

Consent is Not a Defense to Battery: A Reply to Professor Bergelson

Luis E. Chiesa*

I. INTRODUCTION

In her recent book, Professor Vera Bergelson expressed puzzlement over the fact that those who feel “trapped in the wrong body” can “consent to a sex change operation, which often involves the removal of healthy sexual organs,” whereas those who would feel happier being amputees “cannot consent to amputation of an arm or a leg.”¹ Bergelson is equally puzzled by the fact that a spouse may physically injure her partner pursuant to practices of religious flagellation, but she may not cause similar injuries pursuant to sadomasochistic sexual practices.² Why is consent a defense to battery when surgery is performed to remove the sexual organs of someone who desires to look like a member of the opposite sex but not when it is performed to sever the leg of someone who desires to look like an amputee? Why is consent a defense to battery when the victim wants to be injured during a religious ritual but not when she wants to suffer pain while engaging in sadomasochistic sex? Why, in sum, is consent a defense to certain types of batteries but not to others?

Professor Bergelson’s answer is that the law’s current approach to consent is uncertain, outdated and arbitrary.³ Thus, she argues that current rules “need to be revised” in accordance with a more coherent theory of consent, pursuant to which the victim’s freely given and valid consent should always be considered a defense that (fully or partially) mitigates the perpetrator’s liability.⁴ Bergelson then devotes several sections of her insightful book to explaining when and how consent should reduce or eliminate the defendant’s responsibility for engaging in physically harmful conduct.⁵

Although I sympathize with Bergelson’s plea for a more robust consent defense in criminal law, I am puzzled by her puzzlement over the way in which the

* Associate Professor of Law, Pace Law School. I am indebted to Vera Bergelson, Markus Dubber, and Leo Zaibert for providing me valuable feedback on an earlier draft of this essay. I am also indebted to Tony Dillof for our conversations on the nature of consent during the 2010 Law and Society meeting in Chicago.

¹ VERA BERGELSON, *VICTIMS’ RIGHTS AND VICTIMS’ WRONGS: COMPARATIVE LIABILITY IN CRIMINAL LAW* 24 (Markus D. Dubber ed., 2009).

² *Id.* at 21–22.

³ *Id.* at 26.

⁴ *Id.* at 26–27.

⁵ *Id.* at 15–27, 93–105.

law currently draws the lines between lawful and unlawful conduct in this context. The purpose of this brief essay is to explain why I believe that the aforementioned cases are not really puzzling at all. I will do so by arguing that, properly understood, consent is *never* a defense to battery.⁶ More specifically, I contend that consent defeats criminal liability only in two circumstances, neither of which operates as a “true defense”⁷ to liability. In the first group of cases, consent defeats liability when it negates an element of the offense. Thus, the victim’s consent negates the non-consensual nature of the sexual intercourse in the case of rape. Similarly, the victim’s consent negates the unlawful nature of the taking of the property of another in the case of theft. In such cases, consent is not really a defense that defeats liability for engaging in harmful conduct, but rather a negation of an element of the offense that reveals that the perpetrator did not engage in harmful conduct in the first place.

In other cases, consent precludes liability for conduct that nominally satisfies the elements of an offense when, in combination with other factors, it reveals that the perpetrator’s act did not inflict the kind of evil that the offense with which he was charged was designed to prevent. In such cases, consent amounts to a factor that counts in favor of modifying the definition of the offense in a way that reveals that the perpetrator’s conduct does not really fall within the scope of the prohibited conduct.⁸ Thus, the victim’s consent to having her ears pierced, in conjunction with other factors—such as the fact that the procedure is carried out by a licensed professional—reveals that the defendant’s act does not inflict the kind of harm sought to be prevented by the offense. So conceived, consent does not count as a defense to conduct that inflicted the kind of evil represented by the offense, but rather as a factor that contributes to modifying the definition of the offense in way that reveals that the defendant’s conduct did not inflict a legally relevant evil in the first place. Bergelson’s puzzlement stems, I believe, from her failure to consider that consent might operate in this fashion. For Bergelson, as for most criminal theorists, consensual conduct that satisfies the elements of an offense is lawful because, in such cases, consent operates as a justification defense. According to this approach, the procedure of puncturing a part of the human body to create an

⁶ I believe that this claim can be generalized. Thus, I think that, properly understood, consent is not a defense to *any* crime, including homicide. However, I chose to focus on consent’s relevance to battery liability in this essay because other cases, especially homicide, raise thorny issues unrelated to the substantive doctrine of consent. In cases of homicide, for example, proving the victim’s consent to death is compounded by the fact that the victim is no longer alive and able to testify.

