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LAW, ORDER, AND THE CONSENT DEFENSE

KEITH M. HARRISON*

I. INTRODUCTION

Among the benefits that we gain on leaving the state of nature and joining together in a "civilized society" is some amount of added protection of our individual possessions and person. Among our losses is the ability to plunder, at will, the possessions and bodies of those who are weaker than we are. These two statements are generally, but not absolutely, true. I propose that one hallmark of civilization is the security of everyone who lives under its authority that they are free from the unwanted interferences of others with their personal integrity and property rights.[1] One way to gauge the proximity of my two opening statements to absolute truth, and thereby any society's proximity to absolute civilization, is to examine the use of the consent defense in the criminal law. In this essay I will give a framework for examining the consent defense for this purpose.

When we consider the consent defense, we typically think of it as occupying the border between individual liberty and governmental control. In the customary way that the criminal law is discussed and taught, as a control on individual conduct, this is a perfectly

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1. This is hardly a new idea. For example, the proponents of the federal Constitution recognized that:

> In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.

The Federalist 51, (Hamilton or Madison), in THE FEDERALIST PAPERS 322, 326 (Henry Cabot Lodge ed., 1894).

acceptable way to think of the consent defense. However, the criminal law can also be used as a means of controlling and oppressing groups. It is this type of control that makes a society more tribalistic and less democratic. And it is this type of control that is revealed on close examination of the consent defense.

II. HISTORICAL BASIS FOR THE CONSENT DEFENSE

Generally the consent of an individual victim of a crime will not operate as a defense to a criminal prosecution unless the lack of the individual victim's willing, capable, and informed consent is an element of the charged offense, such as in the crimes of rape[2] or larceny.[3] This is so because under our traditional framework for justifying the state's exclusive right to use force to punish criminal wrongdoers, the state is always deemed to be the only legal victim of a violation of the criminal law. The individual who was harmed by the wrongdoer is at best a witness for the prosecution, albeit usually a very important witness. When a wrongdoer is criminally punished for stealing the private property of another individual, the state is not exacting punishment because of any special affinity for that individual property owner over other property owners. The state exacts criminal punishment because the wrongdoer has threatened the essential power of the state to define and guarantee property rights. The state/victim and individual/witness distinction also serves to

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2. *See, e.g.*, State v. Moorman, 358 S.E.2d 502, 505 (N.C. 1987):

> [T]he common law implied in the law the elements of force and lack of consent so as to make the crime of rape complete upon the mere showing of sexual intercourse with a person who is asleep, unconscious, or otherwise incapacitated and therefore could not resist or give consent. Our rape statutes essentially codify the common law of rape. In the case of a sleeping, or similarly incapacitated, victim it makes no difference whether the indictment alleges that the vaginal intercourse was by force and against the victim's will or whether it alleges merely the vaginal intercouse with an incapacitated victim. In such a case sexual intercouse with the victim is ipso facto rape, because the force and lack of consent are implied in the law.

3. *See, e.g.*, State v. Byars, 550 So.2d 876, 879 (La. Ct. App.2d Cir. 1989):

> The elements of theft have therefore been enumerated as follows: (1) There must be a misappropriation or taking; (2) the object of the misappropriation or taking msut be a thing of value; (3) the thing must belong to another; and (4) the misappropriation or taking must be with the intent to deprive the owner permanently of the thing taken. We would add, in a case of this sort, (5) the misappropriation or taking msut be without the owner's consent, or by fraudulent conduct.

explain the difference between the treatment of individual consent in tort and criminal cases. In some instances the fact that an individual has validly consented to some physical harm may operate as a defense to a private action for damages while not having any legal relevance in a criminal prosecution of the same defendant based on the same conduct.[4]

In contrast to the crimes in which the state has to prove lack of consent as an element of the offense stand those crimes for which consent traditionally had been totally irrelevant. These have included homicide,[5] carnal knowledge of someone underage,[6] sodomy,[7] and adultery.[8] In these cases the law is said to "protect" those who cannot, or choose not to, protect themselves.[9]

The general rule has always been that an individual's consent will not relieve a wrongdoer of criminal liability for prohibited conduct.[10] However, certain notable exceptions have developed over time. While some of the original reasons for these exceptions have either vanished or were questionable from their inception, the exceptions persist. As part of the general rule, assaultive behavior is criminal. However, exceptions are made at the lower end of assaultive

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4. Most courts have held, when confronted with the issue, that consent is no defense to an aggravated battery. *See, e.g.*, Jaske v. State, 539 N.E.2d 14 (Ind. 1989). However, the Restatement (Second) of Torts illustrates the effective use of the consent defense by describing a test of strength where one person consents to let another punch him in the chest as hard as he can. The defendant punches the victim in the chest and inadvertently kills him. In the illustration given, the victim's consent would be sufficient to bar recovery for his death but may not bar a criminal prosecution. Restatement (Second) of Torts, § 892 a, illustration 5 (1962).

5. One who commits manslaughter through the injection of narcotic drugs into his or her victim may not rely on that victim's request to, or consent to, administer the drugs as a defense. People v. Cruciani, 327 N.E.2d 803 (N.Y. 1975).

6. "The underlying premise of rape laws is the lack of the female's consent to an invasion of her bodily privacy. The prohibition against sexual intercourse with a female minor is an attempt to prevent the sexual exploitation of persons deemed legally incapable of giving consent." State v. Stiffler, 763 P.2d 308 (Idaho 1988).

7. In those jurisdictions which criminalize consensual adult sodomy, consent will only make both parties criminally liable. *See e.g.*, Miller v. State, 268 N.E.2d 299 (Ind. 1971).

8. In jurisdictions in which adultery is a crime, the fact that those engaging in adulterous sexual intercourse consent thereto is no defense. *See e.g.*, Commonwealth v. Stowell, N.E.2d 357 (Mass. 1983).

9. "Whether or not the victims of crimes have so little regard for their own safety as to request injury, the public has a stronger and overriding interest in preventing and prohibiting acts such as these." *State v. Fransua*, 510 P.2d 106, 107 (N.M. Ct. App. 1973)).

10. See W. E. Shipley, Annotation, *Consent as Defense to Change of Criminal Assault and Battery*, 58 A.L.R.3D 662 (1992).

conduct in the nature of unwanted and unconsented-to touchings that occur in the course of everyday life, such as the minor jostles that are received while walking down a busy street, taking an elevator, or riding in coach.[11]

There have also long been exceptions to the general rule concerning the availability of the consent defense for some conduct that is substantially more dangerous than are everyday social encounters. Ordinarily an individual's consent to violent strikes and blows capable of producing serious injury will not aid the attacker in a criminal prosecution.[12] Yet, such strikes and blows are encountered in the usual course of many common competitive athletic events.[13] Such activity was condoned originally on the theory that the king (or sovereign) might have a sudden need to raise an army of physically fit and competitive-minded men to defend against an enemy invasion.[14]

In other cases of commonly consented-to violence to the body, individuals are allowed to absolve health care providers of criminal liability by giving consent to such sometimes fatal acts of physical invasion as surgery.[15] The criminal law originally allowed consent to operate in this area to improve the likelihood that the individual would maintain the ability to contribute to society.[16] Con-

11. Courts have traditionally held that accidents committed in the course of non-criminal conduct cannot result in criminal convictions. *See, e.g.*, Turner v. State, 485 S.W.2d 282 (Tex. Ct. App. 1972).

