

3-1-2017

Dignity, Rights, and the Role of Consent in German Criminal Law

Kapsaski Ifigeneia

Follow this and additional works at: <https://digital.sandiego.edu/sdlr>

 Part of the [Ethics and Political Philosophy Commons](#), and the [Law Commons](#)

Recommended Citation

Kapsaski Ifigeneia, *Dignity, Rights, and the Role of Consent in German Criminal Law*, 54 SAN DIEGO L. REV. 401 (2017).
Available at: <https://digital.sandiego.edu/sdlr/vol54/iss2/12>

This Legal Moralism is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.

Dignity, Rights, and the Role of Consent in German Criminal Law

KAPSASKI IFIGENEIA*

TABLE OF CONTENTS

| | | |
|------|---|-----|
| I. | INTRODUCTION | 401 |
| II. | THE ROLE OF CONSENT IN GERMAN CRIMINAL LAW | 404 |
| III. | A PERFECTIONIST HARM PRINCIPLE AND THE NOTION OF DIGNITY | 411 |
| IV. | A HUMAN RIGHTS-BASED APPROACH..... | 416 |
| V. | SETTING THE THRESHOLD BETWEEN HUMAN DIGNITY AND LEGAL MORALISM | 418 |
| VI. | CONCLUSION | 420 |

I. INTRODUCTION

Criminal prohibitions against consensual acts can be found in many legal systems. In the German penal code (Strafgesetzbuch), relevant provisions can be found, for instance, in sections 172, 173, 216, 228 StGB.¹ But,

* © 2017 Kapsaski Ifigeneia, Ph.D. candidate, Free University of Berlin.

1. According to Section 172 of the German Penal Code, “[w]hosoever contracts a marriage although he is already married, or whosoever contracts a marriage with a married person, shall be liable to imprisonment not exceeding three years or a fine.” STRAFGESETZBUCH [STGB] [PENAL CODE], § 172, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1502 [<https://perma.cc/4R83-FUHZ>] (Ger.). Section 173 refers to the crime of incest—sexual intercourse among relatives—and will be examined in detail below. Section 173(1) requires that “[w]hosoever performs an act of sexual intercourse with a consanguine descendant shall be liable to imprisonment not exceeding three years or a fine.” *Id.* Section 216(1)—Killing at the request of the victim; mercy killing—states: “If a person is induced to kill by the express and earnest request of the victim the penalty shall be imprisonment from six months to five years.” *Id.* § 216, para. 1. Finally, Section

given the centrality of personal autonomy in liberal democracies and the prevalence of the Harm Principle² as the main principle for the justification of criminal sanctions, are such criminal provisions justifiable from the perspective of a liberal criminal law theory?

Consent has a central role in criminal law as a waiver of rights through its double function as an inculpatory element of the *actus reus*—the absence of consent as an element of the definition of the offense—and an exculpatory role as a defense to a *prima facie* criminal wrong. This liberal consent-based approach would render these criminal provisions unjustifiable, unless other normative standards are deployed that go beyond the traditional version of the Harm Principle³ or even the principle of autonomy. Joel Feinberg defines harm as a wrongful setback to welfare interests.⁴ However, instead of focusing solely on welfare interests to grant protective rights, one could pass from welfarism to autonomy and regard violations of autonomy as wrongful and therefore punishable even if they are not harmful in the sense of diminishing resources.⁵

One cannot grasp the full wrongfulness of consensual conduct solely on the grounds of harm to others—as defined by the Harm Principle—or as a breach of autonomy. This Article proposes an interest-based dignity principle that goes beyond harm and autonomy, but, at the same time, would develop those concepts within an interest-based theory of rights.

228 renders bodily harm punishable, notwithstanding consent of the victim, when the act violates public policy. *See id.* § 228.

2. The Harm Principle was first advocated by John Stuart Mill. *See* JOHN STUART MILL, *ON LIBERTY* (Ticknor & Fields, 2d ed. 1863) (1859). Under Mill’s version of the Harm Principle, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.” *Id.* at 23. Joel Feinberg recognizes other good reasons for criminalization, such as the offense principle and a soft version of legal paternalism. *See* JOEL FEINBERG, *HARM TO OTHERS* 11–12 (1984). According to Feinberg, the offense principle seeks to prevent people from wrongfully offending others as a reason for coercive legislation. *Id.* at 26.

3. As identified by Feinberg, these include the offense principle, legal paternalism and legal moralism. *See* FEINBERG, *HARM TO OTHERS*, *supra* note 2, at 26. Feinberg argues against both legal moralism and legal paternalism as setting legitimate grounds for criminalization and moral limits to criminal law. *See* JOEL FEINBERG, *HARM TO SELF* 23–26 (1986). However, it is noteworthy that Feinberg recognizes other evils, such as “free-floating evils” or “non-grievance evils.” *See* JOEL FEINBERG, *Preface to HARMLESS WRONGDOING* 323 (1988) (recognizing that the “need to prevent evil is always a relevant reason in support of a criminal prohibition,” but also explaining that “non-grievance evils . . . particularly the free floating ones, never—well, hardly ever—are good reasons, and perhaps never are decisive ones.”).

4. *See* FEINBERG, *HARM TO OTHERS*, *supra* note 2, at 37–38.

5. *See, e.g.*, Guido Pincione, *Welfare, Autonomy, and Contractual Freedom*, in *THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS* 214, 214 (Mark White ed., 2009) (explaining the theories of welfarism and autonomy in contract law).

Under an interest-based approach of human rights, there is a list of vital interests, which all individuals share by virtue of their humanity, that must be protected.⁶ Under a perfectionist conception of human rights, the state cannot remain neutral against the various conceptions of good and must reject those that would not promote these vital interests.⁷ This means that the state may need to restrict freedom to promote other goods that might be central to our humanity. A vital interest that is central to our humanity is the interest not to be severely humiliated, or otherwise, not be subjected to degrading or inhumane treatment; to be objectified and treated as a means. Only under a holistic and coherent theory of human rights can we fully understand the wrongfulness of the conduct.

This Article addresses the issue of protecting human dignity as a ground and a threshold for criminalization. Human dignity can be either a limit to the scope of criminal law or a reason that justifies criminalization.⁸ This inquiry will be conducted through the referral to two German cases regarding consensual conduct. The first concerns consensual maiming and killing of a person and the second concerns consensual incest between two adult siblings.

