CONSENSUAL VIOLENCE AND THE STATE: A CASE STUDY IN COMBAT SPORTS

STEPHEN EDWARD KING

THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

SCHOOL OF LAW
UNIVERSITY OF LIMERICK

SUPERVISORS
EOIN QUILL, UNIVERSITY OF LIMERICK
HAYDEN OPIE, UNIVERSITY OF MELBOURNE

SUBMITTED TO THE UNIVERSITY OF LIMERICK, APRIL 2011
ABSTRACT

CONSENSUAL VIOLENCE AND THE STATE:
A CASE STUDY IN COMBAT SPORTS

STEPHEN EDWARD KING

Eastern Asian martial arts have been becoming more and more popular in Western societies since the 1960s. However, the last ten years have witnessed an exponential surge in the popularity of professional martial arts, and in particular, of mixed martial arts. Mixed martial arts allow participants from any martial arts discipline to compete against each other and use any fighting technique, with few exceptions. The professionalisation of martial arts has led to the development of full-contact competitions, where the head is often a primary target. This gives rise to political, legal and moral questions about what a state’s attitude to such sports should be. In particular, the sword of Damocles appears to hang over the legality of such sports. Can these new sports, by analogy, be afforded the same benefits that are controversially given to boxing? Or is it the case that this analogy does not hold due to these sports being potentially more dangerous than boxing and also being unable to claim the same special historical and cultural roots that boxing has in Western society.

It is within the context of exploring what a state’s attitude to combat sports should be, that the main question of this thesis is asked: can a state ever legitimately regulate consensual violence? If it may, in what circumstances and to what degree can it regulate such violence? The answers to these questions are not just important for combat sports; they have an overwhelming significance on other issues central to personhood, such as consensual violence in the context of sexual or religious practices.

Case law from England and Wales shows a continual disregard for individual autonomy by criminalising any consensual harm that causes actual bodily harm – which could be anything from a sore bruise to a broken bone. The exceptions to this rule, the courts say, are based upon public policy considerations which allow courts to consider each case on its own merits, in an ad hoc fashion. It is argued that this is an unprincipled and incoherent approach to the area, and that exceptions should instead depend on whether the activity is regulated in a manner in which the state can have confidence. The current approach of the courts also offends against the harm-principle. But the harm-principle has been the subject of much criticism over the past three decades. Its “all-or-nothing” approach to defining the proper limits of state power has left it impoverished. In particular, it is argued that it does not sufficiently vindicate a state’s duty to foster autonomy or dignity within its political community. It is argued that there can be circumstances in which a state may be justified in paternalistically making reasonable interferences in its citizens’ self-regarding decisions in order to protect their future autonomy. Further, in situations where human rights conflict or regulation is inappropriate or ineffective, and where communities are required to take a stance on a morally controversial issue, the state may legitimately defer to its best interpretation of dignity in order to determine its position.
DECLARATION

I hereby declare that this dissertation, submitted in fulfilment of the requirements for the degree of Doctor of Philosophy, represents my own work.

________________________________
Stephen E. King

1 April 2011
ACKNOWLEDGEMENTS

I must first thank Eoin Quill for his help, encouragement, support and guidance throughout the thesis. He patiently reviewed the text on many occasions and offered sage advice each time. His help has improved this thesis immensely. I also owe a great debt to Hayden Opie, who facilitated my trip to the University of Melbourne as a Visiting Scholar in 2008 and has since offered his very thoughtful insights into my work. He, too, greatly enriched the final version of this thesis.

I would also like to thank all those at the Victorian Professional Boxing and Combat Sports Control Board, the Massachusetts State Boxing Commission and the Nebraska State Athletic Commission for their invaluable help. In particular I would like to thank Noel Sharpe for all of his assistance.

Over the course of writing this thesis I have received much valued advice from Professor Dermot Walsh, Dr Ger Coffey, Dr Patricia Conlan and Dr Colin King, and for that I thank them. I would also like to thank Professor Lloyd Weinreb and Peter Carfagna who both read and provided insightful comments on drafts of Chapters Four and Six, respectively. Indeed, I owe a special thanks to Peter Carfagna, who also facilitated my trip to Harvard Law School as a Visiting Researcher in 2009, along with Professor Paul Weiler, to whom I am also grateful. I also acknowledge the generous support which I have received throughout the writing of this thesis from the University of Limerick School of Law, the Faculty of Arts, Humanities and Social Sciences Research Board, the Centre for Criminal Justice and the International Commercial and Economic Law Group. I would also like to thank all of my friends and colleagues at the University of Limerick for their friendship and support over the years.
The constant love, support and patience of my family made this project achievable. All of the opportunities I have, I owe to my parents and I thank them for going above and beyond to help me complete this thesis. Finally, I would like to thank Morgane Nerrou who, through her love and understanding, is a constant source of happiness in my life. She made the daunting task of completing this thesis that much easier.
# TABLE OF CONTENTS

ABSTRACT .......................................................................................................................... iii

DECLARATION .................................................................................................................... iv

ACKNOWLEDGEMENTS ................................................................................................. v

TABLE OF CONTENTS ..................................................................................................... vii

TABLE OF CASES ........................................................................................................... x

TABLE OF LEGISLATION ................................................................................................. xiii

CHAPTER ONE - INTRODUCTION ................................................................................. 1

Outline ............................................................................................................................... 2

Important Distinctions ................................................................................................. 6

A Sense of History ........................................................................................................ 9

## SECTION ONE: THE DESCRIPTIVE THEORY

CHAPTER TWO - CONSENSUAL VIOLENCE AND THE COURTS ....................... 21

Introduction .................................................................................................................. 21

Dangerous Fighting Sports and Breaching the Peace .............................................. 23

In Search of a Coherent Theory in the Courts ......................................................... 29

The Traditional Common Law Approach .............................................................. 29

*R v Brown* and its Wake ......................................................................................... 32

Sex and/or Violence? ............................................................................................... 33

The Role of the Legislature ..................................................................................... 40

Criticisms ................................................................................................................... 42

Boxing in *Brown* ...................................................................................................... 43

*Brown* in the European Court of Human Rights ................................................ 46

Applying *Brown* in the Court of Appeal ............................................................. 47

The New Zealand Approach ................................................................................... 53

*R v Lee* ..................................................................................................................... 53

*R v Barker* ................................................................................................................ 63

The Uncertain Irish Position .................................................................................... 67

The Issues in *Dolny* .............................................................................................. 68

The *Dolny* Judgments ............................................................................................ 72

Determining the *Ratio Decidendi* ....................................................................... 74

Reflections on the Court’s Approach .................................................................... 76

Explanations of the Approach .............................................................................. 81

Concluding Remarks .............................................................................................. 83

Conclusion .................................................................................................................. 85
CHAPTER THREE - A THEORY OF CONSENT ...........................................87
Introduction .......................................................................................... 87
Law as Integrity ...................................................................................... 89
A New Starting Point ............................................................................. 91
Understanding the Logic of Consent .................................................... 94
Non-Exceptions .................................................................................... 101
  Contact Sports .................................................................................... 101
  Dangerous Exhibitions ....................................................................... 122
  Others .................................................................................................. 132
The Regulatory Exemption .................................................................... 133
Conclusion ............................................................................................ 140

SECTION TWO: THE NORMATIVE THEORY

CHAPTER FOUR – THE HARM PRINCIPLE AND PATERNALISM ............ 143
Introduction .......................................................................................... 143
The Harm Principle ............................................................................... 145
  Feinberg and the Harm Principle ....................................................... 146
  Liberalism’s Paternalism .................................................................... 151
  Criticisms of the Harm Principle ...................................................... 156
Justified Paternalism ........................................................................... 159
  Autonomy-Based Paternalism ............................................................ 162
  What Autonomy Really Requires ..................................................... 164
  Future Autonomy and Present Desires .............................................. 171
  Paternalism as Social Insurance ....................................................... 175
  Rationality and Reasonableness ...................................................... 180
  Application ......................................................................................... 184
Conclusion ............................................................................................ 190

CHAPTER FIVE – DIGNITY AND HUMAN RIGHTS ............................ 193
Introduction .......................................................................................... 193
Restricting Consent ............................................................................... 196
Dignity and Consent ............................................................................ 198
  Baker and the Moral Limits of Consent ............................................ 198
  Wright on Dignity ............................................................................. 203
  Bergelson on Dignity ....................................................................... 205
The State’s Dominion .......................................................................... 207
  Consent as a Justification ................................................................. 210
  Criticisms of Bergelson ................................................................. 213
Brownsword and Human Rights ........................................................ 217
Reconciling Dignity and Rights ........................................................... 221
A Normative Argument ....................................................................... 223
Conclusion ............................................................................................ 228
SECTION THREE: STUDYING COMBAT SPORTS

CHAPTER SIX - MORALISING COMBAT SPORTS ...........................................231
Introduction .................................................................231
Critical Moral Reasoning ......................................................233
The Promotion of Violence and its Brutalising Effect .......................238
Objectives and Attitudes .....................................................244
Negating Immoralities in Combat Sports ....................................253
  Preliminary Arguments .....................................................253
  Playing with Immorality in Combat Sports ................................255
  Social Designation as a Sport ..............................................261
Conclusion ........................................................................266

CHAPTER SEVEN: INJURIES IN COMBAT SPORTS ..................................269
Introduction ...................................................................269
Brain Injuries ....................................................................271
  Accelerations to the head ..................................................272
  Cumulative Concussions ..................................................274
  The Head as a Target ......................................................276
Brain Injury Patterns ................................................................277
  General Studies .............................................................277
  The Effects of Choking ......................................................281
  Mixed Martial Arts ........................................................284
  Taekwon-Do ..................................................................291
Recurring Themes ..................................................................302
Conclusion ........................................................................306

CHAPTER EIGHT - COMPARATIVE REGULATORY SCHEMES .....................309
Introductory thoughts on Regulatory Schemes ................................309
Regulation in Australia ................................................................313
  Victoria ........................................................................314
  Other States ..................................................................323
United States of America .......................................................325
  Nevada ..........................................................................327
  Other States ..................................................................336
The English and Welsh Law Commission Proposals .......................339
Some Comparisons ................................................................345
Conclusion ..........................................................................350

CHAPTER NINE - CONCLUSION ..........................................................353

BIBLIOGRAPHY ........................................................................368
# TABLE OF CASES

### Canada


*R v Lafontaine* (1979) 9 CR (3rd) 263 (Que. SC).

### England and Wales


*Collins v Wilcock* [1984] 3 All ER 374.


*McFarlane v Tayside Health Board* [1999] 4 All ER 961.

*Mitchell v Glasgow City Council* [2009] 3 All ER 205.

*R v Barnes* [2005] 1 WLR 910.


*R v Bradshaw* (1878) 14 Cox CC 83.


*R v Coney* (1882) 8 QBD. 534.

*R v Cunningham* [1957] 2 QB 396.

*R v Dica* [2004] 3 All ER 593.

*R v Donovan* [1934] All ER Rep 207.


*R v G* [2003] 4 All ER 765.

*R v Ireland; R v Burstow* [1997] 4 All ER 225.

*R v Konzani* [2005] EWCA Crim 706.

*R v Moore* (1898) 14 TLR 229.

*R v Orton* (1878) 39 LT 293.

*R v Rimmington* [2006] 2 All ER 257.

*R v Roberts* (1972) 56 Cr App R 95.

*R v Savage; R v Parmenter* [1991] 4 All ER 698.

Watson v British Board of Boxing Control [2001] QB 1134.

European Court of Human Rights


Hong Kong


Ireland

Bupa Ireland Ltd v Health Insurance Authority and others (Voluntary Health Insurance Board, notice party) [2009] 1 IRLM 81.
Crilly v Farrington [2001] 3 IR 251.
Gorman v Martin and others [2005] IESC 56.
Re a Ward of Court (withholding medical treatment) (No 2) [1996] 2 IR 79.
The People (DPP) v Murray [1977] IR 360.

New Zealand

R v McLeod (1915) 34 NZLR 430.

United Nations Human Rights Committee


Unites States of America

Huntley v Holt 20 Alt. 469 (1890).
TABLE OF LEGISLATION

Australia

Boxing and Martial Arts 2000 (SA).
Boxing and Martial Arts Regulations 2002 (SA).
Combat Sports Regulations 2009 (NSW).
Martial Arts Control (Amendment) Act 1989 (Vic).
Martial Arts Control (Amendment) Act 1990 (Vic).
Martial Arts Control (Further Amendment) Act 1991 (Vic).
Martial Arts Control Act 1986 (Vic).
Professional Boxing and Combat Sports Regulations 2008 (Vic).
Professional Boxing and Martial Arts (Amendment) Act 2001 (Vic).
Professional Boxing and Martial Arts Act 1985 (Vic).
Professional Boxing and Martial Arts Act 1996 (Vic).
Professional Combat Sports Amendment Bill 2009 (WA).

Canada


England and Wales

Female Fenital Mutilation Act 2003.
Medical Act 1983.
Offence against the Person Act 1861.
Prohibition of Female Circumcision Act 1985.
Tattooing of Minors Act 1969.
Ireland

Criminal Law (Rape) Act, 1981.
Infectious Disease Regulations 1981.
Medical Practitioners Act 1978.
Non-Fatal Offences against the Person Act 1997.

New Zealand


United States of America

4 Code of Colorado Regulations 740-1(10.009).
Nevada Administrative Code, Chapter 467.
Nevada Revised Statutes, Chapter 467.
CHAPTER ONE - INTRODUCTION

The degree to which a state may legitimately interfere in its citizens’ lives was one of the most fundamental questions in legal and political philosophy throughout the twentieth century. At the dawning of the twenty-first century the suggested answers to this question are still controversial and the subject of much debate. The question becomes particularly difficult to answer where violence is concerned: if an individual consents to violence being caused against himself or herself, what criminal liability can attach to the causer of the harm? The philosophical and doctrinal answers to this question have been at odds for quite some time.

The main aim of this thesis is to question whether a state may ever legitimately regulate consensual violence. If it may, in what circumstances and to what degree can it regulate such violence? I explore these questions primarily in the context of combat sports. As violent, bourgeoning sports, many legislatures in the US and Australia have had to decide between regulating and banning these sports. This appears to suggest that they cannot easily be accommodated by existing legal frameworks. However, it is not a problem unique to combat sports: instances of consensual violence in the course of sexual or religious practices are also not accommodated by current legal rules. Therefore, some consideration will also be given to these forms of consensual violence. In replying to the two main questions posed at the beginning of this paragraph, this thesis hopes to build a coherent framework in which political communities can respond to instances of consensual violence, where the value of each person is represented in its best light, through the community’s best interpretation of what rights, dignity and autonomy require. Such a framework can also help to bring clarity to an area which, for too long, has been plagued by obscurity, leading to injustices.
Outline

In the context of this thesis, consensual violence will refer to the intentional or reckless causation of some physical harm to another, who has consented to the causation or the risk of causation of that harm. The aims outlined above will be approached by dividing the thesis into three sections: first, a descriptive analysis of the approach of common law courts to consensual violence; second, a normative analysis as to what a political community’s approach should be to consensual violence; and third, an analysis of the moral, medical and regulatory issues concerning combat sports in particular, so as to better understand what our attitudes to such sports should be.

A basic principle of most common law jurisdictions for quite some time has been that the intentional or reckless causation of physical injury is a crime that the consent of the injured party cannot justify. Of course there are exceptions to this rule. Where the harm is caused for “a good reason”—according to public policy—no criminal liability will attach to the causer of the harm. Such a statement is uncontroversial in the context of injury caused during surgery, but it also supposedly covers injuries caused in violent sports such as boxing. As some might view combat sports such as mixed martial arts as being similar to other fighting sports such as boxing, they might assume that new fighting sports would benefit from the same protection at law that is afforded to boxing. In order to test this claim, in Chapter Two there will be an analysis of the so-called boxing exception in order to see if it can accommodate combat sports other than boxing. If combat sports are not covered by such an exception, and if a prosecution did arise from a combat sports bout, what would be the likely outcome? In order to gauge how courts have tended to respond to issues of *new* consensual violence, there will be an analysis of cases to date in England, Wales, Ireland and New Zealand.
Those who have attempted some analysis of the case law in this area have come to the conclusion that there are no general principles to be derived. Rather, the decisions represent *ad hoc* resolutions to hard cases: they tell us nothing conceptually coherent. In cases of such desperation, where principle seems to dwindle, Ronald Dworkin turns to the now renowned super-judge Hercules J. in order to adjudicate according to the principles that integrity requires. Integrity requires that judges interpret the law so that it *fits* with past decisions and *justifies* current legal practice and shows this practice in its best light.\(^1\) The judge’s mission is to “impose order over doctrine”.\(^2\)

It is precisely this order, and subsequently integrity, that is missing from the cases dealing with consensual violence. Using Dworkin’s *law as integrity* as a framework, Chapter Three will investigate what can be said to be the best interpretation of the principles so far enunciated in this area. It will be argued that there can be an underlying rationale which shows the cases on consent in their best light. This rationale can only be derived from distinguishing between exceptions to the general rules which do and do not involve consent. Once this distinction has been made, it will be argued that the regulation of potentially dangerous conduct could be the principle which best fits and justifies the case law.

Therefore, Section One, while analytical, is descriptive of current legal practice and the theory of consent advanced in Chapter Three is a theory to justify this current legal practice in terms of integrity, so that we can think of the case law as creating an integrated web of law, as opposed to a collection of unprincipled, *ad hoc* decisions.

In Section Two there is a move away from the descriptive analysis of current legal doctrine to a normative analysis of what the state’s role *should be* in regulating or banning consensual violence. Since John Stuart Mill’s famous essay, *On Liberty*, the

---


harm principle has been the dominant theory of defining where a state’s criminal laws must end. It states, in essence, that the state should not use its laws to prevent an individual from engaging in actions which do not harm others. This includes not criminalising harm that is self-regarding, or harm that is being caused to an individual with their true consent. Chapter Four assesses the arguments for and against the harm principle. As some of the answers provided by the harm principle are unsatisfying, there will be an attempt to develop a richer theory of criminalisation which acknowledges that states dedicated to ensuring that their citizens lead autonomous lives, may in certain, narrowly conceived circumstances, interfere in a citizen’s self-regarding decisions in order to safeguard that individual’s future autonomy. Future autonomy here does not always act as a trump card. Rather, there needs to be a careful analysis as to whether it is reasonable in the particular circumstances to give more weight to future autonomy, considering a loss of present autonomy is in question.

Chapter Five focuses more narrowly on a state’s relationship with violence and dignity. It is questioned if the harm principle might also be enriched by acknowledging a role for human dignity in the criminalisation project. Such a view is contrasted against the liberal rights-based view on consensual violence. Much like autonomy, dignity is fundamentally offended by individuals not being permitted to act on their own self-regarding choices. However, also like autonomy, there may be special circumstances where the affront to dignity caused by an action is much more severe than an affront which prohibits people from acting on their own self-regarding choices. If dignity is to play a role in the criminalisation process at all, it will be argued that it can only play such a role in allowing a state to take a stance on a morally controversial public issue.
In Section Three, combat sports will be focussed on more squarely. There will be an analysis of combat sports from a critical moral perspective in Chapter Six. This analysis will help focus what our attitude towards combat sports should be. It is often claimed by combat sports proponents, or more specifically, mixed martial arts proponents, that those who are critical of mixed martial arts speak in ignorance. In analysing the arguments in both directions, conclusions will be reached which may be of legal significance, but more importantly, should be of significance for the sport itself. It will be argued that combat sports will be morally questionable as long as they promote the attacking of the head as a method of victory, particularly in professional versions of the sports.

Chapter Seven looks to the medical research concerning the effects on health of participating in combat sports. In asking whether combat sports should be submitted to regulation or banned, much depends on one’s interpretation of the medical evidence. The normative theories advanced in Section Two would only concern combat sports in circumstances where they created a risk of serious harm, including in particular, brain damage to participants. It is argued that the medical evidence shows enough of a risk to warrant legal intervention.

Finally, Chapter Eight looks at some regulatory models that have been introduced in the US and Australia. In these countries, combat sports have proven to be popular and commercially successful activities. Legislatures in both of these countries have already recognised the need to legislate for combat sports in order to control risks. In analysing the regulatory frameworks of these jurisdictions, the best elements of their differing approaches can be highlighted. Using these best elements, it will be argued

---

that it would be appropriate for Ireland, England and Wales to establish legislatively sanctioned commissions to regulate combat sports. Such a commission’s primary aims would be to control and contain risks, and ensure the validity of a fighter’s consent. It would achieve these aims through, *inter alia*, an industry licensing procedure and the setting down of conditions which have to be fulfilled before a fighter is eligible to compete.

**Important Distinctions**

At the outset, it is important to clarify some of the terminology that will be used throughout the thesis. The first major distinction to make is between contact sports and combat sports. By contact sports, I mean sports in which bodily contact is incidental to the playing of the game but where the outcome can only be determined through the scoring of points or goals. For example, football games are generally contact sports, whether they are association football, rugby (league or union), Gaelic football, American football, or Australian football. On the other hand, tennis is a non-contact sport, as is golf, swimming, running and we could think of many other sports where bodily contact between players is neither permitted nor incidental to the playing of the sport, although it may occur accidentally. Combat sports, or fighting sports as some refer to them, also permit bodily contact between opponents, however, the contact here is not incidental to the sport. It is a central constitutive element of the sport, where the only ways of winning require that one competitor physically subdue or demonstrate their ability to physically subdue their opponent through a variety of physical

---

techniques. Examples of these sports include boxing, kickboxing, wrestling, mixed martial arts, Taekwon-Do and a host of other martial arts.

With that important distinction made, I will now make another, hopefully uncontroversial distinction. Throughout this thesis I will use the term combat sports in a special way. I will use it to refer to all combat sports except boxing and wrestling. As I have just noted, boxing and wrestling do fall within any definition of combat sports and it is certainly correct to refer to them as combat sports. I make the distinction between combat sports, in the special sense, and boxing and wrestling because I see a unique benefit in discussing combat sports separate from those two sports. Boxing and wrestling have a culturally distinctive place in western society. Boxing, particularly, has a long and colourful history. People are very familiar with the sports and there is nothing new about them. Some might argue that the same could be said of most martial arts, as they may trace their origins to centuries ago. However, while that argument might be correct with respect to eastern Asian countries, I do not believe it is correct with regard to western countries. Martial arts are still seen as something quite new in western countries, with many such activities only being introduced there from the 1960s onwards, as I will discuss below. A certain shroud of mystery still covers martial arts.

By making the distinction between combat sports and boxing and wrestling, it allows an investigation into what a legal system’s response to new sports, such as mixed martial arts or full-contact karate, might be. Such sports are new instances of consensual violence for a community to deal with. Communities are being confronted with new forms of consensual violence all of the time. Of particular importance in recent decades has been consensual violence for sexual gratification or for religious purposes. These new types of violence present various challenges to legal systems and

---

have generally been met with hostility from the courts. Combat sports present a particular challenge because they flaunt what they do in public, unlike most sexual and religious violence. However, combat sports also have a distinctive saving clause as the violence they commit is in the name of sport. Can combat sports, therefore, not be accommodated into our legal system like boxing and wrestling are? Wrestling actually presents few doctrinal problems as the aim of that sport is not to cause serious harm to the opponent: rather competitors win by pinning their opponent to the mat. Boxing, however, presents significant doctrinal problems. Most argue that boxing is an exception to the general rules. However, it is not clear that combat sports could easily slip into that boxing exception. Part of the boxing exception argument appeals to boxing’s established place in society. The same cannot be said for combat sports. More importantly, combat sports have the potential to be even more dangerous than boxing. I do not claim that they are more dangerous, merely that they have the potential to be more dangerous considering that there are many more techniques which can be used instead of just punching with a fist. Of particular concern might be kicks to the head or techniques which choke opponents into unconsciousness. Therefore, it is not clear at the outset that the boxing exception—whatever that means—can or should accommodate a wide range of other combat sports.

A final distinction might be made between combat sports which have as their aim the causation of serious injury and those that do not. Some will consider overly dramatic or blatantly false the assertion that some combat sports or boxing have the causing of serious injury as their aim. I believe that view to be ultimately disingenuous. Any combat sport that permits the head to be attacked, without restraint, by punches or

---


7 There will be a detailed discussion on this topic in Chapter Seven.
kicks, and promotes the attacking of the head as a way to gain victory by causing their opponent temporary brain damage, knocking them out, must be honest and admit that an aim of the sport is the causation of serious harm.\textsuperscript{8} That is what the rules permit and encourage, and that is what fighters intend to do. I make this distinction because some combat sports do not have such aims. Wrestling, as mentioned above, does not involve the attacking of the head or choking. There are also many combat sports that do not practice full-contact competitions. The International Taekwon-Do Federation, for example, practices semi-contact Taekwon-Do in competitions. In order to score points competitors must land techniques on their opponents, but they must do so in a controlled way, with heavy contact being penalised. In semi-contact competitions the emphasis is on scoring points, instead of knocking the opponent out. This thesis is more concerned about combat sports which permit full-contact and which have the head as a target.

\textbf{A Sense of History}

I noted above that a good reason for distinguishing between combat sports and boxing/wrestling was that combat sports were relatively new to western societies and did not have the same cultural place in those societies as boxing and wrestling. I also mentioned that there was a certain air of mystery that surrounded many combat sports, which in turn might give rise to an attitude of suspicion towards such sports. I will now plot a very brief and general history of how some of the more popular combat sports originally developed and later came to be practiced in western societies.

\textsuperscript{8} See Anderson’s comments, which have a similar sentiment: J. Anderson, \textit{The Legality of Boxing: A Punch Drunk Love?} (Birbeck Law Press, London 2007), at 91.
It has been claimed that the practice of martial arts may stretch back as far as the dawn of Chinese civilisation, 2000-3000 B.C.\(^9\) It is from this period that possibly the earliest martial art was practiced,\(^10\) which involved a form of wrestling where opponent’s donned animal horns and wrestled imitating animals fighting.\(^11\) Since this period, the cultural history of China, Japan and Korea has been intertwined with the development of martial arts. In particular, many martial arts developed as fighting techniques to fight off invasions and occupations.\(^12\)

Kung-fu is claimed to be the precursor of many of today’s modern eastern martial arts.\(^13\) It is unclear if its origins are Chinese or Indian.\(^14\) There is also healthy debate as to whether it can be dated to the sixteenth century B.C. or about 200 B.C.\(^15\) “Kung-fu” is actually an umbrella term for over 400 styles of Chinese martial arts, more properly referred to as “wu shu”.\(^16\) Their development in the West is an example of that which lends so much intrigue to martial arts. When Chinese emigrants arrived in the US during the periods of the Californian gold-rush and the building of the Central Pacific Railroad, they brought their styles of kung-fu with them. However, they practised their arts in secret and generally only passed on their skills to family

---


\(^12\) See for example, J. Corcoran, *The Martial Arts Companion: Culture, History, and Enlightenment* (Friedman Group, New York 1992), at 37, where in the early 1600s Okinawans fought against their Japanese occupiers with just their bare hands and feet: or J. Corcoran and E. Farkas, *Martial Arts: Traditions, History, People* (Gallery Books, New York 1988), at 162, where at several points throughout history, Shao-lin monks helped to protect Chinese coasts from invaders such as the Japanese.


Adding to this secrecy was the association of kung-fu with secret Chinese societies that formed in the US and led to the famous tong wars between the 1850s and the 1920s. These secret societies, vying for control of illegal activities such as prostitution, gambling and the opium trade, used kung-fu trained assassins to dispatch enemies with their techniques and with hatchets. Styles of kung-fu were not taught to non-Chinese people in the US until the early to mid 1960s. However, whatever demystification might have occurred by the opening up of kung-fu styles was probably counter-acted by the influx of Hong Kong kung-fu films of the late 1960s and early 1970s. These low-cost films often depicted scenes of protagonists emerging triumphantly against an overwhelming amount of opponents, using just their kung-fu techniques.

Similar mystique attaches to the history of the Japanese fighting systems that developed. While any system that developed in Japan was probably influenced by Chinese kung-fu, the Japanese nevertheless developed their own distinctive systems. Both ninjas and samurai from feudal Japan developed their own fighting systems, which were ninjutsu, and bujutsu, respectively. These systems could stretch back as far the 13th century. As ninjas were essentially a form of spy, secrecy shrouded their activities...
activities and techniques. It is submitted that this clandestineness has contributed to the perception of martial arts as being mysterious. The samurai’s fighting system, bujutsu, would go on to develop into judo, kendo and aikido, among other martial arts.\textsuperscript{25} Judo is anomalous among the eastern Asian martial arts, as it was introduced to the West at a very early stage. In the 1880s, there was some limited practice of judo in the US, and this grew steadily, with even President Theodore Roosevelt studying judo for a year.\textsuperscript{26} In Europe in the early 1900s, judo demonstrations became popular in circuses.\textsuperscript{27} However, by the late 1920s it was a popular sport in many European countries, leading to the first international tournament between London and Frankfurt based clubs.\textsuperscript{28} However, this development is unique to the martial arts, and judo perhaps became popularised as it was seen to be close to wrestling.

Karate finds its origins in the 1600s, with Okinawans using their bare hands and feet to fight off Japanese invaders.\textsuperscript{29} By the late 1800s karate had evolved with modern characteristics of the martial art being formed.\textsuperscript{30} Most styles common today were formed between 1915 and 1940.\textsuperscript{31} Its introduction into the US was due largely to US servicemen who were stationed in Okinawa after Japan’s surrender in World War II.\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{25} J. Corcoran, \textit{The Martial Arts Companion: Culture, History, and Enlightenment} (Friedman Group, New York 1992), at 41.
\item \textsuperscript{26} J. Corcoran and E. Farkas, \textit{Martial Arts: Traditions, History, People} (Gallery Books, New York 1988), at 212-213.
\item \textsuperscript{27} J. Corcoran and E. Farkas, \textit{Martial Arts: Traditions, History, People} (Gallery Books, New York 1988), at 192.
\item \textsuperscript{29} J. Corcoran, \textit{The Martial Arts Companion: Culture, History, and Enlightenment} (Friedman Group, New York 1992), at 37.
\item \textsuperscript{30} J. Corcoran, \textit{The Martial Arts Companion: Culture, History, and Enlightenment} (Friedman Group, New York 1992), at 37.
\item \textsuperscript{31} J. Corcoran, \textit{The Martial Arts Companion: Culture, History, and Enlightenment} (Friedman Group, New York 1992), at 37.
\item \textsuperscript{32} J. Corcoran, \textit{The Martial Arts Companion: Culture, History, and Enlightenment} (Friedman Group, New York 1992), at 39.
\end{itemize}
Many trained in the art and opened schools in the US when they returned.\textsuperscript{33} This led to a steady growth in karate schools throughout the 1950s,\textsuperscript{34} and a boom period for karate followed during the 1960s.\textsuperscript{35} It was also during this period that karate started to grow in France, and spread throughout Europe from there.\textsuperscript{36}

Taekwon-Do or Taekwondo ultimately developed from taekyon which was a rudimentary martial art/dance which may have been practiced by Koreans from as early as 37 B.C. up until Japanese occupation in 1910.\textsuperscript{37} Modern Taekwon-Do is thought to be a synthesis of taekyon with karate and kung-fu.\textsuperscript{38} It was standardised in 1955 and spread to the West rapidly thereafter. As Corcoran explains:

\begin{quote}
“Beginning in the early 1960s, tae kwon doists launched a massive international campaign. Thousands of Korean instructors, financed by Korea, have been dispatched all over the world since then, and tae kwon do has become one of the most, if not the most, popular martial art practised today.”\textsuperscript{39}
\end{quote}

I wish to return to the point made briefly above about the role cinema has played in both the growth in popularity and in mystique of martial arts. As Corcoran points out, the low-budget Hong Kong movies mentioned above gave the perception of martial

\begin{footnotes}
\end{footnotes}
artists as supermen, with black belts instead of red capes. The same can be said of the folk history associated with many martial arts which is imparted to generation after generation of new students. Martial arts films became hugely popular in the late 1960s and early 1970s on both the big and small screen. Interestingly, before Hollywood thought the public was ready for martial arts films in the 1960s, they remade several Japanese samurai films from the 1940s and 1950s into westerns. Of particular note is the remake of Akira Kurosawa’s *Seven Samurai* (1954) into *The Magnificent Seven* (1960). During the 1960s some films and television series incorporated martial arts into their stories, such as the James Bond film *You Only Live Twice*, and the television series, *The Avengers*. However, it was not until the early 1970s that Hollywood started making their own martial arts films. Films such as *Enter the Dragon* catapulted not just Bruce Lee to international stardom, but also the martial arts. As Corcoran puts it:

“By the late 1960s, Hollywood filmmakers began capitalizing on the visual and dramatic qualities of the Asian fighting arts. By the 1970s, the visual media became the single most significant factor behind the growth and proliferation of martial arts on a worldwide scale.”

---

Although most of the martial arts practiced today have eastern Asian origins, some martial arts did develop in Europe as sports at an early stage. Almost none, however, developed into having any distinctive cultural place in society, as boxing and wrestling have. One such example is a mixture between ancient boxing and wrestling developed in ancient Greece called pankration. It was somewhat similar to modern day mixed martial arts as opponents used punches, kicks, throws, locks and chokeholds to achieve victory. It was included as part of the ancient Olympic Games in 648 B.C. Corcoran submits that pankration did not become a popular sport around the world, and in modern times its practice is mainly confined to Greece.

There was also some development of unarmed combat in Europe during the renaissance period, but few developed into modern sports. One combat sport which did develop quite early in Europe (the seventeenth century) was savate. This was a French martial art which combined boxing techniques with kicking techniques. It grew in popularity as a sport throughout the 1800s, with many savate practitioners challenging established boxers, and was included as a demonstration sport at the 1924 Olympics in Paris. Its lack of mass popularity today, however, is attributed to a major

52 See generally S. Anglo, *The Martial Arts of Renaissance Europe* (Yale University Press, New Haven 2000), and in particular at 172-201.
loss in numbers of practitioners throughout the two World Wars of the twentieth century.⁵⁶

In application, a lot of this thesis will touch upon mixed martial arts. Mixed martial arts allow participants from any martial arts discipline to compete against each other and use any fighting technique, with few exceptions. It is, therefore, an interdisciplinary type of competition, with a host of striking, grappling and submission techniques to choose from.⁵⁷ As noted previously, it is somewhat similar to the idea of pankration, and indeed, there have been various reincarnations of this type of competition throughout the nineteenth and twentieth century.⁵⁸ However, mixed martial arts as promoted by the Ultimate Fighting Championship (UFC) find their origins in the introduction of judo to Brazil in the early part of the twentieth century.⁵⁹ While learning judo during this period, Helio Gracie started to develop his own style because he had not the physical stature to compete against other judo practitioners.⁶⁰ He started to focus on techniques involving leverage, groundwork and submission.⁶¹ His new style would eventually become known as Brazilian Jiu-Jitsu. In order to promote this new form of martial art Helio and brother Carlos issued the “Gracie Challenge”, challenging anyone, including practitioners of other martial arts to fight in a no-holds-barred competition.⁶² Such competitions were becoming popular in Brazil in the 1920s, under

---

the name of vale tudo – anything goes. It is said that Helio remained undefeated for 20 years. In the late 1970s the “Gracie challenge” was brought to the US. Now the challenge was being extended by Rorian Gracie, Helio’s son. He would go on to be the driving force behind the launch of the first UFC tournament in 1993. Throughout the early to mid 1990s the UFC promoted itself as a no-holds-barred competition, which catered for all styles of martial arts fighters. It supposedly had no rules, just two suggestions: no eye-gouging and no biting. Acting against either of these suggestions gave rise to miniscule fines for the fighters. Fights were also promoted as only coming to an end, when, *inter alia*, one of the fighters died. The extreme nature of the competitions and of the publicity led to a major public and political backlash, with many referring to it as human cockfighting. In particular, Senator John McCain was very vocal in his opposition to the sport. The backlash, along with McCain’s strong public stance, would eventually lead to many US states banning the competitions, and

---

perhaps even more importantly, many of the cable television networks stopped airing the fights.\textsuperscript{73}

The UFC was revived in 2001 when the casino owners Frank and Lorenzo Fertitta and boxing promoter Dana White bought the UFC for $2 million.\textsuperscript{74} In order to try to move away from the image of mixed martial arts competitions as being bloodbaths, the UFC adopted the Unified Rules of Mixed Martial Arts. These rules introduced basic rules such as weight categories, round time-limits and a list of fouls. It also hired the experienced Marc Ratner as Vice President of Regulatory Affairs.\textsuperscript{75} Ratner had worked with the Nevada State Athletic Commission for over 20 years, including 14 years as its Executive Director. Ratner would lead the UFC’s charge to become a regulated, recognised and legitimate sport in most states in the US. To further its legitimacy, the UFC adopted a policy that it would only operate in states where mixed martial arts were regulated and overseen by state athletic commissions.\textsuperscript{76} Since the UFC’s renaissance it has become unquestionably the largest and most successful promoter of mixed martial arts in the world: “With UFC’s pay-per-view…events being broadcast in over a hundred countries, and its recent purchase of several of its major competitors…there is no single MMA organization that currently approaches the influence of the UFC”.\textsuperscript{77} This success has translated into the UFC being valued at

\begin{itemize}
\item MMA’s Struggle for Acceptance and How the Muhammad Ali Act would give it a Sporting Chance” (2009-2010) 112 West Virginia Law Review 269, at 274.
\item T. A. Green and J. R. Svinth (eds) \textit{Martial Arts of the World: An Encyclopaedia of History and Innovation} (ABC-CLIO, Santa Barbara 2010), Volume II, at 486.
\end{itemize}
approximately $1 billion in 2008,\textsuperscript{78} and perhaps as much as $2.5 billion in 2010,\textsuperscript{79} along with many using the brand “UFC” as being an interchangeable term for the sport of mixed martial arts.\textsuperscript{80}

\textsuperscript{79} P.B. Wilson, “Q&A with Dana White, the President of the Ultimate Fighting Championship” \textit{Indianapolis Star} (16 September 2010).
\textsuperscript{80} T.A. Green and J.R. Svinth (eds) \textit{Martial Arts of the World: An Encyclopaedia of History and Innovation} (ABC-CLIO, Santa Barbara 2010), Volume II, at 489.
SECTION ONE: THE DESCRIPTIVE THEORY
CHAPTER TWO - CONSENSUAL VIOLENCE AND THE COURTS

Introduction

There has been considerable debate for quite some time in legal and political philosophy as to whether a state which is founded upon the principle of freedom for its citizens is justified in criminalising consensual violence. One side argues that once a true consent is present, that should end the state’s interest in the matter. The other side claims that consent must operate within frameworks of dignity or human rights, and therefore, states may criminalise consensual violence where serious harm is caused.\textsuperscript{81} Blissfully oblivious to these philosophical arguments, both the legislatures and courts of most of the common law world take neither view. They are happy to criminalise consensual violence that causes actual bodily harm\textsuperscript{82}: the general rule is that the intentional or reckless causation of actual bodily harm cannot be justified by consent, unless the harm was caused for a good reason.\textsuperscript{83} The problem is, however, that what frequently counts as a good reason is based on the judges’ tastes and there is no rational distinction to be drawn between what constitutes a good reason and what does not.