12. State v. Hatfield, 356 N.W.2d 872 (Neb. 1984).

13. According to some sources the cost of sports injuries in the United States exceeds $40 billion annually, and some 900,000 high school students are injured each year. Steven Greenhouse, *The Big Bucks in Knees and Elbows* N.Y. TIMES, Feb. 1, 1983 at § 3, p. 1.

14. The common law recognizes as not unnecessarily unlawful certain manly sports calculated to give bodily strengh, skill and activity, and "to fit people for defense, public as well as personal, in time of need." Commonweatlh v. Collberg, 119 Mass. 350, 353 (1876).

15. In fact in some situations a doctor may even not be forced to advise a patient of all possible, however improbable, consequences of a surgical procedure, including death. *See, e.g.*, Women's Medical Center of Providence, Inc. v. Roberts, 530 F. Supp. 1136, 1151-1152 (D.R.I. 1982).

16. However the decision as to which surgical procedures should be allowed to be consented to remains a matter of personal taste:

> An ordinary surgical operation, which is done for the sake of a man's health, with his consent, is, of course, perfectly lawful because there is just cause for it. If, however, there is not just cause or excuse for an operation, it is unlawful even though the man consents to it. The classic instance is a case recorded by Lord Coke, tried at Leicester in 1604, when a "young strong and lustie rogue, to make himself impotent", got his companion to cut off his left hand so that he might avoid work and be able the better to beg. Both were found guilty on indictment of criminal offense . . . . A later instance can be given from early Victorian days when soldiers, as part

versely, it has been held that consent would not justify intentional bodily mutilation done with an eye toward increasing the injured person's ability to beg for alms[17] or to avoid military service.[18] In any case — whether involving athletic violence, surgical procedures, or other instances in which the consent defense is available — the individual is allowed to act as a legislature of one on the theory that the individual can adequately protect the interest that the law seeks to safeguard.[19]

The traditional exceptions to the general non-availability of the consent defense are capable of being divided into three broad, and sometimes overlapping, categories: ownership, utility and paternalism. If the early common law principles can be imagined as developed primarily to secure the place of the individual sovereign and his or her peers in society, then those who were the intended subjects of the law were allowed to consent to possible harm if doing so furthered, or at least did not interfere with, the ownership, utility, or paternal interests of those whom the law was designed to serve. Although in the United States there is no individual sovereign and no

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> of their drill, had to bite cartridges. A soldier got a dentist to pull out his front teeth so as to avoid the drill. In the opinion of Stephen, J., both were guilty of a criminal ofense . . . . Another instance is an operation for abortion, which is "unlawful" within the statute . . . unless it is necessary to prevent serious injury to health. Likewide with a sterilization operation. When it is done with the man's consent for a jsut cause, it is quite lawful, as, for instance, when it is done to prevent the transmission an hereditary disease; but when it is done without just cause or excuse, it is unlawful, even though the man consents to it. Take a case where sterilization operation is done so as to enable a man to have the pleasure of sexual intercourse without shouldering the responsibilities attaching to it. The operation then is plainly injurious to the public interest. It is degrading to the man himself. It is injurious to his wife and to any woman whom he marry, to say nothing of the way it open to licentiousness; and, unlike contraceptives, it allows no room for a change of mind on either side. It is illegal, even though the man consents to it, . . .

Bravery v. Bravery, 3 Eng. Rep. 59, 67 (1954) (Denning, L.J., dissenting).

17. *Wright's Case,* (Leicester Assizes 1603) (cited in State v. Bass, 120 S.E.2d 580, 583 (N.C. 1961)).

18. SIR JAMES FITZJAMES STEPHEN, A DIGEST OF THE CRIMINAL LAW (1878) states:

> It seems absurd to say that if A gets a dentist to pull out a front tooth of A's because it is unsightly, though not diseased, A and the dentist both commit a misdemeanor. When it was an essential part of a common soldier's drill to bite cartridges, I believe that it was not an uncommon military offense to get the font teeth pulled out, and this would, I presume, be an offense at common law also.

19. In fact the model penal code absolves a criminal defendant of liability if the victim's consent "precludes the infliction of harm or evil sought to be prevented by the law defining the offense." MODEL PENAL CODE § 2.11.

legally recognized class of nobility, the same framework can explain the use of the consent defense today.

III. THE CURRENT DILEMMA

In recent articles, Professors Patrick Fitzgerald,[20] Brenda M. Baker,[21] and Lucinda Vandervort[22] have examined the apparent paradoxes of the consent defense in a criminal law designed for modern democratic society, a society that has neither a true individual sovereign nor any effective legal class of nobility.

Professor Fitzgerald would like to reconcile common intuition with the common law principles of the consent defense and articulate a general principle that would encompass all of the situations in which one person consents to the invasion of bodily integrity by another.[23] Concluding that such a reconciliation is unlikely, he resorts to, in the admittedly "unlikeliest of places," English tax law for an analogy and derives a set of "badges of 'acceptable' consensual harms"[24] and a similar set of "badges of unacceptable consensual harms."[25] These "badges" are to serve as guideposts in determining

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20. Patrick Fitzgerald, *Consent, Crime and Rationality, in* LEGAL THEORY MEETS LEGAL PRACTICE, 209 (1988).

21. Brenda M. Baker, *Consent, Assault and Sexual Assault, in* LEGAL THEORY MEETS LEGAL PRACTICE, 223 (1988).

22. Lucinda Vandervort, *Consent and the Criminal Law,* 28 OSGOODE HALL L.J. 485 (1990).

23. Fitzgerald, *supra* note 21 at 209.

24. Fitzgerald further states:

> One is that the harm is easily reversible — not that it has to be reversible, but the more reversible it is, the less permanent the setback to what may generally be thought to be the victim's interests. Another is that it is done for the victims own greater physical or mental welfare - the case with medical treatment and surgical operations, which injure the part for the sake of the whole, with palliative care and arguably with mercy-killing, which shortens the quantity of life for the sake of avoiding total deterioration in its quality. Yet a third is that it is done for the good of others individually or generally - the position with organ donation and scientific research.

Fitzgerald, *supra* note 21, at 220.

25.

> Conversely badges of unacceptable consensual harms are irreversibility, lack of connection with the victim's physical and mental health and failure to contribute to the well-being of others. Such an approach might explain the unacceptability of torturing a willing masochistic victim. For while the pain of medical treatment may equal that of non-medical torture and while both treatments may produce ends desired by the victim - freedom from illness in the one case and freedom from psychological tension in the other - the former provides a cure and so a more enduring liberation from the victim's condition, whereas the latter seems to afford no remedy but only temporary relief.

whether conduct that would ordinarily be criminal could be justified or excused. Using this method of explaining and examining the concept of consent as a defense to criminal prosecution, Fitzgerald would like modern criminal law to accept mercy killing and assisted suicide as the type of conduct capable of being defended in a criminal prosecution with evidence of victim consent.[26]

Professor Baker focuses our attention on consent in the areas of intimate interpersonal relations, both those deemed by the law to be acceptable (and hence legitimate sexual intercourse) and those deemed by the law to be unacceptable (and hence sexual assault or some other form of criminal sexual activity).[27] She voices concern over Australian reform efforts in the area of criminal sexual assault laws, which, she maintains, tend to take the emphasis away from lack of consent. Baker envisions problems both in the continued criminalization of individually-desired violent sexual liaisons and the continued non-criminalization of certain unwanted traditional sexual relationships.[28]

Id.

26. *Id.* at 221.