⁷ By “true defense” I mean a claim that defeats liability without negating that the defendant engaged in conduct that satisfied the elements of the offense charged. There are three kinds of “true defenses,” namely: justifications, excuses, and non-exculpatory defenses. See generally Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199 (1982).

⁸ Professor Robinson calls this kind of “defense” an “offense-modification defense,” because it is intended to alter or modify the definition of the offense in a way that allows the defendant to claim that his conduct did not satisfy the elements of the “modified” offense. *Id.* at 208–13.

opening in which jewelry may be worn causes physical harm and is, therefore, harmful in a legally relevant way. However, the victim's consent justifies the conduct because her interest in freely deciding what to do with her own body outweighs the physical harm caused by the procedure.⁹

Once consent to battery is viewed as a justification, one can begin to understand why Bergelson is puzzled by the consistent refusal of courts to exculpate those who engage in consensual sadomasochistic sexual practices and those medical professionals who amputate a leg at the request of the patient in order to treat body dysmorphic disorder. If consent justifies physically injurious acts because the harmful effects of the conduct are outweighed by the value that we place on the victim's freedom to decide what to do with her body, then it is difficult to explain why the victim's informed and freely-given consent to harm provides a defense to battery in some cases but not in others. After all, if consent is a defense to battery because we value the victim's autonomy even more than we value her physical integrity, then consistency demands that we treat voluntary and informed consent as defense in any case of battery.

Although this view has some normative appeal, I believe that it fails to accurately describe the relevance of consent to our current practices of blaming and punishing. Furthermore, I believe that treating consent as a justification is not only descriptively problematic, but also conceptually flawed. Thus, I argue that for the sake of conceptual clarity, consent should either be treated as irrelevant to criminal liability or as a factor that ought to be taken into account when determining whether the defendant's conduct inflicted the kind of evil that the offense was designed to prevent. Finally, I think that it is because of these descriptive and conceptual misunderstandings that scholars such as Bergelson have incorrectly pointed out that our current criminal laws approach the issue of consent in a haphazard fashion. I will defend these claims in three parts.

In Part II, I argue that there are three ways of conceiving the interest sought to be protected by the offense of battery. These approaches provide different accounts of the exculpatory nature of consent in battery cases, none of which is compatible with the claim that consent operates as a justification defense. In Part III, I argue that, contrary to what many scholars contend, the offense of battery does not seek to protect personal autonomy. Therefore, I claim that the exculpatory role of consent in cases of battery cannot be explained by claiming that recognizing consent as a defense vindicates the victim's autonomy. Instead, I suggest that consent is relevant only insofar as it reveals that the infliction of bodily harm was socially acceptable. In Part IV, I argue that consent to battery currently operates as a factor that modifies the definition of the offense in a way that demonstrates that the defendant did not engage in the type of conduct that the

⁹ A justification is a defense that defeats liability for conduct that inflicted a legally relevant harm that is to be avoided whenever possible. *Id.* at 213. However, the defendant is relieved of responsibility because the justifying circumstances reveal that the harm caused by the actor is "outweighed by the need to avoid an even greater harm or to further a greater societal interest." *Id.*

legislature desired to prohibit as battery. Furthermore, I claim that the offense of battery seeks to prevent the infliction of non-trivial physical harm in circumstances where the infliction of such harm is not considered a normal occurrence given current societal practices. Consequently, I suggest that consent is relevant in cases of battery only when, in conjunction with other factors, it reveals that the perpetrator's infliction of bodily harm was a normal occurrence rather than an extraordinary or regrettable event.