\textsuperscript{81} For example see D. J. Baker, “The Moral Limits of Consent as a Defense in the Criminal Law” (2009) 12 New Criminal Law Review 93; V. Bergelson, “The Right to Be Hurt: Testing the Boundaries of Consent” (2006-2007) 75 George Washington Law Review 165; R. Brownsword, “The Cult of Consent: Fixation and Fallacy” (2004) 15 King’s College Law Journal 223. A typical definition of grievous bodily harm or serious harm is “injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ”: s. 1, Non-Fatal Offence against the Person Act 1997 (Ireland).

\textsuperscript{82} In \textit{R v Donovan} [1934] All ER Rep 207, at 212, bodily harm was described as “any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling”. The Crown Prosecution Service gives the following as a list of examples of such harm: loss or breaking of tooth or teeth; temporary loss of sensory functions, which may include loss of consciousness; extensive or multiple bruising; displaced broken nose; minor fractures; minor, but not merely superficial, cuts of a sort probably requiring medical treatment; and psychiatric injury that is more than mere emotions such as fear, distress or panic. See Crown Prosecution Service, ‘Offences against the Person, Incorporating the Charging Standard’ <http://www.cps.gov.uk/legal/1_to_o/offences_against_the_person/> accessed 26 March 2011.

\textsuperscript{83} Attorney General’s Reference (No 6 of 1980) [1981] 2 All ER 1057, at 1059.
This chapter has a number of interlocking aims. First, I will discuss the judgments on which the boxing exception is supposedly established. This exception claims that boxing is a good reason to intentionally or recklessly cause another (at least) actual bodily harm. While a number of themes arise, such as the dangerousness of the activity, whether it is properly conducted and whether it constitutes a breach of the peace, it will be argued that whatever boxing exception was carved out in jurisprudence from the turn of the twentieth century, it is disingenuous to apply that same distinction to modern professional boxing. The problem then arises that if modern boxing cannot genuinely rely on the so-called exception, doubt is cast over whether professional or full-contact amateur combat sports, aside from boxing, can legitimately claim to be covered by the exception.

As the existence or at least the scope of any exception for boxing may be questioned, in the second part of this chapter I will analyse the current appellate jurisprudence concerning consensual violence. While most of the longstanding authority comes from the English and Welsh jurisdiction, other common law countries such as New Zealand are beginning to produce persuasive judgments on issues of consensual violence that are moving away from the traditional approach adopted by, what was, the House of Lords. Indeed, some legislatures are moving to a more liberal stance in this area, as is evident in Ireland, where since the introduction of the Non-Fatal Offences against the Person Act 1997, it was generally thought that individuals could consent to any harm short of serious harm. However, as will be discussed, the Irish courts have recently interpreted the law so as to potentially leave the rules regarding consensual violence stricter than they were prior to the enactment of the 1997 Act.

While discussion of boxing and combat sports does not form part of the ratio decidendi of the cases I will discuss, their rationes are of crucial importance
nonetheless. This is so as they are propositions of law as to how the courts should apply
the normal rules of criminal law to, heretofore, unconsidered areas of consensual
violence. Therefore, while the cases discussed will deal with sexual consensual
violence and religious consensual violence, they nonetheless introduce principles that
may be readily applied to other areas of previously unconsidered types of consensual
violence, such as combat sports.

The doctrinal analysis in this chapter sets the stage for the theory of consent I
propose in Chapter Three. The purpose of this theory is to provide a coherent
explanation of the approach taken by the courts to issues of consensual violence. The
theory is essentially descriptive and requires qualification in certain instances. It is
argued that the regulation of situations where harm or serious harm is intentionally or
recklessly caused is what distinguishes criminal consensual violence from non-criminal
consensual violence.

Dangerous Fighting Sports and Breaching the Peace

There has been much written on the fallacious nature of the boxing exception. It is
fallacious because it is an exception applied to a thing to which it was never meant to be
applied. Take, for example, one of the earlier references to boxing in R v Orton. The
case involved two men fighting each other in a ring, with gloves in a (private) room,
where people were charged money for entry. According to the report, the men fought
with great ferocity for 40 minutes until the police broke up the fight. While such a fight

84 See generally M. Gunn and D. Omerod, “The Legality of Boxing” (1995) 15 Legal Studies 181; N.
Papworth, “Boxing and Prize Fighting: The Indistinguishable Distinguished?” (1994) 2 Sport and the
2007), at Chapter 4; A. Sithampanathan, “Noble art of self defence or unlawful barbarism?” (2002) 13
Entertainment Law Review 183.
85 (1878) 39 LT 293.
would evidently have lacked the safety regulations seen today in fights, it is still
certainly more analogous to today’s fighting than would be the behaviour the court went
on to outline as being acceptable: “if it was a mere exhibition of skill in sparring, it was
not illegal; but, if the parties met intending to fight till one gave in from exhaustion or
injury received, it was a breach of the law and a prize fight, whether the combatants
fought in gloves or not”.86

Prize fighting during this period, generally consisted of large disorderly crowds
gathered around two fighters. The fighters fought, often bare-knuckle, until one could
no longer continue. Such fights were popular public spectacles from the 1600s through
to the 1800s. However, with the loss of support from the elite classes and a growing
judicial determination that such contests be stopped, there was a sharp decline in the
acceptability of such contests in the late 1800s.87 It is Anderson’s thesis that the
modern form of boxing was born from the decided illegality of prize-fighting and that
the course of the evolution of boxing has been directed by legal intervention.88 For
example, in the late 1800s there were two particular problems with boxing: (a) contests
tended to lead to breaches of the peace due to large riotous crowds which attended them
and (b) the nature of the behaviour between the fighters was extremely dangerous to
their health. This was obvious from the judgment in R v Coney.89 The case involved a
question as to whether members of a crowd watching a prize fight could be seen as
aiders and abettors, and therefore be charged with the same crimes as the principals (the
fighters). Central to this question was whether prize fights were to be considered legal
or not. Taking both of the factors outlined above into account, Cave J. reasoned for a

86 (1878) 39 LT 293, at 294.
87 J. Anderson, The Legality of Boxing: A Punch Drunk Love? (Birbeck Law Press, London 2007), at 24-
26, 41-43. See generally Chapters 1 and 2.
See generally Chapters 1, 2 and 3.
89 (1882) 8 QBD 534.
sports exemption (including boxing) and outlined why prize fighting could not be seen as legal:

“The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct a blow struck in a prize-fight is clearly an assault; but playing with single-sticks or wrestling do not involve an assault; nor does boxing with gloves in the ordinary way, and not with the ferocity and severe punishment to the boxers deposed to in Reg. v. Orton.”

However, to apply this view to modern boxing and other combat sports is of no help as it would be an untenable position to contend that the types of assaults in such sports are “not likely, nor intended to cause bodily harm”. That is exactly what they are likely and intended to do.

Stephen J.’s judgment in the same case is also of interest. While coming to the same conclusion as that of Cave J., Stephen J.’s reasoning was based more on the objective dangerousness of the conduct and the injury to the public that such conduct caused:

90 R v Coney (1882) 8 QBD 534, at 539.
“When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured. But the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. Therefore the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults... In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even when considerable force is used, as, for instance, in cases of wrestling, single-stick, sparring with gloves, football, and the like; but in all cases the question whether consent does or does not take from the application of force to another its illegal character, is a question of degree depending upon circumstances.”

Interesting here is the observation that prize fighting is injurious to the public because it is against the public interest that the health and life of a person be endangered. This public interest obviously overrides the person’s right to autonomy in such circumstances according to Stephen J. Stephen J.’s general view aligns with that of Mathew J. who said that “no consent can render that innocent which is in fact dangerous”. Interesting also, is the reference to “sparring with gloves” as being a contrast with the type of conduct that was likely to happen in a prize fight. The assumption clearly being made here is that “sparring with gloves” does not expose life and limb to serious danger. The question thus becomes, can we call modern boxing “sparring with gloves”? The whole concept of sparring is one of practice and perhaps exhibition. It is to distort any real meaning of the word to consider modern professional boxing or mixed martial arts

91 R v Coney (1882) 8 QBD 534, at 549.
92 G. Williams, “Consent and Public Policy” (1962) Criminal Law Review 74, at 80: of the decision he says it “implies that is it right for society to intervene to protect pugilists from the consequences of their own voluntary activities.” Also see V. Bergelson, “The Right to Be Hurt: Testing the Boundaries of Consent” (2006-2007) 75 George Washington Law Review 165, at 190-199, for a discussion on how arguments that suggest that consensual violence ought to be criminalised because such violence is in fact a public harm, are not compelling, in her view.
93 R v Coney (1882) 8 QBD 534, at 547.
94 Notice that in the judgment of Hawkins J. he refers to an “amicable spar” being acceptable as it is a friendly encounter, unless the friendliness is but a ploy to engage in a fight until one is exhausted or unable to continue; (1882) 8 QBD 534, at 554.
bouts to be merely incidents of sparring. Indeed, as Gunn and Omerod point out, “It may well be that the analogy between a sparring match and a boxing match is not sufficient to warrant the legality of the latter”.  

Hawkins J. centred his objection to prize fighting on the grounds that it gave rise to situations which breached the peace. Similarly, Lord Coleridge C.J. emphasised that prize fights were breaches of the peace and therefore consent was not possible. Indeed, while Cave J. discussed what type of conduct could constitute an assault, his claim was that assaults could not be consented to as they were breaches of the peace. The majority, therefore, see the breach of the peace as the overriding reason for the impermissibility of prize fights. This is interesting, considering that modern boxing matches and combat sports do not tend to give rise to such concerns for public peace and order.

Only the judgments of Mathew and Stephen J.J. consider prize fighting in terms of being so objectively dangerous that it was not possible to consent to such conduct. This was so as it was too injurious to the public interest for consent to be a defence.

Anderson sums up the result of Coney as being; “boxing was in the public interest, and was legal, because it was not prizefighting.” What is clear from the Coney judgment is that when the judges spoke of boxing or sparring with gloves, they did not have in mind the type of conduct which is common place in modern boxing. Therefore, from the judgments of Mathew and Stephen J.J., at least, it is not clear whether modern boxing, not to mention other combat sports, has a common law

---

96 R v Coney (1882) 8 QBD 534, at 553-554.
97 R v Coney (1882) 8 QBD 534, at 567.
exemption from the criminal law, as such modern sports do involve conduct which is objectively very dangerous and which is not comparable to the type of conduct which was said to be legal under *Coney*. However, such modern sports may claim such a common law exemption in so far as they cause no breach of the peace, and in the view of the majority, it was the breach of the peace and not specifically the dangerousness of the conduct, which rendered it criminal.

At this point the trail runs cold to an extent. While boxing is mentioned in later cases, it has been argued that the comments are generally *obiter*, due to the facts of the case being decided having nothing to do with boxing, or because the majority put forward such varied analyses that is not possible to pull one binding principle, with regard to a boxing exception, from the rubble.\(^\text{100}\) Up to this point in our analysis it appears as though James summarises accurately that:

> “a combination of over-hyped grudge matches, the emphasis on the knockout punch, the lack of protection for the main target area (the head) and that because injury is an integral and necessary part of participation, these points all demonstrate that professional boxing is the modern equivalent of prize-fighting and should be illegal.”\(^\text{101}\)

\(^\text{100}\) M. James, *Sports Law* (Palgrave Macmillan, Hampshire 2010), at 135, 140, 141.

In Search of a Coherent Theory in the Courts

I will now turn to discuss the common law’s jurisprudence in the area of consensual violence, with the aim of teasing out an underlying rationale for their decisions. Many of the cases involve sensitive areas of liberty, such as sexual and religious freedom. It is interesting to note how the courts react to consensual violence in these situations and to hypothesise how the courts would react to consensual violence in combat sports.

The Traditional Common Law Approach

An early case dealing with consensual violence was *R v Donovan*, in the Court of Criminal Appeal. The case involved a man beating a young woman for his own sexual gratification. Evidence was adduced that both the appellant and the victim had discussed the carrying out of the beating over the phone and had arranged to meet in order to bring their conversation to fruition. At trial, the appellant had been convicted of indecent assault and common assault. He claimed that as the victim had consented there had been no crime. Swift J. delivered the judgment of the court saying that:

---

“If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer...[he continued to say] As a general rule, although it is a rule to which there are well-established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and, when such an act is proved, consent is immaterial.”

This judgment rests on the assertion of certain acts being *malum in se*, or unlawful in and of themselves. Violence which causes bodily harm is denounced as being *malum in se*. There was no authority cited to support this point. Interestingly, both the Irish and English and Welsh Law Commissions accepted that only serious harm should be criminalised. Why would the Commissions suggest legalising conduct which was *malum in se*? The answer must be that the attribution of the characteristic of *malum in se* is a value judgment. Ironically, if it is a value judgment as to whether or not conduct is *malum in se*, the conduct is not really *malum in se*. Surely if something is evil or wrong in and of itself, that evilness or wrongness cannot be taken away by a value judgment? In truth so, *R v Donovan* must be understood as a case based on public policy. It was a matter of public policy that violence causing bodily harm was to be seen as unlawful in and of itself, and when conduct is seen as unlawful in and of itself, it cannot be consented to.

104 [1934] All ER Rep 207, at 211.
107 See Chapter Five, at 207-210, for a discussion on conduct which is *regrettable per se*. However, there is a distinction to be made between conduct which is regrettable in and of itself and conduct which is evil or wrong in and of itself.
The force of public policy was unmasked in *Attorney General's Reference (No 6 of 1980)*, where the Court of Appeal did not cloak such policy in terms of art. Here the reasoning of *Donovan* was given short shrift and described as being tautologous. The judgment in *Coney* was put aside as being the product of a different era, when breaches of the peace were more serious due to less efficient policing methods. Therefore, the court gave its judgment without being burdened by the past authority when it answered the following question: “Where two persons fight (otherwise than in the course of sport) in a public place can it be a defence for one of those persons to a charge of assault arising out of the fight that the other consented to fight?” Lord Lane C.J. quite simply answered that:

“it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason...in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent”.

Aside from the fact that it is the public interest which governs when consent can validly be given to an assault, the qualifier of “for no good reason” is of crucial interest and importance. Thus, if there is a good reason, the public interest would not bar the consent of people causing or trying to cause bodily harm to each other. The qualifier perhaps cancelled the need to further state in the judgment that “Nothing which we have said is intended to cast doubt on the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous

---

109 [1981] 2 All ER 1057, at 1059; Williams also criticises the *Donovan* judgment as being tautologous and incapable of leading to any logical deduction; G. Williams, “Consent and Public Policy” (1962) Criminal Law Review 154, at 156.
110 [1981] 2 All ER 1057, at 1058.
exhibitions etc”. Presumably, however, bodily harm caused in properly conducted games would be for a good reason, as would the harm caused in any of the other activities. Indeed, there are problems with the follow-up statement. Is it in the public interest that children be lawfully chastised to an extent where bodily harm is caused? Furthermore, such cases have nothing to do with consent. Ashworth argues that the public policy test for exceptions is unsatisfactory as “How can it be said that dangerous exhibitions such as circus acts or trying to vault over twelve buses on a motorcycle are ‘needed in the public interest’?” While accepting his point, it may have been a question better asked of boxing, as it seems to me that the dangerous exhibitions he mentions are not ones which involve consent at all. More will be said of this later.

*R v Brown and its Wake*

Undoubtedly the most important decision in this area is that of *R v Brown*. The case involved a group of men involved in consensual sadomasochistic activities. Although no permanent injury was ever sustained from the conduct, there was arguably a risk of greater injury occurring than was actually caused. The appellants were charged under section 47 of the Offences against the Person Act, 1861 for assault occasioning bodily harm, and under section 20 of the same Act for unlawful wounding. There is a considerable amount of debate and controversy over what the case was actually about:

---

115 See Chapter Three, at 122-124.
116 [1993] 2 All ER 75.
117 For a more detailed discussion on s. 47, see Chapter Three, at 104-111.
was it one of consensual violence, or was it one of private sexual conduct? Is there a distinction to be made between the two?

**Sex and/or Violence?**

The majority of the House of Lords considered it a matter of the former variety. Lord Templeman was persuaded that:

“sado-masochism is not only concerned with sex. Sado-masochism is also concerned with violence. The evidence discloses that the practices of the appellants were unpredictably dangerous and degrading to body and mind and were developed with increasing barbarity and taught to persons whose consents were dubious or worthless.”

As such, the question for the majority was whether or not sadomasochist activities could come within an exception to the general rules, which prohibit the intentional causing of actual bodily harm. Lord Lowry, agreeing with Lord Templeman, made the succinct remark that what was involved in the case was not a restraint on some lawful activity, but instead, a refusal by the courts to relax existing laws which prohibited the type of conduct which was part and parcel of sadomasochism. Lord Mustill, on the other hand, was of the belief that the case was really one of private sexual morality, and therefore not the business of the court. He was under the impression that the only reason the conduct was being charged under the 1861 Act was because there was

---

118 As noted in R. Mullender, “Sado-Masochism, Criminal Law and Adjudicative Methods: R v Brown in the House of Lords” (1993) 44 Northern Ireland Legal Quarterly 380, at 382, both the majority and minority appear to have phrased the question in a way which would allow each side to arrive at its own intuitive conclusions.

119 [1993] 2 All ER 75, at 82.


121 [1993] 2 All ER 75, at 99.

122 [1993] 2 All ER 75, at 114, 115.
nothing else with which to charge them.123 This was particularly wrong, according to Lord Mustill, because it was using the 1861 Act to criminalise conduct which was never envisaged as being criminal under the Act.124

Lord Templeman’s opinion was indicative of the majority’s view when he said that “Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.”125 Such thinking was enough to dismiss the broad principle that “every person has a right to deal with his body as he pleases.”126 Unfortunately, the phrasing of Lord Templeman’s speech, as evident above, is often of a conservative, moralist tone and this has given substantial ammunition to his critics.127 Moran, for example, says: “the majority…[were determined] not only to represent the actions of the accused as acts of violence, but as forms of violence that are to be understood as acts so evil that they are not only a threat to the individual but a threat to civilised society”.128 It is clear from the opening paragraph of Moran’s article that he is of the opinion that this was a private, sexual matter.129 Bamfort also considers the activity in Brown to be sexual in nature and invokes powerful arguments from Hart and Duff about the extremely personal nature of one’s sexual appetites and how such appetites are central to an individual’s autonomy. Thus restrictions on an individual’s sexual freedom are not only highly offensive to their autonomy, they also subject them to a particular, ongoing misery.130 Moran goes on to lambast the European Court of Human Rights for endorsing the

124 [1993] 2 All ER 75, at 115.
125 [1993] 2 All ER 75, at 84.
126 [1993] 2 All ER 75, at 82.
House of Lords decision in *Laskey*,\(^{131}\) and references Hedley’s analysis of the judgment, in which he wrote that the House of Lords had read “the European Convention on Human Rights with the pedantry they should reserve for regulations on the production and packaging of light-bulbs. Human rights treaties interpreted in that spirit give rights to no-one”.\(^{132}\)

It seems to me that a number of issues arise and are indeed, at times, misrepresented, in the criticisms of the *Brown* judgment. The first issue to note is that sadomasochism appears to encompass a wide range of activities, some of which do not involve the causing of harm at all. In their submission to the Law Commission’s consultation paper, the “Countdown on Spanner” group partly defined sadomasochism as sex by “obtaining pleasure from an exchange of power and/or pain in consensual sex play or sexual fantasy”.\(^{133}\) Sadomasochism may thus involve many activities that do not entail wounding or causing actual bodily harm. This is important, as it is wrong to suggest that *Brown* decides that the “giving and receiving of pain for purposes of sexual pleasure” is unlawful,\(^{134}\) or indeed that it bans sadomasochism. It is only when the harm caused reaches a level of actual bodily harm, that the conduct becomes unlawful under *Brown*.

The emphasis put on the private and sexual nature of the harm caused also seems to be somewhat misleading. If one engages in sadomasochism that results in actual bodily harm being caused, that sadomasochism necessarily involves the carrying out of conduct, which, when a particular state of mind is present (i.e. the intention to carry out the conduct, or being reckless as to the consequences one’s conduct will bring

about) then an offence has been committed under English and Welsh law. For some, it seems tempting to say that despite the fact that the requirements of the crime were fulfilled, because of its private, sexual and consensual nature, the conduct cannot be criminalised. However, the private, sexual and consensual nature of sexual intercourse between a well informed, mature 15 year old girl and a 20 year old man, will still be the law’s business. In this particular case, the 15 year old who understands the nature and quality of the act and is eager and happy to engage in it, but cannot due to the laws on unlawful carnal knowledge of a minor, is having her autonomy offended by the state. Of course, there may be very good reasons for the state to restrict her consent in these circumstances because of the risk that many 15 year olds will not have the maturity or understanding to engage in sexual activities – however unrealistic such a judgment may be.\footnote{See C. O’Sullivan, “Protecting Young People from Themselves: Reform of the Age of Consent Law in Ireland” (2009) 31 Dublin University Law Journal 386.} In both the causing of actual bodily harm and underage sexual intercourse, the state employs a normative judgment to invalidate the consent given and thus criminalise the conduct, even though the consent given was perfectly valid. Both cases rest on presumptions, either that individuals do not want to sustain actual bodily harm to their persons, or that young people of a certain age cannot understand the nature and consequence of sexual conduct. Note in both scenarios, however, that it is the restriction of the individual’s autonomy that is problematic, and that is why we may criticise the state’s normative judgment. It is not the fact that the conduct is private, consensual and sexual. Whether actual bodily harm is caused in public or in private is irrelevant. The causing in public will merely attract other possible charges of breaching the peace etc. Similarly, the fact that conduct is consensual will not automatically make the conduct lawful: the consensual, unregulated, killing of another individual is unlikely to be ever decriminalised. Finally, and perhaps most importantly, the sexual
nature of the conduct cannot automatically deflect criminal liability. If an individual
gets their ultimate sexual pleasure from driving their sports car at 200 km/h on a bad
road where the speed limit is 80 km/h, it will not be an answer to some charge of
dangerous driving to claim one was simply exercising their sexual freedom. And it does
not matter how much misery they will have to suffer, as Hart suggests, by not being
permitted to engage in this conduct due to criminalisation.\textsuperscript{136} While the private,
consensual and sexual nature of conduct should not and cannot act as some form of
protective cloak from the remit of the criminal law, that is not to say that they should
not be taken into account and given proper importance in determining the normative
judgment the state will make in particular situations.

On this point, we must also note Lord Mustill’s comments that the question for
the House was “whether the public interest requires s 47 of the 1861 Act to be
interpreted as penalising an infliction of harm which is at the level of actual bodily
harm, \textit{but not grievous bodily harm},\textsuperscript{137} (emphasis added) which occurs in private and is
of a consensual, sexual nature. It appears as though Lord Mustill is saying that had the
harm caused been grievous in nature, the private, consensual, sexual nature of the
activity would have been irrelevant. Allen certainly interprets the minority’s judgments
as being so, and says “Both their Lordships accepted that a victim’s consent to harm
amounting to grievous bodily harm was ineffective”.\textsuperscript{138} The question then becomes,
why do the three elements—private, consensual, sexual—protect actual bodily harm
from the normal rules, but not grievous bodily harm? How does the level of the harm

\textsuperscript{137} \textit{R v Brown} [1993] 2 All ER 75, at 114: the argument that the courts should ask whether there is a good
reason to criminalise the conduct is also the basis for Kell’s “social disutility” model in D. Kell, “Social
argument Kell’s model falls foul of the argument below about the 1861 Act being all encompassing in the
interpersonal violence it criminalises; see below at 38-40. As a normative argument, it does not go far
enough, as it allows for the state to potentially intervene when only actual bodily harm is caused
intentionally or recklessly; see Chapter Five, at 223-224.
caused fundamentally change the nature of the conduct? It is hard to see how the causing of actual bodily harm is merely a private, consensual, sexual matter, not for the courts, but the causing of grievous bodily harm transforms the nature of the conduct into violence criminalised under the 1861 Act. There is an inconsistency to Lord Mustill’s reasoning here, and while it may make sense to say that there is a stronger public policy argument to invalidate consent to grievous harm than there is to invalidate it in cases of actual bodily harm (especially where such harm is in private, consensual and of a sexual nature), that is not the same as arguing that there is a change in the nature of the conduct itself: i.e. that when actual bodily harm is caused, it is merely a private sexual matter, but when grievous harm is caused, it then becomes violence that may be criminalised. There is no logic or consistency to such an argument and it thus must be rejected.

If the argument I present is accepted, the fact that there is a private, sexual, consensual element to the case cannot change the fact that the case involved harm that is criminalised in the 1861 Act. That being so, I would argue that the majority were correct in starting from the position that the conduct was unlawful under the 1861 Act and thus required justification.

As noted above, Lord Mustill, and some commentators, appeal to arguments of the nature that the legislature could not have possibly contemplated the legislation being used to criminalise some specific type of conduct, even though it fulfils the criteria of the crime. Therefore, by criminalising the conduct in Brown, the court was essentially making new, retroactive law. This is an extraordinary claim which must be taken very seriously. However, such an argument seems to be particularly problematic and ultimately unconvincing. The very need for the courts to expound

139 [1993] 2 All ER 75, at 101.
exceptions for surgery and sports etc. from the ambit of the legislation presupposes that
the courts have interpreted the 1861 Act as being all encompassing when it comes to the
interpersonal harm it criminalises. One would assume that the legislature had not
intended that harm caused during properly conducted surgeries should be criminalised,
yet the courts have felt the need to specifically refer to surgery as an exception from the
exempt, and the courts often refer to surgery which is “necessitated” as being exempt,\footnote{R v Brown [1993] 2 All ER 75, at 88, 90, 109 [Lord Mustill refers to “proper medical treatment”].} therefore the legality of surgery which is not necessitated is possibly up for debate.
Furthermore, if I decided to perform an appendectomy on a friend who required one,
with their consent, despite having no qualifications or experience in performing such a
procedure, it is likely that I would be committing a criminal offence, unless I had a good
reason. So for example, if we were trapped on a mountain and it became evident that
my friend’s appendix was about to burst imminently, perhaps my actions would be
justified. Without such a good reason, the only type of surgery which would be exempt
from the rules of the 1861 Act would be the type carried out by appropriately qualified
surgeons (and possibly only in circumstances where the surgery is necessitated).

On this point, it is also interesting to note the observations of the Irish Law
Reform Commission when they discussed the English and Welsh Prohibition of Female
Circumcision Act, 1985.\footnote{Law-Reform-Commission, Report on Non-Fatal Offences Against the Person (LRC 45-1994, Dublin 1994), at 40.} The Commission described the Act as being arguably
unnecessary, as the activity prohibited by the Act was already an unlawful activity due
to the 1861 Act.\footnote{This Act has subsequently been replaced by the Female Genital Mutilation Act 2003.} For similar reasons, MacKay also described the proposed bill as
perhaps being an unnecessary measure,\textsuperscript{145} agreeing with the then Lord Chancellor, Lord Hailsham, who argued the activity was already unlawful.\textsuperscript{146} However, there is no specific mention of female circumcision in the 1861 Act, just as there is no mention of sadomasochism. Therefore, the Commission held the view, as I do, that the 1861 Act must regulate all interpersonal violence, unless the legislature has since passed legislation which takes certain areas of such violence from its sphere, such as the Prohibition of Female Circumcision Act.

With these arguments in mind, I would reject the view that the 1861 Act was not intended to criminalise the type of conduct that was in question in \textit{R v Brown}. Furthermore, I would refute any notion that the \textit{Brown} case concerned anything like retroactive criminal law-making. Given that the 1861 Act seems to have always been interpreted by the courts as encompassing all forms of interpersonal harm, it is not surprising or inconsistent for the courts to once again re-affirm that view. That being so, the majority, in my view, proceeded correctly in their approach of seeing the activity as conduct criminalised under the 1861 Act and questioning if there was a good reason to place the conduct in a special exempt category.\textsuperscript{147}

\textbf{The Role of the Legislature}

I have attempted to clarify the starting point for the judgments in \textit{Brown}. Needless to say this is of crucial importance and it is indeed interesting to note that there would have been agreement among the majority and minority if they had started from the same point. For the majority, Lord Templeman felt that he would be creating new law by

\textsuperscript{147} See below at 61-62, for a discussion on the ineligibility of the premise of Lord Mustill’s argument.
exempting actual bodily harm caused during sadomasochism from the remit of the 1861 Act and thus said it was Parliament’s role to legalise such conduct. Interestingly, Lord Mustill admitted that had he started from the same position as the majority, he would have reached similar conclusions:

“As I have ventured to formulate the crucial question, it asks whether there is good reason to impress upon s 47 an interpretation which penalises the relevant level of harm irrespective of consent: ie to recognise sadomasochistic activities as falling into a special category of acts, such as duelling and prize-fighting, which ‘the law says shall not be done’. This is very important, for if the question were differently stated it might well yield a different answer. In particular, if it were to be held that as a matter of law all infliction of bodily harm above the level of common assault is incapable of being legitimated by consent, except in special circumstances, then we would have to consider whether the public interest required the recognition of private sexual activities as being in a specially exempt category. This would be an altogether more difficult question and one which I would not be prepared to answer in favour of the appellants, not because I do not have my own opinions upon it but because I regard the task as one which the courts are not suited to perform, and which should be carried out, if at all, by Parliament after a thorough review of all the medical, social, moral and political issues…Thus, if I had begun from the same point of departure as my noble and learned friend Lord Jauncey of Tullichettle I would have arrived at a similar conclusion; but differing from him on the present state of the law, I venture to differ”.

There, therefore appears to be agreement that the decriminalisation of consensual violence is a question of public policy, and as such, it is best answered by the legislature of the day, “the appropriate body for making a representative pronouncement of moral condemnation”. The legality of the conduct carried out in the course of sadomasochistic activities will depend ultimately on how much weight the state gives to autonomy and if autonomy is counterbalanced by any other interests, such as the maintenance of human dignity for example. The legislature can be held

---

148 [1993] 2 All ER 75, at 82.
149 [1993] 2 All ER 75, at 115.
accountable for its public policy decisions in a way in which the judiciary cannot be. That, along with the resources to carry out the type of investigation that Lord Mustill refers to, is what makes the legislature a more suitable vehicle for deciding whether certain types of conduct should be outside the remit of the criminal law. Of course, that is not to say that there is not an important role for the courts in declaring unconstitutional, legislation which overly interferes with our private lives, as a statute declaring homosexual sadomasochism to be illegal, might well do. As it is, the state hides behind the men and women in robes, refusing to tackle sensitive issues of public policy and refusing to make decisions that could prove unpopular. It is interesting to note, that despite being severely criticised, *R v Brown* is still good law almost 20 years later.

**Criticisms**

The real criticism of the *Brown* case was the court’s unwillingness to extend the amount of harm to which one can consent. As noted in the introduction to this chapter and as will be discussed further below, the debate that rages in legal and political philosophy is whether the state is justified in criminalising serious harm caused consensually. It is almost taken for granted that the state is not justified in criminalising actual bodily harm. I would respectfully submit that the main problem with the English and Welsh approach is that it sets itself an almost impossible task of making distinctions between acceptable and unacceptable forms of consensual violence because it starts at such a low threshold. To prohibit an individual from deciding whether or not they want another person to bruise them is quite invasive and I would suggest overly infringes upon the individual’s autonomy. The difficulty arises at assessing the upper levels of harm that are on the fringe of actual bodily harm and grievous bodily harm. The breaking of a
bone would generally be considered actual bodily harm. However, there is a substantial difference between consenting to someone breaking your finger and consenting to them breaking a bone in your back. While drawing a line may be difficult, it is unacceptable to burden individuals’ autonomy because the legislature is not willing to make a decision. Furthermore, while the courts may have been applying precedent, Lord Mustill and other commentators have asserted that the House was not bound by the precedent and could have started afresh in its approach to the consensual causing of harm. As such, it would have been more desirable if the majority had engaged in a discussion on why it was necessary to prohibit individuals from consensually causing actual bodily harm to each other, in private, in any context. In avoiding such a discussion and blindly accepting that the limit to consensual harm is actual bodily harm, the majority in Brown did not give enough consideration to individual autonomy. Giles correctly asserts that the House of Lords:

“have hidden their considerable influence on such policy decisions on a case-by-case basis, and failed to acknowledge freely or discuss openly the very obvious policy assumptions which underlie the decision-making process in such cases. This is judicial law-making at its worst and most confused - unchallengeable because unacknowledged.”

**Boxing in Brown**

There was some discussion of boxing in Brown. Most of the discussion takes places as a counterpoint to the conduct involved in sadomasochism, with boxing being presented as a lawful activity. Lord Templeman identified boxing as a lawfully permitted, saying:

---

“Even when violence is intentionally inflicted and results in actual bodily harm, wounding or serious bodily harm the accused is entitled to be acquitted if the injury was a foreseeable incident of a lawful activity in which the person injured was participating...Ritual circumcision, tattooing, ear-piercing and violent sports including boxing are lawful activities.”

He then continued to discuss the case law on prize-fighting, merely providing a summary of precedents, with no presentation of an argument or justification for the legality of boxing. Hesitantly, he comes to the conclusion that “rightly or wrongly” it was considered a lawful activity, unlike fighting in general and duelling.

Lord Mustill’s judgment attempted to grapple with a justification for the acceptability of some forms of violence, like boxing, and the supposed unacceptability of others, like sadomasochism. Such an approach led to a more illuminating analysis of modern day boxing:

“For money, not recreation or personal improvement, each boxer tries to hurt the opponent more than he is hurt himself, and aims to end the contest prematurely by inflicting a brain injury serious enough to make the opponent unconscious, or temporarily by impairing his central nervous system through a blow to the midriff, or cutting his skin to a degree which would ordinarily be well within the scope of s 20 of the 1861 Act. The boxers display skill, strength and courage, but nobody pretends that they do good to themselves or others. The onlookers derive entertainment, but none of the physical and moral benefits which have been seen as the fruits of engagement in manly sports... It is in my judgment best to regard this as another special situation which for the time being stands outside the ordinary law of violence because society chooses to tolerate it.”

His point here is that there is no true theory of consent which allows for the conduct in a boxing match. It is merely a value judgment of the court and of society. Therefore, while his account of boxing is more interesting that that of Lord Templeman’s, both reach rather intellectually unsatisfying conclusions in basing the exception in mere

---

152 [1993] 2 All ER 75, at 79.
153 [1993] 2 All ER 75, at 79.
154 [1993] 2 All ER 75, at 107, 108.
public taste. Importantly, however, while the point may have been *obiter*, it must be noted that the House of Lords was willing to accept modern day boxing as a lawful activity. Therefore, while it may be argued that the court in *Coney* could not be interpreted as granting an exception for modern day boxing, it can equally be argued that in *Brown*, albeit *obiter*, the court accepted modern boxing’s legality. However, this does not clarify the legality of combat sports, as it is less clear if society chooses to tolerate such sports given their different historical and cultural background to boxing.

Lord Jauncey of Tullichettle’s judgment is quite instructive as it focuses on both the danger of the activities in question and the lack of regulation. Although he was making an argument in favour of taking into account the potential harm that can be caused by an activity, when considering the public interest, I believe his comments are particularly important in differentiating between regulated and unregulated activities. Thus while it was contended for the appellants that *safe words* had been agreed upon, so that if the pain got too much for them, they could stop the conduct, it was pointed out that “None of the appellants…had any medical qualifications and there was, of course, no referee present such as there would be in a boxing or football match”.155 He went on to state that it was the public interest which drew the line between what one could consent to and what one could not. In analysing the conduct in the light of the public interest he said:

“it would appear to be good luck rather than good judgment which has prevented serious injury from occurring…and an inflicter who is carried away by sexual excitement or by drink or drugs could very easily inflict pain and injury beyond the level to which the receiver had consented.”156

155 [1993] 2 All ER 75, at 85.
156 [1993] 2 All ER 75, at 91.
As I will discuss below, although Lord Jauncey of Tullichettle does not explicitly recognise that regulation is what differentiates the sadomasochistic conduct from boxing, his judgment comes closest to, what I think, is the true distinction.

