Dignity and Victimhood

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INTRODUCTION

If Sandy Kadish has reminded us of limitations of consequentialist approaches to the criminal law and has proposed persuasive resolutions of issues that deontological perspectives reveal, Meir Dan-Cohen has jarred us to rethink fundamental premises about rules in the criminal justice system. His Essay is an example of his ingenuity for unsettling understandings. The Essay reads easily and seems deceptively straightforward, but it is rich in nuance and its themes are complex. This Response identifies the various themes and evaluates their plausibility. I take Professor Dan-Cohen’s Essay as a preliminary exploration of a major subject, and I have responded accordingly, indicating doubts without trying to pursue them to any systematic resolution. I hope these thoughts will contribute to the evolution of Dan-Cohen’s ideas about dignity and criminal law.

What are Professor Dan-Cohen’s main theses? He claims: (1) some crimes cannot be adequately understood as safeguarding autonomy or consequentialist welfare: They need to be conceived as protecting dignity, a respect for people’s equal worth;1 (2) a special feature of basic offenses to dignity is that no essential role is played by the victim’s state of mind—in this respect violations of dignity differ from violations of welfare and autonomy;2 (3) dignity is an “expressive value”3 whose violation depends on the social meaning of practices within a linguistic community;4 and (4) dignity, in some ultimate sense, is more fundamental than welfare or autonomy.5
I think Dan-Cohen's first thesis is right. I also believe that the final claim is correct, but only in a way that makes it less profound than Dan-Cohen may suppose. I have serious doubts about the second thesis—that the victim's state of mind is not important for offenses against dignity—and I do not believe that the expressive aspect of dignity determines the scope of violations in quite the way Dan-Cohen suggests. My doubts are linked to reservations about some of the conclusions he draws from his examples. Among other things, I think the role of the state figures much more prominently in the examples than he acknowledges.6

I briefly summarize Dan-Cohen's Essay, making a few tangential criticisms in footnotes. I then undertake more sustained critical analysis.

I

SUMMARY

Dan-Cohen examines the normative foundations of criminal law from the perspective of a deontological critique that focuses on the mental states of victims. Typically a victim's state of mind helps determine an action's harmfulness or wrongfulness.

We can, Dan-Cohen says, think of a "basic offense" as taking place when an occurrence "involves a setback to or a diminution in a basic value that is protected by the generic offense."7 The test of whether a basic offense has occurred is whether we would have prevented it if we possessed "a perfect technology of crime control."8 Thus, all speeding is forbidden only because imperfections of crime control preclude identifying in advance and preventing harmful instances of speeding.9

6. One might understand this point as an illustration of the need for a greater focus by theorists of criminal law on political theory, here a kind of "micro" political theory, that George Fletcher recommends in his Essay.
7. Dan-Cohen, supra note 1, at 761. Dan-Cohen does not make clear whether a basic offense occurs if a setback or diminution in value occurs but is offset by some countervailing gain in value. How one resolves this question will help determine exactly when basic offenses to welfare, autonomy, and dignity occur.
8. Id. at 761.
9. See id. This construct slights the extent to which behavior that does not cause harm in the ordinary sense may serve as an example that leads to subsequent behavior that does cause harm. Dan-Cohen may answer (and indeed did respond in oral discussion) that the perfect technology would prevent the future behavior, so that we would not need to worry about examples that might contribute causally to that behavior. A minor point is that if the cost of preventing harm is very expensive per instance, one might want to reduce examples that lead to behavior that would directly produce harm unless prevented. More importantly, we need to recognize that Dan-Cohen's response requires perfect prevention, not merely punishment, of harm-producing acts. Were it possible to punish all dangerous occasions of behavior, it would still make sense to reduce behavior that would, by example, lead to instances of harm-producing behavior. Most importantly, since direct prevention of many kinds of harm-producing behavior is much rarer than punishment of that behavior, a concept of "basic offense" built on a technology that can achieve perfect prevention may give a misleading idea of all the behavior a society should want to stop. Interestingly, in State v. Brown, one of Dan-Cohen's illustrations, the court gives as a substantial reason for not allowing consent as a defense to atrocious assault and battery
For utilitarians, and their focus on setbacks to welfare, a victim’s awareness of harm is crucial, though the victim need not know he or she is the victim of a crime (he may think he has lost a wallet that in fact was stolen). Consent figures much less importantly, except as a rebuttable presumption about whether the experiential effects of an act will be positive or negative.10

Consent is central for autonomy. Rape is a serious harm even if a woman is unaware that a man has had sexual intercourse with her. This example shows that deontological concerns about autonomy may lead us to believe a basic offense can occur even when the victim experiences no setback to welfare.