II. A FIRST GLANCE AT THE INTEREST THAT BATTERY SEEKS TO PROTECT

A. Societal Interest in Keeping the Citizenry Free from the Infliction of Bodily Harm

Most criminal codes divide the offenses contained in the code by virtue of the harm that the law seeks to prevent by creating those crimes. For example, the Model Penal Code groups crimes into, among other categories, "offenses against the person" and "offenses against property." The offenses of homicide and battery are classified as "offenses against the person," whereas arson and criminal mischief are included within the group "offenses against property." But what is it that we mean when we say that battery is an offense against the person? One possible answer is that battery counts as an offense against the person because engaging in conduct constitutive of the offense infringes a societal interest in keeping persons free from physical harm. Under this view of the offense, any act that inflicts physical injury to a person instantiates the kind of harm sought to be prevented by the offense of battery. Furthermore, if what we really mean to protect is the citizen's physical integrity—as opposed to her freedom to do what she wants with her body—then the interest sought to be protected by the offense is infringed whenever someone physically injures the person regardless of whether the person wanted to be physically injured. After all, the physical harm suffered by the victim is not erased by her consent.

B. Personal Interest in Having the Freedom to Decide What to Do with Our Bodies

Alternatively, the harm sought to be prevented by the offense of battery may be conceived as the interference with the individual's freedom to do what she wants with her body. Conceived in this manner, the harm sought to be prevented by the offense of battery is not the infliction of physical harm to the body, but rather the interference with the individual's freedom to do as she wishes with her own body. Accordingly, an act that inflicts bodily injury does not necessarily count as an instantiation of the type of harm sought to be prevented by the creation of the offense of battery. Thus, an act consisting in the puncturing of the skin with a needle would not count as inflicting the harm sought to be prevented by the offense of battery unless the victim did not wish her skin to be punctured by the

needle. The reason for this is straightforward. If the real interest sought to be protected by the offense of battery is the individual's freedom to decide what to do with her body, then the puncturing of the skin does not count as the sort of harm that the offense was intended to prevent unless the person did not acquiesce to it. So conceived, the rights of the individuals are only infringed when they do not consent to the harmful conduct. After all, if what is really protected in these cases is the right of the individual to do what she wants with her body—as opposed to the societal interest to protect physical integrity—then it follows that harming such interests with the victim's acquiescence does not infringe her right to do as she wishes with her bodily interests.

This view of rights is in tension with the often-defended view that the victim's consent to injury relieves the perpetrator of liability for battery because it reveals that the victim waived her right to bodily integrity.¹⁰ Under the view of rights espoused in this section, people have a right to do whatever they want with their body rather than a right to be kept free from harm to their body. Therefore, by consenting to suffer bodily modifications they are not, as the consent-as-waiver scholars would argue, waiving their right to be kept free from harm, but rather *exercising* their right to do whatever they want to do with their body. Thus, under this conception, the victim who consents to the body alteration is *not harmed at all* when the tattoo artist punctures her skin with a needle. Given that the interest sought to be protected by the offense is not interfered with in any way in cases of consensual conduct, there is no need to compare the benefits reaped by the conduct with the harm caused by the conduct because there simply is no harm in need of justification in the first place. Therefore, under this conception, consent does not justify the victim's conduct. Instead, it negates the harmful nature of the act.

C. Individual Interest in Being Kept Free From Harm

Some criminal law scholars have argued that the interest sought to be protected by the offense of battery is the individual's right to be kept free from harm rather than the societal interest in protecting the citizenry from bodily harm or the personal interest in freely deciding what to do with one's body.¹¹ Under this view, individuals have an interest to be kept free from injury to their physical integrity. However, they can choose to waive such an interest by consenting to conduct that causes them physical harm. The waiver, however, does not erase the harm caused. The victim is still harmed when the tattoo artist punctures her skin with a needle, even if she consented to getting a tattoo.¹² The harm, however, is

¹⁰ This is the view defended by BERGELSON, *supra* note 1, at 94.

¹¹ See *id.* at 91.

¹² Perhaps those who defend the view that consent functions as a justification would object to the claim that the tattoo artist harms the victim when she punctures her skin with the needle. If, however, they claim that the tattoo artist does not harm the person who desires to get a tattoo, then consent would not function as a justification in such cases, given that the victim's consent would actually reveal that there is no harm in need of justification in the first place.

outweighed by the value that we place in allowing the victim to freely and autonomously decide what to do with her body. Consent, therefore, does not negate the harm inflicted by conduct constitutive of these offenses. It justifies it.¹³

Although plausible, the claim that consent operates as a justification defense in cases of battery is problematic. It is confusing to contend that the interest sought to be protected by these offenses is the prevention of physical harm to the person while simultaneously holding that the infliction of physical harm is justified by the victim's consent because the law values the person's freedom to decide what to do with her body more than it values the person's interest in the integrity of her body. If it is really the case that the victim's freedom to decide what to do with her body is more important to us than whether her body is physically harmed, then it would be more sensible to conclude that what the law really seeks to protect by creating the offense of battery is not the individual's interest in keeping her body free from harm, but rather her interest in having the freedom to do whatever she wants to do with her body.