27. I refer to both sexual intercourse and sexual assault as intimate interpersonal relations — not to indicate that I believe that the two concepts are generally related in any way. While some writers may feel comfortable equating the two, *see, e.g.,* Richard A. Posner, *An Economic Theory of the Criminal Law,* 85 COLUM. L. REV. 1193, 1199 (1985) (" . . . the prohibition against rape is to the marriage and sex 'market' as the prohibition against theft is to explicit markets in goods and services."), I do not. However, I do so here because the law's willingness, or unwillingness, to acknowledge, the power of an individual to control private sexual relations determines whether individually desired sexual relations are punished, while unwanted assaults on individual bodily integrity are allowed to go unpunished.

28. Brenda Baker notes:

> Undoubtedly, consent to certain forms of physical non-sexual contact is quite reasonably taken to be implied in a variety of familiar circumstances, just as there are general understandings that in some emergency situations consent may be disregarded, or not secured, before acting. However, in the case of contacts of a sexual character, inferences about implied consent must be much more cautiously drawn. In many, perhaps most, situations, *implied absence of consent* is the appropriate working assumption; only within rather special contexts, typically marked by interpersonal intimacy or familiarity, can the idea of *implied consent* to certain kinds of sexual approaches or familiarities be entertained.
>
> . . . [R]emoval of consent as an element in the more serious sexual offences [such as where there is violence, physical force, or physical injury] . . . may have unintended and undesirable consequences . . . [such as] prohibiting the imposition of physical force or harm even where that was fully consented to for mutual sexual arousal or satisfaction . . . . [It] might also apply to cases of one partner infecting another with herpes or AIDS even if the other willingly had intercourse knowing the risk . . .

Baker, *supra* note 26, at 229-230 (emphasis in original).

Professor Vandervort believes that both Fitzgerald and Baker's proposals to give added value to individual choice in this area of the law can be attained only after great societal hurdles are overcome, if at all.[29] She explains the traditional distinctions in the availability of the consent defense in terms of "dominant social perceptions and preferences."[30] In fact, while Vandervort recognizes that "it is always societal preference, not consent by the individual, that determines whether a particular physical intervention with that person is classified in law as an assault,"[31] she, and most who have commented on the subject, only hint at the true nature of these "societal preferences" and the role that they play in shaping a criminal law for a free society.[32] What Fitzgerald and Baker fail to account for is the same thing that Vandervort only hints at. That is, despite any stated principle that "it is ordinarily [the] individual who has the right to determine what his or her own interests are and to have that determination repsected by other persons,"[33] the essence of the consent defense is the allowance for the law to differentiate between the same type of bodily intrusions as they occur to different types of people.

I submit that the darker side of the consent defense, as it has historically been allowed to be asserted by the courts and more recently by the legislatures, does not lie in its effect on truly *individual*, or more appropriately — *idiosyncratic*,[34] choices. By its very nature, organized society and its criminal laws will always pose some limits on all of its members' idiosyncratic choices — whether those choices are manifested in such frivolous ways as the desire to drive on the lefthand side of the road (in the United States and Canada) or the much more serious decision to terminate a loved one's suffering from an incapacitating and terminal illness by mercy killing or assist-

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29. "To implement the Fitzgerald and Baker proposal in a manner that actually enhances self-determination, and thus achieves the purported goal, poses a greater challenge than is at first apparent." Vandervort, *supra* note 23, at 488.

30. *Id.* at 489.

31. *Id.* at 487.

32. Indeed Professor Vandervort states that the criminal law is committed "primarily to the preservation of collective societal values as interpreted by the legal system of the day." *Id.* at 493. However, while clearly implied, it is left for the reader to infer how much, or how little, those collective societal values have crushed the freedoms of individuals and groups.

33. Vandervort, *supra* note 23, at 488.

34. In using this term I do not wish to imply any psychological infirmity or raise questions concerning the voluntary nature of the person's conduct. I want only to designate the person's motivation as being derived from a private individualized, but not necessarily unique, assessment of needs, with no desire to yield to the will of society. There may, in fact, be many like-minded individuals who share the same idiosyncratic desires.

ed suicide. As stated by Vandervort, when these idiosyncratic choices "are not congruent with dominant social perceptions and preferences [they] are routinely denied recognition by the criminal justice system."[35] This is the essence of government, even democratic government.

IV. THE DARK SIDE OF THE CONSENT DEFENSE

The dark side of the consent defense is manifested when, acting as the individual sovereign and class of nobility did toward their subjects, a socially dominant group uses the law to assert an ownership, utility, or paternal interest over the self-determination interests of identifiable and discernably less dominant *groups*.[36] This inhibits the ability of the less dominant group to vary from the precepts and traditions of the dominant social group based on the less dominant group's assessment of its own needs, its own desires, and the physical integrity of members of the less dominant group. The less dominant group should then be considered oppressed by the dominant group's use of the law.

The use of the law to oppress weaker social groups should be distinguished from the law's inherent effect of controlling the conduct of individuals. In a particular jurisdiction, a medical doctor may not be allowed to assert the defense of consent when charged with assisting in a patient's suicide.[37] This is because the doctor's, and presumably the patient's, views on whether the sanctity of life should outweigh the quality of that life are truly idiosyncratic. And these views remain essentially idiosyncratic in nature, even if they are the views held by a large number of diverse people. It is the determination of society that these views do not deserve the protection of the law. Any person who acts at the request of someone pursuant to

35. Vandervort, *supra* note 23, at 489.

36. For ease of discussion, let us consider *groups* to be those classes of people for whom there is ample evidence that the law has traditionally and openly sought to discriminate against: racial, ethnic, and religious minorities, women, the lower economic classes; and gays and lesbians.

37. *See, e.g.*, PUBLIC ACTS OF MICHIGAN Section 7(1) Act 270, (1992) (Michigan Commission on Death and Dying):

> A person who has knowledge that another person intends to commit or attempt to commit suicide and who intentionally does either of the following is guilty of criminal assistance to suicide, a felony punishable by imprisonment for not more than four years or by a fine of not more than $ 2,000.00, or both: (a) Provides the physical means by which the other person attempts or commits suicide. (b) Participates in a physical act by which the other person attempts or commits suicide.

these views commits a crime.[38] This use of the criminal law illustrates the never-to-be-resolved problem of truly individual free choice in a democratic society. However, it does not threaten to undermine the very foundation of democratic institutions. On the other hand, if an individual's choices concerning self-determination are invalidated — not because those choices are truly idiosyncratic, but rather because that individual is a member of a discernible and identifiable group being oppressed by the traditions and wishes of another group — then the criminal law is not being used to maintain order in a society that values individual liberty, but rather to enforce a social hierarchy among various groups.

The criminal law has been used to maintain peaceful co-existence among individuals, as well as to oppress less dominant groups. To understand how the consent defense can illustrate these dual uses, let us reformulate a rationale for explaining when the defense will be available.