For some kinds of actions, a basic wrong is done even if the “victim” does not experience a harm and has consented to the action. For these offenses against dignity, the victim’s state of mind does not matter. Thus, a husband may not beat his wife, even when both conceive this as a way to help her overcome her alcoholism, and even if the efforts may be effective in this respect.11 A man who has committed sexual crimes may not consent to the option a trial judge offers that he be castrated, even if he far prefers that to the alternative of a sentence of thirty years in prison. Analogously, slavery is a wrong even if it is not experienced as negative by the slave and even if the slave maintains a substantial amount of de facto autonomy.

The heart of what is wrong in these instances is a denial of dignity, a deontological concern that is not coincident with offenses against autonomy. Dignity involves an attitude of respect: “[W]hether an action is consonant with dignity is at bottom a matter of that action’s meaning.”12 Actions can deny dignity, even if the actors have unblemished intentions and the victims welcome the actions. What counts are the perceptions of a linguistic community. However, subcommunities within broader linguistic communities may assign special meanings to violent acts. If violence that would ordinarily express a denial of dignity carries a different meaning within a subcommunity, such as a sadomasochistic community, the law might allow that violence as an expression of deference to the subcommunity.

10. See Dan-Cohen, supra note 1, at 763. Dan-Cohen talks about “erroneous antecedent assessment[s],” id., but he doesn’t tell us whether the “basic offense” is to be judged by predictable consequences when an act is committed or by what results. (Someone might be assaulted, meet a wonderful nurse at the hospital, and have a much happier life as a result.) It is not Dan-Cohen’s responsibility to fill in the details of a utilitarian account, but these details will matter for how important consent turns out to be, since consent is likely to be a somewhat more reliable reflection of predictable consequences than of all actual consequences.

11. The crucial point is that the (legal) wrong does not depend on the law’s limited capacity to categorize nor on the dangers of example. In and of itself, the beating impairs the wife’s dignity.

12. Dan-Cohen, supra note 1, at 771.
II
Critique

I focus my discussion on Dan-Cohen's examples, basing abstract conclusions on analysis of these and some variations.

A. Castration and the State

My perplexity about the castration example is most straightforward. Dan-Cohen says that if a man is castrated as part of a voluntary operation to change his sex, no denial of dignity is involved, but his dignity is denied if, at a trial court's option, he chooses castration rather than a long prison sentence. What is one to make of the following intermediate hypothetical? A man recognizes that he has powerful urges to commit serious sexual crimes, and perhaps he has already committed one that has not been detected. He realizes that unless his sexual urges abate, he will do terrible things and end up in prison. Despairing of other options, he asks a doctor to castrate him. My present opinion is that the performance of the operation involves no more denial of dignity than the voluntary sex change operation. Even if that opinion is mistaken, the performance of this operation without the law's intervention seems to involve less sacrifice of dignity than the operation chosen at the court's option. If this conclusion is right, and if the operation chosen as an option offered by a trial court is an unacceptable denial of dignity, the difference must lie in the state's involvement. The law's presenting this option as an alternative to ordinary punishment is what would make the operation a special denial of dignity.

B. Wife-Beating and Sadomasochistic Acts

My response to the wife-beating and sadomasochist examples is more complex. Suppose, that after an alcoholic has tried many times, unsuccessfully, to stop drinking, a doctor recommends a form of aversion therapy, instructing the alcoholic to administer a mild shock to himself each time he takes a drink. The alcoholic is willing to try. The next few times he takes a drink, he finds he cannot bring himself to administer the shock. At his next visit, the doctor asks if some member of his family could administer the shock, and the sufferer says, "my wife." She proceeds to do that. Here is State v. Brown, with discrete shocks instead of beatings and with the gender of the participants reversed.