It is, of course, true that physically harming an individual's body usually interferes with her interest in being free to decide what to do with her body. However, this is only the case because we assume (sometimes incorrectly) that people usually do not want to suffer physical pain. Nevertheless, if what we ultimately care about the most is protecting the individual's right to freely decide what to do with her body, we should be prepared to recognize that consent to harm does not amount to a waiver of the victim's rights. Rather, consent to harm allows the victim to exercise her right to do as she wishes with her body. So conceived, consent negates the occurrence of legally relevant harm instead of justifying its infliction.

Another reason why consent should not operate as a justification is that justifications defeat liability whenever the actor inflicts a harm to prevent an equal or greater harm. This, as Section 3.02 of the Model Penal Code suggests,¹⁴ is the gist of all claims of justification. Thus, deadly force used pursuant to law enforcement authority is deemed justified only when the official infliction of physical harm is necessary in order to prevent an equal or greater harm. Consequently, an officer can use deadly force to prevent a suspect from engaging in conduct that jeopardizes the lives or bodily integrity of others.¹⁵ However, she cannot use deadly force in order to prevent a non-dangerous suspect from fleeing.¹⁶ Similarly, an individual can use deadly force against an aggressor in self-defense only in order to ward off the use of deadly force.¹⁷ Finally, and more obviously, an

¹³ This is the view defended by Professor Fletcher. *See, e.g.*, GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 158 (1998).

¹⁴ MODEL PENAL CODE § 3.02 (1962) ("Justification Generally: Choice of Evils").

¹⁵ *See, e.g.*, *Scott v. Harris*, 550 U.S. 372, 383–84 (2007).

¹⁶ *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 21 (1985).

¹⁷ *See generally* MODEL PENAL CODE § 3.04 (1962) (explaining that the actor must believe her conduct is necessary to avoid a greater harm and the selected course of action must also be the only

actor acts lawfully pursuant to the lesser evils justification only when she inflicts harm in order to avoid an even greater harm, such as when she burns a farm in order to create a firebreak so as to protect a neighboring town from being consumed by the flames of a raging fire.¹⁸ These cases illustrate the basic principle that an individual acts justifiably only when she has engaged in harmful conduct in order to avert equally or more harmful conduct.

This is not what happens in the case of consent, unless one is willing to conclude that the perpetrator's physically harmful conduct is justified because by securing the victim's consent the perpetrator inflicts lesser evil than the one caused. This is absurd for two reasons. First, for the reasons previously discussed, it is unclear whether the perpetrator's conduct truly amounts to the infliction of an "evil" upon the victim when the victim freely consented to the act. Second, and perhaps more importantly, even if it is assumed for the sake of argument that the perpetrator's conduct counts as an evil inflicted upon the victim, it is borderline incoherent to contend that the infliction of such an evil on the victim is justified because it averts the evil of not acquiescing to the victim's wishes. If not acquiescing to the victim's wishes is an evil, then agreeing to do what the victim wants the perpetrator to do simply should not count as an evil at all.¹⁹ No matter how you look at it, consent does not fit within the general category of justification defenses.

III. AUTONOMY, DIGNITY AND SOCIAL ACCEPTABILITY

A. *Autonomy and Battery*

Liberal criminal theorists believe that the protection of personal autonomy lies at the core of modern criminal law. This has led several scholars to develop a sophisticated defense of an autonomy-centered criminal law.²⁰ According to these scholars, conduct should be made criminal if, and only if, it interferes with an individual's autonomy.²¹ Vera Bergelson recently defended a more robust role for the protection of autonomy in the criminal law.²² For Bergelson, respect for the victim's autonomy entails not only punishing those who unjustifiably interfere

alternative to lawful actions).

¹⁸ See generally MODEL PENAL CODE § 3.02 (1962) (explaining that the harm or evil sought to be avoided must be greater than that sought to be prevented).

¹⁹ Professor Robinson agrees with this conclusion because he believes, as I do, that "[c]onsent does not outweigh a harm done, but rather refines the specific definition of the harm in the particular offense to say that no harm has been done." Robinson, *supra* note 7, at 212, note 53.