Vandervort states that "[i]f individual and conventional societal perceptions and preferences were the same, there would never be a difference between what the individual considers to be criminal assault and what society labels as a *crime*."[39] To graphically display this perfect union of state and individual preferences, Vandervort uses a horizontal line and designates all conduct above the line as having both positive social value and individual consent and thus legitimate behavior. All conduct below the line lacks individual consent and has a negative social value and is therefore criminal.[40]

As Vandervort demonstrates, problems arise when the individual's decisions concerning personal physical integrity differ from the mandates of the society. Vandervort states that "it is always societal preference, not consent by the individual, that determines whether a particular physical intervention with that person is classified in law as an assault."[41] This point is demonstrated by bisecting the horizontal line (which now only represents the continuum of societal values) with a vertical line representing the continuum of individual preferences.[42]

With individual and societal preferences out of step, those bodily invasions to which the individual consents will be allowed only if they happen to coincide with the type of invasions that society condones. Those bodily invasions which the individual abhors will be punished only if society deems them undesirable. The indi-

38. *Id.*
39. Vandervort, *supra* note 23, at 485.
40. *Id.* at 486, Figure one.
41. *Id.* at 487.
42. *Id.* at Figure Two.

vidual who enjoys sado-masochistic sexual relations exposes any partner to criminal prosecution despite the presence of consent. The hypersensitive public transportation patron, who hopes to keep the world at bay, finds no relief in the criminal law. While some may not like it, there is nothing that can prevent society from shaping the law in ways contrary to truly idiosyncratic spirits. The problems arise in democratic institutions when the law is used to crush groups.[43]

Professor Vandervort writes: "Human beings, even when they share the same general values, are not always in perfect agreement about what is . . . the relative value of particular states of affairs in the world."[44] But what about when an identifiable and discernable group disagrees with a more powerful group about values and particular states of affairs in the world, a situation that has occurred frequently in our history. I maintain that the criminal law has been, and to some degree continues to be, used as a means not only of preserving "the King's peace,"[45] but also as a tool to maintain an established social hierarchy in which racial and religious minorities, poor people, women, and homosexuals have usually been thwarted in any attempt to participate as full members of society.

To demonstrate this theory I shall continue with the graphic depiction suggested by Professor Vandervort. However, in my diagram (Figure One), the horizontal axis represents desires of the dominant group(s) exercising power in society at the time. The vertical axis, instead of representing essentially idiosyncratic desires, represents desires of a discernable and identifiable group being oppressed to some degree by the dominant group. The vertical axis is faint because the extent to which it will have any effect on the legal

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43.

> Persons "wandering or strolling" from place to place have been extolled by Walt Whitman and Vachel Lindsay (citation omitted). The qualification "without any lawful purpose or object" may be a trap for innocent acts. Persons "neglecting all lawful business and habitually spending their time by frequenting . . . places where alcoholic beverages are sold or served" would literally embrace many members of golf clubs and city clubs.
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> * * *
>
> Those generally implicated by the imprecise terms of the ordinance — poor people, noncomformists, dissenters, idlers — may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts . . . . It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."

Papachristou v. Jacksonville, 405 U.S. 156, 164 & 170 (1972).

44. Vandervort, *supra* note 23, at 486.

45. "All offenses are either against the King's peace, or his Crown and Dignity; and are so laid in every indictment." BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, Book One, Chapter, 7, Of the King's Prerogative 258.

outcome of conduct that interferes with personal integrity will vary from time to time and group to group, depending on the social and legal status of the group represented by the vertical axis.[46]

What is depicted in Figure One on the following page is the rule that I advance concerning the availability of the consent defense: The consent of an individual victim can be relevant to the criminal law only if recognizing it does not promote the self-determination of a group over which the dominant group in society wishes to assert some ownership, utility, or paternal interest. This rule is not in conflict with Vandervort's assertion that collective preference will control individual preference when there is a conflict of interests. I maintain merely that if there is a more primary conflict, that of group interest, the dominant group will prevail. If there is no group conflict, there remains the possibility of an idiosyncratic preference that conflicts with society's mandates.

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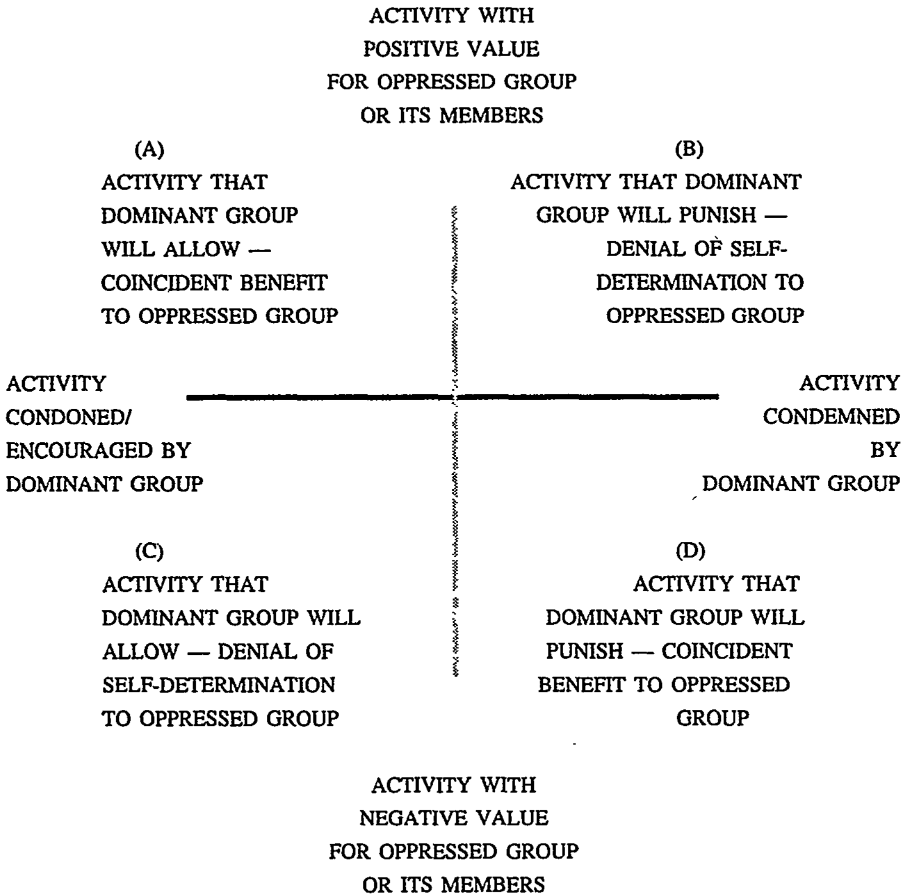
46. "Our interpretation of what constitutes abuse of an individual and of the extent to which individual interests may best be served by their subordination to collective ends is never impersonal, atemporal, ahistorical, or acultural." Vandervort, *supra* note 23, at 497.

Figure One:



V. How the Ownership Interest of the Dominant Group Determines the Availability of the Consent Defense

The most blatant form of dominant group ownership in the law is the enslavement of one group of people by another. Undoubtedly, those who are enslaved have preferences that are contradictory to those who enslave. However, the preference axis of the enslaved group is legally irrelevant, because they have "no rights which the [enslavers are] bound to respect."[47]

The historic and current ability of women to consent legally or to withhold consent to sexual intercourse can be used to illustrate

47. Dred Scott v. Sandford, 60 U.S. 393, 407 (1857).

how a dominant group uses the law to assert an ownership interest in an oppressed group under conditions that do not reach the level of legal slavery. Currently, a woman's free and intelligent consent to sexual relations, or the lack of that consent, plays a major role in determining whether the law will recognize the interference with her bodily integrity as consensual sexual intercourse, based on her self-determination of bodily integrity, or some form of sexual crime.[48] However, historically, if a woman were unmarried, her consent would be irrelevant to a charge of fornication.[49] The vertical axis of Figure One would be non-existent in the law. In traditional legal terms this might be explained as the law's desire to protect the woman's chastity even when she, presumably incorrectly, had determined not to protect it. However, it should more accurately be considered as the ownership interest of the dominant social group (men) being asserted in the law to prevent the owned members of the oppressed group (women) from determining the course of their own bodily integrity. Such an act of self-determination would threaten the ownership rights of men, as a group, over women, as a group. A similar analysis can be used to explain the unavailability of the consent defense in a trial for adultery.

