somewhat borderline. It is important to set a high threshold if we are to protect the cardinal right to personal autonomy. Nevertheless, there comes a point when the gravity of the risked or actual harm is of a degree that it degrades the consentor's humanity. In those cases where the victim alienates her powers of choice (consents to death either immediately or in the long-term) and the harm is irreparable the case for criminalisation is clear cut. But in other cases it is not possible to draw a perfectly clear line, other than to hold that a person ought not rely on consent as a defence when the harm inflicted on the person of her fellow human is of an exceptionally serious kind (broken bones, deep wounds, gun wounds, first degree burns, and so on). The deep wounds inflicted in *Brown* seem to fall into this category.