²⁰ See, e.g., MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS, 153–54 (2002).

²¹ Vera Bergelson, *Autonomy, Dignity and Consent to Harm*, 60 RUTGERS L. REV. 724, 729 (2008).

²² BERGELSON, *supra* note 1, at 67.

with the autonomy of others, but also fully or partially exculpating those who harm the victim because the victim freely and autonomously desired to be harmed.²³ This led Bergelson to argue that the victim's consent should be a full or partial defense to *all* crimes, including aggravated battery.²⁴ This, however, leads to a puzzle. If the legally protected interest in cases of battery is really personal autonomy, then why is it that consent is not a defense to such crimes?

There are at least two possible answers to this question. First, it can be argued that consent is not a defense to such crimes but it *should* be, at least if personal autonomy is to be taken seriously. On the other hand, it can be argued that as important as personal autonomy is to the criminal law, there is another value that is equally or more important to the criminal law that militates in favor of criminalizing certain harmful conduct even if it is consensual. That value is human dignity. This is Bergelson's preferred approach.²⁵ Thus, Bergelson suggests that consent to maiming for the purposes of cannibalizing severed body parts should not be a defense to battery.²⁶ By cannibalizing the victim's body parts the perpetrator treats her like a piece of food. Such conduct ought to be punished because it denies the victim's humanity and violates her dignity.

B. *Dignity and Battery*

One could object to Bergelson's solution by pointing out that perhaps the victim's consent to the cannibalistic experience amounts not only to a waiver of her right to physical integrity, but also of her right to human dignity. However, Bergelson contends that the right to human dignity is not waivable, given that it stems from the very fact that we are human beings.²⁷ This solution strikes me as mysterious and unnecessarily complex. Why should we accept the proposition that an individual can "waive" her right to physical integrity as a way of exercising her autonomy but cannot "waive" her right to dignity as a way of exercising her autonomy? If what we ultimately want to argue is that battery should sometimes be punished regardless of the victim's consent, isn't it better to just acknowledge that the right to physical integrity is sometimes not waivable instead of invoking the contrived concept of human dignity and then suggesting that the right to physical integrity is waivable but not the right to human dignity? Despite its appeal, Bergelson rejects this solution, contending that suggesting that the right to physical integrity is not waivable is tantamount to adopting the "authoritarian," "absolute," and "arbitrary" view that a person's body does not belong to her but rather to some sort of collective entity such as the state or society.²⁸ The problem

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 65.

²⁶ *Id.* at 67.

²⁷ *Id.* at 66.

²⁸ Bergelson, *supra* note 21, at 727.

with Bergelson's argument is that it seems to equally apply to the concept of human dignity. After all, if a person cannot waive her right to dignity it must be because it ultimately does not belong to her but rather to society or some other sort of collective entity.

Bergelson defends the non-waivable character of human dignity by pointing out that dignity is "an essential characteristic of all human beings" and that it's essential for "our collective humanity."²⁹ Unfortunately, this does not establish the non-waivable nature of the so-called right to human dignity. Life is also an essential characteristic of all human beings (and less mysterious than human dignity), but Bergelson argues that the right to life is waivable.³⁰ What explains the difference? Maybe dignity is more important than life itself. This would be an odd proposition, given that, without life, discussions about human dignity seem to be out of place. Perhaps it is true that there is such a thing as human dignity and that it is even more essential than life to "our collective humanity." This, however, is a proposition that must be proven, not assumed.

C. Socially Acceptable Conduct and Battery

If appealing to autonomy and human dignity does not explain why consent is not a defense to (some kinds) of battery, is there an alternative explanation? Fortunately, there is, and it is not as mysterious as the concept of human dignity. Consent is not a defense to certain batteries because, in addition to promoting personal autonomy, the criminal law also cares about encouraging certain types of socially acceptable conduct and discouraging certain socially unacceptable acts. Thus, our current criminal laws allow parents to pierce the ears of their baby girls, but do not authorize them to tattoo their children.³¹ They allow boxers and mixed martial arts fighters to beat each other to a pulp in the ring or cage, but do not authorize the general citizenry to engage in street fights or barroom brawls. Our current criminal law authorizes the severing of body parts for the purposes of a sex change operation, but not for the purposes of satisfying the desires of those who suffer from body dysmorphic disorder.³² What these laws have in common is that they criminalize conduct that for some reason or another is deemed to be socially unacceptable (tattooing children, street fighting, and the severing of body parts to treat body dysmorphic disorder), while it authorizes conduct that is considered to be socially acceptable (piercing ears of newborn girls, boxing and mixed martial arts fighting, and severing body parts for the purpose of a sex change operation).