14. In oral discussion at the Symposium, Dan-Cohen indicated he thought it was mistaken.
15. Some participants at the Symposium thought the state-presented option was acceptable, and, indeed, that it reduced possibilities for abuse.
Why is Brown different? Perhaps no one would recommend such beating as an effective therapy to stop drinking; the means are too extreme because the beating goes beyond any necessary infliction of momentary physical pain. (In Brown the charge was "atrocious assault and battery," and the court said that Mr. Brown severely beat his wife with his hands and other objects.) Perhaps allowing any husband to beat his wife offers too great a temptation to abuse. But if I understand Dan-Cohen, the beating involves a denial of dignity and constitutes a "basic offense," even if it is a highly effective therapy that is not unnecessarily harsh, even if Mr. Brown is a man who otherwise has no inclination whatsoever to hurt his wife, and even if neither Brown himself nor his wife consciously experience the beating as involving humiliation. The reason is that husbands beating wives has an expressive significance that includes a denial of dignity within the linguistic community of which the Browns are members.

If I have understood Professor Dan-Cohen correctly, I find his distinguishing of the Browns from a sadomasochist couple unconvincing. More importantly, I am unpersuaded that dignity relates to individual instances of criminal behavior in some special way.

Dan-Cohen treats the sadomasochist community as one in which the meaning of certain acts of physical violence differs from that in the more general community. I believe that matters are more complicated than he develops. One reason why (many) masochists find the infliction of pain to be sexually stimulating is that they have a desire to be humiliated; (many) sadists like to inflict pain because they want to treat partners in an abusive way. The sexual power of sadomasochist acts is intertwined with desires for dominance and humiliation. These acts are not typically expressions of equal worth; feelings of equality are suspended for the duration. However, I want to disregard this reality and assume that the physical pain that causes sexual pleasure is completely divorced from the ordinary expressive meaning of acts of violence. This simplifies the example in a way most favorable to Dan-Cohen's conclusion that outsiders should perhaps defer to meaning within the subcommunity of sadists and masochists.

Here is my most fundamental problem. If we, the general community, should defer to the sadists and masochists, why should we not defer to the Browns? The answer cannot be that we do not trust the Mr. Browns of this world. Dan-Cohen is arguing that whether Mr. and Mrs. Brown can be

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17. Id. at 28.
18. See Dan-Cohen, supra note 1, at 775-77.
19. At the Symposium, Dan-Cohen commented that sadomasochist acts are forms of play. The implication was that equals could play at being unequals without undermining their overarching sense of equality.
20. If one concludes that "play" at humiliation does not involve offense to dignity, see supra note 19, one can accommodate the actual psychology of sadists and masochists without finding an obvious setback to dignity.
trusted individually is beside the point. The basic offense has occurred because of the general expressive meaning of wife-beating. One might defend this conclusion by focusing on individual victims or on the community at large; but, as I shall show, neither approach can save all that Dan-Cohen writes.

Let us first focus on what the Browns experience. Dan-Cohen says: "Slavery provides us with a paradigm of dignitary harm: harm that consists in demeaning or humiliating a person by denying his or her equal moral worth." More generally, he writes: "As long as certain actions are generally considered to express disrespect, one cannot entirely escape their meaning while knowingly engaging in them, no matter what one’s motivations and intentions are." This sounds as if Mr. Brown is offending against Mrs. Brown’s dignity, whatever the two of them intend. And Dan-Cohen does say specifically that Mrs. Brown "remains the ‘victim.’" One plausible way to understand the idea that her dignity is violated is that, whatever their aims, the Browns themselves will be infected by the social meaning of wife-beating. At some level, they will experience the act as a denial of Mrs. Brown’s dignity, however much they strive to avoid such feelings. From this perspective, the crucial reality is that these social meanings are unavoidable for members of the linguistic community. This account is plausible, and it could distinguish the administering of discrete, moderate electric shocks from hitting with fists, since the shocks would lack the social meaning of hitting. Notice that this account does not really treat the victim’s state of mind as irrelevant; it posits thoughts and feelings of the victim that may be barely conscious but are undesirable. Another feature of the account is that with respect to otherwise similar beatings, it might matter whether the victim is a wife, or is a husband or a friend (of the same gender) as the person doing the hitting. The reason would be that "wife-beating" carries a particularly strong message of inequality, expressing the husband’s domination of his wife. Two friends of the same gender might more easily shed meanings of inequality connected to beating than can a husband and wife when the husband does the beating.