On a final note, it is perhaps arguable that amateur boxing’s legality has been implicitly confirmed by the British government through their acceptance to host the Olympic and the Commonwealth Games, as boxing is a constituent sport of both competitions. If such an argument was accepted, the legality of amateur Judo and amateur Taekwondo would also be confirmed, as they too are constituent sports of both competitions.

**Brown in the European Court of Human Rights**

The case was appealed to the European Court of Human Rights in *Laskey v UK*. At paragraph 43, the Court came to the conclusion that it was the State’s right to regulate violence, regardless of its sexual nature. Indeed the Court found that because of the level of injury and the level of possible injury involved in the case, it was not a matter of private morality to be compared with that of homosexual behaviour. Interestingly, the Court agreed with Lords Templeman and Jauncey of Tullichettle in saying that the Court was entitled to have regard not just to what harm was actually caused, but what harm could have potentially arisen from the acts. As a codicil, some comments made

---

157 Note that when Stockholm hosted the Olympics in 1912, boxing was not included in the schedule of events owing to Sweden’s ban on boxing.


160 *Laskey, Jaggard, and Brown v The United Kingdom* [1997] Case No. 109/1995/615/703-705, at [46]. See also *K.A. and A.D. v. Belgium* (17 February 2005, applications nos. 42758/98 and 45558/99), where the European Court of Human Rights found that Belgium had not been in breach of the convention for prosecuting sadomasochist acts. However, in that case there was a question as to the validity of the consent given by the victim, as the Court heard that the applicants had continued their conduct despite the victim asking them to stop.
in a concurring judgment by Judge Pettiti might be added. He was of the opinion that not only can the state legitimately regulate violence, but it can “regulate and punish practices of sexual abuse that are demeaning even if they do not involve the infliction of physical harm”.¹⁶¹

While *Brown* is certainly a most singular case, its relevance to this discussion is paramount. It does not only reiterate, rightly or wrongly, that one cannot consent to any harm which is above the level of actual bodily harm, it also imbeds the boxing exception in the common law. For while it may be argued that the conduct in professional boxing today could not have been contemplated in *Coney*, the judges in *Brown* were well aware of the nature of modern professional boxing. Further and more interesting is the court’s attitude to new exceptions to the general rule on consent. It will effectively take into account the dangerousness of the activity as well as how it is regulated. It is believed that it is the latter which is the key to the problem at hand in a theory of consent and more shall be said of this in the next chapter. Finally, it is clear, as approved by the European Court of Human Rights, that the state holds dominion over the sphere of violence in society. It is the state which will decide what type, where and how, violence is carried out in the state. Violence which occurs without regard to the state’s dominion may expect to be punished, regardless of its nature, be it sexual or otherwise.

**Applying Brown in the Court of Appeal**

There have been powerful objections to *Brown* on the grounds that it was a decision biased by the Lords’ intolerance for homosexual behaviour. While it is true that many of the Lords displayed their disgust at the activities (as did, it must be said Lord

Mustill), it does not seem clear that their judgments were based purely, if at all, on these moral judgments. Yet, the case of *R v Wilson*,\(^\text{162}\) would seem at first consideration to support the notion of the court’s bias against homosexuals. It involved a husband branding his initials on his wife’s buttocks with a hot knife, at her request, as a display of love for him. He was found guilty of occasioning actual bodily harm at trial, as the judge felt bound by the precedent in *Brown* to direct the jury that the wife’s consent to the conduct was not a defence. At the Court of Appeal, Russell L.J. stated that the conduct had been analogous to tattooing and that it was not any more dangerous than such.\(^\text{163}\) He also went on to say that it was not in the public interest for consensual conduct in a marital relationship to be subject to the criminal law.\(^\text{164}\) Objectors to the decision in *Brown* might understandably be critical that the conduct was exempted because it happened within the context of a marriage.

Is the key distinction between *Brown* and *Wilson* the dangerousness (actual or potential) of the harm that was carried out? Smith agrees that the conduct in the case was essentially the same as tattooing.\(^\text{165}\) However, Roberts submits that Mrs Wilson actually sustained “greater and more permanent disfigurement” than any of the victims in *Brown*,\(^\text{166}\) which somewhat discredits the dangerousness argument. The European Court of Human Rights, however, accepted that *Brown* and *Wilson* could be distinguished due to the difference in seriousness of the conduct in each case.\(^\text{167}\) But they did not comment on the issue of marital privacy. Indeed there has been substantial criticism of the idea that a distinction could be drawn between the cases based on

---

\(^{162}\) [1996] 4 LRC 747.

\(^{163}\) [1996] 4 LRC 747, at 750.

\(^{164}\) [1996] 4 LRC 747, at 750.


marriage, with many submitting that such a rule would be outdated. However, due to
the potential difficulty in actually comparing the branding in *Wilson* with tattooing,
Harris has argued that the true ratio of the case may be that married couples receive
preferential treatment, allowing them to consensually cause each other harm. It is
submitted that the idea of consensual conduct within a marriage not being a proper
matter for criminal prosecution or investigation is fallacious, as a husband who
euthanizes his wife will be as guilty of murder, at law, as a doctor who euthanizes a
patient who is, in all other aspects, a stranger to him. Therefore, even if Harris is
correct in his assertion that the conduct in *Wilson* is not really comparable to tattooing,
the alternative ratio suggested is equally problematic and unsafe. It might also be
noted that whether or not the conduct in *Wilson* actually gave rise to a dangerous
situation is a matter of fact, not of law. Therefore, much of the criticism of this case
may actually be of a poor factual finding.

The Court of Appeal’s approach is also of extreme interest in this case. It
effectively decided the case under Lord Mustill’s approach, thereby starting from the
position that the conduct was lawful and questioning whether there was a good public
interest reason to make the conduct unlawful. This completely ignores the binding
precedent from the *Brown* decision in the House of Lords. This has led some to
suggest that *Wilson* was actually decided *per incuriam* and that it is therefore, authority
for nothing. Some suggest the better view is to see this, as well as the comments

---

170 In F. McAuley and J. P. McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell, Dublin 2000) at 532, it is suggested that remarks about marital privacy should be understood in the context of non-dangerous conduct.
about privacy in marriage, as being *obiter*.\textsuperscript{173} Indeed, it is ironic that Russell L.J. admonished the Crown Prosecution Service (CPS) for taking the case and the trial judge for feeling bound by the House of Lords’ decision in *Brown*, for it seems clear that it was the CPS and the trial judge who were following the law, and the Court of Appeal who were not.\textsuperscript{174}

Looking at *Wilson* in a wider context shows that it was decided at best, on unstable grounds, and at worst, on incorrect grounds. Furthermore, it is unfair to hold it up as an example of judicial bias against homosexuals or unmarried couples. Roberts considers, but ultimately seems to reject the idea of the distinction being based on the sexuality of the participants due to the fact that it would so clearly be at odds with not only principle, but the UK’s obligations under the European Convention on Human Rights.\textsuperscript{175} Some have questioned whether the outcome would have been different if the participants had admitted to deriving sexual pleasure from the acts in *Wilson*.\textsuperscript{176} This is to be doubted. In fact, it is clear from the reasoning of their judgment that the Court of Appeal felt *Brown* had been wrongly decided and therefore tried to avoid its application by distinguishing the two cases on dubious grounds.\textsuperscript{177} If anything, *Wilson* gave hope to those involved in consensual harming activities because it showed an unwillingness to apply the majority’s decision in *Brown* and possibly an appetite for an overturning of that decision in the future.

In passing, it might also be noted that the Court did err in *Wilson* in its suggestion that the conduct was analogous to tattooing, and tattooing required “no state

authorisation”. This is potentially incorrect: local authorities have discretion as to whether to implement Part VIII of Chapter 30 of the Local Government (Miscellaneous Provisions) Act, 1982, and its byelaws, which regulate tattooing. More shall be said of this later.179

Bias against homosexuals in sadomasochistic activities has, perhaps, been put to bed in *R v Emmett*.180 In this case a heterosexual couple engaged in sadomasochism where the female was asphyxiated and burnt with lighter fluid, requiring her to attend a doctor’s surgery on two occasions. The Court of Appeal specifically ruled out any contention that heterosexual sadomasochism should be treated any differently to homosexual sadomasochism, even though the point was *obiter* as neither side had contended the point. The defendant attempted to rely on *R v Wilson*, claiming consent to be a defence. As the Court in *Emmett* accepted *Wilson* as a correctly decided case, it was forced to make a distinction between the facts in *Wilson* and the facts in the case before it. The court dismissed the appeal saying that there was potential for far greater damage to be caused in this instance and the realistic risk had gone beyond that of a transient injury. It continued to say that the conduct at issue had been unpredictably dangerous, as could be seen from the occasion on which the appellant’s partner had been asphyxiated. It was contended that had the asphyxiation gone on for much longer than it had, the woman could have potentially suffered brain damage or died, as the appellant had became distracted with the sexual excitement of the activity. As well as noting *Wilson* for being authority that branding which caused actual bodily harm was not contrary to section 47 of the 1861 Act because it did not give rise to a risk of serious harm and it was analogous to tattooing, the Court also noted that in *Wilson* the Court of

179 See Chapter Three, at 138-140.
Appeal had not thought it appropriate to interfere in consensual husband/wife activity within the matrimonial home. Although it is still refuted that all consensual activity between a husband and wife in private is truly beyond the scope of the law, the courts may presently hold such a position.\(^{181}\)

The difference between the *Brown*/Emmett decisions and the *Wilson* decision may rest on the potential for serious harm to be caused. As mentioned, Roberts argues that the injury caused in *Wilson* was arguably more serious than that caused in *Brown*,\(^{182}\) although this is refuted in *Emmett*, where it was noted that the doctor in the *Wilson* case made no reference to there being a scar. However, the point is that there was no real potential for the harm caused in *Wilson* to become life-threatening. Rightly or wrongly, the House of Lords did believe the conduct in *Brown* had the potential to cause more harm than was in fact caused, and it was certainly the case in *Emmett* that more harm could have resulted, than did in fact result. Is the rule thus that consent will not be a defence when actual bodily harm is caused in the course of conduct which is unpredictably dangerous and which has the potential to cause more harm than is, in fact, caused? There is support for such a conclusion from the judgments of the majority in *Brown*, with Lord Templeman referring to the activities as being unpredictably dangerous;\(^{183}\) Lord Jauncey saying it was only good luck which prevented more serious injury from being caused;\(^{184}\) and Lord Lowrey referring to the possibility of things getting out of hand.\(^{185}\) As will be discussed below, the principle that seems to arise from these three cases in one of regulation of dangerous activities which have the potential to cause serious harm.

---

\(^{181}\) It is therefore the unmarried and presumably those who have not entered into a civil partnership under the *Civil Partnership Act, 2004* who do not have the same protection of their private conduct that married and civil partners do.


\(^{183}\) [1993] 2 All ER 75 at 82.

\(^{184}\) [1993] 2 All ER 75 at 92.

\(^{185}\) [1993] 2 All ER 75 at 99.
James argues, in relation to boxing, that such reasoning is disingenuous to an extent, because normally the law criminalises the contact, not the consequences and certainly not the potential consequences.\textsuperscript{186} However, this seems to potentially miss the point. The point would seem to be that where violence is unregulated and there is a potential for serious harm to be caused, the state takes the position that individuals should not engage in such violence.

**The New Zealand Approach**

*R v Lee*

In 2006, the New Zealand Court of Appeal was confronted with a case of religious consensual violence in *R v Lee*.\textsuperscript{187} It involved an exorcism being performed by the appellant, during which he bounced on the victim’s chest and applied force to her neck. When the victim tried to struggle she was restrained. She died during the exorcism as a result of her injuries. At trial, the judge withdrew consent as a defence for the defendant. The judgment delivered by the Court of Appeal was, I would submit, one of the most careful and clear in this area. The case law and legislative positions of several other common law jurisdictions were taken into account, and there were many references to the philosophical underpinnings of criminalisation, as opposed to a purely doctrinal analysis. The fact that there was a single judgment delivered by Glazebrook J. on behalf of the full court of Anderson P, McGrath, Hammond and William Young J.J., also lent clarity and cohesiveness to the judgment: elements which are at times elusive in *Brown*. The Court decided that the trial judge had been incorrect to withdraw the

\textsuperscript{186} M. James, *Sports Law* (Palgrave Macmillan, Hampshire 2010), at 141.
\textsuperscript{187} [2006] 3 NZLR 42; [2006] 5 LRC 716.
The general law was summarised as follows:

“[313] The test in New Zealand at common law is not a results-based test. If injury is not intended and there is no reckless disregard for the safety of others, then consent is a complete defence to any charge of assault, provided what occurred comes within the scope of the consent.

[314] Where injury was intended or where the perpetrator was reckless, consent is still a complete defence, provided what occurred comes within the scope of the consent, except in the situations set out below.

[315] Apart from sparring matches or playfights and organised matches conducted with a referee and according to established rules, consent is not a defence in relation to fighting. Those involved in sparring matches and playfights must not be acting in reckless disregard for the safety of others and must not intend to cause bodily injury for consent to be operative.

[316] Where grievous bodily harm is intended, public policy factors may require the judge to withdraw the defence of consent from the jury. The same applies where a perpetrator acts in reckless disregard for the safety of others. When deciding whether consent should be withdrawn as a defence on public policy grounds in such situations the judge should take into account the right to personal autonomy, the social utility (or otherwise) of the activity, the level of seriousness of the injury intended or risked, the level of risk of such injury, the rationality of any consent or belief in consent, and any other relevant factors in the particular case.

[317] Under these principles, consent must be left to the jury if there is an evidential basis for it, except where s 63 applies [which states that no person can consent to being intentionally killed], in cases of fighting, and in cases where grievous bodily harm is intended or where the perpetrator acts in reckless disregard for the safety of others and the judge withdraws the defence on public policy grounds. Any withdrawal of the defence will usually be a conditional withdrawal, as it will be for the jury to decide whether the Crown has proved intent to inflict grievous bodily harm or that the perpetrator has acted in reckless disregard for the safety of others. In any particular case, there may also be other factual prerequisites to the withdrawal of consent as a defence which may need to be decided by the jury.

[318] Where consent is left to the jury, it will be for the jury to decide whether the Crown has proved both lack of consent (either explicit or implied) and lack of honest belief in consent or whether the Crown has proved that what happened does not come within the scope of any consent and that the perpetrator did not honestly believe that it did…”

---

The Court, therefore, adopted a Lord Mustill-esque approach by asking whether there was a good reason to withdraw consent, as opposed to asking if there was a good reason to exempt the behaviour from the remit of the criminal law. However, the Court in Lee went much further than Lord Mustill did in Brown. Lord Mustill’s approach involved asking whether there was a good reason to criminalise instances of actual bodily harm, but such a test was not to be extended to the causing of grievous bodily harm. This is rejected in Lee. Instead Glazebrook J. makes it clear that it is only when grievous bodily harm is intentionally or recklessly caused that the court may consider if there are good public policy reasons to withdraw consent.

It is also worth noting that as the Court of Appeal would allow consent to be operative in “organised matches conducted with a referee and according to established rules”, that boxing, and indeed other combat sports, would all be legal in New Zealand, as long as they were subject to some degree of regulation. Although it would presumably be possible for a court to withdraw consent in some such organised matches if the court found, as a matter of public policy, that the sport was too objectively dangerous, or that rules were not well enough established.

Religion

Kaven seems to portray Lee as a heroic pronouncement on religious freedom. The Court did explicitly say that exorcisms were manifestations of religious beliefs and it seemed to accept the European Court of Human Rights’ ruling, that religious beliefs

---

193 R v Lee [2006] 3 NZLR 42, at 120 [323]; [2006] 5 LRC 716, at 801 [323].
194 Kokkinakis v Greece (1994) 17 EHRR 397.
were central to the identity and life of believers.\textsuperscript{195} Furthermore, concerns of exploitation of children and the mentally ill were not allowed to impact on the ability of fully informed adults to consent.\textsuperscript{196} The Court also rejected concerns about dissent in a religion being viewed by those in authority as being some sign of being possessed.\textsuperscript{197} The requirement that there be a rational belief that consent was given would operate to ensure justice in such a case. Furthermore it was pointed out by the Court that the automatic withdrawal of consent in cases of exorcism could have the unintended result of also affecting more mainstream religions while performing such rituals.\textsuperscript{198} It was also noted that the right not to be deprived of life, did not constrain people from voluntarily taking part in an activity where they ran the risk of being deprived of their life.\textsuperscript{199}

Given these remarks one would be inclined to agree with Kaven’s portrayal of the case. However, such a reading neglects more vital parts of the judgment. The Court was clear in saying that if a jury was satisfied that Mr Lee had either intended to cause grievous bodily harm or had acted recklessly with regard to the victim’s safety, a court might then be entitled to withdraw the defence of consent on public policy grounds, weighing up several factors. In this regard, the Court was unwilling to give such religious conduct an exception from the general rules on consent, and thus place it on the same level as boxing and medical intervention. It stated:

\textsuperscript{195} R v Lee [2006] 3 NZLR 42, at 121 [325]; [2006] 5 LRC 716, at 801 [325].
\textsuperscript{196} R v Lee [2006] 3 NZLR 42, at 121 [326]; [2006] 5 LRC 716, at 801 [326].
\textsuperscript{197} R v Lee [2006] 3 NZLR 42, at 121 [327]; [2006] 5 LRC 716, at 801 [327].
\textsuperscript{198} R v Lee [2006] 3 NZLR 42, at 121 [328]; [2006] 5 LRC 716, at 801-802 [328].
\textsuperscript{199} R v Lee [2006] 3 NZLR 42, at 122 [330]; [2006] 5 LRC 716, at 802 [330].
“We have considered the question of whether consent should be always treated as operative where the recklessness or the intentional infliction of grievous bodily harm is for religious purposes, in the same manner as consent is treated as operative for boxing...and medical and surgical procedures... We do not consider that it should be. This is an area where it would be legitimate to conclude that there may be ‘a pressing social need sufficient to justify the restriction on such conduct’.”

Religion was therefore not accepted as some form of protective cloth from the scope of criminal liability in consensual violence, just as sexual expression was not afforded such a cloth in Brown. In fact, recognising exorcisms as being part of religious beliefs and that such beliefs are integral to the identity and life of believers, seem to be on one hand, trivial gains, and on the other hand, nothing we did not know already. Nor can it be said that special protection is given to religious conduct up until grievous bodily harm is caused, as this protection is given to all conduct (except fighting) until such harm is caused. In essence, the Court’s pronouncements are best construed as factors to be taken into account when deciding whether to withdraw the defence of consent. The question will therefore be, in the light of the conduct, should public policy factors outweigh the autonomy of the individual concerned, with their religious beliefs being a fundamental part of that autonomy.

201 R v Lee [2006] 3 NZLR 42, at 123 [337]; [2006] 5 LRC 716, at 803 [337]: religious belief is described as being an important factor in considering the public policy question.
202 Contrast the Lee approach to consensual violence in religion with the approach taken by the Hong Kong Court of Appeal in the case of R v Yuen Chong [1996] 4 LRC 751, at 752, where the court said: “Religious mortification was not a special situation affording a defence to a charge of inflicting actual bodily harm. Nor was there any indication that society tolerated such infliction of harm.”
Public Policy Exceptions

The Court continued to give with one hand and take away with the other when discussing the general rules on consent. It ruled that:

“there is an ability to consent to the intentional infliction of harm short of death unless there are good public policy reasons to forbid it and those policy reasons outweigh the social utility of the activity and the value placed by our legal system on personal autonomy”. 203

The court was also of the opinion that although every interference with individual autonomy had to be justified, autonomy did not have a trumping effect.204 While the critics of Brown might laud the Lord Mustill approach of the Court, they may be less impressed by the considerations that the Court felt would justify withdrawing the defence on grounds of public policy. For example, if the consenting person were injured to such an extent so that they would become a charge on society, that would be a valid reason for withdrawing consent.205 To support this idea, the Court refers back to earlier parts of its judgment where it cited the views of Gonthier J. in R v Jobidon,206 where he stated “Erasing longstanding limits on consent to assault would be a regressive step, one which would retard the advance of civilised norms of conduct”.207 However, this argument can justify nothing, as it could also be used to support keeping the limit of harm to which one can consent at actual bodily harm.

The Court then went on to quote a somewhat famous passage from Fletcher, where he stated:

---

203 R v Lee [2006] 3 NZLR 42, at 116 [300]; [2006] 5 LRC 716, at 796 [300].
204 R v Lee [2006] 3 NZLR 42, at 116 [300]; [2006] 5 LRC 716, at 796 [300].
205 R v Lee [2006] 3 NZLR 42, at 116 [301]; [2006] 5 LRC 716, at 796 [301].
207 [1993] 1 LRC 790, at 817.
“the self-destructive individual who induces another person to kill or to mutilate him implicates the latter in the violation of a significant social taboo. The person carrying out the killing or the mutilation crosses the threshold into a realm of conduct that, the second time, might be more easily carried out. And the second time, it might not be particularly significant whether the victim consents or not. Similarly, if someone is encouraged to inflict a sadomasochistic beating on a consenting victim, the experience of inflicting the beating might loosen the actor’s inhibitions against sadism in general.”

These arguments accepted by the Court in *Lee* are open to substantial criticism. Bergelson condemns the argument concerning individuals becoming a charge on society and says that similar reasoning could be used to ban the poor from having children and to sterilise the mentally ill against their will. It is unsure how well such criticism stands up, as there is quite evidently a distinction to be made between the centrality to the person of being allowed to have a child and a family and the centrality to the person of being allowed to ride a motorcycle without a helmet. The former is clearly something which belongs to a set of priorities much more central to the essence of personhood. In any case, it is submitted a better proposition is put forward by Harris. In the context of sadomasochism, (although it could be applicable to any activity) he suggests there would have to be statistical evidence to show that the percentage of people who become a public charge as a result of their activity is significantly higher than the percentage of people who become a public charge from mountain climbing, parachute jumping etc., in order to justify banning the activity. Even if the percentage was shown to be substantially higher, it would have to be shown that the actual number of people becoming a public charge was also considerable.

---

Harris is also extremely critical of Fletcher’s idea, presented above. Although he was not responding to Fletcher, but instead to a similar proposition put forward by Hughes that: “there is the danger that if X may with impunity inflict serious bodily harm on Y with Y’s consent, X may by a process of addiction, as it were, come to inflict serious harm on those who do not consent”.\(^{212}\) To this general proposition, Harris responds with sound logic which is hard to ignore:

“Without empirical proof, however, the assertion that X may come to beat others without their consent must be an intuition about the psychological nature of man. If the reasoning is a priori, it leads to absurd results. For with equal logic the law could prohibit U from having intercourse with V, who consents to the act, on the grounds that U may, ‘by a process of addiction, as it were,’ come to have sexual intercourse with A, B, or C, who do not consent. In short, sexual intercourse may be banned to prevent forcible rape. What is needed, in other words, is empirical proof, not a priori reasoning”.\(^{213}\)

Justifying restricting consent on grounds of “civilising norms”, the burden on society test, or Fletcher’s lowering inhibitions argument, seem to be vague and open to criticism. Such criticism leaves the justifications unstable. Although it must be stated that the Court would consider the above rationales only in balancing those rationales with “the level of risk of grievous bodily harm, the social utility of the activity… [and] the right to personal autonomy”. Even with this balancing test in place, the test still appears to leave a lot of room for judicial manoeuvring. Indeed, considering that the majority in Brown saw the behaviour as being very dangerous, if the fact finder in that case had concluded that the participants had acted with reckless disregard for the safety of others, the majority in Brown could have easily relied on any of the aforementioned grounds to withdraw consent.


The Court also made interesting comments about whether a consent was real and voluntary, saying that people free from mental illness etc. do not usually allow themselves to be subjected to grievous harm. As one would expect, there would thus have to be a thorough scrutiny of the voluntariness of the consent. This, however, is likely to be difficult in situations where the victim has died as a result of their injuries, or perhaps sustained some form of serious brain damage rendering them unable to provide an account of the events. If the victim was unable to verify their consent, the question arises as to whether there is a presumption that the consent was not real or truly voluntary or that no reasonable person could have held a rational belief in the consent given. There is certainly support for such presumptions to be drawn from the judgment, considering that the Court was of the opinion that generally one would have to be suffering from some serious mental deficiency to consent to such harm.

This discussion serves to highlight a problem with much of the doctrinal criticism. Even if those who suggest that consent should be an operative defence to all levels of harm against individuals, and that the prosecution should have to demonstrate why the conduct should be criminal on public policy grounds, are correct, the public policy grounds that could be proved are so vague that no real rights are won. Further and more worryingly, one might genuinely wonder about the legitimacy of a justice system which indicated to people that they could cause grievous bodily harm to one another, but when they do so, they run the risk of being effectively retroactively criminalised on public policy grounds. At least there were not natural justice concerns with the Brown approach. It seems to me that neither doctrinal approach as presently espoused, is satisfactory. The Brown approach is normatively too restrictive on individual liberty, while the Lee or Lord Mustill approaches are completely ineligible,

---

214 *R v Lee* [2006] 3 NZLR 42, at 116 [301]; [2006] 5 LRC 716, at 796 [301].

215 *R v Lee* [2006] 3 NZLR 42, at 116 [301]; [2006] 5 LRC 716, at 796 [301].
as they deprive individuals of the ability to plan their affairs in advance by knowing what is and is not prohibited by the law. Consider the difference between the following two propositions, representing Brown and Lee, respectively. In the first, an individual knows certain behaviour is criminal, but also knows that there is a possibility that that behaviour will be found to be justified or excused on public policy grounds before a court. This is to be contrasted with knowing that it is normally legal to behave in a certain way (Lee – cause any harm short of death; Lord Mustill – cause actual bodily harm) when consent is present, but if that behaviour becomes the subject of a criminal trial, it may be criminalised on public policy grounds in retrospect. It seems to me that the former proposition is one which is encountered daily in the courts and is quite acceptable. The latter proposition, however, is devoid of justice and not an eligible proposition on which to base criminal law or its sanctions. Indeed, I would submit that such an approach may fall foul of Article 7 of the European Convention on Human Rights, which states:

“No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed”.

As accepted in the House of Lord in R v Rimmington, Article 7 would preclude “the punishment of acts not previously punishable, and existing offences [being]… extended to cover facts which did not previously constitute a criminal offence”. Allowing public policy arguments to support the retroactive criminalisation of conduct (as espoused by the Lee/Lord Mustill approach) would thus appear to be contrary to Article 7.

216 [2006] 2 All ER 257.
217 [2006] 2 All ER 257, at 279 [35].
R v Barker

Lee was recently interpreted and applied in the New Zealand Court of Appeal case, R v Barker. The case involved two girls, aged 15 and 17, who underwent scarification carried out by Mr Barker, aged 50. The scarification took place in a room which Mr Barker had specifically set up for sadomasochistic purposes. Both scarifications took place in a sadomasochistic context, with the 15 year old being suspended by chains and whipped, before being scarified and the 17 year old being dressed in sexual apparel and being scarified while suspended from chains. There was also evidence that the 17 year old was intoxicated at the time, although it was unclear whether she had helped herself to the nitrous oxide which was on the premises or whether Mr Barker had offered it to her. There was conflicting evidence as to whether the girls had fully consented to the conduct or whether their consent had been withdrawn at some stage. This was irrelevant for the trial judge, as he withdrew the defence of consent on public policy grounds and Barker was charged and convicted of injuring with intent to injure and wounding with intent to injure.

The Court of Appeal took Lee as binding authority on the issue of when consent could be withdrawn on public policy grounds but the Court was not in agreement about Lee’s interpretation. Glazebrook J., who wrote the judgment in Lee, took the view that once intent to cause serious injury was proven, consent could be withdrawn on public policy grounds, even if serious injury was not caused and the actual charge was lower than a charge for causing serious harm. She went on to say:

---

“The reality is that there must be a sliding scale in applying the test set out at para [300] of Lee, which...applies to all levels of intended harm. This means that the more serious the level of intended harm, the more likely that public policy factors will serve to exclude consent. The scope for taking into account individualised factors, such as those outlined at para [301] of Lee, will increase as the intended level of harm increases, although, in applying the test, judges should heed the warning (at para [296] of Lee) not to let personal views of acceptable behaviour intrude and to remember the high value to be placed on personal autonomy (see para [302] of Lee).”

Glazebrook J. continued to say that Mr Barker had intended to cause more than mere bodily injury, even if he did not intend to cause grievous bodily harm. Considering the aforementioned sliding scale, she felt that the trial judge had been correct in taking into account public policy factors with regard to withdrawing consent. The factors that the trial judge held to be relevant in withdrawing consent were also held to be correct. The general theme of the public policy argument was the age of the victims, which then linked into the sexual nature of the activity. However, there were elements of the public policy discussion which seemed to operate independent of the victims’ ages. First, the fact that the conduct had taken place in an unprofessional and needlessly risky manner was deemed to be important, as was the view that the scarification was devoid of artistic merit and was administered in a degrading fashion. The victims’ ages do not seem to have any bearing on these factors and it is an interesting insight into what judges may consider to be appropriate grounds for withdrawing consent. Once again, under the Glazebrook J. interpretation of Lee, it is not hard to see the defendants in Brown also being held criminally liable for their conduct once the prosecution could establish that they had a reckless disregard for the safety of others. It is also interesting to note that Glazebrook J. did seem to suggest that

\[ R v Barker [2010] 1 NZLR 235, at 248 [66]. \\
\[ R v Barker [2010] 1 NZLR 235, at 250 [81]. \\
\[ R v Barker [2010] 1 NZLR 235, at 250 [81]. \\
\[ R v Barker [2010] 1 NZLR 235, at 251-252 [82-89]. \\
\[ R v Barker [2010] 1 NZLR 235, at 251 [85-86]. \]
had the victims been older, the withdrawal of consent as a defence would have been more difficult, although the judge refused to give an express opinion on the subject.\textsuperscript{226}

It was also urged that it was the mixture of all of the factors, including their young age, which would have justified the withdrawal of consent.

The vagueness of appealing to public policy can be seen here quite vividly. While admittedly, the age of the victims seems to be some type of highly reactive chemical which ignites the public policy explosion, the elements it reacts with are incredibly interesting. We go from a “burden on society” argument to a “devoid of artistic merit” argument. This must also be seen in the context of Glazebrooks J.’s comments in Lee that consent would only be withdrawn on public policy grounds where the activity was inherently dangerous, in the sense of it being more probable than not that grievous bodily harm would result from the conduct.\textsuperscript{227} It is hard to see scarification falling within such a category, especially where an example of such conduct would be shooting a rifle at an untrained volunteer’s head.\textsuperscript{228}

Hammond J. disagreed with Glazebrook J. on the issue of public policy.\textsuperscript{229} He appealed to the idea that scarification was popular and served not only ornamental purposes but formed part of certain coming-of-age rituals as well. This could be seen as an important part of individual autonomy and in any case, how would a court be able to distinguish between general scarification and thousands of razorblade cuts to the face which form part of some culture’s rituals\textsuperscript{230}. This argument presupposes that a ruling imposing criminal liability upon Mr Barker would have the effect of creating a general rule which criminalised scarification. But such a presupposition ignores the particular

\textsuperscript{226} R v Barker [2010] 1 NZLR 235, at 252 [88].
\textsuperscript{228} R v Lee [2006] 3 NZLR 42, at 109-110 [271]; [2006] 5 LRC 716, at 789, [271].
\textsuperscript{229} R v Barker [2010] 1 NZLR 235, at 256-258 [122-130].
\textsuperscript{230} R v Barker [2010] 1 NZLR 235, at 256-258 [130].
material facts of this case, where the scarification was carried out in an unprofessional and somewhat dangerous manner, leaving the victims to an extent disfigured, as opposed to decorated. Scarification, including ritual scarification, appears to be a delicate art form, not best administered on people dangling from chains (as expert evidence confirmed at the trial). Therefore, just as we might say it would be ludicrous to criminally prohibit all surgeries, we would think it right to impose criminal liability on a surgeon who performs the surgery in an unprofessional manner. A surgeon who performs open heart surgery on a patient dangling from chains may well expect a knock on their door from the law. Taking this into account, Hammond J. could easily have distinguished the case before him from more professional, or well organised versions of the activity.

While O’Regan J. agreed with Hammon J. that the public policy factors were not strong enough to withdraw the defence of consent (and indeed specifically noted that Glazebrook J.’s approach with regard to public policy was more akin to the majority approach in Brown), his primary disagreement with Glazebrook J. was about her view that there was a sliding scale for applying the Lee test. He was persuaded that no such sliding scale existed and that consent could only be withdrawn for public policy reasons when the offence charged was one of intent to cause grievous bodily harm, or reckless disregard for the safety of others. There is a clear logic to O’Regan J.’s argument: why would the fact finder/jury be asked to establish whether intent to cause grievous bodily harm was proven if that offence was not charged? In fact what is elucidated here is the classic problem of categorising different harms. A sore bruise could attract the same charge of occasioning actual bodily harm in England,

233 R v Barker [2010] 1 NZLR 235, at 259 [139].
234 R v Barker [2010] 1 NZLR 235, at 259 [139].
as would two broken legs. The sentence may differ, but the charge could be the same. Glazebrook J.’s approach recognises this difficulty in assessing the different levels of seriousness of injury that are captured by the same offence. Perhaps this is a consideration that should have been taken into account in Lee, as Glazebrook J. certainly seems to backtrack. However, the way in which she tries to backtrack is easily torn asunder by O’Regan J.’s straightforward practical argument.

Essentially for Glazebrook J.’s view to be correct, the Court would also have to be permitted to withdraw consent when just bodily harm was caused. However, as a matter of policy it would only withdraw consent to the lower charge in cases where the conduct was seriously dangerous and was just short of being grievous in nature. Furthermore, the public policy grounds would have to be very strong in order to withdraw the defence. However, considering what Glazebrook J. was ready to accept as a strong argument to withdraw the defence (the lack of artistic merit), it seems almost certain that Brown would have been decided similarly using Glazebrook J.’s modified Lee approach.

All things considered, it seems to me that the Court was closer to the right answer in this case when it discussed the unprofessional manner in which the conduct was carried out.

The Uncertain Irish Position

In Ireland, prior to the enactment of the Non-Fatal Offences against the Person Act 1997, the governing legislation in this area was the Offences against the Person Act

---

235 This is closer to Lord Mustill’s view in Brown and the view expressed in D. Kell, “Social Disutility and the Law of Consent” (1994) 14 Oxford Journal of Legal Studies 121, as it would allow the state to criminalise instances of actual bodily harm when there were good public policy reasons for doing so.
1861. Thus the law in Ireland would have been the same as in England and Wales to that date, with any court considering a case of consensual violence likely to look to the English and Welsh cases as being persuasive authority. The 1997 Act was thought to have liberalised the area by increasing the threshold of harm to which one could consent to anything less than “serious harm”. However, through a mixture of poor drafting and poorer interpretation, the 1997 Act has left this area of law in a greater state of disarray than it was prior to its enactment.

This section describes and analyses a recent Supreme Court decision, Minister for Justice, Equality and Law Reform v Dolny, which potentially has the effect of radically limiting the amount of harm to which individuals can consent. Further, it may have the effect of treating the causation of harm as a strict liability offence. First, the section will summarise the facts of the case and the issues that arose. Second, the judgment handed down in Dolny will be outlined and there will be an attempt to discern the ratio decidendi of the case. There will then be a critique of the court’s approach and it will be argued that the methods of interpretation employed by the court were flawed and that the conclusions reached were dangerously mistaken and potentially unsafe.

The Issues in Dolny

The case involved a Polish citizen who was arrested on foot of a European arrest warrant arising from the following circumstances:

---

236 S. 1 of the Non-Fatal Offences against the Person Act 1997, defines “serious harm” as “injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ”.


238 S. 1 of the 1997 Act defines “harm” as “harm to body or mind and includes pain and unconsciousness”.
“On 20th June 2004 in Krzyz Wlkp., Wielkopolska district, acting together and in collaboration with Mr Rafal Berger and Mr Tomasz Wyrwa, [Mr Damian Dolny] beat Mr Andrzej Lnka by hitting him on the face and head with his fists, thereby causing injury to his body in the form of a contused wound in the left suborbital area and a contused wound in the area of the right superciliary ridge – thus exposing him to the direct danger of sustaining grievous detriment to his health.”

In the High Court, counsel for the respondent claimed that section 5(1) of the European Arrest Warrant Act 2003 had not been fulfilled. It provides that:

“For the purposes of this Act, an offence specified in a European arrest warrant corresponds to an offence under the law of the issuing state, where the act or omission that constitutes the offence under the law of the issuing state would, if committed in the State, constitute an offence under the law of the State.”

This is important as it relates to section 38(1) of the 2003 Act, where it is provided that:

“a person shall not be surrendered to an issuing state under this Act in respect of an offence unless—

(a) the offence corresponds to an offence under the law of the State…”

It was claimed that the offence outlined in the warrant was analogous to an offence under section 3 of the Non-Fatal Offences against the Person Act, 1997, which provides that “A person who assaults another causing him or her harm shall be guilty of an offence”. Counsel for the respondent argued that as section 3 was phrased in terms of an assault, it must incorporate the definition of assault from section 2(1) of the same Act, which provides:

239 [2009] IESC 48, at [3(2)].
“A person shall be guilty of the offence of assault who, without lawful excuse, intentionally or recklessly—

(a) directly or indirectly applies force to or causes an impact on the body of another, or
(b) causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact,

without the consent of the other.”