The result is even more stark and less explicable in the case of the sexual assault of a woman by a man to whom she is married. In that case, the woman's consent, or more importantly the lack of her consent, was historically irrelevant to the law.[50] Traditionally, this legal indifference to a woman's desires concerning her own physical integrity has been explained as some sort of social welfare effort to preserve the marital relationship.[51] It is more easily under-

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48. The law of rape protects the female's freedom of choice and punishes unwanted and coerced intimacy. The male who imposes himself upon the female by force or compulsion obviously violates these interests. MODEL PENAL CODE § 213.1, comment 4.

49. by the nature of the offense the consent of both parties is necessary for the crime of fornication. Nephew v. State, S.E. 930 (Ga. Ct. App. 1909).

50. A man could not even be found guilty of raping, or assaulting with intent to rape, his estranged wife who had sued unsuccessfully for divorce. Frazier v. State, 86 S.W. 754 (Tex. Ct. App. 1905).

51.

> While the marital rape exemption has its roots in the historic subjugation of women, the Courts traced the first explicit statement about rape in marriage to Sir Matthew Hale, the Chief Justice of the Court of Kings Bench from 1671-1675. On the impossibility of marital rape, he stated, "[T]he husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contrac the wife hath given up herself in this kind unto her husband which she cannot retract."

Joyce McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 248 (1992).

stood if the vertical axis of Figure One is erased and the activity, forced sexual relations with one's wife, is viewed entirely on the horizontal axis. It is legal because a socially dominant group (men) is giving legal voice to its wishes without regard to the concerns of an oppressed group (women). The law has also had a historic tolerance for a man who physically assaults his wife.[52] Although, a man may no longer physically abuse his wife, with or without her consent,[53] under a legal right to discipline her, the law and law enforcement have not necessarily progressed at the same rate. The law has given relevance to the preference axis of women who are married. The practical ability of that axis to become more than a faint shadow is largely in the hands of police departments, prosecutors, and courts, which may still be influenced in certain localities by the traditional concept of the marital relationship.[54]

Of course, gender is not the sole determining consideration of one's place in society. Nor has it been the sole determining factor of a woman's ability to consent to interferences with her body. An African-American woman's refusal to consent to sexual intercourse was legally irrelevant at the time when African-Americans were chattels under the law.[55] The race of the woman and her assailant would

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> The common law did place a limitation on the right of a husband to discipline his wife. In its wisdom, it gave a husband the right to beat his wife, provided he used a switch no larger than his thumb. The wife was incapable of bringing suit or being sued without the joinder of her husband. Suit between husband and wife was precluded by the joinder rule, which would have required the husband to sue himself. In the late 1800's, states began to enact Married Women's Acts, for the purpose of removing these disabilities.

Guffy v. Guffy, 631 P.2d 646 (Kan. 1981).

53. State v. Brown, 364 A.2d 27 (N.J. Super. Ct. Law Div. 1976).

54. *See, e.g.* ANTHONY V. BOUZA, THE POLICE MYSTIQUE, 206-207 (1990):

> The police culture, still largely male and white, has traditionally been uncomfortable with the notion of intruding into the family: "A man's home is his castle"; "Don't come between a man and his woman"; "She probably had it coming"; "They'll kiss and make up by morning, and then I'll be the villain"; "She's not going to sign the complaint in court." These are the attitudes that have helped shape policy.

55. The Virginia Supreme Court of Appeals did not address directly the question whether a slave had any personal rights that could be violated by rape, but the other slave state that debated this issue decided that no such rights existed. Mississippi and Missouri, for example, decided that the rape of a slave woman was imply not a crime, even when committed by a slave. When it involved the prosecution of black slaves for the rape of black slave women, Virginia, unlike other states, did not declare that such rapes were not a crime. But no declaration was necessary, because "[the] law simply did not criminalize the rape of slave women." This is not to suggest that slave women in Virginia were

dictate the legal outcome, or the practical possibility, of any criminal prosecution.[56] If the victim was an African-American woman (a member of an oppressed group), then the vertical axis was non-existent. If the woman was poor, had previously engaged in consensual sexual intercourse with another man, or was a prostitute, then the significance of her consent, while not legally irrelevant, would vary from the non-consenting, unmarried, white virgin because of group membership.[57]

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distinctly better off that slave women elsewhere. What is significant is that was not one reported prosecution of a white man for the sexual assault of a black or mulatto women in either colonial or anti-bellum Virginia. This fact provides one of the most telling illustrations of black women's complete and utter powerlessness before the criminal laws of Virginia.

A. Leon Higginbotham, Jr. and Anne F. Jacobs, *The "Law Only as an Enemy": The legitimization of Racial Powerlessness Through the Colonial and Ante-Bellum Criminal Laws of Virginia,* N.C. L. REV., 969, 1056 (1992).

56.

> [R]ape of black female slaves was . . . an institutionalized method of terrorism which had as its goal the demoralization and dehumanization of black women (citation omitted).
>
> The history of sexual assault upon African-American women is unparalleled. Because of her status as a slave, the enslaved woman could not escape sexual assault, and because of her inability to obtain work other than as a domestic after slavery, the newly freed slave could not escape sexual assault either (citation omitted). Although "the rape of a white woman by a slave (or a Black freeman) was a capital offense in virtually every jurisdiction" (citation omitted), the female slave had no protection from rape, regardless of who assaulted her (citation omitted). And "[w]hen Black women were raped by white males, they were being raped not as women generally, but as Black women specifically" (citation omitted).
>
> Moreover, the female slave had no one to protect her from sexual assault. During slavery, an African-American woman could not look to the white woman for protection or sympathy (citation omitted). "Some [white] mistresses responded to the distress of female slaves by persecuting and tormenting them. Others encouraged the use of black women as sex objects because it allowed them respite from unwanted sexual advances" (citation omitted). For the African-American woman, the hope of a life free of sexual assault was just as bleak after slavery. As during slavery, the newly freed slave received no protection or sympathy from the white female. Indeed, some white women solicited African-American women to act as mistresses for their husbands; they hoped to stifle competition from other white women and thus save their marriages (citation omitted). Thus, even to the white woman, the newly freed female slave was an object to be used. The past differences between the status and treatment of African-American women and white women are stark. However, the differences that existed in the past continue today.

Comment, *We Are Not Sisters: African-American Women and the Freedom to Associate and Disassociate,* 66 TUL. L. REV. 1467, 1482-1483 (1992).

57. Slippery notions of the concept of "chastity" have led to a sliding scale in judging the criminality of sexually assaulting women and girls. *See generally,* Comment, *Adolescence in Jeopardy: An Analysis of Texas' Promiscuity Defense*

The relative dominance of groups affects more than just the ability of the oppressed group members to expect the withholding of their consent to have legal significance. It also affects their ability to obtain lawful consent from others, including dominant group members, in areas of social relationships. The best example of this is the historic anti-miscegenation laws. These laws were specifically designed to preserve the white race's dominant position in society.[58] The effect of these laws was to take away the ability of a white person (member of a dominant group) to consent to sexual relations with a person who was a member of another racial group (member of an oppressed group). In this regard at least, white people who desired equal relations with non-whites had the ability to consent to such relations placed on the legally insignificant vertical axis. The situation was controlled by the horizontal axis of white racial supremacy. To recognize the oppressed group as social equals would detract from the ownership interest asserted by the dominant group. While anti-miscegenation laws are no longer constitutional, their supremacist effects are still manifested in the individual attitudes of some judges[59] and disparate outcomes of sexual assault prosecutions.[60]

VI. How the Utility Interest of the Dominant Group Determines the Availability of the Consent Defense

Group oppression is manifested not only by the dominant group's influence over the availability of the consent defense in cases

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for Sexual Assault, 29 HOUS. L. REV. 583 (1992).