This Article does not further examine questions on the ontology of consent; neither does it examine questions regarding validity of consent as rational and voluntary. The issue discussed here concerns the case where consent cannot serve as a waiver of the right protected. This clearly shows that there is a distinct core of wrongdoing, which consists in the violation of human dignity and goes beyond the violation of autonomy rights.⁹

6. See, e.g., John Tasioulas, *On the Foundations of Human Rights*, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 45, 53–54 (Rowan Cruft et al. eds., 2015) (describing an “interest-based theory which regards the interests in question as generative of human rights in crucial part because they are the interests of human beings who possess equal moral status”).

7. See Steven Wall, *Perfectionism in Moral and Political Philosophy*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/perfectionism-moral/#PriStaNeu> (last updated Oct. 10, 2012) (defining theories of perfectionism in Section 1, and explaining how perfectionism proponents reject any constraints on the State when it comes to promoting the good in Section 3.1).

8. See, e.g., Michal Buchhandler-Raphael, *Drugs, Dignity and Danger: Human Dignity as a Constitutional Constraint to Limit Overcriminalization*, 80 TENN. L. REV. 305, 344 (2013).

9. See Daniel Sulmasy, *Dignity and Bioethics: History, Theory, and Selected Applications*, in HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT’S COUNCIL ON BIOETHICS (Mar. 2008), https://bioethicsarchive.georgetown.edu/pcbe/reports/human_

However, human dignity cannot be regarded solely as an objective value, which takes priority over autonomy rights, but rather as an independent value to autonomy based on the subjective right not to be severely humiliated.

II. THE ROLE OF CONSENT IN GERMAN CRIMINAL LAW

The case of Armin Meiwes, the notorious “Rotenburg Hannibal,” is a well-known one in German criminal case law.¹⁰ Another notorious case in Germany has been the case of *Stübing v. Germany*, which has been a landmark case before the Federal Constitutional Court of Germany (BVerfGE) and the European Court of Human Rights (ECtHR).¹¹

dignity/chapter18.html [https://perma.cc/T624-YABP] (refuting the notion that human “dignity is a ‘useless concept,’ reducible to respect for autonomy”).

10. See Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Oct. 7, 2008, 2 BvR 578/07, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2008/10/rk20081007_2bvr057807.html [https://perma.cc/3BJK-R5M6]. The facts of the case were summarized in the Guardian:

In March 2001, Meiwes advertised on the internet for a ‘young well-built man, who wanted to be eaten.’ Brandes replied. On the evening of March 9, the two men went up to the bedroom in Meiwes’ rambling timbered farmhouse. Mr. Brandes swallowed 20 sleeping tablets and half a bottle of schnapps before Meiwes cut off Brandes’ penis, with his agreement, and fried it for both of them to eat. Brandes—by this stage bleeding heavily—then took a bath, while Meiwes read a Star Trek novel. In the early hours of the morning, he finished off his victim by stabbing him in the neck with a large kitchen knife, kissing him first. The cannibal then chopped Mr. Brandes into pieces and put several bits of him in his freezer, next to a takeaway pizza, and buried the skull in his garden. Over the next few weeks, he defrosted and cooked parts of Mr. Brandes in olive oil and garlic, eventually consuming 20kg of human flesh before police finally turned up at his door.

Luke Harding, *Victim of Cannibal Agreed to be Eaten*, GUARDIAN (Dec. 3, 2003, 9:33 PM), <https://www.theguardian.com/world/2003/dec/04/germany.lukeharding> [https://perma.cc/N5G3-8PSM].

11. See Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Feb. 26, 2008, 2 BvR 392/07; see also *Stübing v. Germany*, (2012) 55 E.H.R.R. 24, App. No. 43547/2008. The 28-year-old Patrick Stübing was sentenced to more than two years in prison by the criminal court in Leipzig for having a sexual relationship with his younger sister Susan K. The two siblings had grown up separately in children’s shelters and foster families after their parents’ divorce following Susan’s birth. They both grew up under difficult circumstances, each unaware of the other’s existence. In 2000, the defendant, then twenty-four years old, got in contact with his mother and then met his sister, who was sixteen years old at the time. Starting in January 2001, after their mother’s death, Patrick Stübing and Susan K. had consensual sexual intercourse, leading to the birth of four children, two of them being handicapped and three of them living with foster parents. The first child was born when Susan was seventeen years old. See Dietmar Hipp, *German High Court Takes a Look at Incest*, SPIEGEL ONLINE (Mar. 11, 2008, 6:36 PM), <http://www.spiegel.de/international/germany/dangerous-love-german-high-court-takes-a-look-at-incest-a-540831.html> [https://perma.cc/WE7Z-AGFY]. The criminal court did not impose a sentence on Susan K. See STRAFGESETZBUCH [StGB] [PENAL CODE], § 173,

Both cases share the element of consent. In the first case, the harm inflicted upon the victim was a harm that the victim himself had agreed upon with the defendant.¹² In the second case, there was no actual victim who could have consented to the punishable act, but instead there was a punishable consensual sexual intercourse between adult siblings, which therefore constitutes a victimless crime.¹³

para. 3, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1502 [<https://perma.cc/4R83-FUHZ>] (Ger.) (“Descendants and siblings shall not be liable pursuant to this provision if they were not yet eighteen years of age at the time of the act.”). The court described her as a timid, dependent young woman with a light mental disability, reducing her culpability. The defendant filed a constitutional complaint challenging the constitutionality of Section 173 of the Penal Code. The majority opinion—seven of eight judges—concluded that the prohibition against incest is constitutional, and only the dissenting Judge Hassemmer came to a different result. With regard to the specific case, the issue of protection of minors played a role because Susan K. was not a legal adult—that is, she was less than eighteen years old—at the beginning of their sexual relationship. The Court examined whether the criminal prohibition against adult sibling incest interferes with liberty rights within article 2(1) of the German Constitution, and namely the rights that protect the most private, intimate sphere of liberty. The Court argued there is no absolute protection and that the restriction of such a liberty right serves the legitimate aim of the protection of others or the general public under the condition that the principle of proportionality is also respected.