As consent is part of the definitional element of the crime of assault under section 2(1) of the Act, the same would be true for the offence at section 3. Therefore, the prosecution would have to prove the absence of consent to convict under section 3. Counsel continued to argue that it would therefore be necessary for the warrant to outline that the offence was committed without the consent of the victim and that while a jury may draw an inference of lack of consent, the court could not.

The court was thus asked to resolve a question over which there had been some academic debate: whether section 3 incorporates the definition of assault from section 2(1). In her note on the Act, Bacik says that: “…consent [is not] referred to in the sections providing for more serious types of assault.”241 From this it must be assumed that she does not believe that the section 2 definition of assault is carried over into section 3, for if she did, consent would be referred to in section 3, as the assault element of the offence would require the absence of consent. While a similar view is held by Charleton et al, their discussion on the topic seems to be inconsistent. Although they state that it is strongly arguable that one can only consent to assaults that do not reach the level of causing harm,242 they also make the argument that the only thing which distinguishes section 2 from section 3 is the addition of the external element: the

242 P. Charleton, P. A. McDermott and M. Bolger, Criminal Law (Butterworths, Dublin 1999), at [9.87].
causing harm.\textsuperscript{243} This argument seems to presuppose that the word “assault” in section 2 holds the same meaning as the word “assault” in section 3.

McAuley and McCutcheon are especially alert to the problem of the “carry over definition”.\textsuperscript{244} They believe that the Act should be read in a way which incorporates the definition of assault from section 2(1) into the crime at section 3(1). But they do not believe that is what the legislature intended because in their view such an interpretation of section 3 would result in a major liberalisation of Irish law.\textsuperscript{245} This view is debateable given that the Law Reform Commission did broadly recommend such a liberalisation\textsuperscript{246} and, furthermore, in the Dáil Éireann debates over the legislation, the then Minister for Justice, Equality and Law Reform, Nora Owen, made it clear that she was taking the recommendation of the Law Reform Commission with regard to this liberalisation. She stated:

“Under the present law, consent cannot be a defence to a charge of causing actual bodily harm. The Law Reform Commission recommended that such a rule is no longer appropriate and I have accepted that view. Since section 3 is framed by reference to an assault and consent is a defence to simple assault, it will also be a defence where actual bodily harm is caused”.\textsuperscript{247} (emphasis added)

\textsuperscript{243} P. Charleton, P. A. McDermott and M. Bolger, Criminal Law (Butterworths, Dublin 1999), at [9.92].
\textsuperscript{244} F. McAuley and J. P. McCutcheon, Criminal Liability (Round Hall Sweet & Maxwell, Dublin 2000), at 532-533.
\textsuperscript{245} McAuley and McCutcheon also note that the liberalisation of the law evident from sections 2 and 3 is irreconcilable with section 22, which imports the common law rules that provide defences for harm caused under the 1997 Act. This is so as these defences are based on the lower threshold of harm to which one could consent at common law: see F. McAuley and J. P. McCutcheon, Criminal Liability (Round Hall Sweet & Maxwell, Dublin 2000), at 533.
If this is how the 1997 Act is supposed to be read, it should have raised the threshold to which one can consent from the common law concept of assault, to any harm which did not constitute serious harm. This can be seen from the definition in section 4, which provides that “A person who intentionally or recklessly causes serious harm to another shall be guilty of an offence”. It is noticeable here that the lack of consent is not part of the offence and therefore the lack of consent on behalf of the victim does not have to be proved by the prosecution. As clear as the Minister’s words were in relation to the section’s interpretation, the Supreme Court confirmed the common law exclusionary rule in Crilly v T. & J Farrington Ltd, which prevents courts from using extrinsic evidence in the form of parliamentary debates in order to ascertain a statute’s proper meaning. On this basis, in resolving questions of interpretation before it, the court could only look to the legislation itself.

**The Dolny Judgments**

Peart J. was unconvinced by the argument that “assault” in section 3 was to be defined by “assault” in section 2 and concluded as follows:

---

249 [2001] 3 IR 251.
“The offences created respectively by s. 2 and s. 3 of the 1997 Act, are distinct and different offences. An assault under s. 2 requires for its commission that the person assaulted did not consent to being assaulted, as well as that the assault be inflicted without lawful excuse and intentionally or recklessly. The section is clear in that regard. But the separate and distinct offence of ‘assault causing harm’ in s. 3, contains no such requirements. It is a separate offence, and it is not the case that s. 2 is intended to define the concept of ‘assault’ for all purposes of the Act. There is no definition of assault contained in s. 1 of the 1997 Act, or elsewhere therein.

Section 3 provides for a freestanding offence of ‘assault causing harm’, as opposed to a simple assault. In order to be guilty of this offence, a person must have carried out an assault and must have caused ‘harm’ as defined in section 1 of the 1997 Act. In such an offence, it is not part of the offence that it occurs without the consent of the victim. That is clear from the plain meaning of the words used in the section. In section 3, the word ‘assault’ is not used as a term of art by reference to the provisions of s. 2, or by reference to any statutory definition of that word. The Concise Oxford Dictionary definition of ‘assault’ is ‘a violent physical or verbal attack’. That is the meaning to be given to the word ‘assault’ for the purpose of the section 3 offence…

In order to be guilty of this offence, a person must have carried out an assault and must have caused ‘harm’ as defined in section 1 of the 1997 Act… The requirement that the assault be without the consent of the victim, or that there be any mental element, is distinctly absent from the express provisions of the s. 3 offence of assault causing harm”.251 (emphasis added)

As section 3 is not to incorporate the definition of assault from section 2, but instead is to be a standalone section only requiring that harm be caused, that would mean that individuals cannot consent to being caused harm in Ireland. Furthermore, as there is no requirement that a mental element be proved, it would appear as if the causation of harm is a strict liability offence.

The case was appealed to the Supreme Court and counsel for the appellant urged that Peart J.’s interpretation on the 1997 Act be reconsidered. They also pressed the point that it was not for the court to infer a lack of intention and that in order for

correspondence to be met under the 2003 Act, the details in the warrant should provide enough details to draft a valid indictment in the Irish jurisdiction.252

The portion of Peart J.’s judgment cited above was quoted with approval by Denham J., with whom Kearns and Macken J.J. agreed, in the Supreme Court.253 However, while Peart J. had based his judgment solely on his interpretation of section 3, the Supreme Court went further and rejected the submission that European arrest warrants should provide enough details to draft valid indictments.254 Furthermore, Denham J. held that the words used in warrants are to be given their ordinary meaning.255 Thus when the warrant outlined that the appellant “beat” the victim, the court was entitled to infer a lack of consent, as the ordinary meaning given to the word “beat” includes such an inference. In concluding Denham J. said: “I have no doubt that the acts alleged, beating the named person by hitting him on the face and head with fists, thereby causing injury to his body, are ordinary words which describe acts which would constitute an offence if committed in this jurisdiction.”256

**Determining the *Ratio Decidendi***

Before analysing the High Court interpretation of section 3 of the 1997 Act, approved by the Supreme Court, it is important to consider the interpretation’s binding effect. While the High Court’s ruling turned exclusively on section 3’s interpretation, the Supreme Court ruling did not. As there would have been an inference that consent had not been given to the beating, there would have been correspondence with section 3 of the 1997 Act, without interpreting it as not being defined by section 2. The case could

---

255 [2009] IESC 48, at [17].
256 [2009] IESC 48, at [18].
have been resolved on this point alone. However, it is important to recognise that while
the court could have decided on this point alone, it did not. Both courts found it
necessary to interpret section 3 when dealing with the material issue of correspondence.
The fact that the Court could have decided the case on one ground alone does not stop
both grounds from forming part of the ratio decidendi, as Goodhart explained in his
seminal article on the subject:

> “Having determined the first set of facts and reached a conclusion on
> them, the judge may not desire to take up the time necessarily involved
> in determining the second set. Any views he may express as to the
> undetermined second set are accordingly dicta. If, however, the judge
does determine both sets, as he is at liberty to do, and reaches a
> conclusion on both, then the case creates two principles and neither is a
dictum.”\(^{257}\)

It is submitted that this logic is correct, for otherwise cases such as *Dolny*, where two
independent sets of reasoning are used to attain the same result, would decide nothing.
For while it might be said that the interpretation of section 3 was non-essential because
the same result would have been reached by giving “beat” its ordinary meaning, it could
equally be said that the giving to “beat” its ordinary meaning was non-essential because
the same result would have been reached by interpreting section 3. The argument is
circular and forces us to accept either that such cases have a ratio that includes two
principles, or that such cases decide nothing because both principles cancel each other
out as being unnecessary.\(^{258}\)

There is also an argument against relying on the interpretation of section 3 in
*Dolny* in a wider context. It suggests that the interpretation is specific to cases
involving European arrest warrants. It is submitted that this argument fails for two

\(^{258}\) For a similar argument see N. Duxbury, *The Nature and Authority of Precedent* (Cambridge
reasons. First, there is nothing on the face of either the High Court or Supreme Court judgments that would indicate that the interpretation being given to section 3 was only applicable in European arrest warrant cases. Peart J. certainly does not appear to set up his judgment in such a way. Second, even if he did set his discussion up in a way which confined the interpretation to these special cases, the logic of doing so would have to be questioned. What is it about European arrest warrant cases that suggests pieces of Irish legislation should be interpreted using dictionaries? Sections 5 and 38 of the 2003 Act demand that there be correspondence with an actual offence in Ireland. It would certainly be an anomalous situation if section 3 created one type of offence in Ireland normally, but a different type of offence in the context of arrest warrants, so as to ensure correspondence with the warrant. Such a rule would have the effect of circumventing the 2003 Act, because there would be no real correspondence with an offence that actually existed in Ireland. On the other hand, it would seem sensible to interpret words in warrants according to their ordinary meaning, in order to ascertain whether the offence being described in the warrant, in layman’s terms, corresponds to an offence that actually exists in Ireland.

**Reflections on the Court’s Approach**

As mentioned above, two conclusions can be drawn from the High Court’s interpretation. First, one cannot consent to “harm” being caused against oneself, and second, that section 3 of the 1997 Act creates a strict liability offence. Both conclusions are worrying. Indeed it is quite unexpected that Denham J. would affirm such an interpretation, considering her partly dissenting judgment delivered in *C.C. v*
In that case she endorsed the common law principle of a presumption of mens rea in criminal statutes. Walsh J. described the presumption in the Supreme Court in *The People (DPP) v Murray*,\(^{260}\) holding that it was:

“…well established that, unless a statute either *clearly* or *by necessary implication* rules out mens rea as a constituent part of a crime, a court cannot find a person guilty of an offence against the criminal law unless he has a guilty mind.”\(^{261}\)

The question must be asked: does section 3 of the 1997 Act “clearly or by necessary implication” rule out the issue of mens rea? If mens rea was “clearly” ruled out, the section would outline the lack of need on the prosecution’s behalf to prove the mental element.\(^{262}\)

As section 3 does not “clearly” rule out mens rea, perhaps there is a “necessary implication” that it is ruled out. Peart J.’s reasoning suggests that there is a “necessary implication” that mens rea is ruled out because sections 2 and 4 outlined specific mental elements to correspond with the acts and as section 3 did not include such a specific reference to a mental element, the need to prove mens rea for section 3 was “distinctly absent”. The necessary implication here is that if the legislature had wanted to add a mental element to the section 3 offence, they would have done as they did in the immediately preceding and following sections.

However, it is submitted that there is nothing “necessary” about this implication: it is merely a possible implication, based on the opinion that “assault” in

---

\(^{259}\) [2006] 4 IR 1, at 24.


\(^{261}\) [1977] IR 360, at 386 (emphasis added).

\(^{262}\) For example, take s. 81(1) of the Criminal Justice Act 2006, which amends s. 15A of the Misuse of Drugs Act 1977 to add the following after subsection 3: “In any proceedings for an offence under this section, it shall not be necessary for the prosecutor to prove that a person knew that at any time while the controlled drug or drugs concerned were in the person’s possession that the market value of that drug or the aggregate of the market values of those drugs, as the case may be, amounted to €13,000 or more or that he or she was reckless in that regard.”
section 2 is not supposed to define “assault” in section 3. A good example of where there was a necessary implication is to be found in The People (DPP) v Power.\(^\text{263}\) In that case, without the implication, the purpose of the relevant statute would have been frustrated and there would, as a result, have been an inconsistent construction of the statute as a whole.\(^\text{264}\) This is simply not the case in Dolny: while Peart J.’s implication can be made, it is not necessary for it to be made in order to avoid the purpose of the statute being frustrated or an inconsistent construction being given to the Act as a whole.

It is submitted, therefore, that the High Court and Supreme Court in Dolny have erred in law by suggesting that mens rea need not be proved by the prosecution when the mental element of the offence is “distinctly absent” in the way in which it is absent in section 3 of the 1997 Act.

Inextricably linked to this issue is Peart J.’s interpretation that section 2 was not intended to be a definition of “assault” capable of being applied throughout the 1997 Act. The learned judge seems to rely merely on the fact that “assault” was not defined in section 1 to substantiate his claim. I would argue that there is other reasoning that could and perhaps should have been taken into account. Bennion, whose magnum opus is frequently cited as authoritative by the Irish courts,\(^\text{265}\) takes the view that a definition in a statute need not be framed as a definition, but can nevertheless have a defining

\(^{263}\) [2007] IESC 31.

\(^{264}\) The case involved an interpretation of s. 15A of the Misuse of Drugs Act 1977, as inserted by s. 4 of the Criminal Justice Act 1999. The question for the court was whether the prosecution had to prove that the defendant knew or should have known that the market value of the drugs in their possession was €13,000 or more. The Supreme Court held that there was a necessary implication that mens rea did not have to proved in this instance, as under s. 29 of the 1977 Act, it is not necessary for the prosecution to prove that the accused knew that the package of which they were in possession contained controlled drugs. Therefore, it: “would be absurd to construe s. 15A as requiring the prosecution to prove that he had knowledge of the value of the drugs, his knowledge of the existence of which the prosecution is not required to prove”, at [2007] IESC 31, at [c].

\(^{265}\) See, for example, Bupa Ireland Ltd v Health Insurance Authority and others (Voluntary Health Insurance Board, notice party) [2009] 1 IRLM 81; C and others v Minister for Health and Children [2008] IESC 33; JF v Minister for Health and Children [2008] IESC 16; The People (DPP) v Power [2007] IESC 31.
effect.\textsuperscript{266} This is significant as it plainly suggests that all of a statute’s definitions need not be contained in its primary defining section.

It is also surprising that the court in \textit{Dolny} did not take into consideration the so-called whole Act rule. The outcome of applying this rule to legislation is that where a term at first appears to be ambiguous, the ambiguity can be clarified if the same term is used elsewhere in a context which clarifies the meaning.\textsuperscript{267} The idea of reading an Act as a whole is not a new one and was in fact endorsed several times by the Supreme Court in \textit{Crilly v Farrington}.\textsuperscript{268}

Even more interesting is Bennion’s argument that a term may be assigned different meanings within the same Act.\textsuperscript{269} This would support Peart J.’s technique. However, it is clear from the example that Bennion sets out that if a term is to be assigned different meanings within the same Act, it will be specifically provided for within the Act itself.\textsuperscript{270} There is no such provision for different interpretations of “assault” in the 1997 Act.

It is both regrettable and at odds with precedent that the Supreme Court and High Court declined to give the 1997 Act a contextual reading. A similar observation can be made with regard to the Supreme Court’s affirmation of the High Court’s view that the word “assault” in section 3 of the 1997 Act was to be given its Concise Oxford Dictionary definition, namely, “a violent physical or verbal attack”. Bennion argues that while courts may look to dictionaries to discover the ordinary meaning of a word, if

\begin{footnotesize}
\begin{enumerate}
\item[268] [2001] 3 IR 251, at 275 Denham J. says “the primary and dominant canon of construction still remains that the meaning of legislation is to be gleaned in the first instance by the language taken as a whole of the Act (and sister Acts)”; and at 294 Murray J. references: “the rule of construction according to which when the meaning of the statute is clear and definite and open to one interpretation only in the context of the statute as a whole, that is the meaning to be attributed to it.”
\end{enumerate}
\end{footnotesize}
that word has been judicially defined in a specific context, that meaning will be more reliable than the one attributed to it by a dictionary.\footnote{271} There is precedent for such a view in the Supreme Court case of \textit{Mason v. Leavy},\footnote{272} where Murnaghan J. stated: “Where a statute...defines its own terms and makes what has been called its own dictionary, a Court should not depart from the definitions given by the statute and the meanings assigned to the words used in the statute”.\footnote{273} It thus seems to be accepted that legal terms, particularly in the context of legislation, are taken to have their legal meaning as they are being primarily read by lawyers who have the legal training to understand such terms.\footnote{274}

In this respect, the word “assault” has had an interesting history.\footnote{275} It originally meant to put another person in a state of fear of an immediate battery.\footnote{276} Battery, in turn, entailed the application of force to the body of another person. However, there was no requirement that this force be \textit{violent}.\footnote{277} Assault, in criminal law, is now widely thought to encompass both the original concept of assault \textit{and} the concept of battery. This is represented in the section 2 definition of assault under the 1997 Act. Outside of its legal usage, the term assault is generally used to connote the idea of a battery. Therefore, in common usage, the word “assault” has actually lost its original meaning and taken on the meaning originally given to “battery”. This is reflected in the Concise Oxford Dictionary definition relied upon by Peart J., which does not make any reference to the notion of putting another in fear of an immediate “violent physical or verbal

\footnotesize
\begin{itemize}
\item \footnote{272}{[1952] IR 40.}
\item \footnote{273}{[1952] IR 40, at 47.}
\item \footnote{274}{R. Sullivan, \textit{Sullivan and Driedger on the Construction of Statutes} (4th edn Butterworths, Vancouver 2002), at 47-48.}
\item \footnote{276}{G. Williams, \textit{Textbook of Criminal Law} (Stevens, London 1978), at 135-136.}
\item \footnote{277}{P. Charleton, \textit{Offences against the Person} (Round Hall Press, Dublin 1992), at 200.}
\end{itemize}
attack”. To incorporate such a definition of assault into law is problematic. It would have the effect of reducing the scope of criminal liability for the types of conduct and harm caused in *R v Ireland; R v Burstow*.  

**Explanations of the Approach**

It is worth considering whether a part of Peart J.’s decision may explain his reluctance to allow section 3 to incorporate the definition of “assault” from section 2, and may have confused the Supreme Court and, in consequence, led them to arrive at such a result-based judgment. In the relevant portion of the judgment it is stated:

“I note in passing that the offence of ‘assault causing serious harm’ under s. 4 of the 1997 Act, again includes a mental element, namely, that the offence occurs where ‘a person intentionally or recklessly causes serious harm to another’.” (emphasis added)

This reference to the Non-Fatal Offences against the Person Act, 1997 is, it is submitted, erroneous. Section 4 of that Act does not create an offence of “assault causing serious harm”. It creates an offence of “causing serious harm”. This is a judicial mistake which is repeated throughout several judgments, and it is therefore not surprising to see the mistake raise itself again here. The Supreme Court refers to the offence as “assault causing serious harm” several times in its judgment in *Gorman v Martin and others*, and does likewise in the judgments of *Garvey v The Minister for Justice, Equality and Law Reform v Dolny* [2009] IESC 48, at [13].

---

278 Therefore, it should be noted that in common usage, assault apparently carries the meaning of a violent physical attack, whereas, in its legal usage, no such “violent” element is required.

279 [1997] 4 All ER 225.


Justice, Equality and Law Reform and others;\textsuperscript{282} and Cummins v Judge Patrick McCartan and others.\textsuperscript{283}

If the court in Dolny was indeed operating on the basis of a misunderstanding of section 4, it is easy to see why the 1997 Act has been interpreted in such an odd manner. For, if the section 4 offence was “assault causing serious harm”, and if it was admitted that “assault” from section 2 could be read into section 3, then it would also be capable of being read into section 4. This of course would have the politically and perhaps publicly unacceptable result that in Ireland one would be capable of consenting to serious harm. If one was able to consent to “a substantial risk of death” at the hands of another, there would be no logical reason why one could not consent to being killed by another person. A change of this kind would constitute a significant shift in public policy. Rightly or wrongly, the State holds fast to the view that it is in the public interest that life be protected and that such protection trumps certain rights to autonomy possessed by individuals. As a consequence of this, life may not be taken consensually. It suffices to say that the courts would be constrained from ruling in a way that would effect such a fundamental change in public policy. Change of this kind and magnitude would have to be legislatively sanctioned. Furthermore, given the significance of the change, the legislative intent would have to be clear and unequivocal. Section 4 of the 1997 Act in no way meets these prerequisites. Indeed, the change would arguably have to be constitutionally mandated if one accepts the proposition that there does not exist any constitutional right to die, in the sense of terminating a life or accelerating death, by

\textsuperscript{282} [2006] 1 IR 548.
way of corollary to the constitutional right to life. With this in mind, it is easier to see why Peart J. may have found it unacceptable to conclude that “assault” in section 2 was to be read into other parts of the Act, if he was acting on the assumption that it would also be read into section 4.

The reasoning in *Dolny* may also be results-based in so far as the respondent/appellant’s argument was clearly a piece of clever lawyering. It was not disputed that the victim did not consent in *Dolny*. The point the respondent made was that the warrant had not specified that the conduct had happened without the consent of the victim. It is perhaps the case that in order to see the right thing done, the court interpreted the law so that the case was made against the respondent.

### Concluding Remarks

Peart J. applied *Dolny* in the case of *Minister for Justice, Equality and Law Reform v Zukauskas*. In that case, counsel for the respondent made similar submissions to those in *Dolny*. In response, Peart J. quoted his own interpretation of section 3 from *Dolny* and went on to say that the Supreme Court has “referred specifically to… [his interpretation of section 3], and has affirmed the approach taken…to correspondence.” This would certainly suggest that the High Court, at least, is treating the interpretation of section 3 approved in the Supreme Court as being a binding precedent in future cases. Although it must be admitted that if the interpretation of section 3 in *Dolny* was found to be *obiter* in subsequent cases, it would

---

284 See *Re a Ward of Court (withholding medical treatment) (No 2) [1996] 2 IR 79*, at 124. See also G. W. Hogan and G. F. Whyte (eds.), *J.M. Kelly: The Irish Constitution* (4th edn LexisNexis Butterworths, Dublin 2003), at [7.3.22]-[7.3.27].


equally be *obiter* in *Zukauskas* as the interpretation was made in similar factual circumstances. Furthermore, in their cases and commentary book, Campbell *et al* included both the High Court and Supreme Court decisions in *Dolny* as a competing interpretation of section 3.\(^{288}\) These examples seem to suggest that there can be no question, but that the interpretation in *Dolny* is being taken seriously.

Even if the argument here presented is wrong, and the interpretation of section 3 does not form part of the *ratio* in *Dolny*, it is nevertheless, surely, a persuasive interpretation of the legislation, considering it was specifically approved by the Supreme Court.\(^{289}\) It is submitted that it is unlikely that lower courts and practitioners are going to ignore such comments, considering the court, and indeed it is fair to say, the judge, that endorsed them.

If the interpretation of section 3 is part of the case’s *ratio decidendi*, then in the aftermath of *Dolny*, it is not possible to consent to harm being caused against oneself. The position is therefore similar to that of England and Wales as expressed in *R v Brown*.\(^{290}\) Irish law, however, goes further in that it interprets section 3 of the 1997 Act as creating a strict liability offence. Following *C.C. v Ireland*, such an interpretation of section 3 would almost certainly render it unconstitutional.\(^{291}\) This is regrettable given that a contextual interpretation would avoid such issues by allowing assault to hold the same meaning in both sections 2 and 3 of the Act. Indeed, such an interpretation would also avoid the morally unjustifiable position where an individual’s consent to harm\(^{292}\) caused against themselves is not taken seriously by the state.

\(^{290}\) [1993] 2 All ER 75.
\(^{291}\) [2006] 4 IR 1, at 78-80.
\(^{292}\) As defined in s. 1 of the 1997 Act.
Conclusion

This chapter started with questioning the extent to which there is a common law exception for modern professional boxing. It was argued that the exception enunciated in *Coney* could not cover the type of conduct that is part of modern boxing. However, due to potentially social, historical or regulatory factors the House of Lords was willing to accept boxing as a legal activity in *Brown*. If the true nature of the boxing exception is based upon historical or social factors then it might not easily accommodate modern combat sports which, as discussed in Chapter One, do not share boxing’s historical roots or special cultural place in society.

There was then an analysis of the case law in order to judge how the courts might respond to a new instance of consensual violence. In England and Wales the general rule is that individuals cannot consent to actual bodily harm being intentionally or recklessly caused against themselves. While there may be controversy over setting the limit to which one can consent to harm so low, it is not controversial that this is, in fact, the rule. An even stricter version of the rule may apply in Ireland, where the causation of actual bodily harm could be a strict liability offence. But Ireland is a special case, as the sword of Damocles hangs over the Irish law in this area: there is controversy over what, in fact, the general rule is. A case which focuses centrally on consensual violence may be required in order to see if a future court will accept the *Dolny* judgment as a binding precedent on the case before it.

The exception to the general rule is that the harm was caused for a good reason. This would apply equally in Ireland as in England and Wales, given that section 22 of the Non-Fatal Offences against the Person Act 1997 recognises common law rules that provide justifications or excuses for harm caused under the Act. It is in the exceptions

---

293 See Chapter One, at 7.
to the general rule, it seems to me, where the real controversy lies. Why can people cause each other harm for sport, but not for sexual pleasure? Why can a man consent to a beating in a boxing match, but not to a beating as part of a religious ritual? Are the answers to these questions merely based on *ad hoc* evaluations of public policy? Trying to resolve this controversy will be the work of the following chapter.

The New Zealand cases are important to this area as they represent an application of the Lord Mustill approach. Therefore, the general rule in these cases is that consent justifies all interpersonal violence, although it will not justify or excuse the intentional taking of a life. In exceptional circumstances consent will be withdrawn as a defence on public policy grounds when grievous bodily harm is caused intentionally or recklessly. This approach is fundamentally flawed and normatively more abhorrent than the *Brown* decision. Individuals are essentially given carte blanche to intentionally cause as much harm to another, short of death, as they wish, as long as it is consented to. However, the state may then, after the fact, decide on public policy grounds—which have the potential to be dubious—to ignore the consent of the victim and impose criminal liability if grievous bodily harm is caused. The approach, along with that of Lord Mustill in *Brown*, is, it seems to me, an ineligible theory as it breaches basic rules of natural justice by retroactively criminalising conduct. The weakness of such a theory and its dependence upon public policy arguments has already been shown, where in Barker Glazebrook J. advocated withdrawing the defence of consent on public policy grounds which included the fact that the violence caused lacked artistic merit. Whatever the weaknesses of the majority’s approach in *Brown* were, it must be favoured over the *Lee*/Lord Mustill approach.
CHAPTER THREE - A THEORY OF CONSENT

Introduction

It is taken as accepted by many judges and academics that there is simply no general theory on consent to violence to be derived from the English and Welsh case law. Sullivan submits:

“That there are areas of utter incoherence in the criminal law is undeniable. To give some examples, the law concerning when and on what conditions effective consent may be given to the infliction of varying degrees of bodily harm defies any attempt at analysis—one can merely note the cases and their individual factual circumstances”. 294

Bergelson puts it more strongly in saying: “The rules governing individuals’ ability to consent to bodily harm are not merely strict; they are morally and conceptually incoherent.” 295 In discussing Brown, Giles says that logic is missing from the reasoning used in the case and that it is doubtful that any general principle can be drawn from it. 296

Launching a normative attack on the current law by saying that rules which dismiss an individual’s consent to sustaining sore bruises against themselves are morally unjustifiable is one thing. However, much of the incoherency referred to above is about the nature and application of exceptions to the general rules: even if this incoherency probably arises from the bar being set too low in the first place.

For example, what is it that rationally distinguishes surgery and boxing from sadomasochism? Surgery does not involve anger and it is usually for the welfare of the victim. But then boxing is also an exception and there can be, and often is, anger present and the conduct does not contribute to the physical welfare of the victim. It is, however, justified as being in the public interest. How is it in the public interest? It is hard to see how it is in the public interest that people watch or society allows two individuals to dehumanise each other through violence. Nor does it necessarily make the participants healthier members of society. Perhaps, it is vital to the public interest as an expression of their autonomy? However, accepting such an argument necessarily leads to accepting the legality of sadomasochism and even euthanasia, as why would the public interest in expressing autonomy be any greater for boxing than for either of the latter, more controversial, expressions of autonomy? This is but one of the many incoherencies and it seems only to be justifiable on the grounds that the majority of people are willing to tolerate boxing. By the same token, the majority are not willing to tolerate sadomasochism or euthanasia and find these types of conduct repulsive and that repulsion is turned into law. Such a position is in itself unjustifiable. However, perhaps the original premise being accepted is inaccurate.
Law as Integrity

It is at this point that I will turn to Ronald Dworkin’s thesis of law as integrity. The well known thesis requires judges in communities that are dedicated to principles to “interpret contemporary legal practice seen as an unfolding political narrative”. It demands that judges interpret the law as if there was a single author who had a coherent conception of justice and fairness. The theory judges arrive at through interpreting previous case law and contemporary political morality must fit and justify previous decisions and current practice. More than that, it must show the community’s practice in its best light. As Dworkin puts it: “When a judge declares that a particular principle is instinct in law, he reports…that the principle both fits and justifies some complex part of legal practice, that it provides an attractive way to see, in the structure of that practice, the consistency of principle integrity requires.” It is exactly this type of principle which is reportedly missing from the jurisprudence concerning consensual violence. In R v Barnes, Lord Woolf C.J., in the Court of Appeal, typified the absence of such principle in saying: “The advantage of identifying that the defence [of consent] is based upon public policy is that it renders it unnecessary to find a separate jurisprudential basis for application of the defence in the various different factual contexts in which an offence could be committed.” Not only would such a view be ineligible as far as law as integrity is concerned, such a view seems to me to be ineligible altogether. It essentially means that all cases will be decided on an ad hoc

300 R. Dworkin, Law’s Empire (Hart Publishing, Oxford 1986), at 255. It does not, however, have to fit and justify decisions that seem to be mistakes when considering the area as a whole, at 230.
basis leaving it difficult for individuals to plan their affairs. This hardly paints our legal system in its best light. Indeed, in their argument for a rational reconstruction of the doctrinal concept of consent, Elliot and de Than suggest that the “current position [regarding consent] is so muddled, complex and lacking in logic” that it might breach Article 7 of the European Convention on Human Rights, as well as general rule of law requirements, in so far as the rules lack legal certainty.\textsuperscript{304} The \textit{ad hoc} system of adjudication that Lord Woolf C.J. seemingly favours, also suggests a lack of legal certainty. Furthermore, there is a persuasive argument that laws made by legislatures may rest on justifications of public policy that they will benefit the community as a whole.\textsuperscript{305} However, because of the unique position that judges hold, their conclusions may not be based on public policy, for that is too easy. It would give the judge “authority to hold people liable in damages for acting in a way he conceded they had no legal duty not to act.”\textsuperscript{306} This seems to be unacceptable. Rather, judges must make their decisions based upon principles, not policy.\textsuperscript{307}

It is for these reasons that we should reject Lord Woolf C.J.’s comments that no jurisprudential basis is required in order to explain how consent applies in cases of consensual violence. I will now attempt to outline a theory of consent, in accordance with law as integrity, which aims to interpret the case law that has been reviewed, as well as current legal practices in order to show that there can be a coherent theory which explains what the courts do. It will be argued that the theory fits and justifies previous case law and current legal practices and represents a coherent principle which shows the community and its practices in their best light.

\textsuperscript{305} R. Dworkin, \textit{Law’s Empire} (Hart Publishing, Oxford 1986), at 244.
\textsuperscript{306} R. Dworkin, \textit{Law’s Empire} (Hart Publishing, Oxford 1986), at 244.
A New Starting Point

The original premise is that whether consent is withdrawn as a defence is solely a question of public policy. However, there is a better underlying reason for the acceptability of some types of conduct and the unacceptability of other types of conduct. The explanation is one of regulation. It is my argument that in order for activities to be exempt from the general rules, those activities must be subject to some form of regulation in which the state can have confidence. The aim of this regulation will be to contain and control risks. The more general philosophical arguments which support regulation in these circumstances are set out in Chapter Four.

Take the discussion above once more but from a different perspective. Instead of claiming that boxing remains legal because of public policy, think of it as remaining legal because it is regulated. The same can be said of surgery. Now take sadomasochism and euthanasia: first, the logistics of regulating sadomasochism seem preposterous. Anderson argues that the use of safe words so that participants know when to stop constitutes regulation, refereeing and balancing. But how much confidence can a state have in such a regulatory set-up? Would it be acceptable for boxers to regulate themselves by simply entering into a (gentlemen’s?) agreement not to punch or kick the other while downed? Such agreements might not even be considered self-regulation, as that usually has the connotation of a united governing body regulating affairs, such as the British Boxing Board of Control (BBBC). It is some form of one on one or ad hoc regulation. The potential serious ineffectiveness of such regulation is demonstrated in McIlwaine v The Queen. Here a Reverend engaged a male prostitute and instructed him to tie the Reverend’s wrists to the top of his bed and

---

to tie a bathrobe around his neck and to pull on such so as to asphyxiate him, while at
the same time to perform fellatio on him. The prostitute was to keep asphyxiating and
performing fellatio on the victim until he said stop—the most straightforward safe word
of them all—or until he climaxed. The victim died of asphyxiation before he climaxed
or said stop. Of course it is easy to cite the extreme example, but it is a clear indication
that to call the use of safe words regulation is unlikely to be something that would
persuade a court that risk had been minimised. This, however, is not an argument
against the proper legality of sadomasochism. Whether or not the behaviour in
sadomasochism should be legal is quite clearly, in my view, a political decision. It is a
decision that elected officials need to be held accountable for. It is not for judges to
make new law. Lord Mustill saw the criminalisation of sadomasochism as the creation
of new law. This is erroneous. Rightly or wrongly, the conduct that necessarily forms
part of sadomasochistic activities is conduct which is prohibited by the law. The fact
that it is of a private sexual nature is irrelevant. Therefore, as sadomasochism involves
the commission of offences, for people to be exempt from punishment for same would
require the creation of new law, unless it was regulated. As a thought experiment,
imagine a well established board called the English Sadomasochist Control Board.
Leaving aside obvious issues of dignity and privacy, the Board is an independent body
formed by like minded people to ensure safety in sadomasochistic activities. As part of
its function it organises independent observers to attend sexual encounters of a
sadomasochistic nature. The observer has the power to end the activity if a participant’s
health is put in serious immediate danger. Furthermore, the observer has an ambulance
and a near-by hospital on stand-by. This is obviously absurd, but let our imaginations
run wild. Imagine R v Brown in the context of such a regulatory body. Would the

310 ——, “Assault and Battery. Consent. Consent of Masochist to Beating by Sadist Is No Defense to
Prosecution for Aggravated Assault. People v. Samuels, 58 Cal. Rptr. 439 (Ct. App., 1st Dist. 1967)”
decision have been the same? It is doubtful; indeed if the ruling was the same it would expose it as being a judgment based purely on legal moralism.

Euthanasia could be regulated by a body. Whether it would be a completely self-regulating body such as the BBBC is doubtful considering the extreme importance of what would be in question. It is submitted that sooner or later euthanasia will be legalised and when it is, the reader can be confident that it will be a heavily regulated procedure.

Almost all of the cases from England and Wales which were considered in Chapter Two refused to grant exceptions to the general rule, in situations where the conduct in question had not taken place in a regulatory context. *Wilson* was an exception to this. However, it must be remembered that *Wilson* did not follow the binding authority of the *Brown* case. Further, the Court in *Wilson* justified allowing consent to being branded because it drew a comparison between branding and tattooing, under the assumption that tattooing required no regulation. Below, I make the argument that tattooing does require regulation, and indeed is partially regulated in Ireland, England and Wales. If my argument is correct, the Court is *Wilson* was incorrect to grant an exception to branding on the basis that it was akin to “unregulated” tattooing.

I will now test this regulatory theory of consent against the established exceptions in order to see if they are regulated, which would thus explain why the intentional or reckless causation of harm was permitted at law in those activities.
At this point I should sketch some of the main points from Westen’s work in *The Logic of Consent*. This will help to set up the vocabulary of the discussion in such a way which will enable us to avoid any of the confusions of consent that Westen warns us against. The first thing to do is to distinguish between factual consent and legal consent. As circular as it may seem to state it: a factual consent is a consent for which there is a factual basis. The existence of such consent would be, if the actor were truthful, empirically demonstrable. Such a consent could be either attitudinal or expressive. Westen rightly takes factual attitudinal consent as being the “core conception” of consent, for this is the type of consent which is “real”. Here the person consenting, “C”, makes a decision to acquiesce to x. This is a subjective mental state that C experiences. Factual expressive consent is quite different as no such mental experience is required on C’s behalf. Instead, C must give the impression that they have consented to “A” carrying out x. C may or may not genuinely experience the acquiescence, but it appears to A that C does.