²⁹ BERGELSON, *supra* note 1, at 66.

³⁰ *Id.* at 93–94.

³¹ A couple in Georgia was recently charged criminally for tattooing six of their seven children despite the fact that both the parents and the children consented to the procedure. See Brett Singer, *Parents Arrested for Giving Their Kids Home Tattoos*, PARENT DISH (Jan. 4, 2010), <http://www.parentdish.com/2010/01/04/parents-arrested-for-giving-their-kids-home-tattoos/>.

³² BERGELSON, *supra* note 1, at 24.

While some of these distinctions might seem arbitrary to some, others, like the prohibition of street fighting and barroom brawls, seem particularly uncontroversial.

Bergelson claims that it is arbitrary to disallow consent as a defense to battery when physical harm is inflicted pursuant to sadomasochistic sexual activities, while allowing it as a defense when physical harm is inflicted pursuant to religious flagellation.³³ If personal autonomy is taken to be the legally protected interest in these cases, then Bergelson is surely right, for in both cases the victim has decided that she wants to suffer physical harm and not giving full effect to such desires stifles her autonomy. However, the arbitrariness dissipates if one takes the legally protected interest in these cases to be not the protection of autonomy, but rather the encouragement of socially acceptable activities and discouragement of socially unacceptable conduct. For better or worse, sadomasochistic sex is considered by and large to be a socially unacceptable activity, while religious practices are generally considered to be acceptable even if they are somewhat odd.³⁴ Similarly, severing the genital organs of a patient in order to perform a sex-change operation is considered socially acceptable (and lawful) because medical professionals agree that this is a procedure with a legitimate medical purpose.³⁵ Contrarily, severing body parts in order to satisfy the desires of someone who suffers from body dismorphic disorder is considered socially unacceptable (and unlawful) because most medical professionals believe that such a procedure lacks a legitimate medical purpose.³⁶

IV. IF CONSENT IS NOT A JUSTIFICATION, THEN WHAT IS IT?

A. *Consent as an Offense-Modification Defense*

Sometimes the absence of consent is an element of an offense. When this is the case, consent uncontroversially defeats criminal liability because it negates an essential element of the crime. However, there seem to be cases when consent defeats criminal liability even though it does not appear to negate an element of the

³³ *Id.* at 21–22.

³⁴ I am aware that distinguishing lawful from unlawful conduct in the context of battery by looking at the social acceptability of the act might lead to legal moralism. While legal moralism is perhaps normatively unappealing, I have little doubt that, as a descriptive matter, it succeeds quite well in coherently explaining the ways in which the law draws lines between lawful and unlawful inflictions of physical harm. Given that my aim is to provide a *descriptively* accurate account of the relevance of consent to the law of battery, I do not examine the normative appeal of this account here.

³⁵ It is reasonable to assume that in cases involving medical procedures, the social acceptability (and lawfulness) of consensual acts usually hinges on professional judgments about the legitimacy of the conduct, given that the general citizenry lacks the knowledge and training that is necessary to evaluate the legitimacy of such procedures.

³⁶ See generally Jesse Ellison, *Cutting Desire*, NEWSWEEK (May 28, 2008), <http://www.newsweek.com/id/138932>.

offense. Paradigmatic examples include consenting to cosmetic surgery, getting a tattoo, and engaging in a boxing match. In all of these cases, the conduct of the perpetrator seems to satisfy the elements of the offense of battery, for the doctor who cuts into the patient's body, the tattoo artist who inserts a needle into the client's arm and the boxer who lands a right uppercut to the face of his opponent all "cause bodily injury to another."³⁷ In such cases, the conventional view is that consent functions as a justification that defeats criminal liability in spite of the fact that the perpetrator's conduct satisfied the elements of an offense and thus caused the type of harm that is sought to be prevented by the creation of the offense. I have argued that this view is wrong because, if the harm sought to be prevented by the offense of battery is the interference with the person's freedom to decide what to do with her body, then the victim's consent negates the causation of the harm in the first place rather than justify its infliction. If, on the other hand, the harm sought to be prevented by the offense is the protection of the bodily integrity of the individual, then the victim's consent is irrelevant and does not therefore justify causing bodily harm.