12. It is remarkable that the lower court, the District Court of Kassel, convicted Meiwes for manslaughter, rejecting his claim that he should be only convicted under the lower offense of “mercy killing” under § 216 of the German Penal Code. STRAFGESETZBUCH [STGB] [PENAL CODE], § 216, para. 1, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1502 [<https://perma.cc/4R83-FUHZ>] (Ger.) (“If a person is induced to kill by the express and earnest request of the victim the penalty shall be imprisonment from six months to five years.”). The German Supreme Court reversed the ruling, and Meiwes was convicted of murder under § 211 of the German Penal Code by the District Court of Frankfurt. *Id.* § 211, para. 2 (“A murderer under this provision is any person who kills a person for pleasure, sexual gratification, out of greed or otherwise base motives, by stealth or cruelty or by means that pose a danger to the public or in order to facilitate or to cover up another offence.”).

13. Under Section 173 of the German Penal Code regulating the offense of incest, Whoever performs an act of sexual intercourse with a consanguine relative in an ascending line shall be liable to imprisonment not exceeding two years or a fine; this shall also apply if the relationship as a relative has ceased to exist. Consanguine siblings who perform an act of sexual intercourse with each other shall incur the same penalty.

Id. § 173, para. 2. In this case, neither the Federal Constitutional Court nor the European Court of Human Rights overturned the criminal convictions, insisting on the legality of criminalization of consensual adult incest between siblings. However, from the perspective of criminal law theory, the question whether there are really convincing reasons to criminalize adult incest remains open.

It is also noteworthy that in both crimes, consent—or more precisely, the absence of consent—plays no role in the definition of the offense as an element of the *actus reus*. This means that both types of conduct are considered *prima facie* wrongful and consent could possibly act as a defense if we accept the priority of the principle—*Volenti non fit injuria*.¹⁴ According to this principle, the conduct, even if harmful, does not constitute a wrong, since no wrongful violation of the autonomy rights of the victim has taken place.

However, this was not the case in none of the aforementioned decisions. In both of these cases there has been a conviction, regardless of the fact of consent. In the first case, there has been a conviction of murder under specific aggravated circumstances and in the second case, a conviction for incest without considering the voluntary engagement of all actors.

Irrespective of whether the two decisions could be considered as erroneous due to the total disregard of the existence of consent, it is still worth examining what would distinguish the two cases had the court taken into account the consent of the victim.

The distinction lies in the different roles of consent in criminal law. These different roles of consent are linked with the definition of wrongfulness and its relation to harm. To wrong another means to violate his or her moral or legal rights, to violate their autonomy, which would mean to cross their moral or legal boundaries without their consent, as Larry Alexander points out in *The Ontology of Consent*.¹⁵ This could mean that either the punishable conduct is *prima facie* wrongful¹⁶ and consent serves as a defense or justification of the *prima facie* wrong (exculpatory role of consent), or that the conduct is not even *prima facie* wrongful¹⁷ because it does not violate a prohibitory norm; but the absence of consent can transform the otherwise non-wrongful conduct to a wrongful one, acquiring, thus, an inculpatory role in the definition of the *actus reus* of the offense.¹⁸ In the

14. Meaning, “a person is not wronged by that to which he consents.” See, e.g., Vera Bergelson, *Consent to Harm*, in *THE ETHICS OF CONSENT* 165 (Franklin G. Miller & Alan Wertheimer eds., 2010). Joel Feinberg is committed to the *Volenti* maxim as a foundational principle in criminal law. See FEINBERG, *HARM TO OTHERS*, *supra* note 2, at 115–17.

15. See Larry Alexander, *The Ontology of Consent*, 55 *ANALYTIC PHIL.* 102 (2014); see also Bergelson, *supra* note 14, at 122. However, an inquiry into the ontology of consent is not within the objectives of the current paper.

16. See Bergelson, *supra* note 14, at 115.

17. See LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY* 275 (2009), in which the authors argue that without consent there is not even a legally protected interest.

18. See Bergelson, *supra* note 14, at 116.

first case, the conduct is *per se* evil or regrettable,¹⁹ and thus it needs consent as a justification in order for the perpetrator to be exculpated. This is the case in the crimes of murder or physical injury. There is a prohibitory norm, a moral imperative which prohibits people from killing or injuring others. In the case of having sex, or transporting things or people, there is no such norm that would ban all these activities altogether because they are not regrettable in themselves;²⁰ only under certain circumstances they would qualify as wrongful conduct.²¹ These circumstances are defined in the *actus reus* of the offense, and the absence of consent, as one of these circumstances, renders a conduct wrongful that would otherwise be morally neutral.²² Consensual conduct, in this sense, is not even *prima facie* wrongful. The role of consent—more precisely, the absence of consent—in this case is, thus, inculpatory.

The conclusions drawn are also reflected in the offenses of the German penal code. A typical example of the inculpatory role of consent is the offense of rape under Section 177 of the German penal code,²³ which requires

19. See FEINBERG, HARMLESS WRONGDOING, *supra* note 3, at 17–18, defining evil in the most generic sense as any occurrence or state of affairs that is rather seriously to be regretted.

20. See Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 123 (1996), where she argues that “consent can function to transform the morality of another’s conduct—to make an action right when it would otherwise be wrong.” She uses several examples: “consent turns a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment; a commercial appropriation of name and likeness into a biography.” *Id.*

21. See GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 568 (1978).

22. See Bergelson, *supra* note 14, at 116.

23. Section 177 of the German Penal Code—sexual assault by use of force or threats; rape—provides that

Whosoever coerces another person (1) by force, (2) by threat of imminent danger to life or limb, or (3) by exploiting a situation in which the victim is unprotected and at the mercy of the offender, to suffer sexual acts by the offender or a third person on their own person or to engage actively in sexual activity with the offender or a third person, shall be liable to imprisonment of not less than one year.

STRAFGESETZBUCH [STGB] [PENAL CODE], § 177, para. 1, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1502 [<https://perma.cc/4R83-FUHZ>] (Ger.). Section 177 also provides for additional penalties in serious cases:

In especially serious cases the penalty shall be imprisonment of not less than two years. An especially serious case typically occurs if (1) the offender performs sexual intercourse with the victim or performs similar sexual acts with the victim, or allows them to be performed on himself by the victim, especially if they degrade

either force or threat of danger to life or exploitation of situation of dependence, all of which imply the absence of the valid consent of the victim of rape. By contrast, the offense of causing bodily harm of Section 233 requires no such element of force. The same applies to the offense of murder under Section 211 of the German penal code. The reason that the absence of consent does not constitute an element of the *actus reus* in bodily harm or murder consists in the fact that this conduct is deemed *prima facie* wrongful.