Assessing either form of factual consent requires no normative moral or legal judgment about whether C’s legal relationship has changed with A. Legal consent, however, does just that. As a legal concept, it can be employed to assess situations from

---

normative positions so as to decide whether or not individuals’ legal relationships have changed towards each other.\textsuperscript{317}

There are in turn two types of legal consent. Prescriptive legal consent involves some form of factual consent and added to that some normative judgment about the circumstances under which that factual consent will be valid.\textsuperscript{318} Therefore, that C understood the nature and consequences of $x$ and that C was free to choose would be examples of factors that would be considered alongside the factual consent. The second type of legal consent is the one which this chapter will be most concerned about: imputed consent. Imputed consent is a legal concept which makes no reference to C’s factual consent, either attitudinal or expressive.\textsuperscript{319} As such, it is a complete fiction in the sense that a court might hold that C consented to $x$ when C neither subjectively experienced such a consent, nor objectively expressed it.

To complicate matters further, Westen points to three types of imputed consent. First, there is constructive consent which operates to make legal conduct which is not itself consented to, but which forms part of something else which is consented to.\textsuperscript{320} Two examples of situations where constructive consent is operative are in contact sports and marital rape cases. In the former, players may not actually consent to being touched by anybody on the playing field, however, consent is imputed and they are constructively deemed to consent to the touching which is inherent in the activity.\textsuperscript{321} In a similar way, individuals constructively consent to being bumped into while they walk through crowded streets. The marital rape example harks back to the wicked rule which

\textsuperscript{321} P. Westen, \textit{The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct} (Ashgate Publishing, Aldershot 2004), at 269-270.
allowed husbands to rape their wives. The rule used to be constructed on the grounds that by consenting to marry her husband, the wife was constructively consenting to being forced into having sexual relations with her husband, whenever he wanted.\textsuperscript{322}

The second type of imputed consent is informed consent. This is where an individual is deemed to have consented to harm which was not actually consented to, by virtue of having acquiesced to run the risk of that harm occurring.\textsuperscript{323} Westen gives the example of an individual who undergoes eye surgery to correct their vision after they have been told that there is a very small risk of blindness.\textsuperscript{324} He argues convincingly that the individual has not prescriptively consented to the blindness for it is not the case that they prefer the certainty of blindness to not having the operation.\textsuperscript{325} Neither could it be said that they constructively consented, as it is not the case that blindness is incidental to or a necessary part of surgery that one consents to by consenting to the surgery.\textsuperscript{326} Rather, when they consent to the treatment, the individual is consenting to run the justifiable risk of blindness in order to better their sight.\textsuperscript{327}

There is a third type of imputed consent which involves deciding what C would have consented to if they had the opportunity. This is called hypothetical consent and is very relevant to unconscious patient cases, but not to what we are discussing at the moment.\textsuperscript{328}

\textsuperscript{327} P. Westen, \textit{The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct} (Ashgate Publishing, Aldershot 2004), at 281 and see also 270.
\textsuperscript{328} P. Westen, \textit{The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct} (Ashgate Publishing, Aldershot 2004), at 284-293.
Having set the vocabulary of the conversation, we may also banish the favoured term of courts and academics, which is now riddled with confusion: implied consent. The confusion arises from its double usage. On one hand, we speak of an individual’s implied consent to $x$, when they indirectly express to others their acquiescence via linguistic and social conventions. For instance, when a rugby player runs onto the pitch, by doing so it could be said that he impliedly consented to take part in the activity. We can then go further and state that by consenting to take part in the activity, he has constructively consented to conduct which forms part of that activity. To be clear, he has not impliedly consented to be assaulted, he has impliedly consented to take part in the game through the social convention of running onto the pitch. We go a step further when we say: as the game normally involves bodily contact which could constitute an assault, consent is imputed onto him, and he is deemed to have constructively consented to the assaults.

There is another way, however, in which we use the term “implied consent”. We use it to demonstrate that consent has been implied by law (which under our vocabulary would be imputed consent). This meaning of “implied consent” is of course very different from a meaning of acquiescing via linguistic and social conventions. Take for example, McCutcheon’s observation that normally an (1) implied consent is capable of revocation, yet a participant in a contact sport could not revoke their (2) implied consent to the bodily contact which is part of the game. When McCutcheon is discussing implied consent at point (1), he is referring to consent transmitted via linguistic and social conventions. However, his use of the term at (2) is

---

a reference to imputed consent, which an individual cannot avoid in these circumstances, as it is a normative decision that their legal relationship with the other players must change. McCutcheon also makes the point that consenting to the risk of $x$ is not the same as consenting to $x$.\textsuperscript{332} This is nicely demonstrated with the example of walking late at night through a violent district. If an individual does so, they are certainly running the risk of being attacked or interfered with in some way. Yet in the former situation an attacker could not claim in court that C had “impliedly consented” to the attack. The answer to this puzzle lies in understanding legal consent as a legal concept. As a legal concept, legal consent is informed by normative decisions, just like other legal concepts such as legal rules.\textsuperscript{333} Therefore, in the end, as Westen puts it, “whether and when prescriptive acquiescence to a social practice ought to be treated as constructive consent to $x$ is a normative issue”.\textsuperscript{334} And while some of these normative issues are controversial, some are not, as can be seen from the fact that “every jurisdiction repudiates the view that, by voluntarily walking in dark alleys, people constructively consent to have sexual intercourse with any stranger who forces them to do so.”\textsuperscript{335}

Finally, the criticism that imputed consent is merely a legal fiction and therefore unsatisfactory must be answered. Take Living’s comments that:

“the concept of consent in contact sports appears anomalous, and to offend against the accepted meaning of the word…Framing the decision as to unlawfulness within the implied consent of the participant is a fiction that is


\textsuperscript{335} P. Westen, The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct (Ashgate Publishing, Aldershot 2004), at 279.
singularly unhelpful, as the rules and usual practice of the sport are the sole
determinant of the validity and existence of the victim’s consent.”

The fact that the concept of consent in contact sports offends against its accepted
meaning is demonstrated by Livings in comparing the subjective approaches to
determine if the victims consented taken in R v Dica, and R v Konzani, with the
objective approaches taken in R v Cey, and R v Barnes. All of these cases
involve “implied consent”. However, in reality, Dica and Konzani are cases which
revolve around factual consent. The courts were concerned about what the victims had
factually consented to and it was not prepared to make a normative legal judgment that
consent to sexual intercourse would lead to an imputation of informed consent to
contracting HIV. In contrast, the sporting cases, Cey and Barnes, use objective criteria
because they do not have to determine a factual consent. It is a legal rule that if one
consents to partake in a contact sport, one constructively consents to the assaults that
form part of that sport. This legal rule necessarily obviates any requirement to defer to
the subjective factual consent of the individual. Livings is, of course, correct that
“implied consent” in sports, in the imputed sense, is a fiction. But there is nothing
unusual about this. Implied consent to being assaulted by people bumping into you, in
the imputed sense, would also be a fiction when one walks through a crowded street.
Furthermore, it is important to note that criticising a legal concept, such as imputed
consent, by calling it a fiction, is no criticism at all. The real criticism must be of

336 B. Livings, “A Different Ball Game - Why the Nature of Consent in Contact Sports Undermines a
337 [2004] All ER (D) 45.
341 B. Livings, “A Different Ball Game - Why the Nature of Consent in Contact Sports Undermines a
whether the normative judgment underlying the concept is morally justifiable. Westen explains this well in saying:

“To be sure, because legal fictions are not predicated on acts of actual acquiescence, their underlying rationales are not transparent. Yet it is a fallacy to think that because the rationales that underlie legal fictions are nontransparent, the rationales must be spurious. Every legal fiction is, in effect, a legal rule; and, as with other rules, legal fictions purport implicitly to be grounded upon supporting rationales. It follows, therefore, that one cannot effectively criticize a legal fiction by declaring it to be a fiction, any more than one can effectively criticize a rule by declaring it to be a rule. To criticize a legal fiction, one must approach it in the same way one would approach any other rule: one must examine it critically to discover and assess its underlying rationale.”  

Making the distinction between factual consent and legal consent and understanding the nature of imputed consent will be important in the following sections. It will be important because it will help to determine if the regulatory theory proposed needs to be used in certain of the exceptional categories. In understanding the type and nature of the consent involved in the various situations, it will be easier to recognise those activities which are truly exceptions to the general rule that one cannot consent to harm caused intentionally or recklessly, and those activities that masquerade as exceptions to the general rule when there are, in fact, better explanations for their continued legality.

Non-Exceptions

Contact Sports

Introduction

It is frequently suggested that there is an exception to the general rules on consensual violence when it comes to contact sports. The general rules are presented as stating that consent to the causation of bodily harm is ineffective, and thus as many contact sports necessarily involve contact which gives rise to such harm, there is a sports exception which allows for such harm to be caused. Participants are allowed to consent to this harm because it is caused for a “good reason” and hence public policy dictates that there be such an exception. The aim of this section is to investigate the claims that are made with regard to this exception in relation to the normal rules of consent. It will be argued that the exception may not actually exist, at least insofar as it affects the rules on consent. It should be pointed out that this section is only concerned with contact sports, and not combat sports, where harm is intentionally inflicted as part of the game. Normally, in contact sports, any harm that arises, does so accidentally and incidentally to the playing of the game, which does not have as its aim the intentional infliction of harm.

My argument will start with setting the problem up in a more comprehensive way. I will then analyse section 47 of the Offences against the Person Act 1861, in order to better understand the character of the offence which is most problematic. I will

then apply this analysis to sports situations in order to ascertain where the exception might lie. There will then be an argument against relying on implied consent to defeat offences concerning the causation of violence and that the criteria used to establish that implied consent would be better used to establish recklessness. Finally there is a brief note on the role of the governing body.

The argument I make here does not propose to solve many of the problems that exist in trying to decide whether actions on the pitch are properly described as criminal when they fall within a grey area between being criminal and possibly part of the game. Rather, the aim is to investigate and perhaps adjust the grammar of the conversation so as to ensure the firmness of the theoretical foundations of any theory or rules trying to tackle the “grey area” problem.

*But it Must Exist!*

After a thorough review of the relevant case law, McCutcheon comes to the conclusion that the rule with regard to sports appears to be that force is only legal in sports when it is not intended or likely to cause harm and it is legal because the participant consents to the force.\(^{345}\) But if that were true, he continues, the rule would be no different to the general rule on consensual violence. “However, expressions of the rule have incorporated sport as an exception and thus the degree of force to which participants consent must be different.”\(^{346}\) And he certainly has a point. In England and Wales the leading case law in the area of consensual violence makes specific reference to an exception for sports from the general rules. In *R v Donovan*,\(^{347}\) it was declared that rough and undisciplined sport was an exception to the general rule on the causation of


\(^{347}\) [1934] All ER Rep 207.
harm.\textsuperscript{348} In \textit{Attorney General's Reference (No 6 of 1980)},\textsuperscript{349} the Court of Appeal outlined that consent of the victim would not negate criminal liability once actual bodily harm was caused. However, in the following paragraph they said: “Nothing which we have said is intended to cast doubt on the accepted legality of properly conducted games and sports…”\textsuperscript{350} Similarly in \textit{R v Brown},\textsuperscript{351} Lord Jauncey held that consent of the victim would not preclude the perpetrator of actual bodily harm from criminal liability “unless the circumstances fall within one of the well-known exceptions such as organised sporting contests and games…”\textsuperscript{352} Similar sentiments are found throughout the \textit{Brown} judgment.

Therefore, McCutcheon is certainly right that there appears to be some sort of sporting exception, as the jurisprudence continually refers to such exceptions. However, paradoxically, the courts have made pronouncements to the effect that even in sport, the intentional or reckless causing of harm will be unlawful. The genesis of such pronouncements came from Bramwell L.J. in \textit{R v Bradshaw},\textsuperscript{353} where he instructed that an act would be unlawful if it was the perpetrator’s intention to cause serious injury or act recklessly as to whether serious injury could be caused.\textsuperscript{354} This threshold was lowered from serious harm to bodily harm in \textit{R v Moore},\textsuperscript{355} where it was held that nobody had a right to use force which was likely to injure another person.\textsuperscript{356} The most recent appellate decision on the matter was in \textit{R v Barnes},\textsuperscript{357} where again the Court of

\begin{thebibliography}{9}
\bibitem{348} [1934] All ER Rep 207, at 211.
\bibitem{349} [1981] 1 QB 715.
\bibitem{350} [1981] 1 QB 715, at 719 [E].
\bibitem{351} [1994] 1 AC 212.
\bibitem{352} [1994] 1 AC 212, at 244-245.
\bibitem{353} (1878) 14 Cox CC 83.
\bibitem{354} (1878) 14 Cox CC 83, at 85.
\bibitem{355} (1898) 14 TLR 229.
\bibitem{357} [2004] EWCA Crim 3246.
\end{thebibliography}
Appeal generally accepted that the intentional or reckless causing of harm would be
criminal.\textsuperscript{358}

However, if this is the correct position, it is difficult to see how the sporting
position is any different to the normal position, as stated in \textit{Attorney General's
Reference (No 6 of 1980)}, where consent was held to be irrelevant once bodily harm
was intended or likely, unless there was a good reason for such.\textsuperscript{359} To reason that there
must be an exception purely on the grounds that the courts keep speaking about such an
exception is not good enough if there is no evidence of actual application of this
exception.

\textit{Section 47}

An analysis of what there might be as a sporting exception must start with an analysis of
relevant portions of the Offences against the Person Act, 1861. On many occasions we
come across academic and judicial despair in their attempt to find some form of
coherent theory as to the practice of limiting consent.\textsuperscript{360} In many respects, any such a
theory has been obstructed by judicial interpretations of the legislation which create an
offence which does not exist in the legislation. By this, I do not mean to say that the
House of Lords, for example, created a new offence which criminalised
sadomasochistic behaviour in \textit{R v Brown},\textsuperscript{361} as others never tire of arguing.\textsuperscript{362} The
offence, of which I am speaking, is created from the problematic section 47 of the 1861
Act. This section creates the offence of assault occasioning actual bodily harm.

\textsuperscript{358}[2004] EWCA Crim 3246, at [14].
\textsuperscript{359}[1981] 1 QB 715, at 719D.
\textsuperscript{360}V. Bergelson, “The Right to Be Hurt: Testing the Boundaries of Consent” (2006-2007) 75 George
Journal of Legal Studies 747, at 756.
\textsuperscript{361}[1993] 2 All ER 75.
\textsuperscript{362}See M. Giles, “R v Brown: Consensual Harm and the Public Interest” (1994) 57 Modern Law Review
I find Gardner’s argument persuasive that an assault offence is a crime of invasion of personal space.\(^{363}\) It is this that distinguishes it from the crime of violence at section 20, which makes it an offence to maliciously wound or inflict grievous bodily harm.\(^{364}\) We have little choice but to be persuaded that the prosecution need not prove mens rea with regard to the occasioning of the actual bodily harm, for that is what the courts have concluded. In *R v Savage; R v Parmenter*,\(^{365}\) the House of Lords held:

“once the assault was established, the only remaining question was whether the victim’s conduct was the natural consequence of that assault. The words ‘occasioning’ raised solely a question of causation, an objective question which does not involve inquiring into the accused’s state of mind… The verdict of assault occasioning actual bodily harm may be returned upon proof of an assault together with proof of the fact that actual bodily harm was occasioned by the assault. The prosecution are not obliged to prove that the defendant intended to cause some actual bodily harm or was reckless as to whether such harm would be caused.”\(^{366}\)

Thus once the defendant intentionally or recklessly assaults\(^ {367}\) the victim, as a matter of constructive liability, he is liable for the harm that arises from the assault. There is disagreement about whether this constructive liability element of section 47 is appropriate. Gardner defends it in saying that once one oversteps the mark and assaults another individual, one is on notice that if any harm arises from that assault, section 47 will be applied.\(^{368}\) Simester and Sullivan, on the other hand, argue that in cases involving aggravated violence, “constructive liability seems wrong in principle”.\(^ {369}\)

They continue to argue that principle demands that there be correspondence between the


\(^{365}\) [1991] 4 All ER 698.

\(^{366}\) [1991] 4 All ER 698, at 712-713. By holding such, the House of Lords approved *R v Roberts* (1972) 56 Cr App R 95.

\(^{367}\) In the sense of both assault and battery.


mental element and the act.\textsuperscript{370} However, their view of section 47 as creating an offence of “aggravated violence” seemingly misses or rejects Gardner’s point that it is not a crime of violence. Gardner also makes the point that the correspondence principle to which Simester and Sullivan refer, is not part of English law.\textsuperscript{371} Instead the principle is “no guilty act without a guilty mind”. Such a principle is fulfilled, according to Gardner, when there has been a guilty mind in respect of the assault.\textsuperscript{372}

The problem with the limiting of consent starts when courts bar consent of the victim from defeating a charge of section 47. In \textit{R v Donovan}, the Court of Criminal Appeal said “it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and, when such an act is proved, consent is immaterial”.\textsuperscript{373} The sentiment that consent will not make lawful, conduct which involves the causation of actual bodily harm has been echoed and reaffirmed in more precise terms in subsequent cases. This sentiment gives rise to two theses; one extreme and one moderate. The extreme thesis is explicitly stated in \textit{Attorney General's Reference (No 6 of 1980)} and it dictates that “it is an assault if actual bodily harm is intended and/or caused”.\textsuperscript{374} The causation of actual bodily harm alone would make the offence a crime of strict liability, and thus the subject of “great odium” as no mental responsibility for the crime would have to be proved.\textsuperscript{375}

In \textit{Brown}, Lord Templeman impliedly rejects the extreme thesis and endorses the moderate thesis in stating that “the authorities dealing with the \textit{intentional infliction} of bodily harm do not establish that consent is a defence to a charge under the 1861

\textsuperscript{372} J. Gardner, \textit{Offences and Defences} (Oxford University Press, Oxford 2007), at 41.
\textsuperscript{373} [1934] All ER Rep 207, 210.
\textsuperscript{374} [1981] 2 All ER 1057, 1059.
\textsuperscript{375} See H. L. A. Hart, \textit{Punishment and Responsibility} (2nd edn Oxford University Press, Oxford 2008), at 20, 47. 106
Act” (emphasis added). The moderate thesis thus, retains a requirement that there be a guilty mind, and only bars consent from defeating the charge once the actual bodily harm is caused intentionally or recklessly.

I think the extreme thesis (and I use the word extreme in its most pejorative sense) can be dismissed, as subsequent courts have not expressly approved such a rule, and there are strong philosophical arguments against strict liability crimes with large potential prison sentences. Further, Smith suggests that as Attorney General’s Reference (No 6 of 1980) involved the intentional infliction of harm, the remarks giving rise to the extreme thesis would therefore be obiter. However, even if we accept the moderate thesis, many problems still lay ahead of us.

It is not enough to invoke public policy and claim that consent is no defence to a section 47 charge. As noted, section 47 is a crime of constructive liability and thus the original point at which the border of the law is breached is when the common law offence of assault is committed. However, it is well established that consent of the victim defeats the common law charge of assault. But if the victim consents to the assault and actual bodily harm is occasioned, surely the actus reus of the offence of assault has not been committed, i.e. the touching has not been done without the consent of the victim. How then, on any rational construction of section 47 can consent be barred, when it appears to be a fundamental part of the actus reus of the crime on which the section is constructively built: i.e. there is no crime of assault when consent is

---

376 [1993] 2 All ER 75, at 82.
379 See Attorney General’s Reference (No 6 of 1980), 1 QB 715 at 718E-G.
present, and there is no crime of assault occasioning actual bodily harm if the crime of assault has not been committed. It certainly makes even less sense if we accept Gardner’s view of section 47 as an invasion of personal space crime. How can it be said that an individual is barred from legally consenting to the invasion of their personal space on public policy grounds?

The Crown completely misunderstood this point in its arguments in Brown. They argued that assault was a prerequisite of sections 18 and 20, as well as section 47. Thus they believed that if the prosecution had to prove the lack of consent for section 47, it would also have to do likewise for sections 18 and 20. This would have the effect of allowing individuals to consent to intentionally caused grievous bodily harm. However, this whole argument is based on a misunderstanding of the law. Assault does not form part of sections 18 and 20; they are not crimes of constructive liability, as section 47 is. Neither are they crimes of invasion of personal space; they are crimes of personal violence. The distinction is not just important to understand the components of the crime, it is important to rationally understand the barring of consent in sections 18 and 20. It is a much simpler starting point to see that as states will claim a dominion over violence on their territory, they will claim a right to regulate it and thus perhaps regulate it in the fashion of barring consent to the intentional or reckless infliction or causation of wounds or grievous bodily harm. It is no starting point at all to claim a state has any type of legitimate interest in barring individuals from consenting to invasions of their own personal space.

In a very convoluted way, the courts may have somewhat solved this problem of barring consent from defeating a section 47 charge by inventing a fictitious crime, or at least attributing to a real crime fictitious elements. I am now speaking about the

---

381 R v Brown [1994] 1 AC 212, at 227 A.
382 J. Gardner, Offences and Defences (Oxford University Press, Oxford 2007), at 42.
moderate thesis of intentionally or recklessly causing actual bodily harm, to be charged under the auspices of section 47. As I hope was evident from the discussion of section 47 so far, it does not explicitly create such an offence. However, decisions of appellate courts in England and Wales would suggest that there is some implicit offence of intentionally or recklessly causing actual bodily harm. This fiction is helpful insofar as it allows us to separate the offence at section 47 in the following way:

1. (a) It is an offence to intentionally or recklessly assault an individual and for that assault to occasion actual bodily harm, even if such harm is not intended or recklessly brought about.
2. (a) It is an offence to intentionally or recklessly cause actual bodily harm.
2. (b) The offence at (2) (a) will be committed regardless of the consent of the victim and will be charged under section 47.

To be sure, the entirety of part (2) is a judicially created imposition on the section 47 offence. However, even though the imposition is a fiction, as noted above, that is not necessarily a criticism of the fiction itself. As Westen notes, legal fictions are generally legal concepts, and hence essentially like rules and duties etc. What really needs to be examined, therefore, is the normative principles on which the fiction is based. I do not intend here to defend the normative issues at stake in deciding whether individuals should be allowed to consent to actual bodily harm being intentionally

384 R v Brown [1993] 2 All ER 75, at 82; R v Dica [2004] All ER (D) 45, at [46].
385 See above at 100.
caused against themselves.\textsuperscript{387} There does, however, seem to be a \textit{prima facie} case for having an offence of intentionally or recklessly causing actual bodily harm. There is certainly a moral difference between someone who assaults but neither intentionally nor recklessly occasions the actual bodily harm, and someone who sets out to intentionally bring the harm about, or is reckless to its coming about. “Perhaps the moral difference needs to be marked” is how that argument might go, just as the moral difference is marked between the natures of sections 47 and 20, despite the punishment being the same.\textsuperscript{388} Indeed the Law Commission suggested the implementation of a similar offence,\textsuperscript{389} and in Ireland such an offence was created under section 3 of the Non-Fatal Offences Against the Person Act 1997, which essentially replaced section 47 of the 1861 Act.\textsuperscript{390} The Canadian Criminal Code also distinguishes between harm which is occasioned from an assault and harm which arises from other unlawful conduct.\textsuperscript{391}

There is another way of explaining the liability that arises under section 47 despite the presence of consent. That is to say that the intentional or reckless causation of harm automatically constitutes an assault. A strict reading of \textit{Attorney General's Reference (No 6 of 1980)} would lead to such conclusions: i.e. “it is an assault if actual bodily harm is intended and/or caused”.\textsuperscript{392} As an assault is deemed to have occurred, the occasioning of the harm can be constructively added. Such an explanation is unsatisfying when it is accepted that assault is a crime of invasion of personal space. It falls foul of the distinction made above between the state exercising dominion over inter-personal violence and the state claiming to exercise dominion over the extent to which an individual can have their personal space invaded.

\textsuperscript{387} See Chapter Five, at 223-228.
\textsuperscript{388} J. Gardner, \textit{Offences and Defences} (Oxford University Press, Oxford 2007), at 47-49.
\textsuperscript{390} Even if that replacement marks a significant difference from s. 47: see J. Gardner, \textit{Offences and Defences} (Oxford University Press, Oxford 2007), at 52.
\textsuperscript{391} Compare ss. 267(b) and 269 of the Criminal Code of Canada 1985.
\textsuperscript{392} [1981] 2 All ER 1057, at 1059.
It is hoped that the above remarks help to make some sense of consent being barred from section 47. It is not, as the Crown argued in Brown, because the absence of consent is not an essential element of assault and therefore need only be proved by the prosecution in exceptions to this rule, of which common assault is one. This argument presents things the wrong way around and almost demands that we be grateful to our benevolent state for allowing us the privilege to consent to common assaults. Rather, the courts have created a legal rule that the intentional and reckless causation of bodily harm is an offence, to which consent is not a defence, and which may be charged under section 47. There may be nothing that extraordinary about such a rule, considering the courts equally created the legal rule that consent was not an effective defence to sections 18 or 20 (even though this is not stated in the statute), as well as the legal rule that when an assault is not consented to, one will be legally responsible for the harm that ensues, despite a lack of intention or recklessness (such a rule is equally absent from the statute). On both of these latter issues, if normative arguments going the other direction had won out, the courts could easily have created rules completely opposed to the ones that exist at present.

Application to Contact Sports

Accepting the description of the current rules in this area that I have presented solves the problems presented in the introduction without recourse to an exception. Contact sports pose no problems with regard to unintentional and non-reckless actual bodily harm that is occasioned from assaults which are consented to, as there would be no offence under section 47 in sense (1)(a) & (b). Contact sports thus can exist without an exception in such circumstances. Furthermore, to claim that participants can consent

---

394 See above at 109.
to harm due to public policy is to misunderstand the fact that the participants can consent to assaults, which may lead to harm, and that such a consent does not depend on any public policy considerations. To argue otherwise, would be to get things the wrong way around as the crown did in Brown.

Problems would arise, however, in situations where players do acts intended or likely to cause bodily harm. Consent would be no defence to such situations. This is the point, presumably, where the supposed sports exception would kick-in and allow consent in such situations. But in R v Barnes, the Court of Appeal accepted the Law Commission’s view that the intentional or reckless infliction of harm, even in the course of sport, will attract criminal liability:

“the present broad rules for sports and games appear to be: (i) the intentional infliction of injury enjoys no immunity; (ii) a decision as to whether the reckless infliction of injury is criminal is likely to be strongly influenced by whether the injury occurred during actual play, or in a moment of temper or over-excitement when play has ceased, or ‘off the ball’; (iii) although there is little authority on the point, principle demands that even during play injury that results from risk-taking by a player that is unreasonable, in the light of the conduct necessary to play the game properly, should also be criminal.”

Lord Woolf C.J. went on to say that such a view was subject to the fact that if “the play is within the rules and practice of the game and does not go beyond it, [this] will be a firm indication that what has happened is not criminal.”

Living recognises a divergence here from the approach of the Law Commission. Even though the Commission talk about a “sporting exemption”, the rules they propose are essentially

396 [2004] EWCA Crim 3246, at [15].
the same as the normal rules for the criminal law.\textsuperscript{398} \textit{Barnes} on the other hand, as Livings suggests, gives rise to a presumption that once the conduct is within the “rules and practice” of the game, there will be no criminal liability.\textsuperscript{399} Such a presumption, as espoused by the court in \textit{Barnes} is helpful and logical. It is also not a new idea to this area. In our genesis case, \textit{R v Bradshaw}, Bramwell L.J. said:

\begin{quote}
“if a man is playing according to the rules and practice of the game and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention and that he is not acting in a manner which he knows will be likely to be productive of death or injury”.\textsuperscript{400}
\end{quote}

Since our conversation is confined to sports in which the intentional or reckless infliction of bodily harm is not an aim of the sport, it seems quite reasonable to start with a presumption that when bodily harm occurs in such sports, it was not caused intentionally or recklessly, and so is accidental. Note however, that if there is a sports exception from the normal rules insofar as there is a presumption that harm caused within the rules and practice of the game is not caused intentionally or recklessly, that sports exception would have nothing to do with consent, or the limits of consent. Instead of being a sports exception, it would rather be a sports presumption. That presumption would be about the harm-causer’s intention, and would have nothing to do with the victim’s consent.

If a player-victim denies he consented to certain harm on the pitch, it will be imputed that he constructively consented to being assaulted in the way in which assaults normally occur on the pitch. Harm that is occasioned by such assaults cannot attract

\textsuperscript{400} (1878) 14 Cox CC 83, at 85.
liability because there has been consent to the original assault (albeit a fictional, imputed consent). There is no sports exception here either. Imputing consent is based on normative judgments as to when it is morally proper that an individual’s legal relationship with others should change, despite what that individual thinks. 401 There is nothing peculiar to sports about employing this normative judgment. The same occurs every day when we walk down the street and fulfil the legal requirements for an assault offence by bumping into others in a crowded street. Of course, anyone who complains that they did not consent to being assaulted in such circumstances can expect their claim to fall on deaf ears as far as the state prosecutor will be concerned, for the law imputes a constructive consent: i.e. that when one walks through the streets, one consents to the assaults that are commonplace to that activity. 402 However, we do not call this the “street exception”. Further, while it is possible that I have just had the misfortune of falling upon bad nightclubs, it does appear as though the requirements of assault and even sexual assault are fulfilled on too many occasions to count in one night in such places. Some men will touch women on the dance floor, without their consent, and in a sexual way. The touching is something more than merely attracting their attention by a tap on the shoulder. 403 In such situations we would rightly say that if the same thing happened in any other situation, such as on the street etc., there would be no question but that the assaulted woman would have a case that the state prosecutor would probably find much merit in prosecuting. However, in the context of a nightclub setting, the conduct will be lawful, unless of course the assault in the nightclub became aggravated by continuing with the conduct after the woman had made it clear she wished him to stop. In nightclub cases, it is suggested that it is once again imputed onto

402 Collins v Wilcock [1984] 3 All ER 374, at 378.
403 Collins v Wilcock [1984] 3 All ER 374, at 378.
everyone who enters a nightclub that they constructively consent to a certain minor
degree of invasion of personal space (constituting an assault) which is frequently sexual
in nature. That is the nature of that environment and people who do not wish to be so
assaulted do not have to enter. Note again, however, we would not call this “the
nightclub exception”. It is merely another instance where people are taken to
understand and consent to the type of conduct which is inherent in partaking in some
activity, be it walking through Grafton Street on Christmas Eve, dancing in an alcohol-
fuelled, crowded nightclub or playing rugby with opponents eager to win. Therefore, as
far as imputing consent to assaults that normally occur within a particular sport goes,
there is nothing peculiar to sports in this regard that would merit the title of a “sports
exception” to the normal rules of consent.

Recklessness in Sports

In the famous case R v Cey, the victim was hit with a hockey stick in the neck and
pushed into the boards, sustaining facial injuries. The respondent had been charged
under section 245.1(b) of the Canadian Criminal Code for assault causing bodily harm.
Assault in section 245.1(b) was defined by “assault” in section 244(1), which required
that the force or threat be applied without the consent of the victim. The question for
the court was whether the crown had negatived consent. The court essentially justified
imputing consent in situations such as sports where assaults are to be reasonably
expected in the course of a game. It also recognised that some violence would be
beyond the scope of this imputed consent. It said: “case law recognizes that
participants agree to the risk of blows provided they are unintentional, instinctive or

reasonably incidental to the game”.407 Such a formulation is familiar to what has been seen thus far. It went on to say that the “implied consent”, or what we are calling “imputed consent”, would be analysed objectively.408 This, of course, is always the case with imputed consent, as such consent is not a reflection on the mind of the individuals: it is a normative judgment that their relationship with others must change. As such, there is no requirement, and indeed it would make little sense, to look to the actual subjective mindset of the individual once using imputed consent. As “implied consent” was to be judged objectively, the court famously laid down criteria by which to judge whether what was done came within the scope of the implied consent:

“The conditions under which the game in question is played, the nature of the act which forms the subject matter of the charge, the extent of the force employed, the degree of risk of injury, and the probabilities of serious harm are, of course, all matters of fact to be determined with reference to the whole of the circumstances. In large part, they form the ingredients which ought to be looked to in determining whether in all of the circumstances the ambit of the consent at issue in any given case was exceeded.”409

The Cey principles were later adopted in another Canadian case, Cicarelli,410 and in R v Barnes.411 However, in both of the latter cases the principles were expanded to include looking at the state of mind of the accused.412 Taken on the whole, it might strike one that the criteria employed by the courts would be well suited to determining recklessness. Indeed, Anderson implicitly recognises this when he presents the criteria in the context of determining whether injury was recklessly caused.413 It is submitted if...
the idea of objective criteria had occurred to an English judge, he may well have phrased the criteria in terms of recklessness. The reason for which the Canadian court did not, it is submitted, is largely contextual. The crime for which Cey was being prosecuted, assault causing bodily harm, could only be committed intentionally, as an assault could only be committed intentionally under section 244.\textsuperscript{414} The Crown could have brought charges for criminal negligence causing bodily harm, under section 204 of the Code. Criminal negligence was defined as “wanton or reckless disregard for the lives or safety of the persons”.\textsuperscript{415} As that charge was not brought against the accused, the court in Cey essentially had the job of describing recklessness under the guise of implied consent. It is submitted that this has become clearer in subsequent cases where the courts have also suggested that the state of mind of the accused be taken into account. Such a criterion is more in keeping with determining recklessness than in making a normative decision on whether legal relationships should change: what bearing could the defendant’s mindset possibly have on the question as to whether the victim should be held to have contructively consented to certain conduct? This is not to be confused with “a reasonable belief in consent”, as that question is altogether different. Imputed constructive consent involves questioning whether by agreeing to X, one is also taken to consent to Y, even though one never consented to Y. The “reasonable belief” defence is set up as an excuse for some conduct, by virtue of mistake.

Assessing recklessness by context and the state of mind of the accused is in line with the Cunningham test that “the accused has foreseen that the particular kind of

\textsuperscript{414} In D. Stuart, *Canadian Criminal Law* (2nd edn Carswell, Toronto 1987), at 136, authority is pointed to to suggest that assaults could be caused “recklessly”: see *R v Lafontaine* (1979) 9 CR (3rd) 263 (Que. SC). However, this does not appear to have been raised in Cey.

\textsuperscript{415} S. 202(1)(b) of the The Criminal Code of Canada 1985.
harm might be done and yet has gone on to take the risk of it”.\footnote{1957} It is therefore not unique to sports either. In the more recent affirmation of the Cunningham test in R v G,\footnote{2003} the House of Lords stated that the:

> “knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable... It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if...one genuinely does not perceive the risk.”\footnote{2003}

Such reasoning supports the factors of context that the Cey principles lay out, so as to allow a tribunal of fact to ascertain how obvious the risk was. It is also noticeable in R v Barnes that the Cey principles are not presented as criteria for determining what the victim impliedly consented to. Rather they are used as criteria to establish whether the conduct is rightly characterised as criminal by virtue of unreasonable risk taking. This reasoning could allude to criminal negligence, as could part (iii) of the Law Commission’s “rules for sport” that the court adopted.\footnote{2003} Indeed, Gardiner argues that in a sporting context “Recklessness is to be understood...as meaning the conscious taking of an unreasonable risk”.\footnote{1994} Even if the argument with regard to the criteria being better suited to determining recklessness is unconvincing, the criteria would still be better employed to determine whether the behaviour was so unreasonable it was criminal, than it would to determine the scope of implied consent.

\footnote{1957}{[1957] 2 QB 396, at 399.}
\footnote{2003}{[2003] 4 All ER 765.}
\footnote{2003}{[2003] 4 All ER 765, at 784 [32].}
\footnote{1994}{For a discussion on criminal negligence see A. Ashworth, Principles of Criminal Law (4th edn Oxford University Press, Oxford 2003), at 193-196.}
Rules and Practices of Contact Sports

There have been quite a few learned articles that have already tackled the issues of “playing culture” and to what extent that should be taken to be part of the practice of the sport and thus something to which there is imputed consent. The term “playing culture” was coined by Simon Gardiner as meaning the underhand tactics that are often used in sports to gain advantages over the opposing team, such as hard tackles to soften up opponents in rugby or insulting or verbally abusing opponents to distract them in cricket. Gardiner submits that: “These playing cultures develop to gain an advantage within the formal rule structure…Indeed, certain practices that are contrary to the playing rules may be followed so frequently that it becomes ‘customary’ to break the law of the game.”

The question thus arises, is it possible for punches and other intentional attempts to cause harm to form part of a playing culture and therefore capable of being consented to. If so, this would give rise to a sporting exception from the normal rules, as it would allow sports participants to constructively consent to being caused harm intentionally. Pendlebury describes “playing culture” as being dynamic and potentially evolutionary and progressive. It is easy to see how reactive punches in rugby, or consensual fights breaking out in fast paced ice-hockey games can quickly become part of the sports’ playing culture, especially if this is fuelled by an increased expectation among spectators for such violence. The latter point is no justification for

anything,\textsuperscript{425} and while “playing cultures” may develop so as to include violent elements, that does not necessarily mean that those elements will be taken as being consented to. For if an act within the playing culture was clearly an intentional act to cause bodily harm, under \textit{Barnes} that act would fall within the scope of the criminal law. Therefore, the de facto position must be that playing cultures can only form part of what is constructively consented to, to the point that that playing culture does not involve the intentional or reckless causation of bodily harm. There is, however, another side to that coin. If the causation of the harm does form part of the game, it will perhaps have to submit to regulation, as boxing does. Indeed, the form of that regulation would have to be, presumably, up to the standard of that used for boxing, if the state is to endorse it.