Nevertheless, I agree that bodily harm caused as a result of cosmetic surgery, tattooing and boxing is not punishable. However, I believe that the exclusion of liability is a result not of justification, but of the social acceptability of the conduct. Therefore, I submit that in these cases consent functions as an "offense-modification" defense that defeats liability for conduct that appears to satisfy the elements of the offense of battery by revealing that the perpetrator's conduct failed to cause the social harm that the offense of battery seeks to prevent.³⁸ In other words, performing cosmetic surgery, piercing someone else's ears at their request, and engaging in a boxing match are simply not the type of conduct that the legislature desired to make criminal when it drafted the offense of battery.³⁹ Consequently, such conduct should be considered lawful because the underlying

³⁷ MODEL PENAL CODE § 211.1 (1962).

³⁸ A similar solution has been defended by several German criminal theorists. *See, e.g.,* CLAUS ROXIN, I DERECHO PENAL PARTE GENERAL 517 (Luzón Peña, et al., trans., 2000).

³⁹ Instead of arguing that the social acceptability of the conduct functions as an offense-modification defense, it could be contended that the social acceptability of the conduct should operate as a kind of justification that is not based on the idea of choosing the lesser evil. Therefore, it could be argued that ear piercing or tattooing is not punishable because it is justified pursuant to the social acceptability of the conduct rather than because engaging in such conduct prevents a greater evil. The problem with this claim is that justifications defeat liability for engaging in conduct that should be avoided whenever possible. Therefore, the justification of self-defense defeats liability for killing a child or a psychotic aggressor. *See generally* George P. Fletcher & Luis E. Chiesa, *Self-Defense and the Psychotic Aggressor*, in CRIMINAL LAW CONVERSATIONS 365 (Paul Robinson, Kim Ferzan, and Stephen Garvey eds., 2010). Nevertheless, engaging in such justified conduct (killing a child or an insane person) ought to be avoided if possible. Contrarily, piercing someone else's ears with their consent, tattooing their arm, or landing an uppercut on an opponent during a boxing match does not amount to conduct that should be avoided whenever possible. Thus, what makes these acts lawful is that, contrary to what happens in cases of justified conduct, engaging in such acts does not create a regrettable state of affairs that is in need of special justification.

conduct is not socially harmful in any meaningful way rather than because it is an instance of justifiable infliction of socially relevant harm.⁴⁰ More importantly, what ultimately determines the non-criminal nature of these acts is not the victim's consent, but rather the social acceptability of the conduct. Consent in most of these cases is a necessary, albeit insufficient, condition for determining whether the conduct is socially acceptable. Thus, consent is a factor amongst many others that should be taken into account in order to determine whether the defendant should not be punished because he did not cause the kind of harm that society sought to prevent when it enacted the prohibition against battery.⁴¹

B. What Interest Does the Offense of Battery Seek to Protect and When is Consent Relevant to Determining Whether the Interest Has Been Infringed?

1. Battery Does Not Seek to Protect Autonomy

As a general rule, an offense seeks to protect individual autonomy when it includes the absence of consent as an element of the offense. When someone consents to engage in certain conduct she is exercising her autonomy to do as she wishes. Therefore, if non-consent is an element of the offense, it is reasonable to assume that the interest sought to be protected by the offense is the person's autonomy to decide what to do with certain bodily or property interests. In contrast, when the absence of consent is not considered an offense element, it is generally because the interest sought to be protected by the crime is something

⁴⁰ The German criminal theorist Hans Welzel championed a similar solution. Welzel argued that conduct that is considered "socially adequate" under the circumstances should not be punished even if it nominally satisfies the elements of the offense charged. HANS WELZEL, *DERECHO PENAL ALEMÁN* 66 (Bustos Ramírez et al., trans., 1997).

⁴¹ This account of consent as an offense-modification defense is compatible with the Model Penal Code's general approach to the doctrine of consent. Pursuant to § 2.11(1) of the Code, the consent of the victim is relevant to criminal liability if it "negatives an element of the offense" or "precludes the infliction of the harm or evil sought to be prevented by the law defining the offense." The Code then fleshes out several instances in which consent precludes the infliction of the kind of harm sought to be prevented by the offense of battery. These include consent to non-serious harm and consent to engage in lawful sports and other concerted activities not prohibited by law. MODEL PENAL CODE § 2.11(2) (1962).