58. "[T]he state court concluded that the State's legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of the blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' obviously an endorsement of the doctrine of White Supremacy." Loving v. Virginia, 388 U.S. 1, 7 (1967).

59. A Michigan state probate court judge publicly stated that he was opposed to authorizing abortions for minors who did not have parental consent. However, he would authorize an abortion in the case of a white girl who had been raped by a black man. *In re* Bourisseau, 480 N.W.2d 270 (Mich. 1992).

60. *See, e.g.* REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, Vol. II at 165 (1991):

> [W]here the victim of the crime is white and the perpetrator is black, research has shown that prosecutors are more likely to upgrade the charges brought. Black defendants, therefore face more serious charges, more vigorous prosecution, and more severe sentences than white offenders when the victim is white. In rape cases, one study found that where the victims knew the rapist, black defendants were nearly twice as likely to be incarcerated for raping white women as for raping black women (60% vs. 30.9%).

involving sexual relations, but also in other more apparently benign situations. If one person cuts deep into the flesh of another with a sharp knife, the assailant is criminally liable in all jurisdictions for what the Model Penal Code terms an "aggravated assault."[61] Because of the serious nature of this conduct, the consent of the injured individual to the cutting is irrelevant to the assailant's guilt. However, if the person wielding the knife is a properly trained and duly licensed physician acting within the norms of the medical profession, the patient's consent provides the surgeon with a good defense to a criminal prosecution. In certain instances — for example, when the patient's life is in danger and consent cannot be obtained — the physician can even proceed without consent.[62] Even if the patient dies in, or as a result of, surgery, a physician whose conduct conformed to the standard of care of the profession will not be subject to criminal liability.

There are few criminal prosecutions of doctors for performing generally accepted medical procedures on consenting patients. However, the traditional manner in which the consent defense is applied would be consistent with the law's desire to seek the greater social good of extending life and alleviating pain, a manifestation of a utility interest. Therefore, an individual is allowed to consent to the surgical removal of a malignancy because the benefit of a more comfortable and longer life for the individual, as well as a more productive and less dependent citizen, outweigh the harm that the law seeks to avoid. Unquestionably, the possible harm resulting from even a routine surgical procedure can be very great.[63] Yet because the law values life and health so highly, it is willing to allow the individual to risk death to extend life or ease the burdens of illness.

This traditional justification for the availability of the consent defense for medical treatments that extend life or alleviate pain fails

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61. MODEL PENAL CODE § 211.1(2)(b) (Proposed Official Draft 1962). "A person is guilty of aggravated assault if he . . . attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon."

62. MODEL PENAL CODE § 3.08 (Proposed Official Draft 1962).

> The use of force upon or toward the person of another is justifiable if . . . the actor is a doctor or other therapist or person assisting him at his direction and: (a) the force is used for the purpose of administering a recognized form of treatment that 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 or . . . the treatment is administered in an emergency when the actor believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent[.]

63. *See, e.g.*, William E. Brigman, *Circumcision as Child Abuse: the Legal and Constitutional Issues*, 23 J. FAM. L. 337 (1984).

to explain adequately those procedures which are not designed to extend life or ease pain, including many forms of cosmetic surgery.

Undoubtedly some cosmetic surgery is performed to assist a patient in the resumption of a normal life following a traumatic event, such as a disfiguring accident. Other cosmetic surgery is performed to assist those who were born with birth defects in leading normal lives. In these cases, the traditional analysis maintains that the individual's consent to the possible harm involved in a surgical procedure is a sufficient safeguard to the harm that the law seeks to avoid (reckless mutilation or endangering life), when compared with the probable beneficial result (individual comfort and productive membership in society).

One class of medical procedures that have been performed with little attention from the legal community is that type which is done to achieve Western standards of beauty, such as the surgical augmentation or reduction of the female breast. These are but two of the many types of cosmetic procedures performed on a routine basis in many hospitals. Examination of these procedures can dramatically demonstrate the inadequacy of traditional analysis of the consent defense to fully explain consent to medical treatment. What explanation of the consent defense can the traditional analysis make of the patient who consents to surgical alteration of his or her body, not because of a traumatic episode, but because of a strong desire to change his or her appearance? The law certainly does not justify allowing such consent to fulfill a desire to let an individual rearrange his or her physical appearance as the individual sees fit. If that were the case, draft-age men would be allowed to give legal consent to the amputation of body parts to avoid military service. The crafty person would be allowed to consent to mutilation to beg more effectively on the streets. At best the consent of a woman to breast enlargement can be justified as appropriate for the patient's mental health because of the inadequacies she feels regarding her body, usually as a result of societal pressures.[64] The more realistic expla-

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64. Anne Bolin, *Vandalized Vanity: Feminine Physiques Betrayed and Portrayed*, *in* TATTOO, TORTURE, MUTILATION, AND ADORNMENT 82 (1992).

> Women have come to be defined primarily in terms of allure and adornment, highly visible displays, and demonstrations of men's success. Capitalism and beauty conspire as a system in which seasonal changes in fashions as well as cycles in the female contour sell products. Women's ambivalence about body concept is institutionalized as a mechanism in the economics of beauty. Because women are valued for how they look, not what they do, they are more affected by ephemeral attractiveness norms than men. "When beauty images change, bodies are expected to change as well, for nature cannot satisfy culture's ideal."

nation can be found by recalling the relevancy of consent to cases that involved an asserted ownership interest of one class of person over another, such as the physical discipline that a husband could legally exert over his wife under the old common law scheme.[65] The wife's consent was irrelevant in most cases because, in the view of the law, she was her husband's property.[66] As long as his actions were not fatal, the husband did not fear criminal sanction for his conduct.[67]

In modern times, men assert a group utility interest in the bodies of women. The utility interest can lead to results that are just as oppressive as those caused by an ownership interest. However, the utility interest differs from the ownership interest. An ownership interest results in total control over the oppressed group. A utility interest, on the other hand, does not equal total control but is instead an interest in what the oppressed group does to fulfill the wants of the dominant group. Therefore, while the hallmark of an ownership interest is a denial of the right of the oppressed group to control its own integrity, the utility interest allows the oppressed group to consent to harms to which others may not.

As an oppressed group, women are allowed to consent to surgical procedures that are otherwise legally unjustifiable, if in so consenting they are attempting to bring their bodies closer to the male (dominant group) dictated norm of physical appearance. Similar observations can be made concerning surgical procedures that are designed to make other racial or ethnic group members' appearance more caucasian and western European.[68] In the early twentieth cen-

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65.

> The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to entrust him with this power of restraining her, domestic chastisement, in the same moderation that a man is allowed to correct his servants or children, for whom the master or parent is also liable in some cases to answer.

BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, Book One, Chapter 15, Of Husband and Wife 432.

66. "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . . ." BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, Book One, Chapter 15, Of Husband and Wife 430.

67. *See generally,* Michael Dowd, *Dispelling the Myths about the "Battered Woman's Defense:" Towards a New Understanding,* 19 FORDHAM URB. L.J. 567 (1992).