This already lights up our case. While in the case of Armin Meiwes the element of consent of the victim could act only as a defense or justification of the perpetrator's conduct, in the case of consensual sexual intercourse between adult siblings, there should be no wrongful conduct at all. This can be explained by the fact that there are some kinds of conduct that, although they are deemed immoral, should not be criminalized because they are simply not the law's business.²⁴ However, this has not been the decision of the lawmaker under Section 173 of the German criminal code, defining the offense of incest.

More specifically, section 173 of the German Criminal Code criminalizes sexual intercourse between siblings without any requirement of force or threat of danger or exploitation that exists in rape, although consensual sexual intercourse is not deemed *prima facie* wrongful. This creates a paradox because it allows for the criminalization of consensual sexual intercourse between adult siblings—assuming that the consent given is valid—whereas consensual infliction of pain or physical injuries could amount as no wrong at the end, due to the justification of consent.²⁵ One could question the validity of the arguments in favor of the criminalization of incest. The German Federal Constitutional Court invoked several arguments in favor of the criminalization based on the protection of public goods, which are going to be discussed further in the next chapter. The ECtHR on the other hand, grounded its argumentation mostly on the public morals

the victim or if they entail penetration of the body (rape), or (2) the offence is committed jointly by more than one person.

Id. § 177, para. 2. Finally, subsections (3), (4) and (5) provide additional stipulations on sentencing depending on aggravating or mitigating circumstances. *Id.* § 177, para. 3–5.

24. See THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (Authorized Am. ed. 1963) (“Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business. To say this is not to condone or encourage private immorality.”).

25. See section 228 of the German Penal Code, which provides that “[w]hosoever causes bodily harm with the consent of the victim shall be deemed to act lawfully unless the act violates public policy, the consent notwithstanding.” STRAFGESETZBUCH [STGB] [PENAL CODE], § 228, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1502 [<https://perma.cc/4R83-FUHZ>] (Ger.).

clause under Article 8, paragraph 2 of the European Convention on Human Rights (ECHR),²⁶ paving the way for the protection of morals to serve as a legitimate aim for criminalization, prohibiting conduct that is inherently immoral—as a free-floating evil—and allowing feelings of disgust or societal taboos to serve as grounds for criminalization under a narrow version of legal moralism.

If the Harm Principle in its traditional form cannot grasp the whole range of wrongdoing, it is important to provide other principled moral limits to criminal law and to set a threshold that the state cannot transgress while pursuing various conceptions of the good. In this way, criminal law could retain a moral content without turning moralistic.

This could be achieved by endorsing a theory of perfectionist liberalism, which would require the appeal to a perfectionist Harm Principle grounded on a reason-based morality. The liberal principles would be then safeguarded, but at the same time autonomy would not be the primary value to be fostered by criminal law, but it would be one value central to our humanity together with other values, such as human dignity.

Before examining this alternative, it is important to stress the centrality of autonomy as a value to be protected through criminal law. A harmful setback to interests does not suffice, under any criminal law theory to justify criminalization without the violation of the autonomy of the victim. On the contrary, violation of the autonomy of the victim counts as wrongful, even without harm, due to the centrality of autonomy in liberal conceptions of human agency.

Joel Feinberg in *Harmless Wrongdoing* defines the sense of harm as the overlap of harm and wrong.²⁷ This means that only setbacks of interests that are wrongs, and wrongs that are setbacks to interest, count as harms under the Harm Principle.²⁸ But how would the Harm Principle justify the criminalization of these kinds of conduct in a liberal democracy? By

26. Article 8, paragraph 2 of the European Convention on Human Rights includes the Public Morals as a limitation clause of the right to private life [Stubing v. Germany, (2012) 55 E.H.R.R. 24, App. No. 43547/2008]. The interpretation of this clause has been mostly associated with the margin of appreciation of the Member States. *See also* Handyside v. United Kingdom, App. No. 5493/72, Eur. Ct. H.R. para. 48 (1976) (“By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.”).

27. *See* FEINBERG, HARMLESS WRONGDOING, *supra* note 3, at 36.

28. FEINBERG, HARM TO OTHERS, *supra* note 2, at 36.

inflicting blame through criminal sanctions, the state interferes with important rights of the person, such as liberty rights or property rights, thus requiring specific justification in order to be legitimate.

The most prominent theory of criminalization in German criminal law doctrine is the theory of legally protected interests (die Rechtsgutslehre), which could be considered as a variant of the Harm Principle. This theory has been developed as a safeguard for individual freedom in political society, thus restricting governments when they interfere coercively with individual rights. Under this principle, the state cannot coercively interfere with individual liberty, unless it does so in order to prevent harm or risk of harm to these legally protected interests.

The idea of the legally protected interest or legal good (Rechtsgut) goes back to the 19th Century and imposed principled limits to the criminal law.²⁹ Under this doctrine, criminalization is a legitimate goal in order to serve the protection of a legal good. Under a new, refined version of the doctrine, these legal goods can be either individual or collective goods.³⁰ According to other scholars, these legal goods can refer either to persons or to material things, but not to abstract ideas.³¹ At this point, one could see the correspondence of the doctrine of the legally protected interests to the Harm Principle because harm to legally protected interests could be the equivalent of the setback to interests under the Harm Principle of Joel Feinberg. However, since there is no detailed list of legal goods in German criminal law doctrine, it remains unclear whether these goods can be overridden by other considerations.³²

Since these legally protected interests can be either individual or collective, the state has the right to coercively interfere with individual liberty in order to promote public goods. The Federal Constitutional Court (BVerfGE) used this same reasoning in *Stübing*. This trend of the German constitutional doctrine and the case law of the BVerfGE would be compatible with a

29. See Carl-Friedrich Stuckenberg, *The Constitutional Deficiencies of the German Rechtsgutslehre*, 3 Oñati Socio-Legal Series 31, 34 (2013); see also Claus Roxin, *STRAFRECHT ALLGEMEINER TEIL* 14–53 (4th ed. 2006).