If the pervasive effect of community attitudes on the Browns themselves explains why Mr. Brown should be punished, what are we to say about our sadists and masochists? Dan-Cohen notes that the social meaning of boxing is different from that of ordinary violence, but when he confronts sadomasochistic sexual acts, he is inclined to think that the general

21. Dan-Cohen, supra note 1, at 773.
22. Id. at 774.
23. Id. at 767.
24. At the Symposium, Jeremy Waldron noted that the original idea of dignity involved respect due to people because of their particular status, and that this idea of dignity has largely given way to concepts of equal worth. A liberal society might be especially wary of acts that tend to reflect outmoded but tenacious notions of inequality.
community does not make such an exception. Yet he says that if, within the community of practitioners, the violence has a different meaning, perhaps the general community ought to defer to that meaning.

But just how are the sadists and masochists different from the Browns? They are full members of the larger linguistic community, not isolated like the Amish. They will understand the meaning the general community attaches to their acts. Can they avoid being affected by that meaning? Certainly not completely. Can they insulate themselves more than the Browns? Perhaps, but this seems to be a matter of degree. Is it relevant that they, unlike the Browns, engage in a “recognized social practice” that in their subcommunity has a meaning different from ordinary physical acts of violence? I do not see why, except insofar as that makes it easier for them not to be infected by the general meaning. Putting my points more abstractly: if we focus on the “victim,” the vital question seems to be whether she can experience what is happening to her as not involving a loss of dignity. Two people who newly create a practice of their own that assigns violent acts a special meaning are not distinguishable from a larger subcommunity that has, over time, assigned a practice of violence a special meaning, except insofar as the isolated two are less able to insulate themselves from the general meaning assigned by the larger community.

A different approach, one that preserves Dan-Cohen’s notion that the victim’s mental state is irrelevant, is to focus on the general community. Whatever the Browns may be capable of, can we (members of the broader community) view wife-beating as not involving loss of dignity? If we are incapable of so viewing it, perhaps we should not or cannot (or both) approve the violent acts. Remember, this is not a matter of thinking that the law is unable to figure out what the Browns intend; Dan-Cohen believes Mr. Brown has committed the basic offense even if we could be sure that the Browns’ intentions are pure. As with an inquiry that is victim-centered, one that focuses on the attitudes of the general community might lead to a conclusion that the “meaning” of an assault could depend on the relations and gender of the persons involved.

If emphasis is placed on the general community’s sense, perhaps we must distinguish what the Browns do from what the law allows them to do. If no one knows about the Browns’ practice, has any wrong been done? My sense is that no wrong has been done (assuming minimum force, pure intentions, and effective therapeutic result), except insofar as the Browns are infected by the generally assigned meaning of wife-beating. But community approval is something else. One may reasonably think the law

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25. Of course, one could think that the perspectives of the individual assailant, the individual victim, and the general community all are relevant.
should not approve acts that have an expressive meaning of denying dignity within the community. Thus, the intervention of the state may become as crucial for *Brown* as for the castration example.

If one adopts this community-centered approach, should sadists who beat masochists fare better than Mr. Brown? What seems crucial is whether the larger community can somehow accept the subcommunity’s special meaning as special. Again, in principle, I don’t see why the Browns are different from the sadists and masochists. If the general community (or representatives of it) could be brought to understand what the Browns are about, that they have created a new practice that for them does not involve loss of dignity, why should the community not defer to that every bit as much as it defers to the more established practices of sadists and masochists that have an acceptable meaning among that community of practitioners? If the general community should not, or need not, defer to the Browns, why should it defer to the sadists?