68. Ronald S. Matsunaga, *Westernization of the Asian Eyelid,* ARCH, OTOLARYNGOL. 111, 149-153 (1985).

> There has been a substantial rise in interest for westernization of Asian eyelids in the United States and other Western countries. This can be partly

tury, there were numerous experiments conducted in an attempt to cure the impotence of men with testicle transplants from donors who were usually poor, minorities, or prison inmates.[69] When such donors were not readily available, animal donors were used.

In these types of cosmetic surgeries, the patient's consent legalizes the physician's otherwise assaultive conduct. Therefore, the vertical axis of Figure One has legal relevance. On the other hand, those who consent to having themselves maimed to avoid military service or to increase their ability as beggars will not be able to relieve their assailants of criminal responsibility. The vertical axis gauging their preferences is irrelevant.

The law allows healthy people to undergo the sometimes untested methods of cosmetic surgery, such as the implantation of silicone bags in the human body,[70] and increase their earning capacity by making themselves conform to dominant notions of personal appearance. Yet beggars will not be allowed to have themselves mutilated in the hopes of increasing their earning capacity. How can the differences in these outcomes be explained using the traditional analysis of the consent defense?

A more direct example of the dominant group exerting its

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attributed to the influx of immigrant Asians who have been exposed to Western culture and are desirous of emulating their Western counterparts. Also, there has been an increased demand for westernizing the Asian eyelids, as reflected in the greater number of Western surgeons who have been consulted to perform this operation.

69. Long before Hemingway told the world of how Jake Barnes' phallic misfortune led him to try to re-capture his youth and vigor through other men, scientists were attempting to rejuvenate the elderly and reinvigorate the impotent with the testicles of younger men:

> Voronoff thought at first of transplanting human testicles in cases of testicular exhaustion due to age or deficiency, whether the latter were congenital or caused by some local change such as orchitis or sclerosis. But human testicles are difficult to procure. People do not yet understand that the loss of one testicle has no bad effects . . . . If this were generally known, many young people might be willing to give one testicle for this purpose.
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> * * *
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> Voronoff thought of the possibility of procuring testicles from criminals condemned to death, but he concluded that this too was impracticable. He decided to try the testicles of anthropoid apes . . .

NORMAN HAIRE, REJUVENATION: THE WORK OF STEINACH, VORONOFF, AND OTHERS at 171 (1925).

70. Only after over two million American women had undergone surgeries involving silicone-filled breast implants did the Food and Drug Administration call for a moratorium on the procedures to study the safety of the implants. Judy Foreman, *FDA Asks Moratorium on Breast Implants,* THE BOSTON GLOBE, Jan. 7, 1992, at 1.

utility interest is evident in professional boxing, as well as other organized athletic events, especially those events which are financially lucrative for their organizers. The object of boxing is for each competitor to inflict physical violence on the other.[71] It has few of the virtues typically associated with competitive athletics.[72] This is significant because, in addition to its potential service to the sovereign in training draft-age men, traditional theories of the consent defense in organized athletic contests rely upon the virtues instilled in young people as a justification for its continued use.[73] Yet, despite the fact that most major medical authorities have called for a ban of boxing events because of health risks,[74] boxers will continue to be allowed to beat each other senseless because of the monetary (utility) interest of those who profit from their consented-to suffering.[75]

VII. How the Paternal Interest of the Dominant Group Determines the Availability of the Consent Defense

In addition to asserting both ownership and utility interests, socially dominant groups tend to affect the criminal law with a paternal interest. As this interest is used to affect the rights of individuals, while not without controversy, there is at least a general acknowledgement of the appropriateness of paternalism on the part of the

71. However, the evils of dominant group interest are not limited to boxing or to professional athletics. One head coach of a college football team was recently fired when players complained that he forced them to practice beyond the maximum time allowed under NCAA rules, punched them in unprotected areas of their bodies with a clenched fist, and ordered them to take painkillers and avoid classes that conflicted with their availability to play football. *See Colorado State Lists Charges Against Bruce,* N.Y. TIMES, Nov. 26, 1992, at B23.

72. In advocating a ban of boxing, editors of *The New Republic* found support in their position in noting that: "Of all professional athletes, none are less worthy of emulation than boxers. Boxers get rich without an education. They achieve status through violence. Their victories involve no teamwork. And they indulge in ritual self-promotion." *Ban Boxing,* THE NEW REPUBLIC, Aug. 8, 1988, at 7.

73. In most athletic contests, a participant who launches a violent attack on another player has gone beyond the rules of the sport, as well as committed a crime. State v. Floyd, 466 N.W.2d 919 (Iowa Ct. App. 1990).

74. The American, British, Canadian, and Australian national medical societies have all urged that boxing be abolished. *See* George D. Lundberg, M.D., *Boxing Should Be Banned in Civilized Countries - Round 3,* 255 JAMA 2483 (1986).

75. "When you see guys like Trump, Kennedy, and Rockefeller — bluebloods — when they come to a fight, regardless of what they may represent, they come to see someone get hurt, and my objective is to inflict as much punishment [on my opponent] as possible." Mike Tyson, *quoted in, Ban Boxing,* THE NEW REPUBLIC, Aug. 8, 1988, at 7.

state. For example, only a few would argue that the state should be without power over those who practice medicine or dentistry without some form of training and licensure. However, in the case of inter-group relations, I propose that paternalism is something that lacks the benign characteristics that may be seen in the regulation of individual conduct.

In inter-group relations the dominant group seeks to perpetuate its norms of behavior through its paternal interest by allowing an individual to consent to what would otherwise be a criminal assault. This is frequently accompanied by denying the use of consent as a defense to similar assaultive conduct, which perpetuates a less dominant group's culture. A good example of a dominant group's paternal interest affecting the law is the law's continued tolerance for the practice of circumcision. In the vast majority of cases, circumcision is a procedure with debatable, if any, medical benefit.[76] The most likely reason for its continued practice is its significance in religious culture.[77] Even though it is a surgical procedure, *bris milah*, the

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76. *See, e.g.,* (Edgar J. Schoen, MD, Chairman, *et al,*) American Academy of Pediatrics Task Force on Circumcision, *Report of The Task Force on Circumcision,* 84 PEDIATRICS 388 (1989):

> Properly performed newborn circumcision prevents phimosis, paraphimosis, and balanoposthitis and has been shown to decrease the incidence of cancer of the penis among United States men. It may result in a decreased incidence of urinary tract infection. However, in the absence of well-designed prospective studies, conclusions regarding the relationship of urinary tract infection to circumcision are tentative. An increased incidence of cancer of the cervix has been found in sexual partners of uncircumcised men infected with human papillomavirus. Evidence concerning the association of sexually transmitted diseases and circumcision is conflicting.
>
> Newborn circumcision is a rapid and generally safe procedure when performed by an experienced operator. It is an elective procedure to be performed only if an infant is stable and healthy. Infants respond to the procedure with transient behavioral and physiologic changes.
>
> Local anesthesia (dorsal penile nerve block) may reduce the observed physiologic response to newborn circumcision. It also has its own inherent risks. However, reports of extensive experience or follow-up with the technique in newborns are lacking.
>
> Newborn circumcision has potential medical benefits and advantages as well as disadvantages and risks. When circumcision is being considered, the benefits and risks should be explained to the parents and informed consent obtained.

Id.

But see, Norma Fakjian, M.D., *et al, An Argument for Circumcision; Prevention of Balanitis in the Adult,* 26 ARCH. DERMATOL. 1046-1047 (1990). ("Those who forgo circumcision in the neonatal period appear to be inclined to develop inflammatory diseases of the foreskin in adulthood. Uncircumcised diabetic males may be particularly predisposed to develop balanitis.")