It is up to governing bodies to ensure that the intentional or reckless causation of bodily harm does not form part of the playing culture. They will most likely achieve this by enforcing severe penalties on those who engage in such conduct, unless the courts enforce a severe penalty first. Further, the point is often made that the fact that a governing body is willing to stand over the playing culture of its sport, and the intentional and reckless causation of harm, will not necessarily save its participants. The point here is that the criminal law has not devolved its power of regulation of violence to sports governing bodies.\textsuperscript{426} The common sentiment appears to be, if the governing body is not willing to its job, the courts will do it for them.\textsuperscript{427} As O’Donnell says:

\begin{quote}


\end{quote}
“If games are becoming more violent it is up to the referees and administrators to stop this. Just as an increased incidence of housebreaking does not make it any more acceptable as a crime, the rise in dirty play does not ‘de-criminalise’ the commission of an assault if all the constituent elements of the offence are present”.

Conclusion

Most of the authorities in the area of consensual violence appear to allude to a “sports exception” which is not subject to the same rules as normal, everyday behaviour. Through the above analysis I am not convinced that such an exception actually exists. A special rule for sports probably does exist with regard to presuming that bodily harm caused in the course of the game is unintentional and not reckless. However, as noted, such a rule would not be any exception to the general rules that govern consent. It has also been suggested that the Cey criteria for establishing the limits of implied consent would be better suited to being applied as criteria for establishing recklessness in the course of a game. Finally, it has been argued that if governing bodies allow their sports to go beyond the general rules of consent, they risk their participants being prosecuted or their sport being legally regulated in a manner similar to boxing.

The ideas expressed here will not, perhaps, be of much use to the practitioner. I do not believe I have helped in the real battle of determining the criminal from the non-criminal in the grey areas of sport. On the other hand, I do hope that a certain degree of clarity has been achieved in this section. With clear theoretical foundations in place, we are in a better position to start tackling the real hard questions in criminal sports law.

Entertainment and Sports Law Journal
<www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume4/number2/Pendlebury>, at [32].


Dangerous Exhibitions

Introduction

In a similar vein to the sports exception, the courts and academic commentators frequently refer to an exception for dangerous exhibitions from the normal rules of consent.\textsuperscript{430} There has, however, been very little written on the subject in depth. In this part I intend to distinguish dangerous exhibitions where consent is relevant from those where it is not. I then seek to theorise an explanation that fits with the normal legal rules. Through this explanation it will be shown that there does not have to be, and indeed it would be wrong in principle for there to be, any exception from the normal rules of consent in the context of dangerous exhibitions. It will be contended, therefore, that individuals may not consent to being intentionally or recklessly caused harm in these circumstances, just as they cannot do so in sadomasochism.

One Person Activities

Certain types of dangerous exhibitions or conduct will be excluded from the need for a regulatory scheme. Rock climbing for example, or the example cited by Ashworth of a stunt man trying to jump over buses will not be put to the regulatory test.\textsuperscript{431} It is submitted that if it is a case of a one-person activity, then we are changing the context and meaning of our conversation if we employ “consent” in these circumstances. Young surveys the many meanings and definitions that can be attributed to consent and a general theme which seems to arise is the need for at least two people to be


\textsuperscript{431} A. Ashworth, Principles of Criminal Law (4th edn Oxford University Press, Oxford 2003), at 325.
involved. Westen also discusses consent in the context of involving at least two people, and frequently invokes “acquiescence” to signal what it means to consent. The rock-climber or the stuntman do not “consent” to anything in the way in which I have been using the word “consent”. To whom are they supposed to be consenting and to what are they supposedly consenting? It is submitted that the rock climber decides to run the risk of climbing a mountain, but he does not consent to this, as the activity does not involve a second person to whom he can consent. Decision is prior to consent in the hierarchy of the mind’s functioning. We cannot factually attitudinally consent, without a decision to do so. We can, however, make decisions without consenting. As rock-climbers decide to climb mountains and such decisions do not generally involve acquiescence to another to climb, it is not proper to speak of consent in these circumstances. It is therefore, unnecessary to include dangerous exhibitions which involve only one person as an exceptional category to the normal rules of consent. It is true that the normal rules of consent do not apply in these circumstances, but that is only because the circumstances are not ones in which consent is conceptually relevant.

For completeness, an argument which suggested that the person who sold or rented the climber his equipment or who allowed him access to the mountain could be guilty of an inchoate offence would be flawed. So too would be the idea of considering the liability of the promoter who signed the stuntman to perform his stunt, or for that matter the man who sold him his motorcycle. The ludicrous idea of holding the stuntman’s motorcycle supplier liable betrays the danger of trying to find accessories in such circumstances. Such a search would be legally fruitless in Ireland and England, in

---

432 P. W. Young, *The Law of Consent* (The Law Book Company, Sydney 1986), at 12-17. See in particular 14: “Consent involves the presence of two or more persons, for without at least two persons there cannot be a unity of opinion or an accord of minds, or any thinking alike”, citing *Huntley v Holt* 20 A. 469 (1890), at 470.

any case, as there is no offence of self-murder or self-manslaughter, nor is there a crime of causing serious harm to oneself, as both of the relevant Acts refer to causing the harm to another. One cannot be an accessory at law to a principal, if that principal has committed no crime. Glanville Williams makes the point:

“Suicide has always meant intentional suicide: in effect (though not in legal theory) self-murder. For no purpose is it a crime for a person to kill himself negligently. Anyone who incites or helps him cannot be guilty of manslaughter as a perpetrator, because he is not the perpetrator; and he cannot be guilty as accessory, because of the absence of the crime ....

Apart from these technical arguments, it would be unfortunate if the accessory to de facto self-manslaughter could be convicted, because it would mean that people who help mountaineers and others to fit out foolhardy expeditions might be convicted of manslaughter if a member of the party dies. There has never been any such prosecution, and it would be undesirable to have a rule of law making the prosecution possible”.434

Two or more Person Activity

Some dangerous exhibitions are, however, more problematic: those being ones which do actually involve a second person. That is the type of dangerous exhibition Gonthier J. evidently had in mind in the Canadian Supreme Court decision of R v Jobidon,435 when he exempted activities from the normal rules of assault and consent which involved “stuntmen who agree in advance to perform risky sparring or daredevil activities in the creation of a socially valuable cultural product.”436 Williams seems to have devoted most time to this subject. His conclusion is that for the sake of an easy life it would be best for the law to have no application in circumstances involving circus entertainers and stuntmen etc. He says “Unless the law abrogates control over this area, the courts will be faced with the invidious task of deciding between the risks that people

435 [1991 CanLII 77 (S.C.C.)].
may and may not legitimately run in respect of their own bodies.”437 It is not hard to see why Williams arrives at this overly simple conclusion. Despite showing a distinction between injury or death being caused by oneself and being caused by another, he still mixes examples of both types of conduct in a melting pot and tries to deal with them both. Thus, he mixes examples of people who partake in free-fall parachute jumps (single person activity) with examples of motorcycle racing (where injury can be caused by the person themselves or by another motorcyclist’s dangerous technique) with examples of stuntmen and circus performers (where presumably injury is being caused by another person).438 His conclusion is only partially true, as much will depend on the context in which the risks are being taken.

Consenting to the risk of being caused grievous harm was the subject of the *R v Dica* case.439 Here the Court of Appeal held that individuals could consent to the risk of transmission of diseases during sexual intercourse, if they were informed about the risk.440 However, in this case there were very good public policy reasons not to criminalise the risks which flow from sexual intercourse, which the Court made clear in its judgment.441 It also pointed out that disease was a risk from sexual intercourse, just as pregnancy was.442 And indeed, just as a disease may harm an individual, there is authority for the point that an unwanted pregnancy can constitute harm to the mother.443 Of course harmful pregnancies from risky sexual intercourse could not be criminalised. But then how can such cases be distinguished from cases where risky sexual intercourse leads to the transmission of a harmful disease?

---

439 [2004] All ER (D) 45.
440 [2004] All ER (D) 45, at [47].
441 [2004] All ER (D) 45, at [49]-[51].
442 [2004] All ER (D) 45, at [47].
443 *Mitchell v Glasgow City Council* [2009] 3 All ER 205, at 233 [75], and *McFarlane v Tayside Health Board* [1999] 4 All ER 961, at 981.
The public policy arguments against criminalisation set out in *Dica* are strong and as regulation would be ineffective in such cases, its resolution is best explained with regard to a community’s best interpretation of dignity, as developed in Chapter Five. But can the same be said about the public policy arguments that support risk taking in dangerous exhibitions? Gothier J. suggested that it is in the public interest that dangerous exhibitions should be free from the general rules of assault and consent. However, the Law Commission’s submission in relation to this issue appears more persuasive:

> “the social value of persons exposing themselves to the risk of death or serious injury at the hands of a third party in the name of exhibition or entertainment is perhaps less obvious now than it was in an era more sympathetic to the values of the circus or music hall.”

In its follow up paper, the Commission did not really pay attention to the area of dangerous exhibitions because under their recommendations there would be no need for special consideration of such activities.445

It is submitted that it is significant that in the only case which actually confronted the issue of a dangerous exhibition head on, and did not just deal with it as an aside or an abstract codicil, the person who caused the harm was found to be criminally liable. The case was *R v McLeod*, and it involved an expert marksman who attempted to shoot the ash off the end of a cigarette which was in the mouth of a member of the audience who was willing to partake in the performance. The volunteer moved as the marksman shot and the bullet went through his cheek. The defendant was

---

446 (1915) 34 NZLR 430.
found guilty of causing bodily harm in a fashion that if death had occurred, it would have been manslaughter.\textsuperscript{447}

\textit{Audience Volunteers}

It is submitted that there is a hidden truth to the submission by Charlotte Walsh to the Law Commission paper where it was pointed out that a member of the public who agrees to be a volunteer in a dangerous exhibition does not consent to serious injury, but merely to take part in a piece of entertainment.\textsuperscript{448} The truth is that a volunteer does not really think they are putting themselves in any real danger. An expert marksman or an expert knife thrower is presumed to be of such a high level of skill that they can take risks that if a non-expert took, the law would have no problem in prosecuting. If I decide to ask my wife to allow me to practice my knife throwing skills with her tied to a board and she consents and I duly start throwing knifes around her, even though I have no previous experience, there can be no question that if one knife accidentally hits her and kills her that I will have committed a crime. The reason individuals agree to participate in such spectacles is based on the premise that the knife thrower does have the experience and the expertise so that the person can be sure that they will not get hit by a knife. It is true that there is almost a pretence in the audience of fear that the participant may be struck by a wild knife, but nobody actually believes that will happen. No person would volunteer themselves if they thought there was a real risk of being injured. The only way injury is even slightly likely to happen is if the participant moves unexpectedly as was the case in \textit{McLeod}. In street performances, participants are constantly reminded not to move when the exhibition is being performed as they could get injured if they do. On this way of looking at the situation, it is the participant’s own

\textsuperscript{447} (1915) 34 NZLR 430, at 434.
negligence which causes their injury, not that of the knife thrower. For example: I decide to go shooting with a companion and we are both walking beside each other. It is agreed that I will shoot at anything that rises up on the left and my companion will shoot at anything that rises up on the right. A pheasant is disturbed and rises to fly off on the right and in my excitement I jump in front of my companion’s gun to aim at the bird while my companion also aims and fires thereby shooting me.449 My shooting companion would not be guilty of any crime.450 What if a dentist was drilling a patient’s tooth in order to administer a filling and despite the dentist’s warning not to move, the patient intentionally jerks their head and the dentist drills more of the tooth than was necessary or knocks the drill into another perfectly healthy tooth, damaging it. Who is really at fault in these cases?

Two points can be drawn from the above. First, as a matter of factual consent, it may be possible to distinguish between consenting to participate in the dangerous exhibition and consenting to running the risk of sustaining harm. It is submitted that people generally do not really entertain the idea of being hurt, if they did, it is unlikely that they would participate. Second, if the volunteer moves, when instructed not to, and is injured as a result, the situation might be better characterised as an accident, or as a situation in which the performer of the feat lacks culpability.

However, what would happen if the expert performer hit the volunteer who did not move? Would there be an exception from the normal remit of the criminal law? If it is correct that the volunteer did not factually consent to being harmed, the question becomes whether consent will be imputed, and the volunteer be held to have had informed consent to being injured from the activity. However, the normative arguments that would support such an imputation of consent do not seem to be strong. There were

good reasons for imputing consent to assaults in sport, for without such an imputation the sports could not continue, especially if players explicitly withdrew their consent from being touched in any way on the pitch before a match. And there are familiar good reasons why society might wish for sports to continue in existence, such as health, community spirit etc. Such reasons do not exist in favour of dangerous exhibitions. The main good reason tends to be for public enjoyment. However, such a reason would not be sufficient to justify the risks volunteers would, in fact, be taking. For that reason, if an expert marksman just happens to have a bad shot which takes the life of another human being, then it seems proper that he should be liable for his conduct. If he chooses to partake in such an activity where somebody’s life is put in real danger, then he must be sure that he does not have bad shots. If he does, he will be liable. If he cannot be sure that he will never have a bad shot, then he should not partake in the activity. Society would be none the worse off for lack of participation in such an activity. There, therefore, does not seem to be a convincing enough argument that consent to the risk of death should be imputed to the volunteer. Without such an imputation, there would be no departure from the general rules.

Industry Risks

There is perhaps a distinction to be made between dangerous exhibitions which include untrained, uninformed members of the public or an audience, and those which include industry professionals, like professional film stuntmen. For example, let us take Williams up on his challenging example of Blondin going over Niagara Falls in a wheelbarrow being wheeled by his assistant.451 Not that it matters, but my research does not lead me to the same set of factual circumstances. While Blondin did cross

Niagara Falls with a wheelbarrow, he was not in it, he was wheeling it. He did, however, cross the Falls with his manager on his back.\textsuperscript{452} Again, for the sake of argument, let us rewrite history slightly and say it occurred as Williams described it. First, his assistant was not an audience member/volunteer. Therefore, this is in the realm of two stuntmen or members of the industry performing a feat. As both men would understand the risks that existed, with a conscious effort made to reduce all of those risks, there may be a stronger case for imputing consent in such circumstances. It is often said of stuntmen that they are some of the most careful people in the entertainment industry. The reason they are experts at stunts is because everything is so scrupulously planned. Very little, if anything, is actually left to chance. Their job is essentially to create the illusion that what they did was incredibly dangerous and brave. But it is generally just an illusion. Injury which arises would generally be classed as accidental and there would probably be a presumption, such as in sport, that the harm caused was not caused intentionally or recklessly.\textsuperscript{453} Indeed, it would be odd to think that if it was proven that one stuntman intentionally or recklessly injured a fellow stuntman that he should be protected from the criminal law.

\textit{Conclusion}

To conclude on dangerous exhibitions, it is submitted that there are three possible positions: (i) if a participant is hit because they moved when they were warned not to,\textsuperscript{452} “Blondin’s Last Performance”, New York Times, 18 July 1859, available online <http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9C0DE4DA1F31EE34BC4052DFB1668382649FDE> (accessed 28 August 2009) and “Jean Francois Gravelet (aka The Great Blondin)” <http://www.tourniagara.com/history/daredevils/jean-francois-gravelet/> (accessed 28 August 2009)

\textsuperscript{453} Chris Corbould, a special effects supervisor, known for his work on James Bond and Batman films was recently prosecuted for breaching health and safety regulations, which the prosecution maintained had led to death of a camera man during the filming of \textit{The Dark Knight}. The jury cleared him of the charges. It is interesting to note that the police originally arrested Corbould on suspicion of manslaughter, but decided against proceeding with the case, as they felt the death was an accident: ——, “Stunt expert cleared in Batman cameraman death trial” \textit{BBC News} (14 March 2011) <http://www.bbc.co.uk/news/uk-england-surrey-12737728> accessed 19 March 2011.
there should be no liability on the entertainer; (ii) if the entertainer makes a mistake and
causes harm (or serious harm) they should be liable; (iii) if two stuntmen perform a feat
together and one makes a mistake causing harm (or serious harm) to the other, there
should be a presumption that the harm was not caused intentionally or recklessly.
Points (ii) and (iii) can be distinguished on the basis that members of the general public
should not be subjected to harm in circumstances where they do not appreciate the real
and full nature of the risk involved and where they do not genuinely expect that they
will be harmed by performers holding themselves out as being capable of performing
the act without causing harm. Stuntmen do understand the risks of what they do and
they carry out those risks in controlled circumstances and are unlikely to work with
those who they do not think capable of performing the stunt without causing harm.

If these submissions are correct, then dangerous exhibitions are not exceptions
to the normal rules of consent. They are not situations in which an individual may
consent to harm being caused against themselves intentionally or recklessly. Many
cases have nothing to do with consent. Those are the cases which only involve one
person who decides to do something dangerous. Other cases are arguably accidents or
at least situations in which it would not be fair to hold the performer criminally liable,
as the injury results from the fault of the volunteer. Such reasoning is, admittedly, not
in line with the only authority on the point, *R v McLeod*. However, the decision in that
case was set in a somewhat peculiar statutory context. If fault does lie
with the performer, consent is unlikely to provide a defence. There are two reasons for this. First, the
victim arguably has not consented to being harmed, as they do not see their being

---

454 McLeod was charged with an offence which corresponds to s. 190 of the Crimes Act 1961 (New
Zealand), which states: “Every one is liable to imprisonment for a term not exceeding 3 years who
injures any other person in such circumstances that if death had been caused he would have been guilty of
manslaughter.”

harmed as something which is actually likely to happen. Second, as a matter of normative judgment, consent to the harm should not be imputed as the reasons for not imputing seem to outweigh the reasons for imputing, due to *inter alia* the vulnerability of the general public to be persuaded to take part in these acts. Stuntmen performing feats will also not be held to imputedly consent to the intentional or reckless causation of harm against themselves. However, as in sports, there would be a presumption that the harm caused was not done so intentionally.

Due to the lack of appellate decisions on these issues, the conclusions here arrived at are based largely on my own understanding of the logic that underpins the area. While it would be easy to simply say that dangerous exhibitions are immune from the normal rules of consent, that explanation would be unsatisfactory. It would be difficult to understand the logic that dictates an individual may consent to being stabbed and killed by an impalement artist in Leicester Square but two individuals could not engage in sadomasochism in the privacy of their own home. The explanation I provide, it is hoped, reconciles these two instances by showing that the intentional and reckless causation of harm cannot be consented to in dangerous exhibitions.

**Others**

No time will be devoted to lawful chastisement as this writer is in agreement with Lord Mustill that the issue of consent does not arise in such instances.

Attempts to forge an exception from the general rules for rough horseplay are also unconvincing. It is submitted that, for adults, the normal rules of consent should apply. McAuley and McCutcheon come to similar conclusions saying that as rough horse played is allowed because bodily harm is not intended, nor is it a likely consequence, then “horseplay is not really an exception, rather if falls within the general
rule.”

Anderson cites this with approval. As a caveat to this paragraph it is submitted that any exemption which purported to allow the intentional or reckless causation of bodily harm to a person in the context of *rough horseplay* who did not explicitly consent to that harm being caused to them would be indefensible.

**The Regulatory Exemption**

With the above distinctions addressed, it can be seen that the theme of regulation runs through all of the proper exemptions: surgery; boxing; tattooing and piercing. In Ireland surgeons must be registered in accordance with Part 6 of the Medical Practitioners Act, 2007. Under section 37, it is an offence for an unregistered medical practitioner to practice medicine (which includes the practice of surgery, as per section 1 of the Act) or to advertise one’s services as a medical practitioner. Section 38 provides for exceptions to section 37, most notably among them perhaps is the exception to practice medicine in the course of first aid. The practitioner must register with the Medical Council, which was established by the Medical Practitioners Act 1978, to provide for the registration and control of persons engaged in the practice of medicine. The Council’s regulatory powers will soon be increased with the introduction of schemes to ensure the ongoing maintenance of professional competence of its registered practitioners.

Surgery and the practice of medicine is also regulated in England and Wales by the Medical Act, 1983 and its amending legislation. The Law Commission point out that, unlike in Ireland, there is no specific offence of practicing

---

medicine without being registered. There are, however, other considerable disadvantages such as not being allowed to use a title, or to recover medical fees in court. The Law Commission comes to the right conclusion in saying that persons who are not registered deserve no protection from the criminal law for carrying out surgeries.

In this brief outline, it can be seen that surgery is a regulated activity. More time could be spent to impress on how heavily regulated the industry is, however, for the present purposes it suffices to point out that it is indeed a properly regulated activity. Due to the industry’s regulation, if the state wishes that certain types of surgery not be carried out, it will have to pass specific laws to criminalise certain procedures. However, it is submitted that if a surgeon performed a procedure that was not accepted as being reasonable within the medical community, they may still be open to criminal liability. Therefore, a surgeon who attempts to carry out a brain transplant, using the brain of a healthy consenting patient is likely to face charges, principally because they have acted outside of regulations which stipulate that surgeons must act in accordance with modern best-practice methods.

Ritual male circumcision is a type of surgery which causes some problems as it is not normally carried out by a regulated surgeon, or so the Law Commission would have it believed. However, it appears that there is some form of regulation over this activity. When males of the Muslim faith are circumcised, it is usually done in hospitals

---

460 S. 49, Medical Act, 1983.
461 S. 46, Medical Act, 1983.
463 See, for example, the tenor of s. 44D of the Medical Act, 1983.
and clinics, and thus in a regulated environment.\textsuperscript{465} When males of the Jewish faith are circumcised, the procedure is carried out by a Mohel who is trained in the medical practice of circumcision as well as Jewish rituals surrounding the procedure. Mohels will examine the child to ensure they are fit for the procedure, if they are not, it will be postponed. George Robinson adds some more interesting information:

“today’s mohel will also have been educated in modern surgical hygiene. The Reform movement in particular has taken an active interest in certifying mohelim who are doctors: They undergo training in the theology, history, and liturgy of the brit milah. A[sic] increasing number of Orthodox mohelim are also physicians.”\textsuperscript{466}

In 2003 a 29-day-old baby died after being circumcised in his home in Waterford. Gardaí subsequently arrested a Nigerian man, who was later found not guilty of recklessly endangering the child’s life.\textsuperscript{467} This case demonstrates that circumcisions can be dangerous and are not always professionally carried out. This poses a problem for the regulatory theory I seek to propose. It shows that there will be no criminal liability for such acts, despite being outside of a regulatory context. However, the first thing to be noted is that there was a prosecution: i.e. the dangerous, unprofessional conduct, outside of a regulatory context led to a prosecution. The second thing to note is that the decision of the court in this particular case was not an appellate decision and therefore

\begin{footnotesize}
\begin{enumerate}
\end{enumerate}
\end{footnotesize}
lacks any binding effect, as a jury decision does not establish any legal principle.\footnote{One might argue that the jury nullified the legal principle I have been arguing for (that the intentional or reckless causation of harm or serious harm can only be consented to in regulated situations). However, it is unlikely that this principle was explained to jury.  
\footnote{\textit{.Department of Health and Children}, “Cultural Male Circumcision: Report of Committee 2004/2005” (Dublin, 2006) <http://www.dohc.ie/publications/pdf/circumcision.pdf?direct=1> accessed 20 March 2011, at 9-12.}} Finally, it should be noted that the trial judge gave a bizarre direction to the jury insisting that they not bring their own white western values to the case.\footnote{\textit{"Nigerian cleared over circumcision death” RTE News (7 October 2005) <http://www.rte.ie/news/2005/1007/igbinediono.html#article> accessed 20 March 2011.}} It is difficult to understand how such a direction could have any bearing on the factual issues that the jury was charged with deciding upon. It is not difficult, however, to understand that such sentiments could easily have persuaded the jury to find in one direction, and not another.

and subject to the criminal law.\textsuperscript{474} In essence, the report supports the theory that circumcisions should only be legal when carried out in some form of regulated context.\textsuperscript{475}

Boxing is also a regulated activity. In Ireland amateur boxing is regulated through the Irish Amateur Boxing Association\textsuperscript{476} (IABA) and professional boxing seems to be governed and regulated by the Boxing Union of Ireland\textsuperscript{477} (BUI). The British Boxing Board of Control (BBBC) regulates boxing in the United Kingdom. It is not necessary to delve into the specifics of boxing’s regulation at this point, but it will suffice to say that while it is a regulated activity, there is much concern over whether it is regulated enough or whether that regulation is sufficient or not.\textsuperscript{478} It is in the debate over the adequacy of regulation which draws calls from some sides to have boxing prohibited. Those who call for boxing’s ban or better regulation are obviously concerned with safety issues in boxing, considering the dangerous nature of the conduct. With this in mind, it can be said that to say an activity is regulated will not automatically exempt it from the remit of the criminal law. The regulation must be adequate to the dangers represented in the activity.


\textsuperscript{475} Female genital mutilation is prohibited in the UK (Female Genital Mutilation Act 2003) and generally thought to be unlawful in Ireland, although the situation could be made clearer; see S. Mullally and T. Ni Mhuirthile, “Reforming Laws On Female Genital Mutilation In Ireland: Responding To Gaps In Protection” (2010) 17 Dublin University Law Journal 243. Even if those wishing to facilitate the practice in Ireland were to form a regulatory body, it is likely that a specific law would be passed to prohibit the conduct, similar to that in the UK.


\textsuperscript{477} Very little information is available about this body. It appears to be affiliated to the European Boxing Union (see ——, “EBU Ltd”, European Boxing Union Website <http://www.boxebu.com/> accessed 2 September 2009). The BUI was involved in withholding a purse from a boxing match which was feared to be rigged by spectators and analysts: see M. Foley, “Gomez controversy a body blow to boxing” TimesOnline (5 February 2006) <http://www.timesonline.co.uk/tol/sport/article726946.ece> accessed 2 September 2009; ——, “Union awards purses to McDonagh and Gomez”, BreakingNews.ie (17 February 2006) <http://archives.tcm.ie/breakingnews/2006/02/17/story245223.asp> accessed 2 September 2009.

\textsuperscript{478} See Anderson’s discussion of the effectiveness of BBBC regulation in the UK: J. Anderson, The Legality of Boxing: A Punch Drunk Love? (Birbeck Law Press, London 2007), 76, 77, 179. So much is his dissatisfaction with the BBBC’s regulation of the industry, Anderson recommends that the BBBC be replaced by a statutory body called the British Boxing Association, at 177.
Questions of adequacy aside, it is interesting to note that when boxing’s future was called into jeopardy by a bill proposing to ban the sport in the UK in 1995, many members of the House of Lords referred to the fact that boxing was a regulated activity in order to refute the need for a ban on boxing. The Earl of Shrewsbury,479 Lord Howell,480 Lord Meston,481 Lord Donoughue,482 and the Parliamentary Under-Secretary of State, Department of National Heritage (Lord Inglewood),483 all referred to regulation as a reason against banning.

Tattooing and piercings form a final category which could be seen as being exempt from the general rules of consent because it is regulated. It is unclear to what extent such practices are regulated in Ireland. It seems that the dangers of the activities are regulated in so far as instruments which have not been sterilised can give rise to infections and infectious diseases. Under the Infectious Disease Regulations 1981, on becoming aware of the presence of an infectious disease in a person, a medical officer is required to make enquiries into the nature and source of the infection in order to prevent its spread and remove conditions favourable to it.484 There are problems, however, with some less reputable tattoo artists and piercers performing their services on minors without parental consent. It may be the case that in Ireland such activities are not regulated to the extent that they should be in order to claim exemption. However, the lack of regulation is due to governmental apathy in this area, as many individuals involved in these activities would appear to welcome regulation, in order to make the

484 S. 11, Infectious Disease Regulations 1981.
practice safer, more reputable and in order to subject everyone to the high operating
standards that many of the more reputable studios subject themselves to.\footnote{485}

In England it is an offence to tattoo any person under the age of 18.\footnote{486} Notably,
there is no provision in the Tattooing of Minors Act, 1969 to excuse those from liability
who tattoo a minor, with the consent of that minor’s parents or legal guardians. There
is, however, an exemption for a doctor or someone operating under a doctor’s direction
to tattoo a minor for a medical reason.\footnote{487} Power to regulate other specifics of the
industry has been devolved to local authorities.\footnote{488} They are at liberty to decide on
whether they will enforce the provisions of Chapter 30 of the Local Government
(Miscellaneous Provisions) Act 1982. If a local authority does resolve to enforce
Chapter 30, it becomes an offence for an unregistered person to perform acupuncture,\footnote{489}
or run a business of tattooing, ear-piercing or electrolysis.\footnote{490} The Act also deals with
the suitability and sanitation of the premises being used, as well as the cleanliness of the
people involved in the activity and the cleanliness of their equipment.\footnote{491}

There is no regulation for piercing other parts of the body, aside from the ear, or
for the practice of branding, aside from voluntary certification schemes.\footnote{492} They
therefore seemingly fall outside the regulatory model of consent proposed. Of course
just because they do not presently fall within the model does not mean that they should
not or could not fall within the model. Indeed, it appears from the Law Commission’s
report that several members of the industry are calling for it to be regulated. Many of

\footnotetext{485}{See for example the extensive set of regulations that the Tattoo Dublin studio set out for themselves and anyone else who would want to consider themselves to be a professional tattoo artist: ——, “Health Issues: Tattoo Issues” Tattoo Dublin <http://www.tattoodublin.com/health.htm> accessed 3 September 2009.}
\footnotetext{486}{S. 1, Tattooing of Minors Act, 1969.}
\footnotetext{487}{S. 13(2), Local Government (Miscellaneous Provisions) Act 1982 (C.30).}
\footnotetext{488}{S. 14, Local Government (Miscellaneous Provisions) Act 1982 (C.30).}
\footnotetext{489}{S. 15, Local Government (Miscellaneous Provisions) Act 1982 (C.30).}
\footnotetext{490}{See ss. 14 and 15, Local Government (Miscellaneous Provisions) Act 1982 (C.30).}
\footnotetext{491}{Law-Commission, Consultation Paper No. 139: Consent in the Criminal Law (HMSO, London 1995), at 123.}
these people appear to be very professional, conscientious specialists, who ensure high levels of cleanliness and indeed offer comprehensive advice to prospective clients so that they can make fully informed decisions.\textsuperscript{493} The industry’s reputation is marred, however, by those who are less scrupulous about their operating procedures. While the Law Commission did not feel the need to deal with the issue in their recommendations,\textsuperscript{494} it did say that “We have not got the slightest doubt that effective statutory controls should be put in place to ensure that these activities are properly and hygienically carried out by licensed practitioners in appropriately licensed premises…”\textsuperscript{495}

\textbf{Conclusion}

In the previous chapter there was a comprehensive analysis of the jurisprudence on consensual violence in order to try to gauge how the courts react to new instances of consensual violence. Many would have claimed that such an analysis would have been ultimately pointless, for there would be no general principle to be drawn from the jurisprudence, and it would therefore be impossible to predict how a court might react to a prosecution for consensual violence in the context of combat sports. It has been argued, however, that there can be a general principle to explain how the courts treat consensual violence. However, this principle can only be arrived at through distinguishing real exceptions to the general rules from decoy exceptions. It has been argued that the contact sports and dangerous exhibitions exceptions are both decoy

\begin{flushleft}
\textsuperscript{494} This is because their general recommendation was that people should be allowed to consent to levels of harm up to, but not including serious disabling injury. Therefore, tattooing, piercing etc. would come within the spectrum of harm that one could consent to.
\end{flushleft}
exceptions. While they may receive special treatment at law with regard to a presumption that injury was not caused intentionally or recklessly, they do not receive special treatment from the perspective of the rules on consent.

With these important distinctions made, a general theory can be advanced which requires that, in order to be exempted from the general rules, consensual violence must occur in a regulated context. The state (and the courts) must be able to trust the regulation to ensure that the consent given by the victim is real, and that risks involved have been contained and controlled, so that the conduct is no longer unpredictably dangerous. If such a regulatory system is appropriate and in place, the conduct will not be subject to the criminal law. Such regulatory systems can be seen at work in regulating surgery, boxing and in many instances tattooing. It is submitted that instances of intentional or reckless causation of harm that are not regulated, but not criminal, should be regulated. Therefore, proper regulation is required in all instances of tattooing and piercing. Not only do industry specialists support such a move, but adherence to legal principle demands that the activity be regulated. In my opinion, regulation is “the best constructive interpretation of the community’s legal practice” in these regards.\footnote{R. Dworkin, \textit{Law’s Empire} (Hart Publishing, Oxford 1986), at 225.} If this view is correct, integrity demands that the intentional or reckless causation of harm can only be legal if regulated. Integrity thus gives us a principle which we can use to forecast how the courts might respond to a criminal case which involves the causation of bodily harm in combat sports. In order to avoid criminal liability, integrity demands that the combat sports must be regulated.
SECTION TWO: THE NORMATIVE THEORY
CHAPTER FOUR – THE HARM PRINCIPLE AND PATERNALISM

Justifying Autonomy Based Paternalism

Introduction

This chapter focuses on one of the fundamental debates in political and legal philosophy. It questions whether a state is ever justified in interfering with an individual’s self-regarding choice. The dominant liberal theory in this area for over a century has been John Stuart Mill’s harm-principle.\textsuperscript{497} It answers the question in the negative and asserts that it is an insult to an individual for states to act in such a way as it compromises the individual’s dignity and autonomy, in that it deprives them of the opportunity to act on their own choices and take responsibility for their lives. Those who would answer the question in the positive might advocate paternalism. This refers to prohibiting somebody from acting so as to cause harm to themselves (or consenting to harm being caused against them). Gerald Dworkin describes it as “the use of coercion to achieve a good which is not recognized as such by those persons for whom the good is intended”.\textsuperscript{498} Therein this definition is the clear suggestion that the person being coerced does not know what is best for him. As Feinberg says, paternalism allows the state to correct my choices because “they know my own good better than I know it myself”,\textsuperscript{499} and he regards this as highly patronising. However, some theories of paternalism argue from the same foundational premise as the harm-principle. They

\textsuperscript{497} Although there are other liberal theories which would reject state interference in self-regarding actions, see for example, A. Ripstein, “Beyond the Harm Principle” (2006) 34 Philosophy and Public Affairs 215.


claim that some interference with autonomy is required in order to ensure that a person can continue to lead an autonomous life and therefore continue to take responsibility for their life.

In order to develop a theory which can inform us on what the political or legal response to emerging combat sports should be in a society, there will be an in-depth discussion of the harm principle, the type of soft-paternalism it condones and the criticisms it often faces. With the criticisms made, it will be argued that the harm principle alone cannot give a full account of legitimate criminalisation in a society. There needs to be some room in any theory of criminalisation for hard, coercive paternalism. There will then be a discussion of what type of arguments can justify paternalism, with a thorough analysis of the theory which justifies paternalism in order to promote future autonomy – autonomy-based paternalism. This theory will then be applied to some common examples in order to see if the results are intuitively suitable. It will be argued that autonomy-based paternalism would condone interference in combat sports to restrict participation to those who have been approved to fight by doctors and it may also condone the banning of certain dangerous techniques to the target area of the head, which are likely to increase the risk of brain injury.

Note the distinction between coercive paternalism and non-coercive paternalism in N. Fotion, “Paternalism” (1979) 89 Ethics 191, at 194-195.
The Harm Principle

It is the importance of individual freedom which is at the heart of liberalism and at the core of the classic essay by John Stuart Mill, *On Liberty*. In this famous work, Mill outlines the value of human freedom of thought and discussion,\(^{501}\) and the idea that, as nobody really knows what is truly right or wrong, people should be allowed to think, discuss and act according to their own principles and that their life-experiment should not be interfered with, once their actions are not affecting anyone else.\(^{502}\) Mill’s theory is built around what is referred to as the *harm principle*. In one of the most quoted and famous paragraphs in the philosophy of liberalism, he says:

“…the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That 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. He cannot rightfully be compelled to do or forebear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.”\(^{503}\)

C. L. Ten notes that that the “validity of… [the harm] principle depends on there being a distinction between self-regarding and other-regarding actions”.\(^{504}\) For Mill, there is a distinction between acts which directly affect other people’s interests (other-regarding) and acts which merely indirectly affect others’ interests (self-regarding).\(^{505}\) Of it he says:

“there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person’s life and conduct which affects only himself, or, if it also affects others, only with their free, voluntary and undeceived consent and participation.” \(^{506}\) (emphasis added)

Two important ideas can be taken from this. First, as long as B, the person who is affected by A’s actions, consented to being affected by A’s action and that consent was “free, voluntary and undeceived”, then society has only an indirect interest in the conduct and thus no right to interfere. Therefore, the harm principle could exclude a combat sports competition between two people from the scope of the state’s powers. Leading on from this is the second important idea: in order to allow a combat sports competition, the state must be sure that the requisite consent is present and that that consent is “free, voluntary and undeceived”. This leads to a significant justification in allowing the state to regulate combat sports which is compatible with the classical liberal doctrine as espoused by Mill.

**Feinberg and the Harm Principle**

Joel Feinberg’s *The Moral Limits of the Criminal Law* has been one of the most detailed and well-armed cannons of harm-principle theory. His theory on the extent to which it is morally acceptable for the state to limit a citizen’s liberty is built around an interpretation of Mill’s principle. Feinberg believes that liberty should be the norm in a

society, which is democratic and has an ideal legislature. Any interference with this liberty must be justified by a set of liberty-limiting principles. Dworkin identifies Feinberg’s five possible contenders as liberty-limiting principles: the harm principle; the offence principle; legal paternalism; legal moralism; and moralistic legal paternalism. However, it is only the harm and offence principles that Feinberg actually accepts as liberty-limiting principles, as he denounces the latter three possibilities throughout his four volumes.