30. See, e.g., Stuckenberg, *supra* note 29, at 34.

31. See Stuckenberg, *supra* note 29, at 34 (“The influential definition given by Roxin (2006, § 2 margin no. 7), for instance, identifies ‘personal legal goods’ with the conditions considered necessary for the existence and development of a human being like life, health, personal liberty, property, etc. Consequently, a criminal law provision is considered illegitimate if its aim is the protection of something that does not count as a personal ‘legal good’ such as public morality, religious commandments, abstract or collective interests (which is highly controversial) or the paternalistic prevention of self-endangerment.”).

32. The German Federal Constitutional Court has argued, for instance, that there are no *a priori* legally protected interests that could be protected outside of the context of the German constitution. See Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Feb. 26, 2008, 2 BvR 392/07, at 39.

perfectionist theory, where interests are to be balanced and can be outweighed by other interests or public goods.

III. A PERFECTIONIST HARM PRINCIPLE AND THE NOTION OF DIGNITY

For one to grasp the wrongfulness of crimes such as the ones described above, he or she could either reformulate the Harm Principle to make it more plausible, or abandon the harm principle altogether in favor of other candidates for criminalization. Prominent scholars such as John Stuart Mill and Joseph Raz undertook the endeavor to establish a perfectionist Harm Principle, while Meir Dan-Cohen replaced the Harm Principle with the Dignity Principle.³³ For the purposes of this paper, I will focus solely on the perfectionist theories of Joseph Raz and his version of the Harm Principle.

In contrast to the principle of state neutrality, legal perfectionism claims that the state shall not remain neutral between different understandings of the nature of the good.³⁴ Joseph Raz tried to establish a perfectionist version of the Harm Principle in relation to a reason-based notion of morality to avoid a utilitarian path in order to describe harm. At the introduction of the last chapter of *The Morality of Freedom*, under the title *Freedom and Politics*, he talks about a *moralistic doctrine* of individual freedom based on the moral value of individual liberty. He claims that value-pluralism and as expressing itself in personal autonomy can and should be promoted by political action. This notion of reason-based morality does not simply consist of conventional moral beliefs, feelings of indignation or disgust in a given society, but it is rather an autonomy-based morality.³⁵ Under this perfectionist theory, it is a state's primary duty in a liberal society to promote, protect, and foster the autonomy of all citizens. Joseph Raz claims that "[s]ince our concern for autonomy is a concern to enable people to have a good life it furnishes us with reason to secure that autonomy which could be valuable. Providing, preserving or protecting bad options does not enable

33. See MEIR DAN-COHEN, *Defending Dignity*, in HARMFUL THOUGHTS. ESSAYS ON LAW, SELF, AND MORALITY 150, 151–57 (2002).

34. For a defense of the principle of State Neutrality, see Ronald Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113, 113–143 (1978), and JOHN RAWLS, POLITICAL LIBERALISM 191 (1993). Under this principle, the state should be neutral among rival understandings of the good. The principle of state neutrality thus articulates a principled moral constraint on permissible or legitimate state action.

35. JOSEPH RAZ, THE MORALITY OF FREEDOM 417 (1986).

one to enjoy valuable autonomy.”³⁶ Therefore, it follows that perfectionism is in line with the autonomy principle because only valuable autonomy and not autonomy *per se* is worth pursuing. Autonomy, in Raz’s view, requires that one can access an adequate range of valuable or worthwhile options. Thus, the state need not stay neutral between worthwhile or worthless options that people pursue. It is rather clear that that autonomy principle “permits and even requires governments to create morally valuable opportunities, and to eliminate repugnant ones.”³⁷ How is this perfectionist liberalism compatible with the endorsement of the Harm Principle as a principled limit to state interference with autonomy?

Raz argues that, although the state should promote worthwhile options and eliminate repugnant or worthless options, this should not be done through state coercion, rather through other, non-coercive measures.³⁸ The reason for this limit³⁹ lies again in the autonomy principle, for the means used, coercive interference, violates the autonomy of the victim. Raz argues that “first it violates the condition of independence and expresses a relation of domination and an attitude of disrespect for the coerced individual. Second, coercion by criminal penalties is a global and indiscriminate invasion of autonomy.”⁴⁰

Raz thus reformulated the Harm Principle as a principle “that regards the prevention of harm to anyone—himself included—as the only justifiable ground for coercive interference with a person.”⁴¹ In this sense, coercion as a means to prevent harm is an autonomy gain, whereas coercion to prevent harmless immoralities is an autonomy loss.⁴²

The problem with this reinterpretation of the Harm Principle is that not all coercive measures of the state express a relation of domination and an attitude of disrespect for the coerced individual. Moreover, with regard to autonomy, this version of the Harm Principle is both too broad and too narrow for our purposes. This can be attributed to the fact that (a) infringements of autonomy can be wrongful and therefore there is an autonomy loss even in cases where there is no harm in the sense of diminishing resources and

36. *Id.* at 412.

37. *Id.* at 417.

38. *Id.*

39. It is important to stress that this is a limit concerning the means used to pursue the good, and not relating to the duty of the state to remain neutral against various conceptions of the good.

40. RAZ, *supra* note 35, at 418.

41. *Id.* at 412–13.

42. *Id.* at 418–19.

(b) not every coercive measure violates autonomy.⁴³ The Harm Principle is thus too sterile, even if we endorse a perfectionist view of harm. Another problem is that this aretaic version of harm would justify self-regarding duties, which cannot be within the scope of criminal law, as will be examined further.

Having put aside this perfectionist version of the Harm Principle, one should seek other candidates, which could justify criminal punishment. The next candidate for criminalization endorsed in this paper is the *Dignity Principle*. Dignity can serve both as a value justifying criminal coercion, but also as a value imposing principled limits to it.