77.

> This is the *bris milah* (circumcision), which has been the practice of our

Hebrew term for the religious circumcision, is not necessarily conducted by a physician but a *mohel*, who may by coincidence be a physician.[78] Despite the controversy concerning its health aspects no one has suggested that circumcisions be criminalized.[79] However, the legislatures of Idaho[80] and Illinois[81] have enacted statutes that make criminal the mutilation of a child during religious ceremonies. Yet

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> people for 4,000 years. This is a precept so ancient and so ingrained in the subconscious of our nation that, until recently, it would have been unthinkable to omit a properly performed *bris* to initiate a male Jewish infant into the Covenant of Abraham.

HENRY C. ROMBERG, M.D., BRIS MILAH 18 (1982).

78. However, there are some *mohelim* who believe that physicians should not be admitted to their ranks. "One *mohel* after another . . . had *a kabolleh foon taten,* a tradition from his father, not to teach *milah* to a physician." *Id.*, at 25. And some believe that a *mohel* usually performs the procedure with more skill than a physician. "[T]he traditional *mohel* performs a circumcision far more skillfully, far less traumatically, far more safely, and certainly far more aesthetically . . . than the average medical house officer who is assigned to circumcise newborn babies." *Id.* at 27.

79.

> The opinion of the medical profession is divided over the whole topic of circumcision. One group feels quite strongly that routine circumcision for all males is a good prophylactic health measure; the other group maintains with equal vigor that it is unnecessary, possibly dangerous, cosmetic surgery not accompanied by any proven or tangible benefit. Both sides concede, however, that *as an ancient Jewish religious ritual,* it need not be interfered with. That is stated plainly even by those who are most opposed to routine circumcision.

Id. at 30 (emphasis added).

80. The Idaho code provides:

> A person is guilty of a felony when he commits any of the following acts with, upon, or in the presence of a child as part of a ceremony, rite or any similar observance:
>
> . . . mutilates . . . any . . . human being;
>
> * * *
>
> The provisions of this section shall not be construed to apply to:
>
> * * *
>
> The lawful medical practice of circumcision or any ceremony related thereto . . .

Idaho Code § 18-1506A (1992).

81. Illinois provides that:

> A person commits the offense of ritual mutilation, when he mutilates . . . 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 offense ritual mutilation does not include the practice of circumcision or a ceremony, rite, initiation, observance, or performance related thereto.

Ill. Rev. Stat. ch. 38, para. 12-32 (1992).

these laws specifically exempt circumcision from their definitions of ritualized abuse. Is this because the legislatures of these states made a finding that tattooing the numbers 666 on the scalp of a child is more abusive than is cutting the foreskin away from an infant's penis and sucking the blood from the wound?[82] Probably not. It is more likely that the Judeo-Christian culture, which recognizes circumcision as an accepted and harmless religious practice, has little trouble viewing other types of bodily mutilations done in connection with worship as ritual abuse. While the legislatures of these states could apparently enact laws that criminalize circumcision under any circumstance, that is unlikely.

An example of paternal interests affecting the availability of the consent defense in a non-religious context is exemplified by the fact that many jurisdictions allow individuals to consent to tatooing.[83] Without individual consent, tattooing would clearly constitute a mutilation of the victim[84] of such seriousness that its use has been outlawed as a form of cruel punishment.[85] Even though the practice of tattooing was apparently acquired by caucasian sailors from Tahiti,[86] it has currently gained widespread acceptance in many parts of American culture. Yet it is doubtful that the same jurisdictions that allow tattoo parlors to flourish would tolerate similar establishments dedicated to the provision of decorative body scars to those who were willing to pay for them.[87]

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82. Dr. Romberg explains:

> The traditional practice of *metzitzah b'peh* [literally, withdrawal of the blood by mouth], which has its roots in the earliest history of the Jewish people and has survived unchanged to the present time, should be viewed with great respect. It is spoken of very positively in the Jewish literature on circumcision both as an essential part of the ritual and as a health measure which prevents infection and promotes healing. Although there are certain circumstances where a glass tube may be used, most Jewish sages speak strongly in favor of (and some insist on) *metzitzah b'peh* without additional instrumentation.

Romberg, *supra* note 78 at 57.

83. In fact, some jurisdictions permit the tattooing of minors so long as the consent of their parent or guardian has been obtained. *See, e.g.*, ARK, CODE ANN. § 5-27-228 (1992); KY. REV. STAT. ANN. § 211.760 (Baldwin 1992); and S.D. CODIFIED LAWS, § 26-10-19 (1992).

84. Tattooing is commonly considered self-mutilation by many prison authorities. *See e.g.*, Gates v. Collier, 501 F.2d 1291, 1322 (5th Cir. 1974), Meyers v. Alldredge, 492 F.2d 296, 312 (3d Cir. 1974), Martin v. Foti, 561 F. Supp. 252, 268 (E.D. La. 1983) and Taylor v. Perini, 413 F. Supp. 189, 226 (N.D. Ohio 1976).

85. The Uniform Code of Military Justice, Article 55, prohibits "[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment . . . " 10 U.S.C. § 855 (1956).

86. SHARON ROMM, M.D., THE CHANGING FACE OF BEAUTY 234 (1992).

87. Some cultures view the acquisition of such scars in the same way that

By this point it is probably apparent that, as I stated at the outset, the three broad categories that I have identified often overlap. For example, the anti-miscegenation laws, which I attributed to the dominant group's ownership interest, could also be categorized as a paternal interest. The utility interest evidenced in professional and intercollegiate athletics could be seen as a sign of an ownership interest.

VIII. CONCLUSION

It has been my purpose to demonstrate that there is a unifying principle in the law regarding the use of the consent defense in the criminal law. That principle is not one that the law will overcome any sooner than the underlying societal relationships that shape the law will disappear.

To the extent that we value personal liberty and autonomy in our society, our laws must at some point yield to the individual's choice and decision concerning bodily integrity. If our courts and legislatures decide that certain idiosyncratic preferences are too far beyond the bounds of desirable or acceptable conduct, the law will be used to enforce societal opinion and criminalize conduct associated with those individual preferences. In an ideal society, this legal restriction would never yield different results based on the group membership of the individual.[88] However, until our society is much closer to the ideal than it currently is, our laws can be expected to yield such different results. Therefore, Professor Baker's earnest desire that the criminal law be used to impose sanctions always and only on the basis of the participants' consent to a sexual encounter will not be achieved until the ownership, utility, and paternalistic interests of dominant groups play no role in sexual mores. Likewise,

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many Americans think of tattoos. *See, e.g., Id.* at 243:

> "Many African tribes, adhering to a tradition that dates to prehistory, adorn their bodies with scars. Scars in undulating stripes and patterns are placed for psychological and social identification. They announce group membership, proclaim the arrival of adulthood, and tell the world that the bearer is beautiful." And there is some evidence that there might be at least limited demand for such services in this country.

88. As Justice Black stated:

> Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.

Chambers v. Florida, 309 U.S. 227, 241 (1940).

Professor Fitzgerald's hopes to legalize mercy killing must find a law devoid of such interests in human life. It may be difficult for many to acknowledge that the criminal law is little more than a tool to enforce the will of the dominant social group. However, failure to accept this in the area of the consent defense in criminal law will leave us with a rule that is more appropriate to Alice in Wonderland than to a predictable set of criminal laws: The consent defense may be used when "we" say it may and it may not be used when "we" say it may not.