The Code, however, considers consent to recognized forms of medical treatment to amount to a justification to engage in conduct that satisfies the elements of the offense. MODEL PENAL CODE § 3.08(4) (1962). It is unclear why the drafters of the Model Penal Code believed that consent to engage in lawful sports and other lawful concerted activities (tattooing, piercing) negates the sort of evil that the legislature intended to prohibit as battery, whereas consent to medical treatment justifies engaging in conduct that inflicts the kind of harm sought to be prevented by the offense. Why, for example, is the insertion of a needle to get a tattoo treated as a case in which no legally relevant harm has been caused (§ 2.11(2)), while the insertion of a needle to extract a blood sample is treated as a case in which legally relevant harm has been caused but the infliction of such harm is justified by countervailing considerations (§ 3.08(4))? Assuming that the victims consented to the conduct and that the physical harm inflicted in both cases is the same, the Model Penal Code's distinction seems arbitrary.

other than personal autonomy. Therefore, it is sensible to conclude that personal autonomy is not the interest sought to be protected by the offense of battery, given that non-consent to the physical harm is not an element of the crime. Why else would the legislature fail to specify that the victim's consent defeats criminal liability for battery? In such cases, it is reasonable to assume that, absent strong evidence to the contrary, the reason for the prohibition is protecting some socially valuable interest other than the victim's autonomy.

2. Battery as a Protection Against Non-Trivial Inflictions of Physical Harm Pursuant to Socially Unacceptable Activities

If battery does not seek to protect autonomy, then the most obvious conclusion is that it seeks to protect individuals against the infliction of physical harm. However, it is unlikely that the legislature intended to prohibit all harmful physical contacts as batteries. Take, for example, the acts of piercing the ear of a baby girl, slamming into the catcher while trying to be safe at home plate, and tackling the quarterback in football. In all of these cases a person may cause physical harm to another person. Nevertheless, it would be odd to conclude that the legislature intended to prohibit these acts as instances of battery. Perhaps it could be argued that these acts should count as battery but that they should not be punished because the infliction of legally relevant harm in such instances is justified because it prevents an equal or greater evil. This would also be odd, unless one is willing to accept that not being able to decorate a baby's body with earrings, foregoing a run in baseball, and failing to force a fumble in football amount to greater evils than inflicting physical harm to a person. Rather than defending these unappealing propositions, it is more sensible to conclude that such acts do not really fall within the scope of conduct that was intended to be prohibited as battery.

As a result, the offense of battery should be understood as seeking to prevent the infliction of non-trivial physical harm in circumstances where the infliction of such harm is not considered a normal occurrence given current societal practices. The infliction of trivial harm is not socially unacceptable because it amounts to a *de minimis* infraction⁴² that is to be expected and tolerated as a result of living in what Professors Prosser and Keeton called our "crowded world."⁴³ Furthermore, the infliction of non-trivial harm that is a normal occurrence according to current societal practices is not socially unacceptable because it does not amount to an extraordinary or regrettable event that is in need of special justification. In such cases the opposite is true, given that in light of current societal practices the infliction of such bodily harm is considered to be a normal part of everyday life.

⁴² So-called *de minimis* infractions should not be criminal. MODEL PENAL CODE § 2.12 (1962).

⁴³ DAN B. DOBBS, ROBERT E. KEETON, W. PAGE KEETON, & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS §§ 9, 42 (5th ed. 1984).

Physical harm caused as a result of body piercing and tattooing, cosmetic surgery and sporting activities constitute paradigmatic examples. Finally, I believe that the consensual nature of these activities is relevant to explaining why they are considered to be a normal part of everyday life. Ultimately, however, what makes these activities a normal part of life is not that they are consensual, but rather that they are undertaken pursuant to generally accepted societal and/or professional practices.

V. CONCLUSION

There is general agreement that consent is sometimes relevant to ascertaining a defendant's liability for battery. Most scholars believe that in such cases consent operates as a justification that relieves the actor of liability for conduct that admittedly satisfies the offense elements of battery. In this brief essay I have argued that this view is mistaken. Properly understood, consent does not justify the infliction of physical harm. Rather, consent is relevant to battery liability when, in conjunction with other factors, it modifies the definition of the crime in a way that reveals that the defendant's act does not actually fall within the range of conduct prohibited by the offense.