First, it is of interest to note that when discussing the harm principle Feinberg sees harm in a legal sense as being an overlap between harm in the sense of interfering with an interest, and harm in the sense of wronging someone, by for example, treating them unjustly or violating their rights. This is vital when considering whether or not one can consent to harm being caused to oneself by another. He appears clear on this matter:

“One class of harms (in the sense of set-back interests) must certainly be excluded from those that are properly called wrongs, namely those to which the victim has consented. These include harms voluntarily inflicted by the actor upon himself, or the risk of which the actor freely assumed, and harms inflicted upon him by the actions of others to which he has freely consented.”

This must be because while one’s interest may be harmed by allowing someone to cause violence to oneself, one cannot be legally wronged by an act that one has consented to. Feinberg furthers this point by using the example of a legally constituted boxing match, which is comparable in terms of intent when throwing a punch to any other combat sport. He shows that while you may be injured physically, none of your rights have been injured. The inference here is that as you have consented to some violence being caused against you, your right not to have violence caused against you is not violated (or injured). He sees this concept as being embodied in the volenti non fit injuria doctrine, that one cannot be wronged by something to which one has consented. He cites Aristotle saying that the definition of wronging someone includes “the fact that the action is contrary to the wish of the person acted upon”. This would lead to saying that one cannot be wronged once one has consented, as that would be “to consent to being-treated-contrary-to-one’s-wishes”, which Feinberg describes as “absurd”.

In applying this brief look at Feinberg’s liberalism and his interpretation of the harm principle as a liberty-limiting principle to the situation at hand, it can be presumed that he would have little problem with combat sports, once both parties consented to the activity. However, he is very interested in ensuring that this consent is adequate.

Furthermore, it is likely that the greater the risk that a serious degree of physical harm will be caused by the conduct, the more imperative it will be that the consent obtained be truly adequate. Of this Feinberg says:

“Volenti is most plausible when it denies title to complain only to him whose consent was *fully voluntary*, and a person’s consent is fully voluntary only when he is a competent and unimpaired adult who has not been threatened, misled, or lied to about relevant facts, nor manipulated by subtle forms of conditioning.”519

The key to understanding the argument is that liberalism would not tolerate banning activities where there has been a true consent between the parties to cause violence to one another. However, that does not mean that a supporter of liberalism would not condone state interference so as to regulate such activities. Indeed, liberalism’s support for these activities’ continued existence demands that they be regulated, so as to ensure that an adequate consent is present. Of course, perhaps the regulation would not have to come from the state itself: there could be a system of self-regulation. However, the state would still be justified in reviewing the actions and performance of the self-regulating body and indeed stepping in and taking control if it deemed the self-regulating body to be inadequate. Here it is interesting to note that when Jack Anderson deals with this topic—with specific reference to professional boxing—he makes it clear throughout, that one of the principal reasons which lends itself to supporting the continued existence of boxing, and which spurs liberals on to potentially condemn a banning of the sport, is the fact it is a regulated activity:

“Feinberg, and liberalism in general, impliedly have little problem in supporting the existence of professional boxing, largely because of the presence of a licensing and regulatory procedure, the purpose of which is to ensure that all parties to the combat genuinely, substantially and voluntarily consent to the fight”.

A possible question which may be asked is whether liberalism would also require amateur versions of combat sports to be regulated. It is submitted that from a purely theoretical view, liberalism should still insist on some form of regulatory system which could ensure an adequate consent was present between the participants. For example, club A decides that in order to maintain its own high standards and prestige in competitions that all people who had already attained the rank of black belt prior to joining A will have to be re-graded by an instructor at club A in order to continue holding their rank in club A. It is of course open for already qualified black belts to refuse to be re-graded out of principle. However, if they choose this option they will be demoted within the club to a lower, colour-belt grade. Up to this point, the situation mirrors exactly the scheme introduced by the University of Sydney’s Taekwondo Club. Imagine the hypothetical situation where X is such a person who was previously a 3rd degree black belt but had been demoted a full two levels below 1st degree black belt (to a level of much less skill) because out of pride and principle he refuses to re-grade. X decides to compete in a county competition and is drawn against Y. Y is the same grade as the now demoted X, and Y clearly consents to fight. However, he consents to fight X who is wearing a belt which signifies that he is a much lower grade in that sport, and therefore capable of a considerable less amount of skill than he really possesses (let us say that in reality it would take Y a further 5 years to reach the level of X). Is Y’s consent here adequate for liberalism? It is submitted it is not, and if

---

$X$ seriously harms $Y$, there does not appear to be any legal or moral justification for this harm. Regulation of amateur combat sports should not, thus, be excluded from the ambit of the state, because although participants are unlikely to be coerced into fighting for someone’s financial benefit as in professional combat sports, there are other substantial risks to a valid consent being formed due to, *inter alia*, mismanagement of an organisation or a general lack of competent governance of a sport.

It is therefore submitted that some form of regulatory scheme is necessary to ensure adequate consent. Feinberg helpfully contributes, “All we need to assure ourselves of in assessing voluntariness is that the risk-taker knows exactly what the risk is that he is taking, and his ignorance is a vital component of that risk”. 522 To demonstrate this point he refers to going on to a lake which has frozen-over to some extent, but the sportsman is not sure to what extent:

“If the probability of break-through at some weak point is only 1% and that is known to the sportsman, he does take some risk, but he takes it voluntarily. If he believes that the probability is 1% when in fact it is more like 99%, then he takes a big risk and takes it, in his ignorance, quite involuntarily”. 523

The question may then become, to what extent are combat sports practitioners aware of the risks they take, or whether they are mistaken as to the level of risk they face.

**Liberalism’s Paternalism**

Paternalism, in the coercive sense, involves the concept of coercing citizens to either do something or to refrain from doing something, because if it was left up to them, they

---

may make the incorrect decision (from the point of view of the state) and therefore harm
themselves. It is therefore a way of protecting people from their own actions which are
stupid or irrational. A classic example of such paternalism is the requirement to wear a
helmet while riding a motorcycle.\textsuperscript{524} This type of paternalism is sometimes called hard
paternalism or legal paternalism. Feinberg sees it as the only type of paternalism that is
truly paternalism and differentiates it from what he would like to call “soft-anti-
paternalism”,\textsuperscript{525} but what he actually refers to as “soft-paternalism” as that is the term
which is most commonly used.

The distinction between these two types of paternalism goes to the relevance of
consent. Hard paternalism is dedicated to protecting the actor from physical harm
causd to him by himself or by another and it is irrelevant whether or not he consents to
the harm. Soft-paternalism is dedicated to ensuring that people who have not developed
or are incapable of developing their mental faculties to a normal, adult level, are
protected from harming themselves, or allowing others to harm them, because they do
not fully comprehend the nature and quality of the consequences of their decisions. It
also aims at protecting those who do not really consent to a risk, because their consent is
not “free, voluntary and undeceived”.\textsuperscript{526} However, if the requisite consent is found to
be present, the person will not be restrained. Thus, Feinberg sees soft-paternalism as
being merely a principle which is easily derived from the harm-principle itself.\textsuperscript{527}

\textsuperscript{524} See L. Blom-Cooper and G. Drewry (eds), \textit{Law and Morality} (Duckworth, London 1976), at 29.
There is debate over whether motor-cycle helmet laws are enacted to protect motor-cyclists or the tax-
payer from having to pay the costs of taking care of the motor-cyclist after a helmetless accident. Gerald
Dworkin points out that helmets could keep badly injured motor-cyclists alive that would have otherwise
died from head injuries, and thus helmet laws impose more costs on society: G. Dworkin, ‘Paternailism:
Some Second Thoughts’ in R. Sartorious (ed), \textit{Paternalism} (University of Minnesota Press, Minneapolis
\textsuperscript{525} J. Feinberg, \textit{The Moral Limits of the Criminal Law: Harm to Self} (Oxford University Press, Oxford
1986), at 15.
\textsuperscript{526} J. S. Mill, \textit{On Liberty} (Ticknor and Fields, Boston 1863), at 27.
\textsuperscript{527} J. Feinberg, \textit{The Moral Limits of the Criminal Law: Harm to Self} (Oxford University Press, Oxford
1986), at 12.
Thaler and Sunstein advance a slightly different theory of soft-paternalism, which they call *libertarian paternalism*.\(^{528}\) They recognise that many individuals in a community, and particularly the government, will have opportunities to influence how people live their lives and thus may be called *choice architects*.\(^{529}\) This power, they submit, should be used to help normal people to live “longer, healthier and better” lives.\(^{530}\) However, those who have the power to influence may only *nudge* others in the right direction and may not over-rule their decisions. Therefore, those who want to exercise their freedom contrary to the influence are free to do so.\(^{531}\) As they describe it: “A nudge…alters people’s behaviour in a predictable way without forbidding any options or significantly changing their economic incentives”.\(^{532}\) As these nudges are preferred to “commands, requirements, and prohibitions”,\(^{533}\) this theory is essentially a soft-paternalistic one. However, note that it focuses on influencing people into making the right decisions, as opposed to ensuring those decisions are voluntary.

The question which thus arises is why should soft-paternalism be needed to regulate combat sports? Notwithstanding other examples that have been given, it is clear that combat sports are, or have the potential to be dangerous to the physical well-being of individuals.\(^{534}\) This alone would be sufficient for state intervention by some hard paternalists. However, for the harm-principle liberals, the physical harm caused is only objectionable if there has been no consent, but as there is a potential for a

\(^{534}\) There will be a detailed discussion on injuries rates in combat sports in Chapter Seven.
substantial risk of harm from the activity, the liberal’s curiosity is aroused as to whether the consent was real or not.\textsuperscript{535} Therefore, the liberal feels the state is entitled to verify the consent; however, “The point of the procedure would not be to evaluate the wisdom or worthiness of a person’s choice, but rather to determine whether the choice really is his”.\textsuperscript{536} What is crucial to understand here is that the soft-paternalist does not care whether the action is rational or not, as judged from the eyes of society. Instead she is concerned with the nature of the consent itself.\textsuperscript{537} Arneson notes this by condemning anybody who would penalise someone for nurturing their irrational quirk; the fact that the quirk may seem unreasonable to others, not fitting in with their life-plan or conception of good, is not a reason to criminalise it.\textsuperscript{538}

Thaler and Sunstein’s choice architects may be less interested in whether the consent was real in such cases and might instead be interested in how to \textit{nudge} people away from potentially putting their future health and happiness in danger. They might, therefore, be in favour of licensing procedures for combat sports in which the head is a legal target for punches and kicks.\textsuperscript{539} The lack of licensing requirements and costs (although only minor) for combat sports which did not allow dangerous techniques to the head in competitions would be an incentive for individuals to choose to participate in those sports as opposed to the more dangerous ones.\textsuperscript{540}

\textsuperscript{535} J. Feinberg, \textit{The Moral Limits of the Criminal Law: Harm to Self} (Oxford University Press, Oxford 1986), at 124; according to Feinberg, “Our justification for extra caution in…[some] cases is simply our expectation based on experience that the act is not voluntary, and our need to make sure, therefore, that the present case is different in that respect from most others of its category.”


\textsuperscript{538} R. Arneson, “Mill versus Paternalism” (1980) 90 Ethics 470, at 474.


Therefore, due to the possible dangerous nature of combat sports, soft-paternalism would allow for a degree of regulation. It is interesting at this point to turn to Anderson’s synopsis of what form such soft-paternalistic intervention could actually take. He believes that professional boxing would benefit from the introduction of “mandatory education programmes” for boxers,\(^{541}\) which would detail the medical dangers and long term effects of boxing, as well as the financial realities of being a professional boxer (citing Dixon that very few people actually become extremely wealthy;\(^ {542}\) this is even more true in other combat sports where very few professionals could survive on their earnings from fights alone, and so usually have second jobs as a primary source of income). If such a programme was required before a combatant was licensed, this would solve Dixon’s problem that most “boxers probably fail to clear the very first hurdle required for an autonomous decision: having adequate information. Boxers are unlikely to have subscriptions to the *Journal of the American Medical Association…*\(^ {543}\) Following on from this, Anderson submits that:

> “the professional boxer coached from a young age in the skills of the sport, subjected to regular medical and neurological check-ups, licensed to fight in properly promoted and presented events, is a boxer who has made a deliberative choice to pursue professional boxing as a career”.\(^ {544}\)

Anderson’s suggestions, which would ensure that the consent given would be voluntary and adequate in the eyes of liberalism, give an interesting insight into the different types of regulation which could be introduced for combat sports. It can be gleaned from his

\(^{543}\) N. Dixon, “Boxing, paternalism and legal moralism” (2001) 27 Social Theory and Practice 323, at 325; Dixon equates such a programme to a governmental health warning on cigarette packets, at 326.
suggestions that a civil servant asking “are you really sure you want to fight?” and then
ticking a piece of paper to confirm this consent would obviously be vastly ineffective in
ensuring proper consent. Instead, to ensure such consent, some form of regulatory
body, which would educate, observe training, progress and medical fitness from a
distance and only licence fighters and fights where it was satisfied a valid consent was
present, would be required.

However, it is a mistake to regard boxing and combat sports regulation as creatures of merely soft-paternalism. While they may carry out the checks that liberalism requires, they also go much further than this. As we will see in Chapter Eight, almost all boxing and combat sports regulatory bodies will be empowered with the ability to prohibit a fighter from fighting where he fails certain medical examinations, or indeed where a doctor advises that the fighter is unfit to fight. Note that it is not merely a case of the doctor advising the fighter that he has not reached an acceptable level of fitness, with the fighter retaining the choice as to what to do with that advice. The doctor’s medical opinion is the final say in the matter. This is clearly a hard paternalistic feature of such regulatory systems.

**Criticisms of the Harm Principle**

The harm-principle’s all-or-nothing approach to criminalisation has garnered criticism, even from those largely persuaded by liberal ideology.\(^{545}\) For example, Shafer-Landau reasonably asks why paternalism has to be described as a doctrine which asserts that voluntary self-harm is always a good reason for criminalisation.\(^{546}\) He asks why the

---


middle ground is not acknowledged: that is that “such harm is only sometimes a good and relevant reason” for criminalisation.\textsuperscript{547} The question is particularly pressing considering Shafer-Landau’s observation that both the harm-principle and certain instances of paternalism are both justified by the same background justification: intuition. Feinberg’s argument centres on the intuitive grounding justification that we do not like the idea of legal interference with voluntary self-regarding actions.\textsuperscript{548} But Feinberg does not defend this starting premise.\textsuperscript{549} He merely allows its intuitive force to take hold. However, it is questionable if it is supported by any general moral principle. We must not forget that intuition is not an argument and Shafer-Landau suspects that any grounding moral justification could be question begging. He doubts that as an argument on its own legs, it would actually persuade any paternalist with different intuitions that they were mistaken.\textsuperscript{550} It is argued that while many will share Feinberg’s intuition, they will also share paternalist intuitions to inter alia ban gladiatorial fights and require that motor-cycle helmets be worn. Both of these intuitions leave us with “conflicting considered judgments and no reason available within the argument for giving priority to the antipaternalist resentment over the paternalistic convictions”.\textsuperscript{551}

It is also the foundations of the harm principle that are attacked when Young argues that Mill was wrong to base his theory of liberty on the premise that competent persons know their own interests best.\textsuperscript{552} Young argues that Mill’s arguments against slavery directly conflicted with such a premise.\textsuperscript{553} Indeed, Thaler and Sunstein argue that such an assumption is clearly false, and go as far as to say that nobody could really

believe such a premise upon reflection. Even staunch, liberty-defender, Hart recognised such a view was unrealistic.

Young also contends that Mill’s argument that paternalism demeans or disrespects individuals is also open to question. He argues that forcing people to take part in mandatory fire drills could hardly be seen as demeaning individuals. Indeed, it is also hard to see how forcing individuals to wear motor-cycle helmets could be seen as demeaning those individuals. However, it is arguable that Young is confusing actions with principle. There is nothing demeaning about the action of people evacuating a building as a practice-run. However, Mill’s argument is surely that in principle, it demeanes an individual to invalidate his decision and thus treat him as being a child, without full mental capabilities. Even if this is Mill’s argument, it is still not necessarily correct. Husak discusses the idea that by imposing paternalistic legislation on individuals, it is defining people as being inferior to a group of people who are superior, and therefore, know better. He argues that non-paternalistic legislation also gives rise to a superior versus inferior type of situation:

“Consider a standard example of a non-paternalistic interference: a law against murder. The fact that a legislator votes to enact a law against murder indicates his belief that a number of citizens are inclined to commit murder, and that sanctions are needed to deter them. Suppose the legislator is correct in this belief. Suppose further that this particular legislator has no inclination to commit murder, and would be no more likely to commit murder in the absence of a law proscribing it. Arguably, those citizens who are inclined to commit murder and need to be restrained by the threat of sanctions suffer from some shortcoming or deficiency vis-à-vis the legislator. Ideal persons, possessed of Kantian ‘holy wills,’ need no external laws. Perhaps, then, the coercive relation itself, at least when held to be justified, requires an alleged superior and inferior”.

Finally, the harm principle is sometimes criticised as being an empty formula.\textsuperscript{557} It is traditionally interpreted as a principle which prohibits the state from enforcing private morality.\textsuperscript{558} However, Raz points to the fact that the harm principle must enforce some form of morality, or else the principle means nothing.\textsuperscript{559} It must rely on a moral theory which establishes rights and gives some meaning to what it means to describe an action as being “unjust”. Raz demonstrates that if perfectionist autonomy was the moral theory which underpinned the harm principle, it could mean that harm to others or to self could justify state coercion.\textsuperscript{560} Indeed, Shafer-Landau also notes the potentially emptiness of what it means for actions to be voluntary, or sufficiently voluntary. As there is no precise threshold to determine what it means for an action to be voluntary, it has to be discovered considering a number of different considerations, which leaves assessing voluntariness more of an “art than a science”.\textsuperscript{561}

\section*{Justified Paternalism}

Although the theoretical weakness of the harm-principle’s all-or-nothing attitude to criminalisation has been noted, this attitude is one of the principle’s main advantages. It closes a door to minimum paternalistic interference to prevent this minimum from being expanded into broader paternalistic regulations. If any different theory of criminalisation is to be developed, it must also close some doors for the same reasons. Any theory of paternalism which respects the right of citizens to take responsibility for

\textsuperscript{558} J. Raz, \textit{The Morality of Freedom} (Oxford University Press, Oxford 1986), at 413.
their own lives must limit the degree to which the state can interfere in those lives. The
first such limit that might be put in place is to recognise Ronald Dworkin’s distinction
between volitional and critical interests. The only justifiable paternalism for Dworkin is
volitional paternalism, which would allow for coercion only in cases where people were
being forced to do something they already wanted to do, and it is therefore in their own
volitional interests.\textsuperscript{562} This would include the wearing of seat belts.\textsuperscript{563} He does,
however, distinguish volitional paternalism from critical paternalism which would allow
coercing people into living \textit{better} lives than the ones they currently live, despite them
valuing the life they are currently living to be good.\textsuperscript{564} It does not matter if the
individual eventually endorses the \textit{better} life, for the threat of coercion has corrupted
their critical judgment.\textsuperscript{565}

It is unclear whether such an account of acceptable and unacceptable
paternalism would lend itself to prohibiting certain types of conduct during a combat
sports competition. This is chiefly because the distinction between volitional and
critical interests is not easy to draw in practice, with Wolfe regarding it as “slippery, at
best”.\textsuperscript{566} He questions how deep-felt convictions have to be before they qualify as
critical interests.\textsuperscript{567} That said, I am tempted to think that generally practising sports of
any kind are things people want to do, as opposed to things people should want to do
where forbearance would make one’s life worse.\textsuperscript{568} It is submitted that if wearing a

\textsuperscript{562} R. Dworkin, “Liberal Community” in G. Dworkin (ed), \textit{Morality, Harm and the Law} (Westview Press,
Oxford 1994), at 41.
\textsuperscript{563} R. Dworkin, “Foundations of Liberal Equality” in G. B. Peterson (ed), \textit{Tanner Lectures on Human
Values} vol. 11, (University of Utah Press, Salt Lake City 1990), at 77.
\textsuperscript{564} R. Dworkin, “Foundations of Liberal Equality” in G. B. Peterson (ed), \textit{Tanner Lectures on Human
Values} vol. 11, (University of Utah Press, Salt Lake City 1990), at 77.
\textsuperscript{565} R. Dworkin, “Foundations of Liberal Equality” in G. B. Peterson (ed), \textit{Tanner Lectures on Human
Values} vol. 11, (University of Utah Press, Salt Lake City 1990), at 42.
615, at 625.
615, at 627-628.
seatbelt is a valid example of volitional paternalism, so too is the compulsory wearing of helmets while riding motor-cycles and so too could be the banning of particular combat sports techniques which increase the risk of serious brain injury.

Dworkin has recently clarified the distinction between volitional and critical interests, I believe. Although he does not use those terms anymore, he points to the difference between paternalism justified by moral arguments and paternalism justified by ethical arguments (ethical paternalism).\textsuperscript{569} Central to this distinction is his endorsement of the view of morality as involving how we treat others and ethics pertaining to how we lead a good life.\textsuperscript{570} It is ethical paternalism that Dworkin finds intolerable. He views ethical independence as being crucial to individuals’ dignity and argues that nobody should interfere with an individual’s choices about matters of ethical foundation.\textsuperscript{571} Foundational choices such as religious, sexual and political identity must all be choices which are free from the coercive power of the state, with the only exception being where the life, security or freedom of others is compromised by the exercise of an individual’s ethical independence.\textsuperscript{572} Dworkin does not consider driving without wearing a seat-belt, or presumably riding a motor-cycle helmetless, to be a foundational conviction in a person’s life.\textsuperscript{573} It seems to me that Dworkin’s identification of critical interests as ethical interests weakens and responds to Wolfe’s argument, as it is clearer what is meant by ethical foundations. That said, while there could remain a blurry line between that which is foundational in a person’s life, and that which is not, it seems that arguing one way or the other will require serious moral argument.

Dworkin would not permit all cases of paternalism in non-foundational cases either. He argues that interferences should enhance people’s capacity to take charge of their own lives, rather than diminish it, and they should help people to achieve what they want, despite moments of acknowledged weakness.\textsuperscript{574} This leads on to the best justification for paternalism that is generally advanced: autonomy-based paternalism.

**Autonomy-Based Paternalism**

If we accept that paternalistic intervention may only ever be justified by moral arguments and not ethical arguments, then the next question is what moral arguments may be legitimately employed to justify paternalism. Many submit, and I agree, that the best moral argument that can be made for paternalism is one based upon the protection of an individual’s autonomy. This argument was first made, ironically, by Mill, despite his vehement arguments against paternalism in *On Liberty*. He admits that paternalism can be used in one instance: to prevent an individual from selling themselves into slavery.\textsuperscript{575} He says:

“In this and most other civilized countries…an engagement by which a person should sell himself, or allow himself to be sold, as a slave, would be null and void; neither enforced by law nor by opinion. The ground for thus limiting his power of voluntarily disposing of his own lot in life, is apparent, and is very clearly seen in this extreme case. The reason for not interfering, unless for the sake of others, with a person’s voluntary acts, is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it. But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it, beyond that single act...The principle of freedom cannot require that he should be free not to be free.”\textsuperscript{576}


Mill is often criticised for this valuing of one conception of good over all others,\textsuperscript{577} although Fuchs claims that when this section is read in conjunction with Mill’s earlier work, *Principles of Political Economy*,\textsuperscript{578} it can be interpreted that Mill would only advocate banning such contracts on soft-paternalistic grounds, saying that there would be a presumption against the validity of a consent to a contract to continue to do something forever, without any way of revoking that contract.\textsuperscript{579} But, as will be discussed below, such a presumption seems to be in itself, hard paternalism.

Autonomy is recognised by many to be central to an individual’s dignity. It is through their autonomy that individuals shape and take responsibility for their own lives. A certain paradox arises, however, in situations where individuals use their autonomy to deprive themselves or take the risk of depriving themselves from the future ability to shape and take responsibility for their own lives. Many question whether a state which respects its citizens and their autonomy should be drawn into this paradox by paternalistically preventing citizens from acting on choices which will or may result in fettering their autonomy. The question is a difficult one, not least because it could potentially and controversially involve giving more weight to individuals’ future autonomy than to their present autonomy.

In order to explore autonomy-based paternalism further, I will first sketch the different in ways in which leading theorists describe and understand autonomy. There will then be an analysis of the debate between those who favour prioritising future interests over present ones. Following from that, I will discuss the role that reasonableness must play in autonomy-based paternalism. Finally, I will apply the theory to some common examples, including that of combat sports.

What Autonomy Really Requires

Sellers describes autonomy as signifying self-rule: “the right of states or of families, or of associations or individuals to make their own laws for themselves”.\textsuperscript{580} It is clear that liberalism finds it deplorable when this self-rule is not respected, with Feinberg referring to it as being patronising.\textsuperscript{581} Liberals should thus be instilled with a strong sense that it is imperative to ensure that the individual’s autonomy is respected, and thus the person is respected and therefore the faithful will vehemently oppose any hard-paternalistic measure.

However, is it disrespecting a person’s autonomy and thereby insulting them in the gravest way if he is prevented from murdering another? Of course not, as in such a case that person would be interfering with his victim’s autonomy. This type of distinction is made by Dworkin, when he elucidates the difference between liberty as license and liberty as independence.\textsuperscript{582} The difference being “liberty as licence...[is] the degree to which a person is free from the social or legal constraints to do what he might wish to do, and liberty as independence...[is] the status of a person as independent and equal rather than subservient”.\textsuperscript{583}

Joseph Raz has an important contribution to make to the discussion, in his book *The Morality of Freedom*, which he considers to be a contribution to a general theory of political liberalism.\textsuperscript{584} He considers autonomy to be morally valuable and a constituent of the good life.\textsuperscript{585} It requires varied options which in turn requires a toleration of a

competitive pluralism of interests.\textsuperscript{586} However, he does not interpret autonomy as meaning the freedom to do whatever one wants. Rather he sees it as the choice between many varied options, which are on the whole consistent with community goals and values.\textsuperscript{587} He says:

“The autonomous person chooses his own profession or trade. He may be denied the chance to cut down trees in the next field without any diminution to his autonomy. In other words, autonomy and positive freedom bear directly on relatively pervasive goals and relationships and affect more restricted options only inasmuch as they affect one’s ability to pursue the more pervasive ones”.\textsuperscript{588}

Furthermore, while there must be an adequate range of options for the autonomous individual to choose from, the existence of one option in particular is not required.\textsuperscript{589} He gives an example of a legitimate action, which would be consistent with autonomy, where a government could try to eliminate the game of soccer over a period of time and replace it with American football.\textsuperscript{590} Raz’s interpretation of autonomy is consistent with Feinberg’s interpretation of liberty. Feinberg describes liberty as “the possession of alternative possibilities of action, and the more alternatives, the more liberty”.\textsuperscript{591} However, implicit in this statement, and in its context, is the clear idea that he does not believe that \textit{all} the alternatives will always be on the table, so to speak. It would be the ultimate in liberty if all of the alternatives were available, but one can still have liberty without all.\textsuperscript{592} This is seen in Pinch’s dilemma.\textsuperscript{593} He is in a train and all of the tracks

\textsuperscript{590} J. Raz, \textit{The Morality of Freedom} (Oxford University Press, Oxford 1986), at 410-411; he also notes here that whether or not such a change would be accepted would depend on pragmatic considerations, which would need to err on the side of caution.
\textsuperscript{592} J. Feinberg, \textit{The Moral Limits of the Criminal Law: Harm to Others} (Oxford University Press, Oxford 1984), at 210-211.
are switched to open for him, with the exception of the track which leads to E, as E is merely “a small siding at a warehouse on a dead-end line of a minor branch”. The only problem is that E is the only place Pinch wants to go. However, as this is the only option not open to him, he is still seen to possess his liberty. How can this be? With reference to Isaiah Berlin’s *Four Essays on Liberty*, it is said that “freedom is one thing and contentment another…they are both valuable, but sometimes in conflict with one another so that one cannot have both”. Realising that liberty-interests clash, as in Pinch’s case, Feinberg argues that there needs to be a liberty-balancing exercise. This entails assigning more weight to the interest which is more fecund, and less weight to the less fecund interest. The more fecund an option is, the more that option gives rise to further options. Therefore, according to Feinberg, rape laws impinge on males’ liberty, but they do so by closing off one option, from which flows no further options. On the other hand, rape laws protect females from harmful and traumatic experiences, which if allowed to occur, could close hugely fecund future options. Raz’s conception of autonomy bearing on “pervasive goals and relationships”, referred to above, is a similar idea. He argues that going to a university or standing for a general election are pervasive choices, interference with which would constitute major

curtailments of autonomy. This is contrasted with denying someone the choice of a particular flavour of ice-cream, which is said not to affect autonomy at all.

It may therefore be questioned how much prohibiting certain dangerous techniques would actually curtail an individual’s autonomy. The option to use a particular kick to the head for example, does not appear to be a fecund option. As participants would have a host of other options to choose from in order to win the contest, perhaps it would not be a major curtailment at all. In such a case, regulatory machinery would not have unduly affected the participant’s autonomy even if they are not happy with not being allowed to perform the technique any more. Although, given Raz’s example above about a state respecting autonomy even if it were to substitute one sport for another, would it be possible to ban or discourage a particular type of combat sport, as long as there were many other options available? Why stop there? Using this paradigm the state could surely say that combat sports are just one of many sports, and therefore they could all be banned, as long as there was a wide range of other sports to choose from. The problem here is that the state would be closing off one option which in turn leads to several different options. The more fecund the option being closed off the harder it would be to reconcile with autonomy. Raz also comments on the difficulty of closing off an option that someone has already committed much to. The more fecund the option, the more likely it is that there will be a greater number of people committed to it. Feinberg’s conclusion on the matter is helpful when he says:

---

“the interest in open options is something of quite independent value, and is always invaded to some degree by criminalization even when no other actual interest is. That fact has little moral bearing, however, except when the options closed by criminal statutes are relatively fecund, in which case it is a fact of high moral importance”.

605

Gerald Dworkin’s conception of autonomy is quite different and much more stripped down than other conceptions. He makes the distinction, which will be discussed more below, between first-order preferences (immediate desires) and second-order preferences (long term, life interests), and thinks of autonomy as the ability to critically reflect upon first-order preferences in the light of second-order preferences. Upon such reflection, individuals will either accept or reject the first-order preferences. However, there is nothing in this conception that ensures or tries to ensure that the agent should continue to have this critically reflective capacity, or the ability to act upon critical reflections. For example, he believes that one could define their life in terms of being a slave and could come to the conclusion that “My autonomy consists in being a slave”. However, this seems to ignore his idea of decisions with irreversible consequences, discussed below. Once one defines one’s autonomy as being that of a slave, one can no longer critically reflect upon this decision or more importantly, if upon reflection one changes one’s mind, they can no longer act upon this change. However, while Dworkin sees autonomy as being normatively important and conceptually fundamental, he argues that it is not the only important and fundamental

concept and should not be raised to a higher level than it deserves. This allows Dworkin the flexibility of proposing paternalistic measures and recognising that they infringe a person’s autonomy, but claiming that this infringement is acceptable because of its support of some other fundamental value. It is therefore a question of balancing values, where, for example, “A small amount or trivial instance of autonomy may be traded off for a large benefit”.

Dworkin’s view of autonomy is mechanistic, in that it is the capacity to critically reflect. Raz paints a richer view of autonomy, considering what autonomy requires. Importantly for Dworkin, paternalistic measures must always be counter-autonomy, even if justified by other values. For Raz, however, paternalistic measures may be consistent with his richer view of autonomy.

Before moving away from autonomy, and more importantly, before moving away from this concept of autonomy not being an exercise of choice between all options possible, but rather as something which one can exercise given an adequate range of choices, consideration should be given to the interesting theory of autonomy advanced by John Rawls. He submitted that acting autonomously would entail acting on objective principles which are ultimately derived from the “original position”. Rawls describes the original position as where a group of individuals are covered by a “veil of ignorance”, which prevents them from knowing their background, religion, ethnic origin, status in society or anything which could persuade them to form a moral view.

612 Rawls’s work does not focus on the importance of the harm-principle theory. Rather, it focuses on a theory of liberal social-contract.
which is consistent with their own beliefs or interests.\(^{614}\) The group is then asked to agree upon general principles of justice, which are acceptable to all, and which would be acceptable to all in a society.\(^{615}\) As they do not know anything about their position in society etc., it is thought that they will choose the fairest principles possible.\(^{616}\) It is from this basic starting point that Rawls starts to develop his two principles of justice.\(^{617}\)

Rawls therefore sees moral principles and convictions in such a society as being objective, as they have been arrived at in the original position, and as mentioned, it is acting based on these objective principles—whatever they might be—which is autonomy.\(^{618}\) He says:

> “some have characterized autonomy and objectivity in an entirely different way. They have suggested that autonomy is the complete freedom to form our moral opinions and that the conscientious judgment of every moral agent ought absolutely to be respected. Objectivity is then attributed to those judgments which satisfy all the standards that the agent himself has in his liberty decided are relevant…From the standpoint of justice as fairness it is not true that the conscientious judgment of each person ought absolutely to be respected; nor is it true that individuals are completely free to form their moral convictions. These contentions are mistaken if they mean that, having arrived at our moral opinions conscientiously (as we believe), we always have a claim to be allowed to act on them.”\(^{619}\)

He goes on to suggest that it is not the person’s conscience that must be respected, rather the individual himself/herself, and this is done by limiting their actions, according


\(^{617}\) These are “First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all”; J. Rawls, *A Theory of Justice* (Clarendon Press, Oxford 1972), at 60; J. Rawls, *A Theory of Justice* (Rev. edn Belknap Harvard University Press, Cambridge 1999), at 53.


to principles which they would agree to in the original position.\textsuperscript{620} While a marked departure from harm-principle liberalism, as espoused by Mill and Feinberg, it once again demonstrates that it is not the case that in order for autonomy to be respected, one must be able to always act as one wishes. For Rawls, it can be limited by these objective principles, which everyone would agree to, if they were covered with the veil of ignorance and therefore were not subject to the mental control of their own particular prejudices. If autonomy was to be interpreted as allowing people to act in accordance with their conscience, absolutely, he says “autonomy is likely to lead to a mere collision of self-righteous wills, and objectivity to the adherence to a consistent yet idiosyncratic system”.\textsuperscript{621} 

**Future Autonomy and Present Desires**

There is debate over whether future interests, values, desires or plans are legitimate reasons for curbing present interests, values or desires. Lindley acknowledges that giving \textit{carte blanche} to one’s present autonomy may have the result of curtailing one’s future autonomy.\textsuperscript{622} However, he believes that autonomous agents must give a special weight to, and act upon, present beliefs and values, because if they do not, they cannot be said to really hold those values at all.\textsuperscript{623} So if it is a case where an agent’s present autonomy’s values conflict with their future autonomy’s values, and the agent foregoes the present values for the sake of the future values, it is really the future values that the agent holds, not the present values.


\textsuperscript{622} R. Lindley, \textit{Autonomy} (Humanities Press International, Atlantic Highlands 1986), at 88.

\textsuperscript{623} R. Lindley, \textit{Autonomy} (Humanities Press International, Atlantic Highlands 1986), at 92.
Dahl also offers an account of present desires being more important than future desires which would presumably want the person’s good to be maximised. He argues that there is a rational value to acting on one’s own choices, even if those choices lead to irrational ends. 624 This in turn leads him to the conclusion that if an individual cannot act on their own choice and maximise their good, it would be more rational for them to act on their present choice rather than having their good maximised for them. 625

Feinberg also argues against paternalistic intervention to safeguard future interests to the detriment of current interests, drawing an analogy between a sovereign state and a sovereign individual, saying:

“Whether an autonomous person’s liberty is interfered with in the name of his own good or welfare, his health, his wealth, or even his future open options— which are themselves constituents of his well-being—it is still a violation of his personal sovereignty. After all, sovereign political states do not claim the right to impose their benevolent interventions on other sovereign states; how then can autonomous individuals coerce other autonomous individuals into conduct deemed conducive to their own long-range good?” 626

But there are cases when sovereign countries give up aspects of that sovereignty for benefits in the long term. Take member states of the European Union. Each member state thinks itself sovereign, yet they have consented to be bound by the decisions of the European Commission and the European Court of Justice in certain areas regarding the freedom of goods, services, capital and people. European law case books are filled with cases where states adamantly claim not to be in breach of their obligations to remove barriers to the above mentioned freedoms, with the Court finding against them and thus

making them do something they do not want to do. But the member states accept these judgments in the knowledge that having similar barriers removed across the European Union is in their future interests. Sovereignty seems to be more of a flexible concept than Feinberg pictures it, with the result being that the analogy may favour intervention in the present to safeguard long-term interests, where individuals (hypothetically) agree to give up a part of their sovereignty in order to be governed by a political system which recognises that paternalistic interferences will sometimes be necessary to safeguard future autonomy.

Others, however, conceive the problem in different terms. For example, Regan argues that when one’s present desires conflict with future desires, both sets of desires give rise to different selves (different people). This device allows him to argue that paternalists may potentially have to intervene to save the later person from the earlier person.