In chapter five of his book, *Harmful Thoughts, Essays on Law, Self, and Morality*, entitled *Defending Dignity*, Meir Dan-Cohen criticizes the Harm Principle for being both over-inclusive and under-inclusive.⁴⁴ He claims that a shift from welfarism⁴⁵ to autonomy—as an interest to be protected irrespective of any setbacks to other welfare interests—is still not enough to grasp the whole range of wrongdoing. He then refers to the well-known example of the “happy slave,” arguing that slavery constitutes a significant violation of dignity, although a slave might enjoy the same degree of welfare or autonomy. This notion of dignity is construed as independent of autonomy and welfare and prior to both.⁴⁶

Dan-Cohen argues that, “if two people can enjoy in fact the same level of welfare and exercise the same degree of choice, yet one of them is a slave while the other is not, the evil of slavery must ultimately not lie in the ideas of autonomy or welfare.”⁴⁷ Not only is dignity construed as a value independent of autonomy in this view, but it also always takes priority

43. For example, a requirement to wear an electronic tagging device after criminal conviction. See John Stanton-Ife, *The Limits of Law*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/law-limits/> [<https://perma.cc/573Q-X5HA>].

44. See DAN-COHEN, *supra* note 33, at 151.

45. The traditional notion of Harm as defined by Joel Feinberg is the one which interprets harm as a setback to welfare interests. See FEINBERG, *HARM TO OTHERS*, *supra* note 2, at ix.

46. According to this quite unrealistic scenario, this is a case of a slave, who cannot suffer any setback to his welfare interests and gives valid consent to being a slave. The only way to justify the criminal prohibition of slavery would be through the dignity principle, as a conduct severely humiliating, which requires the complete negation of all autonomy rights on a permanent basis. The same applies to victimless crimes, such as virtual child pornography, where no actual harm to children has been caused. See DAN-COHEN, *supra* note 33, at 157; Tatjana Hörnle & Mordechai Kremnitzer, *Human Dignity As a Protected Interest in Criminal Law*, 44 ISRAEL L. REV. 143, 160 (2011).

47. DAN-COHEN, *supra* note 33, at 156–57.

over autonomy or welfare.⁴⁸ Thus, it stands in a hierarchical relationship with other values as a core value. This idea resembles the notion of dignity in German Constitutional Law, not only as a subjective right, but also as an objective value (Objektiver Wert), which runs through the whole legal order and from which all other subjective rights derive.⁴⁹

Both Dan-Cohen and the German constitutional legal doctrine and case law endorse a Kantian notion of dignity based on the second formulation of the categorical imperative that *persons must be treated as ends and not merely as means* (Objektformel).⁵⁰ As Antony Duff argues aptly,

if we ask why violations of autonomy should be seen as so significant, one obvious (roughly Kantian) answer is that they constitute serious, criminalizable wrongs because they radically deny, or fail to respect, the victim's humanity. Autonomy is, from this liberal perspective, a central value (a right to be respected, as well as a good to be fostered) because it is central to our humanity, which is itself the ground of our moral standing and of our moral claims on the respect and concern of others (hence the centrality of Kant's demand that we respect "humanity").⁵¹

However, this Kantian conception of human dignity based on the impermissibility of using another as a means, can be either too narrow or too broad for the objectives of criminal law. It is true that one can mistreat another just for the sake of mistreatment and not as a means to achieve

48. See Tatjana Hörnle, *Criminalizing Behaviour to Protect Human Dignity*, 6 CRIM. L. & PHIL. 307, 314 (2012). See also the decision of the Federal Administrative Court of Germany [BVerwGE] in the so-called Peep Show case, where the court invoked human dignity as an objective, inviolable value—which overrides personal autonomy—in order to justify the prohibition of consensual acts of adult women in the shows. Bundesverwaltungsgericht [BVerwGE] [Federal Administrative Court] 64, 274, Dec. 15, 1981.

49. For the notion of human dignity (Menschenwürde) as an objective value in German constitutional law, see Art. 1 par. 1. in conjunction with Art. 3 par. 1 of the German Basic Law (Grundgesetz). This interpretation of human dignity as an objective constitutional value can be deduced from Article 1 par. 3 GG, which provides that “The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.” The absence of such a provision for human dignity, together with the provision of Article 1 par. 1, which defines human dignity as inviolable could lead to the definition of human dignity as an objective value, which can be used for the interpretation of the constitution itself and the of the other subjective rights. See also Horst Dreier, *Kommentierung von Art. 1 GG*, in GRUNDEGESETZ KOMMENTAR 470–72, para. 116–20 (2004).

50. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 38 (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1797) (“The practical imperative will therefore be the following: *So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.*”). For the endorsement of the “Object Formula” in the German constitutional legal doctrine, see Dürig G., *Der Grundrechtssatz von der Menschenwürde*, Archiv des öffentlichen Rechts 81, 117–157 (1956). See also Dreier *supra* note 49, at 167–168, for criticisms of the object formula. See also BVerfGE 27, 1 (1969); BVerfGE 65, 1 (1983); BVerfGE 45, 187 (1977); BVerwGE 64, 274 277–280 (1981); BVerwGE 84, 314 317ff (1990).

51. R.A. Duff, *Harm and Wrongs*, 5 BUFF. CRIM. L. REV. 13, 43–44 (2001).

other goals.⁵² It is also too broad, in the sense that not all cases of treatment of a person as means constitute grounds for criminalization, given for example the practice in modern economies.

Duff continues:

But if we then recognize the inadequacy of a Kantian conception of humanity, which focuses only on our autonomy as formally rational beings, and develop a richer conception that does justice to the morally significant aspects of our nature as social, embodied and impassioned beings, we will see that there are more ways to deny or radically fail to respect humanity than by violating autonomy. We will then also see that we therefore have good reason—reason of the same kind as we have to criminalize violations of autonomy—to criminalize other modes of conduct that deny or radically fail to respect the humanity of those against or on whom they are perpetrated.⁵³

For the purposes of criminal law, one needs a less austere and a much richer conception of human dignity. This dignity conception would focus on the equal moral worth of all persons and on the claims that others have on our respect and concern as our fellow human beings. This concept would shift the focus from *what humans are to what we ought not do to each other*, as Hörnle pointedly notes.⁵⁴

This richer conception would require one to define dignity not solely as an objective value, an innate self-evident quality of all human beings totally independent and prior to autonomy rights, but also to explain why dignity should be protected as a subjective right. If we understand dignity as a value that can never be lost, then even in cases of severe humiliation or severe setbacks to interests such as torture, the victim can still retain her dignity and her status as autonomous and rational moral agent.⁵⁵ Moreover, creating reasons for criminalization independent of autonomy rights would leave the door open for pure legal moralism and legal paternalism, as it would generate moral duties against oneself—duties which are rejected even by deontic theories of moral obligations—and it would support criminalization of conduct irrespective of consent.