Were the general community’s attitude toward a practice the overarching concern, perhaps that community should not defer to a subcommunity unless the way members of the general community perceive a practice within a subcommunity is altered by their knowledge of how participants in the subcommunity understand the practice. On this view, the “basic offense” of denial of dignity is unusual not only in making the mental state of the victim irrelevant; it is unusual in making “wrong” a practice that may not hurt the victim in any respect. The community upholds its notions of dignity, but not because these actually protect the ostensible “victim.” Mr. Brown is to be punished even if his original behavior, carried out in private, does not injure Mrs. Brown’s dignity (or her welfare or autonomy). We would have an unusual kind of victimless crime, where outsiders’ notions of the dignity of the victim control condemnation and punishment.

My own opinion is that if one is talking about whether a basic offense, as Dan-Cohen conceives it, has occurred, what should matter critically is the meaning assigned by participants to their acts. If the Browns are strong enough or peculiar enough to escape the common meaning of wife-beating, their acts taken alone would not amount to the basic offense. However, once the law intervenes, it should not approve a practice whose general meaning involves a denial of dignity, unless people can be made to understand that what the Browns of this world do is not like ordinary wife-beating.

At the end of the day, I am left with substantial doubt that when one introduces dignity as a concern of the criminal law, the range of “basic offenses” reaches much more broadly than it does for the concerns of autonomy and welfare. Putting the point differently, I resist the claim that the victim’s mental state matters less for a basic offense to dignity than for
a basic offense to welfare or autonomy.\textsuperscript{26} At a minimum, we need a fuller explanation of just how dignity reaches more broadly, even when the participants do not take themselves to be engaging in practices that deny dignity.

\textbf{C. The Analogy to Slavery}

Professor Dan-Cohen points out that slavery could conceivably involve little sacrifice of welfare and de facto autonomy. He assumes that slavery always involves a denial of dignity; it is “the paradigm of injustice because by its very terms it denies people’s equal moral worth and thus treats them with disrespect.”\textsuperscript{27} Does this conclusion depend at all on social conventions and the form of slavery? Suppose that among honorable peoples who fight wars from time to time captured soldiers are treated as slaves. The law assigns each captured soldier to a householder who has nearly complete legal control over the former soldier’s activities, but, according to social convention, citizens are supposed to treat their slaves personally with the respect owed an equal. (The social convention works partly because each people wants its own captured soldiers to be well treated.) I do not see why slavery without loss of dignity is any less plausible than slavery without loss of welfare and de facto autonomy.

One might respond, of course, that to be a slave is to have less than equal worth under the law. That is undoubtedly true, but to be a slave is also to have a minimum of de jure autonomy. If what really matters is de facto autonomy, rather than de jure autonomy, as Dan-Cohen urges, de facto dignity matters rather than de jure dignity; and de facto dignity might be maintained by a slave.

A more interesting example contemplates two young scholars who think they would enrich their academic work on slavery by experiencing a life as restricted as that of a slave.\textsuperscript{28} Each agrees that she will be the “slave” of the other for three months, though neither “master” will be personally abusive. They realize the law would never enforce a contract to be bound as a slave, but they exchange promises to this effect. The first “slave” faithfully does everything the “master” instructs for three months. Now the tables have turned. Is the former “master” doing anything wrong by becoming a “slave”? Does she have a moral obligation to do so? I think submission is not wrong, and, further, that the combination of her agreement and her having been master for three months carries some moral  

\textsuperscript{26} Stephen Morse pointed out at the Symposium that Mrs. Brown would have some claim of dignity (as well as some claim of autonomy and welfare) to allow her to choose the painful, but effective, therapy of being beaten by her husband.

\textsuperscript{27} Dan-Cohen, \textit{supra} note 1, at 770.

\textsuperscript{28} If the scholars wished to approximate more fully a typical slave’s experience, they would want to experience the slave’s extreme humiliation as well.
force in the direction that she should submit. That does not mean, by any stretch, that the law should force her to submit.