A more robust concept of human dignity could be developed within a coherent theory of autonomy rights serving as a principle independent of the autonomy principle, but at the same time not taking priority over it, thus standing in a horizontal relationship to it. However, to construe dignity

52. Hörnle, *Criminalizing Behaviour*, *supra* note 48, at 312.

53. Duff, *supra* note 51, at 44.

54. See Hörnle, *Criminalizing Behaviour*, *supra* note 48, at 313.

55. See *id.* at 314.

as an independent value compared to autonomy does not mean that they do not overlap at all. Indeed, in many constellations disregard for autonomy would count as dehumanizing conduct.⁵⁶ On the other hand, to construe human dignity as an independent value means that the principle of dignity would therefore justify dehumanizing and degrading conduct, even if the actors engage voluntarily in that.

How we are to formulate this principle of dignity? We already rejected its nature as solely an objective value and inherent quality of all human beings. We also defined it as a principle independent of autonomy rights, but not prior to them, as Dan-Cohen claims. The next step of our inquiry entails the definition of human dignity as a subjective right and as a fundamental interest *not to be severely humiliated*.⁵⁷ This definition requires the formulation of a rights-centered approach, which will be conducted further. This is important to stress, because construing human dignity as a subjective right does not mean that it acquires a relational character losing its objective value. Dan-Cohen provides a definition that goes beyond the literal meaning of humiliation and acquires an objective symbolic social meaning.

Slavery in this view tends to inflict suffering, harm, and disregard, and this fact has become the basis of a social convention which loads slavery with symbolic meaning expressing indignity, even when sometimes there is no suffering, harm, or disregard. As Dan-Cohen summarizes his point, “Once an action-type has acquired a symbolic significance by virtue of the disrespect it typically displays, its tokens will possess that significance and communicate the same content even if the reason does not apply to them.”⁵⁸ Thus, this concept of humiliation is based on this objective social meaning, not subjective feelings or beliefs.

IV. A HUMAN RIGHTS-BASED APPROACH

The aforementioned conception of dignity could be accommodated within a coherent theory of human rights, creating a holistic approach. This endeavor requires an inquiry into the philosophy of human rights. For the purposes of our inquiry, two salient theories of rights will be examined. The two main trends in the philosophy of human rights are linked with the previously discussed theories of legal perfectionism and state neutrality.

The first prominent theory of rights is an interest-based theory of rights linked to legal perfectionism. It concerns a conception of positive liberty

56. *See id.*

57. *Id.* at 315–16.

58. DAN-COHEN, *supra* note 33, at 162.

that is interest-based, claiming that a person has autonomy interests in controlling certain domains of her life.⁵⁹ Individual interests are seen as generating rights and corresponding duties.⁶⁰

The second prominent theory of rights is linked to the principle of state neutrality imposing limits on the state when pursuing certain conceptions of good, claiming that a person's autonomy is violated if he is treated on the basis of certain impermissible—that is, moralistic or paternalistic—considerations.⁶¹ These theories of rights are mostly known as liberal-egalitarian theories.

Interest-based theories of rights balance human rights with collective goods, allowing the restriction of rights for the promotion of certain collective goods.⁶² Contrastingly, liberal-egalitarian theories do not protect fundamental interests of the individual against the demands of the common good, but they rather serve as trumps, blocking reasons that are based on corrupted utilitarian calculations.⁶³ If we treat human rights as trumps, then we cannot permit any balance of interests—individual or collective. In this respect, either we understand human dignity as an inviolable objective value not to be overridden by other interests—a concept, which we already rejected—or as another interest that cannot justify the restriction of liberty because it might be based on external preferences.

An interest-based theory of rights can grasp the nature of human dignity not only as an objective value, but also as a subjective right based on a fundamental interest not to be severely humiliated.⁶⁴ This is a fundamental inter-subjective interest all human beings share, and it can justify criminalization even when there is no infringement of autonomy, like in cases of consensual conduct.

This conclusion leads to the departure from the Harm Principle and its substitution by a perfectionist liberal principle that would require the state to discriminate, to some extent, between conceptions of the good—and to reject those that involve valuing the dehumanization of one's fellows. On

59. See Kai Möller, *Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights*, 29 OXFORD J. LEGAL STUD. 757 (2009).

60. See GEORGE LETSAS, *A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 99–130 (2008).

61. See Möller, *supra* note 59, at 757.

62. RAZ, *supra* note 35, at 246–47.

63. See Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301, 303 (2000); see also Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153, 158 (Jeremy Waldron ed., 1984).

64. See Hörnle, *Criminalizing Behaviour*, *supra* note 48, at 315.

the contrary, dehumanization of the self would require legal rights against oneself, which cannot be imposed by criminal law and for these reasons human dignity cannot take priority against autonomy, but instead stands in a horizontal relationship with autonomy as an independent value.⁶⁵

V. SETTING THE THRESHOLD BETWEEN HUMAN DIGNITY AND LEGAL MORALISM

But how does the aforementioned inquiry into the dignity principle and the venture to accommodate the principle into a coherent theory of rights, creating a holistic rights-based approach, applies to our cases of consensual maiming and killing and of consensual adult incest?

As already mentioned, what is common in both cases is the element of consent. In the first case though, the conduct has been harmful as it constituted a setback to the most essential welfare interest, the interest in continued living and physical integrity. Under a strict application of the *Volenti* maxim, and without recourse to the principle of human dignity, this conduct could not pass the threshold of criminalization and would not be deemed wrongful, since there is no violation of autonomy and thus no wrongful conduct. Even if it constitutes a *prima facie* wrong, then the consent would provide at least a partial defense to the perpetrator, due to its role as a waiver of rights. However, maiming and killing another person in order to devour her or for the purpose of sexual gratification is definitely a case of disrespect, and the use of the person as a means of sexual gratification that clearly denies her equal moral worth.

The second case is a bit more complex because it constitutes a victimless crime. If we set aside all arguments provided by the German Federal Constitutional Court about the potential harms to the family or the children that were born⁶⁶ and the issue of whether the consent of Suzan

65. *See id.*

66. It is remarkable that the Federal Constitutional Court, unlike the European Court of Human Rights, did not invoke the protection of morals as a candidate for criminalization of consensual adult incest. Rather it tried to emphasize the potential harms caused by such conduct. Among the harms mentioned by the court, were concerns about the protection of the family institution and eugenics. Both arguments are rebuttable, since there are many cases where the family is to be affected by the conduct of its members deemed to be immoral, such as the sexual intercourse of homosexual siblings that is not criminalized under German criminal law. At any case, there is no clue that non-traditional families, such as the one described above are in a lesser degree capable of leading a family in the same way that other married couples do. Another concern regards the children born and the risk of giving birth to children with disabilities or genetic disorders. Apart from the debate of wrongful birth and the arguments in favor of being born with disabilities compared to non-existence, it is also true that similar risks exist in many cases of older parents or parents with genetic disorders, where giving birth is definitely not a crime. Moreover, the *actus reus* of the offense does not criminalize the outcome of giving birth

Stübing was valid, we can focus on the argument of ECtHR regarding the protection of public morals.

In this case, if we apply the dignity test, we cannot identify any interest of a victim not to be severely humiliated, that could have been violated by the consensual sexual intercourse between the adult siblings. This conduct could be criminalized only by recourse to impure legal moralism due to the indirect harms caused to other protected legal goods by the conduct—this was the line of argumentation of the Federal Constitutional Court in *Stübing*⁶⁷—or of legal moralism in the broad sense—with regard to the free-floating evil of a drastic social change. If this notion of morality is endorsed, then it requires a conventional account of morality in contrast with a reason-based one.

As an example of impure legal moralism, I cite the famous Lord Devlin’s social disintegration thesis. In Devlin’s view, a society is in part constituted by its morality and it, therefore, has a right to defend itself against any attack on that morality. The criminalization of kinds of conduct that constitute societal taboos, like incest, is a prerequisite of preserving the morality of society and hindering its disintegration.⁶⁸

This conventional account of morality would preserve taboos and would base criminalization on feelings of disgust, indignation, et cetera, which have little rational basis. The same applies to other indirect harms to public

to children or the risk of such an outcome; rather, it sanctions the act of penetration in itself, irrespective of the possibility of impregnation. *See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 26, 2008, 2 BvR 392/07, at 1–72; see also Stübing v. Germany, (2012) 55 E.H.R.R. 24, App. No. 43547/2008.*

67. *See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 26, 2008, 2 BvR 392/07, at 1–72.*

68. Consider the famous 1959 Maccabean lecture of lord Devlin in favor of criminalizing homosexuality and the notorious Hart-Devlin debate. According to Ronald Dworkin, Devlin’s “conclusions fail because they depend upon using ‘moral position’ in this anthropological sense.” RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 254 (1978). According to this notion of the moral position,

this common opinion is compound of prejudice (resting on the assumption that homosexuals are morally inferior creatures because they are effeminate), rationalization (based on assumptions of fact so unsupported that they challenge the community’s own standards of rationality), and personal aversion (representing no conviction but merely blind hate rising from unacknowledged self-suspicion).

Id. Even if one does not accept Dworkin’s claim that emotional responses cannot be moral responses, it is the nature of the feeling of disgust that Devlin endorses as an element of the common morality, that is particularly susceptible to distortion, and it creates problematic transfers of subconscious negative attitudes to objects and groups of people. *See* MARTHA NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW* 87–123 (2004).

interests that do not survive scrutiny. This conclusion would be impermissible both under an excluded-reasons conception of human rights, as an impermissible moralistic consideration and under an interest-based theory of human rights that recognizes the protection of fundamental inter-subjective interests as the only principled limit to criminal law. Sexual life as the core of intimacy is considered to be not the law's business, unless it interferes with human dignity as a subjective right not to be severely humiliated. This can be also deduced from the title of the chapter of the German penal code which includes most sex offenses, which defines them as "offenses against sexual autonomy," indicating the passage from a morality-based approach to an autonomy-based approach.⁶⁹ Consensual sexual intercourse among persons who are of legal age that, provided that the consent is valid,⁷⁰ does not set back their welfare interests does not violate their autonomy or constitute any kind of severe humiliation. Therefore, criminalization on purely moralistic grounds should be avoided.

Finally, in the case of the ECtHR judgment and as far as it concerns the nature of human rights as anti-majoritarian rights, there can be no valid argument in favor of criminalization that would be based on the conventional moralistic beliefs of the majorities of the Member States. The ECtHR's decision completely overlooked its role as safeguarding the Right to Private Life under Article 8 of ECHR by not invoking any moral arguments in favor of its decision, but rather relying on the doctrine of the margin of appreciation of the Member States in order for them to apply the conventional moral beliefs of their national majorities, without taking into account any substantive moral arguments.

VI. CONCLUSION

If we are to locate dignity within a coherent system of human rights, then this principle would fit better in a system of fundamental inter-subjective interests, being a value based on a fundamental interest—*not to be severely humiliated*. This approach goes beyond the Harm Principle and the Autonomy Principle and constitutes the threshold between permissible and impermissible state interference with autonomy rights.

The element of consent in this context, as an element of the *prima facie* or definitive wrong, cannot serve as a waiver of the right not to be severely humiliated. Autonomy is one of the two main pillars that stand in the core

69. See Tatjana Hörnle, *Consensual Adult Incest: A Sex Offense?*, 17 *NEW CRIM. L. REV.* 76, 86–87 (2014); see also STRAFGESETZBUCH [STGB] [PENAL CODE], ch. 13, translation at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1502 [<https://perma.cc/4R83-FUHZ>] (Ger.).

70. For the conditions of the validity of consent, see Hörnle, *Consensual Adult Incest*, *supra* note 69, at 86.

of our humanity. Dignity is the second pillar and is in horizontal relationship with autonomy as an independent value and as a right without being its source. Any conduct that does not pass this threshold cannot be a sufficient reason for criminalization. This notion of dignity is a moral notion, referring to a reason-based morality and a perfectionist theory which would maintain its liberal credentials, but at the same time it would not require the state to remain neutral between various conceptions of the good. Thus, fostering human dignity would be a valuable option under this principle that would serve both as a limiting principle for autonomy rights, but also as a principled limit to state coercion. This reason-based morality would not be based on personal feelings of disgust or other irrational feelings, rather than on fundamental inter-subjective interests. The preservation of taboos or conventional moral beliefs is not within the scope of criminal law.