If someone is not physically compelled by private force, or required by law, perhaps submitting as a slave need not necessarily be at odds with dignity any more than slavery need be at odds with autonomy or welfare.29

D. The Centrality of Law

My understanding of all three classes of illustrations—castration, physical beating, and slavery—suggests that the law’s involvement is much more central than Professor Dan-Cohen’s discussion intimates. In various settings, it appears that the particular acts alone might not involve a “basic offense” in his terms if they are carried out in private; what is unacceptable is the law’s encouragement of, or acquiescence in, the acts. I do think protecting dignity is important. But I am not yet persuaded that the relationship between behavior covered by the definition of the crime and instances of the basic offense is radically different for dignity than it is for autonomy and welfare. For autonomy and welfare Dan-Cohen assumes that a setback to value does not occur unless the victim suffers a setback; the same may be true with respect to dignity. If Dan-Cohen responds that the expressive view within the community determines whether a setback in value has occurred, I am not sure why one could not say the same about setbacks to autonomy and welfare—that it is sufficient that the community views an activity as detrimental to autonomy or welfare or both.30

III

How Is Dignity Fundamental?

Are dignity and equal worth more fundamental than welfare and autonomy in the understanding of criminal offenses? At the deepest level, a sense of the dignity or worth of victims underlies the criminal law. Human beings get protection under human law that is not given to mosquitoes. (Matters may be different in mosquito law, if there is such a thing.) We know from history that neither actual protection nor assumed worth need be equal. In many historical societies individuals with different levels of status have received different levels of protection. For most modern

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29. Dan-Cohen might treat this example as a form of extended “play” in accord with his suggestion at the Symposium that sadists and masochists are engaged in temporary play that need not affect their long term sense of each other as equals.

30. To be clear, Dan-Cohen’s position is that the sort of behavior that generally impairs welfare or autonomy may be made criminal, even for instances in which neither welfare nor autonomy suffers. Thus the Browns could be punished on welfare or autonomy grounds, although in their particular instance neither value is impaired. What Dan-Cohen denies is that in such an instance they would commit the “basic offense” from the perspective of autonomy or welfare. It is in this respect—not in terms of an overall judgment about punishability—that he claims dignity as a rationale differs from autonomy and welfare.
governments, the formal assumption (at least) is that people have equal worth in some important sense. The welfare and the autonomy they warrant is judged from this baseline. But dignity is a sweeping and amorphous concept. When people think about whether particular behavior should be made criminal, I do not think dignity figures as more fundamental than welfare and autonomy, though I agree with Dan-Cohen that it can be an important independent consideration.

CONCLUSION

In his fascinating and challenging Essay, Professor Dan-Cohen has offered a persuasive argument that we may conceive of denials of dignity even when no denial of autonomy or welfare occurs. It follows that a deontological approach to the coverage of criminal liability cannot focus exclusively on autonomy. Dan-Cohen shows that, in some sense, notions of dignity, of the basic (equal) worth of human beings, lie behind the protections criminal law affords in a modern liberal society. His argument that the victim’s state of mind is irrelevant when a rationale of dignity underlies a basic offense is less persuasive. He may be right that dignity importantly involves an expressive meaning, but perhaps two or more individuals who create new meanings should be able to opt out on conditions similar to those available to established subcommunities with special meanings. His examples and his discussion alert us that we need to focus not only on original behavior, but also on the role of the state. Sometimes the behavior alone may not offend against dignity, but legal acceptance of the behavior may unacceptably express a denial of dignity.

31. The treatment of children complicates matters a bit; their welfare is at least as important as that of adults, and they are assumed to be of equal worth, but they are given less autonomy. Something similar might be said of the mentally incompetent.
32. See Kent Greenawalt, The Right to Silence and Human Dignity, in THE CONSTITUTION OF RIGHTS 192-94 (Michael J. Meyer & W.A. Parent eds., 1992) (discussing the extent to which “dignity” is a useful basis for developing protections within the Bill of Rights).
33. Dan-Cohen assumes that a basic offense to autonomy occurs only when a victim fails to consent. When dignity works indirectly, as it were, undergirding the claim about autonomy, the victim’s state of mind does matter. Thus, it is only with respect to direct offenses to dignity (that is, when the expressive meaning of an act is a denial of dignity) that the victim’s state of mind is said to be irrelevant.