Thaler and Sunstein also address the idea of two selves, but perhaps in a more convincing way. They suggest that we can see individuals as being made up of two selves: a Planner – who sees the bigger picture and takes time to critically reflect on the best choices for that person’s good—and a Doer—who is unreflective and highly susceptible to momentary temptations. The Doer is the Homer Simpson to the Planner’s Mr Spock. They use the commonplace example of trying to get up early in the morning to illustrate these two selves. At 6am in the morning, the Doer will be quite likely to turn his alarm clock off and go back to sleep. Unfortunately for the Doer,

---

the Planner foresees this (from previous experience) and thus places the alarm away from the bed so that the Doer has to at least get out of bed to turn the alarm off.\textsuperscript{632}

While Thaler and Sunstein would only suggest that choice architects try to help the Planner with strategies and aids, they would not condone coercively helping the Planner. Young, on the other hand, makes a similar type of distinction, but with different consequences. He distinguishes occurrent autonomy from dispositional autonomy.\textsuperscript{633} The former signifies acting autonomously in particular situations,\textsuperscript{634} and choices which are only of momentary significance.\textsuperscript{635} The latter concerns the general self-directedness of one’s life,\textsuperscript{636} and those choices which have a more global significance in a life.\textsuperscript{637} He argues that autonomy in the dispositional sense is more important than autonomy in the occurrent sense, and that there may be instances in which hard paternalism would be justified to protect dispositional autonomy.\textsuperscript{638} Anyone committed to autonomy, he argues, must be supportive of some hard paternalistic measures.\textsuperscript{639}

Scoccia argues that future interests or values can only take precedence over current desires if it is the case that the individual has highly autonomous values:\textsuperscript{640}

“paternalistic interference with imprudent choices will not impose any values on the


\textsuperscript{640} D. Scoccia, “Paternalism and Respect for Autonomy” (1990) 100 Ethics 318, at 330.
chooser if the chooser himself strongly cares about his future well-being”. However, it may be the case that individuals will have strong desires to make their own self-regarding choices, desires which are stronger than those to protect their future autonomy. But this leads back to Shafer-Landau’s problem of competing intuitions. For it is likely that most people will share both desires. They will be likely to have highly autonomous desires so that they can continue to exercise their desire of making their own self-regarding decisions. This conflict seems to be best resolved by placing some reasonable restrictions on a narrow group of self-regarding decisions, motivated by occurrent desires.

**Paternalism as Social Insurance**

In his highly influential essay *Paternalism*, Gerald Dworkin advanced two theories of justified paternalism. They both depend upon the principle he extracts from Mill’s discussion on slavery: that paternalism is only ever justified “to preserve a wider range of freedom for the individual in question”. The first, “future-orientated consent” is explained by reference to the example of a child who is unhappy about his autonomy being restricted at first, but as he acquires his full range of mental faculties, he comes to realise the wisdom of the restriction. Husak points out that for Dworkin, the paternalism will only be justified if the interference is in fact later appreciated by the child. Husak then shows that this definition is flawed, as if a child was killed before it had time to realise the benefit of the restriction, the intervention would then not have

---

641 D. Scoccia, “Paternalism and Respect for Autonomy” (1990) 100 Ethics 318, at 325.
642 D. Scoccia, “Paternalism and Respect for Autonomy” (1990) 100 Ethics 318, at 323-324.
been justified.\textsuperscript{647} Therefore, he suggests that it is better to say “what justifies an instance of parental paternalism is that it is \textit{reasonable to believe} that the child will consent to the interference”.\textsuperscript{648} If this new definition of when paternalism is permissible is accepted, then, the question is, what is reasonable to believe? He suggests it is reasonable to believe that a person will consent to whatever interference is, in fact, reasonable.\textsuperscript{649} From this, he reaches the conclusion that “it becomes evident that the central focus is on the reasonableness of the interference…”\textsuperscript{650} Husak, therefore, excludes the idea of moral autonomy as a sufficient reason to limit paternalistic interventions, and instead focuses on whether the intervention is of a reasonable nature or not.

The second theory which can be drawn from Dworkin’s essay is that in certain situations rational beings will consent to their being restricted at some point in the future, as they are all too aware that when the time comes to act or refrain from acting, there will be a temptation which, unless restrained, they are likely to act upon, and will later regret doing so.\textsuperscript{651} Therefore, individuals in a society will generally recognise the need for some form of \textit{social insurance}:

“\textit{I suggest that since we are all aware of our irrational propensities—deficiencies in cognitive and emotional capacities, and avoidable and unavoidable ignorance—it is rational and prudent for us to in effect take out ‘social insurance policies’. We may argue for and against proposed paternalistic measures in terms of what fully rational individuals would accept as forms of protection.”}\textsuperscript{652}

\textsuperscript{648} D. N. Husak, “Paternalism and Autonomy” (1981) 10 Philosophy and Public Affairs Journal 27, at 34.
While individuals might not consent to being restricted from doing or being made do some specific act, Dworkin argues that their consent to be governed by the people they elect is sufficient for the coercion.\footnote{G. Dworkin, ‘Paternalism’ in R. Sartorious (ed), \textit{Paternalism} (University of Minnesota Press, Minneapolis 1983), at 29.} Dworkin’s argument based upon this principle is strongest when he suggests that paternalistic measures are most justified when they concern decisions with irreversible consequences.\footnote{G. Dworkin, ‘Paternalism’ in R. Sartorious (ed), \textit{Paternalism} (University of Minnesota Press, Minneapolis 1983), at 31.} Not only do these types of decisions prevent us from returning to our departure point, some will also have consequences which fetter our ability to make reasoned choices in the future.\footnote{G. Dworkin, ‘Paternalism’ in R. Sartorious (ed), \textit{Paternalism} (University of Minnesota Press, Minneapolis 1983), at 31.} However, he recognises that there are some risks that individuals will genuinely want to take with their lives, like mountain climbing or skiing.\footnote{G. Dworkin, ‘Paternalism’ in R. Sartorious (ed), \textit{Paternalism} (University of Minnesota Press, Minneapolis 1983), at 33.} The question will then become, to what extent do the paternalistic interferences limit participation in the activity; and to what extent is the activity important in the person’s life.\footnote{G. Dworkin, ‘Paternalism’ in R. Sartorious (ed), \textit{Paternalism} (University of Minnesota Press, Minneapolis 1983), at 33.} Of course, the burden of proving an activity’s harmfulness and the probability of the harm’s occurrence would have to borne by the state.\footnote{G. Dworkin, ‘Paternalism’ in R. Sartorious (ed), \textit{Paternalism} (University of Minnesota Press, Minneapolis 1983), at 33-34.}

As Dworkin’s theory sees individuals debating about what forms of social insurance policies to adopt through their legislatures, he does not consider this form of paternalism to rest on hypothetical consent, in the same sense that Rawls’s does, as we will see now.\footnote{G. Dworkin, ‘Paternalism’ in R. Sartorious (ed), \textit{Paternalism} (University of Minnesota Press, Minneapolis 1983), at 29.} John Rawls also acknowledges the need for \textit{hard} paternalistic interference in society. He justifies his stance with his belief that it is what people in the original
position would choose. He says that people in the original position would endorse paternalism for children or people “seriously injured or mentally disturbed”\(^{660}\): in general anyone who “cannot rationally advance their interests”. This is not particularly troublesome and fits within the soft-paternalism theory quite easily. The novel departure comes when he says:

“It is also rational for them to protect themselves against their own irrational inclinations by consenting to a scheme of penalties that may give them sufficient motive to avoid foolish actions and by accepting certain impositions designed to undo the unfortunate consequences of their imprudent behaviour. For these cases the parties adopt principles stipulating when others are authorized to act in their behalf and to override their present wishes if necessary; and this they do recognizing that sometimes their capacity to act rationally for their good may fail, or be lacking altogether.”\(^{661}\)

Such a theory of course must be subject to limitations and Rawls suggests that paternalistic interferences would only be appropriate where there was an “evident failure or absence of reason and will” and these measures must be “guided by principles of justice and what is known about the subject’s more permanent aims and preferences, or by the account of primary goods”.\(^{662}\)

Feinberg questions whether Rawls is using *hypothetical rational consent* in order to justify this type of paternalism.\(^{663}\) Hypothetical rational consent involves substituting an individual’s consent for what a “hypothetical, perfectly rational person would consent to in his circumstances”.\(^{664}\) Feinberg says that such a theory as “a substitute for the explicit choices of competent persons who are ‘unreasonable,’ foolish,

---


imprudent, or reckless with their own interests...is a sham and an outrage”). However, it is unclear how Feinberg’s criticisms here are confined to the ‘hypothetical rational consent’ theory, as surely all hard paternalism to one degree or another could be characterised as saying that a perfectly (or at least a more) rational person would not act in the way in which the individual is about to act.

However, it is submitted that Feinberg is correct in thinking that Rawls is not using a hypothetical rational consent theory. The sense in which consent is hypothetical for Rawls, is a sense in which people consent to being governed in a particular way under the veil of ignorance. In particular, they would hypothetically consent to a limited scheme of paternalistic restrictions. One might dispute that they would. However, as they would share our competing intuitions to both want to be self-governed and to feel that there are instances in which it would be reasonable for the state to interfere in that self-governance, it seems likely that they would consent to such a scheme. The hypothetical consent is therefore not to the particular interference, but rather to the broader form of government which endorses that interference. This aligns the theory with Gerald Dworkin’s perspective outlined above. Indeed, as mentioned above, Dworkin would argue that this consent is not hypothetical at all, since in democracies citizens have an opportunity to elect representatives to govern them, and therefore by voting, consent to be governed by their representatives. In the same way that we hypothetically consent to a form of government and to a limited sphere of paternalistic interferences, we also hypothetically consent to a scheme of rights and to laws which favour one economic system over others. This hypothetical device is employed equally against the man who kills another and claims that he never, in fact, consented to be bound by a scheme of rights that protects his victim, as it is against the

The role consent plays in both Rawls and Dworkin’s theory of paternalism is thus similar to the role consent plays in all major social contract political theories. Of course, such theories are open to criticism, but that criticism would be directed at the foundations of such a theory and not uniquely to an aspect that proposed paternalism. With hypothetical consent to a form of government established, Rawls and Dworkin agree that a rational form of government would permit reasonable paternalistic interferences. Rawls’s characterisation of why this would be rational is much the same as Dworkin’s idea of a social insurance scheme. They both agree that any such paternalism must be limited in scope. It is submitted that the best restrictions seem to be: the prohibition on interfering with ethical decisions; and only allowing moral arguments which focus on promoting future autonomy and thus allowing individuals to continue taking responsibility for their own lives or which help the individual to achieve something they really want to achieve.

**Rationality and Reasonableness**

If we accept the limitations which stipulate the circumstances under which paternalism can be justified, the question then arises as to how we can identify legitimate cases for paternalistic interference. For even if future autonomy is put in jeopardy by an unhealthy diet, that would surely not mean that the state could force us to eat better and exercise. Legitimate cases for autonomy-based paternalistic interference, it seems therefore, must be derived from reasoned argument in order to establish what is reasonable. Of course, establishing what is reasonable is an interpretive enterprise. It requires interpretation of the community’s political morality. But so too does the harm
principle. After all, in order to know if an individual’s rights have been infringed, we must know the substance of those rights, and that substance can only be derived from an interpretation of the community’s political morality. So it is not open for harm principle proponents to claim that the “reasonableness” evaluation in autonomy-based paternalism is arbitrary.

The arguments for and against autonomy-based paternalistic interference must not only establish the gravity of harm and the likelihood of occurrence, they must also assess how the harm can be reduced with the most minimal amount of interference. And most importantly, they must keep in mind to what extent autonomy is being lost in the process of trying to save future autonomy.

For some, this should be the real business of philosophers interested in paternalism. Husak is of the opinion “that philosophers should abandon the attempt to formulate general objections to paternalism, and should concentrate instead on assessing the justifiability of instances of paternalism on their individual merits”. Similarly, Raz is also inclined to say that ultimately it is a pointless endeavour to form a “general pro- or general anti-paternalistic conclusion”. For Husak then, the proper focus is on whether a particular interference is reasonable. Young is also of the opinion that discussion of paternalistic measures should be about whether those particular measures are rationally justifiable. This reasoned argument will hopefully move us closer to

---

669 D. N. Husak, “Paternalism and Autonomy” (1981) 10 Philosophy and Public Affairs Journal 27, at 34. Husak would reject the device of “consent” being used to try to justify paternalism, as the question as to what people would reasonably consent to inevitably becomes, “what it would be reasonable to consent to”, with the question being resolved only by finding what is reasonable and having nothing to do with consent. However, this ignores Dworkin and Rawls’s point of people at some point consenting to be bound by paternalistic interferences which would be reasonable.
the objectivity that is required by Rawls’s argument and thus closer to what would be perfect rationality in the given circumstances. This rationality through reason can lead us to decide when and what type of paternalistic interference is reasonably justifiable in particular instances.

The question as to what is reasonable seems to be eventually endorsed by Feinberg as well. In tackling “Stubborn counterexamples (B),” 671 he discusses the problem of a legalised fight to the death. 672 He starts by saying that:

“The state would insist on a licensing procedure to confirm voluntariness and protect innocents from indirect dangers…the aim of the combat would be to establish the dominance of one of the combatants, to establish once and for all which of them is the more formidable gladiator and incidentally to give thrills of the most basic kind to the audience…it must be governed by fair rules impartially administered…Without such rules the spectacle might be a mere homicide committed with impunity by a cheater”. 673

From this liberal view on a legalised fight to the death, he starts to proffer that the combatants “and certainly the state licensors”, 674 would probably decide that just as much fun would be had by all if the referee stepped in once one competitor had established a clear superiority over his opponent, instead of actually allowing the dominant competitor to finish off his opponent with perhaps a patented finisher move where he spectacularly kills his opponent. What Feinberg ends up discussing here is of a completely different nature to what he starts discussing: at the start it is a fight to the death and at the end it is little more than time-limitless mixed martial arts bout. However, Feinberg knows this very well and reasons that it is far more reasonable to

conduct the competition in its new form. Although it is very odd for Feinberg to start using reasonableness as a reason to coerce something, he says:

“Unreasonableness is not the same thing as involuntariness, of course, but extreme unreasonableness creates a strong presumption of nonvoluntariness that would be difficult to rebut, and the state might even be justified in making the presumption conclusive for practical reasons”.

From this it would appear that Feinberg suggests that liberalism, based around the harm-principle, would condone regulation, not just ensuring adequate consent itself, but it may also be justified, in cases of extreme unreasonableness, in tampering with the nature of the sport itself and perhaps banning the sport. So for example, if there was a particular choke hold in a combat sport, which risked cutting off oxygen to the brain and risked permanent brain damage, the state may be justified in modifying the sport’s rules, so that that technique was not allowed to be performed in competitions.

Although the position is far from clear. He similarly uses extreme unreasonableness to answer whether liberalism would condone slavery contracts. The thrust of the argument is that even if the state could organise regulatory machinery to police the entering into such contracts, that machinery would not be infallible. Therefore, to forego the risk of even one person slipping through the net and involuntarily entering into an extremely unreasonable slavery contract, the state may take the position of holding a conclusive presumption that such behaviour is involuntary. But surely such a presumption would be a form of hard paternalism, as the individual is deprived of the opportunity to prove the voluntariness of their choice so

675 It is odd considering his distinction between reasonability and rationality; see J. Feinberg, The Moral Limits of the Criminal Law: Harm to Self (Oxford University Press, Oxford 1986), at 106-113.
that they can duly act upon it. No regulatory machinery is ever going to be infallible, therefore there is always the chance that someone will slip through the net and involuntarily consent to fight in a competition where he sustains brain damage. It seems to me that it is not really a question of infallibility leading to mistakes, rather it is a question of the reasonableness of the conduct in question. And it is more honest to characterise the interference as such. Characterising it as a presumption of involuntariness would surely be as much of a sham as saying that hypothetically a perfectly rational person would consent to be prohibited from engaging in the behaviour.

**Application**

How would combat sports fair under the scrutiny of a group of people under the veil of ignorance, or indeed under critical, reasoned argument? First, we might look at the objective facts about combat sports to see if such an activity was a rational or irrational inclination. Sport in a society is usually seen as something which has intrinsic value, as it promotes health, fitness, mental well-being, co-operation, and fair play. It is unlikely that there is anything objectionable about sport *per se*. Also, there may be nothing irrational about a sport in which one man/woman wishes to demonstrate and exercise their physicality and fighting prowess against a similarly minded opponent. It is about as rational as chasing a small golf ball around a giant field and trying to manipulate it into a just-adequately-sized hole. However, the constituents of the sport may start to sound irrational when it can be objectively proven that certain strikes or holds, delivered to certain target areas on the body, at speed, could cause irreversible brain damage or serious harm. It is at this point that eyebrow raising may start and doubts of rationality
may start to creep in. Just as doubts would start to creep in if a constituent element of
golf was that an extra 5 shots would be taken from one’s score for every time the
competitor succeeded in knocking out a fellow golfer in the distance on another hole
with his ball. The idea of live, moving targets and a humorous “bop” sound of a golf
ball hitting a skull when there was successful contact may indeed increase the
popularity of golf with some who find immobile, inanimate targets less interesting. And
there can be no doubt that it would be a wonderful display of skill, even more so
perhaps than getting a hole-in-one. However, the rationality of allowing such a rule
would be highly questionable, considering the disastrous health effects that a player hit
by a golf ball on the head would suffer. That said, suppose if the golfers were required
to wear helmets and other protective gear which would prevent them from drastic
injury. Now this new type of golf has suddenly become less objectionable thanks to one
simple measure. However, there is no way around the fact that such a measure is
clearly a hard paternalistic one.

In combat sports, would a similarly efficient and reasonable paternalistic
restriction be to ban contact to the head, or to ban certain types of manoeuvres from
competition? Competitors in boxing are already (hard) paternalistically forced to have
medical checks prior to fights and their participation in a fight is conditional upon a
doctor’s approval. The doctor does not just nudge the competitor away from fighting
with his advice. His medical opinion is determinative of whether the fighter will fight
or not. These restrictions leave the sport of boxing relatively intact, while advancing
future autonomy. With a relatively delicate incision with a scalpel, certain elements of
combat sports can be cut away from competitive sparring, such as certain techniques or
target areas, which then leaves the sport in a form which is much the same as it was
before, but is now less objectionable from a rational perspective which values health.
Chiefly, from a Rawlsian perspective, the activities no longer include irrational elements, which are irrational because they would go against an objective truth in the original position, which would be likely to be: anybody who is both physically and mentally healthy is likely to value that health and not want to seriously endanger that health. 678

Some may argue that such a view would accept paternalistic measures banning smoking and junk food, as they would endanger the health of a person who was both mentally and physically healthy. In arguing that paternalism is justified in boxing but not to ban junk food or cigarettes, Dixon relies on an argument that there can be different degrees of losses to future autonomy. 679 He submits that a “boxer’s chronic brain damage over several decades is a far more serious loss of autonomy than that suffered by a junk food eater whose capacity to think rationally is not at all diminished during a life that is less healthy and slightly abbreviated as a result of unwise eating habits”. 680 However, such an argument only holds if smoking and eating junk food do not lead to the same types of reductions in mental autonomy that being repeatedly punched in the head leads to. This may not necessarily be true. Both smoking and obesity increase the risk of having a stroke. Strokes can lead to permanent brain damage, depending on the severity of the stroke. 681

There is a distinction between junk food/smoking and boxing, but it is not to be found in their supposedly differing effects on future autonomy. All three activities pass the initial test of placing future autonomy in jeopardy. There, therefore, needs to be

reasoned arguments on both sides to find if intervention is reasonable and what restrictions would be reasonable. Let us take junk food first. Of course junk food is unhealthy and excessive amounts without daily exercise can make one obese. But similarly over-eating healthy foods and not taking daily exercise will make one obese. Indeed, one might take daily exercise and still gain weight if their calorie intake from their over-eating is more than they are burning off through their exercise. Already it should be noticed that the domain of interference has become far too broad. Measures to lessen the risk of brain injury from strokes from being obese would not only have to ban junk food, they would have to regulate how much healthy food we eat and the amount of exercise we take. The disadvantages of sacrificing so much autonomy by coercively banning or regulating certain foods and forcing citizens to exercise would outweigh the advantages gained for individuals’ future autonomy. This seems to me to be the real reason there is not hard paternalistic interference in the types of food people eat and the amount of exercise they take. There is, of course, a huge amount of soft-paternalistic influencing in this area, with nutrition labels, amongst other things, nudging us to eat better.

The case for not interfering in smoking tobacco is less convincing. I do not believe that it is a testament to the harm-principle that individuals have the *right* to smoke. Rather the legality of smoking tobacco seems to me to derive from the way in which it is embedded in society. I do not believe for a minute if tobacco was only to be discovered tomorrow that states would allow it on the market after scientific testing. Rather, it would join the list of other prohibited drugs. Indeed tobacco’s grip on modern society is loosening. Many new laws in numerous countries have recently been passed to prevent smoking in places of work and New York has just recently passed laws to
prohibit smoking in public parks, beaches and pedestrian areas.  And while the grip loosens, the arguments for not paternalistically interfering seem incredibly weak, especially considering, as Thaler and Sunstein note “Millions of Americans still smoke…and, significantly, the overwhelming majority of smokers say that they would like to quit”. It might be, therefore, that paternalistic laws would merely help people achieve something they already want to achieve. Such laws might be especially justified considering the tobacco industry’s recent attempt to keep smokers addicted by adding larger amounts of nicotine to their products, as recent research has found. As nicotine is the agent which is primarily responsible for addiction, it seems that tobacco companies are making it harder for their customers to achieve what they really want to achieve: i.e. to quit smoking.

Might another target for paternalism be dangerous sports or activities? In particular very popular activities such as skiing and mountain climbing can result in losses of future autonomy. If it is proposed to intervene in combat sports, why not intervene in these activities? It is true that some distinction has to be made. Again, I believe argument is required all the way down. It is not enough to merely say that future autonomy is jeopardised. That is merely a primary criterion which allows us to consider these activities for paternalistic interference at all. I do not have space here to make a full argument that distinguishes skiing/mountain climbing from combat sports, but I do believe such an argument would generally go as follows. Accepted


paternalistic measures for boxing and combat sports include the mandatory wearing of gloves, the mandatory stopping of the fight if the doctor decides it necessary and the prohibition on competing without clearance from a doctor. These interferences either do not affect, or affect only minimally the sport of boxing. Similarly, as argued above, boxing and combat sports could continue, relatively unchanged in terms of the main aim (to show physical dominance over another) by prohibiting attacks to the head. Of course, some would be frustrated by not being allowed to punch their opponent in the head, but similarly there are those who are frustrated because they cannot punch their opponent with their bare fist. It is hard to see what type of similar measures could be introduced for skiing and mountain climbing. Any measure which purported to ban these activities would presumably go too far. It would completely eliminate an option that many people in the community had already committed to.\(^{686}\) Again the gain for future autonomy would appear to be outweighed by the losses to autonomy in general. While banning either of these activities would seem to me to be unreasonable, small interferences may be warranted which leave the activities largely unchanged. For example, it is becoming more and more common for ski operators to provide skiers with helmets.\(^ {687}\) The failure to do so, may give rise to a breach of their duty of care towards their customers. Indeed, the wearing of ski helmets is becoming more popular in general.\(^ {688}\) Illinois has just become the first state to mandate wearing a helmet while skiing in the United States.\(^ {689}\) It is, therefore, not unforeseeable that skiers might be

mandated to wear helmets in the future, although this would depend on whether helmets were an efficient way of preventing brain injuries while skiing.

Conclusion

Although it has been seen that the harm principle would be quite willing to step in and regulate consensual activities such as combat sports to ensure an adequate consent is present, it is also clear that once such a consent is established that it has no qualms about allowing individuals to continue their conduct. This would be the case unless it was felt that the conduct was extremely unreasonable, at which point a presumption of involuntariness might be condoned. However, it was argued that such a presumption is itself hard paternalism. Indeed much of the criticism of the harm principle leads me to think that there is a place for a limited scheme of hard paternalism in a just system of criminalisation.

It has been argued that paternalism justified by a limited range of moral arguments may be an appropriate part of any criminal law system. Given the special, central role that autonomy plays in the life of an individual, it was suggested that it might be appropriate to give individuals’ future interests in autonomy precedence over present, fleeting desires in certain circumstances where future autonomy is put in serious danger. Of major consequence from this analysis was the concept of autonomy as being the having of a broad range of choices to choose from, but not being the having of all choices to choose from. This allowed for an exploration of the idea that certain techniques from combat sports may be prohibited in competitive bouts, while leaving

the rest of the activity relatively unchanged. The result of prohibiting such techniques would be to eliminate any calls to ban such sports and also reduce the risk of future brain damage. The legitimacy of such action would depend on the individuals concerned actually or hypothetically consenting to a form of government which recognises the need for paternalistic interventions in order to safeguard future autonomy. The form and extent of such interventions would be subject to moral argument all the way down in order to establish what is reasonable in the particular circumstances. The question of reasonableness therefore plays a significant determining role in this theory. It would also, it seems to me, play the same crucial role in determining the illegality of gladiatorial fights and slavery contracts. The more honest acceptance of the role reasonableness plays in these two situations would demonstrate that even the staunchest defences of the harm principle must make room for hard coercive paternalism.

To sum up on the application of this theory to combat sports, it seems that soft-paternalism would condone a regulatory system to ensure voluntariness. It would also support nudges such as licensing procedures to try to dissuade people from taking part in combat sports which allowed the head to be a legal target in competitions. However, many of the common features that we see in regulatory systems in the UK, Australia and the US go much farther than merely verifying the voluntariness of the competitor to compete. They force competitors to wear gloves, and mouth-guards. They prohibit competitors from fighting if a medical doctor does not certify them fit to fight. They mandate that a doctor can bring a fight to an end, despite the protests of the fighter than he wants to continue. These are all hard paternalistic measures. Autonomy-based paternalism would condone minor interferences in combat sports in order to lessen the

691 Although it should be noted that the wearing of boxing gloves protects the fighter’s hands more than it does his opponent’s head. Arguably if they were to fight bare-knuckle, competitors would be less likely to attack the head for fear of damaging their hands.
risk of brain injury and hence fetter future autonomy. While I recognise such a view to be controversial, it has been argued that autonomy-based paternalism would justify the prohibiting of dangerous techniques to the head. This would have the effect of removing one of the major moral objections to combat sports, as competitors would no longer have to attack their opponent’s brain in order to win. While many would doubt such an intervention to be minimal, it would be minimal in the sense of the overall objective of the sport: to demonstrate one’s ability to physically dominate their opponent through a range of fighting techniques.
CHAPTER FIVE – DIGNITY AND HUMAN RIGHTS

Introduction

In Chapter Four the limits of the harm principle and the legitimacy of the role of paternalistic measures in any criminal legal system were discussed. Such measures were justified as they protected autonomy. There was an analysis of paternalistic measures from a broad perspective and therefore discussed not only single-person risk taking—riding a motor-cycle without a helmet, skiing, smoking—but also activities involving more than one person, such as combat sports. The latter category will often involve the issue of interpersonal violence. The issue of violence raises the question of the extent to which the concept of dignity will provide a good reason for paternally interfering with individuals’ choices. Indeed, the dignity argument does not only fall within the sphere of paternalism, with some arguing that the enforcement of dignity is generally for the benefit of society at large.692

Again the argument is a difficult one, with similar bases being used to justify diametrically opposed ends. For instance, some might claim that individuals should not be allowed to cause serious harm to one another because it deprives the harmed individual of the minimum degree of respect that dignity requires. Others will argue that by prohibiting individuals from consensually causing each other serious harm, we deprive the consenting person of the minimum degree of respect that dignity requires.

This chapter looks at the role dignity can play in restricting the legal effectiveness of consent. It is contrasted with a rights-based approach to consent. There will be an argument made that the concept of dignity can play a limited role within a

rights-based approach. There will also be a discussion about the role consent plays in a state’s attitude to violence. In particular there will be an argument that the state holds dominion over the sphere of violence, which legitimises a state requiring the causation to violence to be justified.

Recourse to dignity may be claimed in some of the previously imagined cases of extreme violence, such as gladiatorial bouts to the death. A real life example has recently drawn the attention of those who argue that dignity should play a role in determining what acts of violence may be legitimately criminalised. The case involved a German cannibal, Armin Meiwes, who advertised on the internet to find someone he could “slaughter”. In 2001 Bernd Jeurgen Brandes responded to Meiwes’s offer and agreed to being killed and eaten. At his home in Rotenburg, Meiwes cut off and flambéed Brandes’s penis, which they both attempted to eat. Brandes then spent many hours bleeding out in a bath tub until Miewes eventually kissed him and then stabbed him in the neck several times. He proceeded to dismember the body and eat 20kg of Brandes’s flesh over the following months. A lot of that evening was captured on videotape, which Miewes would subsequently use as a type of snuff-film pornography for self arousal. There was no doubt that Brandes had consented to his

---


own killing. For both it was the fulfilling of lifelong sexual desires: to eat someone and to be eaten by someone.698

Does the consent here nullify any wrongfulness of the actions? Does consent have some sort of overriding quality that justifies all harm that consequently flows from the conduct, as long as the consequences only directly affects those who consented? Feinberg would probably argue that consent does have such an overriding quality, unless the conduct was judged to be extremely unreasonable. Hard paternalists might agree with a Feinberg-esque irrefutable presumption that the consent is involuntary. Within autonomy-based hard paternalism, it might be argued either way. Reasoned arguments may point to the fact that the closing off of the option to kill and eat another is not the closing of a fecund option. It is also a choice that has irreversible consequences and certainly affects future autonomy. However, as in the case of suicide, it will simply end future autonomy, as opposed to fettering it.699

For some, it is cases such as this which show another short-coming of the harm-principle. It shows its failure to acknowledge the role the concept of dignity must play in criminalising certain types of conduct. For it is only by acknowledging the role of dignity that we can reconcile principle with intuition. However, others feel that such theories put too much of an emphasis on dignity, and not enough on individual human rights. It is this debate to which I will now turn.

Restricting Consent

There are three important frameworks which can underpin a theory of consent. The first is the utilitarian approach, which places no special importance on the concept of consent. Whether or not it will be deemed as necessary will depend on a balancing of whether it is convenient to acquire consent, what the economic costs of acquiring consent are etc. If, after all economic and social factors have been taken into account, more people will benefit from the non-requiring of consent, consent will not be required. Wright demonstrates this point with his example of two celebrities being forced to marry; a marriage to which they are indifferent, but which would be ecstasy to their fans:

“Our utility measurements might indicate that the fans’ aggregate preferences outweigh all other considerations, including A’s and B’s desires. Thus, A’s and B’s consensual transaction, as well as their refusal to consent, is even in these intimate contexts subject to being overridden on utilitarian grounds by strangers.”

Thus, in a utilitarian system, consent is probably undervalued, as there is more emphasis on the economics of happiness for the many, than there is on autonomy for the individual. I will not give more consideration to the utilitarian view and will instead now move to discuss the “dignity” approach to consent and the human rights approach.

While discussing society’s fixation on consent, Brownsword dismisses the “dignitarian alliance” as quick as he dismisses the utilitarian approach. This is because,

for the alliance, it is only human dignity that is important and not necessarily consent. This conflicts with the human rights view Brownsword supports, which sees consent as a “relevant and categorical consideration but one that is parasitic on the background scheme of rights.” Brownword’s approach to consent is a relevant and categorical consideration in their scheme, but which is parasitic on the concept of dignity. For example, Wright claims that “dignity underlies and limits the role and value of consent; consent does not in turn underlie or limit the role and value of human dignity.” It seems that if the words human dignity were replaced by the words human rights, the quotation would accurately represent Brownword’s approach. Wright goes on to say that consent need not only be of instrumental value, but can have intrinsic value. However, such intrinsic value depends on human dignity, whereas for Brownword, consent’s intrinsic value is tempered only by consideration of the entire human rights framework. Indeed, as Wright later argues, consent could only be overridden in extraordinary circumstances, as ignoring consent is a fundamental affront to human dignity. I wish to examine three scholars in the dignitarian tradition who have recently presented frameworks for the concept of consent, dependent on dignity, before moving to analyse more closely Brownword’s rights-based approach to consent.

---

Dignity and Consent

Baker and the Moral Limits of Consent

Baker relies on a Kantian notion of dignity. For Kant, rational beings have an intrinsic value which gives them dignity.\textsuperscript{707} This arises as rational beings have a will which makes them capable of choice, as opposed to being motivated purely by appetites or instinctive drives.\textsuperscript{708} As Kant explains:

\begin{quote}
\"…rational nature exists as an end in itself.\" The human being necessarily represents his own existence in this way; so far it is thus a subjective principle of human actions. But every other rational being also represents his existence in this way consequent on just the same rational ground that also holds for me; thus it is at the same time an objective principle from which, as a supreme practical ground, it must be possible to derive all laws of the will. The practical imperative will therefore be the following: \textit{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.}\textsuperscript{709}
\end{quote}

Therefore, while rational beings have to respect their own dignity, they have to respect each other’s dignity equally. Any act which uses another human being as a means to an end offends against that person’s dignity and would therefore be an immoral act for Kant. Equally, it would be immoral to allow another human being to use oneself as a means to an end, as in doing so they necessarily offend against one’s own dignity.

Of course as it stands such a theory would be far too wide-reaching to be an effective framework for criminalising offences against dignity. It is at this point that the


\textsuperscript{708} R. Lindley, \textit{Autonomy} (Humanities Press International, Atlantic Highlands 1986), at16.

bite to Baker’s theory can be seen. He realises that to criminalise any affront to dignity would have the effect of treating false promising and rape as being equal wrongs in the eyes of the law. 710 As a result of this, he says:

“…it is necessary to…consider objective consequences to determine whether the violation of dignity is worthy of criminalization. It is the gravity of harm that determines whether the violation of dignity is worthy of criminalization.” 711

It is important to note here that the concept of harm is merely used as an indicator as to the level of disrespect for dignity that has occurred. Therefore, theoretically the “harm” aspect does not itself cause the conduct to be criminal. Rather, it is the severity of the affront to dignity that causes the conduct to be criminal. Harm is thus an important peripheral indicator. This is made explicit when Baker talks of human beings having a right to waive their right not to be harmed, but having no right to waive their right that their dignity not be affronted past a certain point. 712 He continues:

“It is not the disrespect in itself that makes the conduct in R. v. Brown criminalizable, but the degree of the disrespect. We measure the degree of disrespect by evaluating the gravity of the harmdoing involved. Respect at this level means that when wrongful harm goes beyond a certain cutoff point, consent will not provide a defense.” 713

He distinguishes conduct such as extreme sadomasochist sex or the voluntary transmission of HIV to a fully informed, willing recipient from contact sports and surgery. He correctly asserts that normally the harm arising in contact sport is from an

accident and that accidents are not to be criminalised.\textsuperscript{714} He does not, however, go further to discuss harm that arises in a contact sport which is clearly not an accident. Surgery is not seen as affronting dignity as it is merely a temporary setback which will, it is hoped, result in a long-term benefit.\textsuperscript{715} Sadomasochism on the other hand, may have a telos of sexual gratification, but that aim cannot be achieved without causing harm and violating dignity.\textsuperscript{716} Furthermore, Baker argues that it will not be a once-off occurrence, like surgery might be. Rather, it will be repeated regularly. The consensual transmission of HIV is a different type of affront to dignity. Here, not only is serious harm caused, but it is also irreparable, severely restricting the newly infected individual’s autonomy, as they can never change their mind about being infected.\textsuperscript{717} Therefore the consensual transmission of HIV would be an immeasurably worse affront to dignity than most sadomasochist conduct. Thus ultimately, personal autonomy must be curtailed, according to Baker, when the advancement of same entails causing an unacceptable level of harm to another individual, which therefore has the effect of affronting their dignity.

Baker’s view of dignity, if accepted, would fill a major gap in consent theory. While many generally agree that the causing of serious harm to another, even with their consent, should not be legal, it is hard to support that opinion with a good reason, apart from making bland suggestions about the uncivilised nature of the conduct. Baker’s theory of applying dignity to the framework plugs that hole. It now suffices to respond that such conduct affronts that person’s dignity and they have no right to have it

\textsuperscript{715} D. J. Baker, “The Moral Limits of Consent as a Defense in the Criminal Law” (2009) 12 New Criminal Law Review 93, at 119. He does, however, go on to discuss the possible criminality of surgeons profiting on patients who have become addicted to having plastic surgery.
affronted in such a serious manner. However, does this argument go too far and not far enough at the same time? Does it go too far in suggesting that the type of harm seen in *R v Brown* could be enough to be a serious affront to dignity?\(^{718}\) It is arguable if this were so, that autonomy expressed through consent would be too severely constrained in favour of quite an abstract notion of dignity. The problem thus becomes that the dignity argument does not just support criminalising serious harm in the sense of permanent and irreparable harm,\(^{719}\) it could also be employed to support the criminalisation of less serious types of harm as is demonstrated by Baker’s wavering over whether the harm in *R v Brown* was sufficient to constitute a serious affront to dignity, even though the harm caused in that case was nowhere close to being permanent or irreparable.\(^{720}\) Baker’s inability to set a minimal threshold below which dignity will not be seriously enough affronted to warrant criminalisation is perhaps indicative of the fact that finding the harm threshold will once again be a public policy decision. If this is true, then it is possible that in effect, all Baker’s thesis does is legitimise a public policy decision, under the auspices of a philosophical theory of dignity.

On the other hand, the argument may not go far enough in so far as it is unclear if relatively low levels of harm caused to individuals could be criminalised where conduct results in engendering a general level of disrespect towards individuals of the same gender or who are affected by the same medical disorder. Take the example of dwarf-tossing in France. In the *Wackenheim* case,\(^{721}\) an individual affected by

---


dwarfism allowed himself to be tossed onto an air bed, while wearing protective clothing. The French Conseil d’État decided that such behaviour was an affront to human dignity and consequently banned the practice. Could watching and participating in such activities have the effect of lowering the level of respect for similarly affected individuals in general, seeing them as dehumanised objects? Thus not only would the conduct be an affront to the dignity of the individuals tossed, but in fact it would be an affront to all people suffering from a similar condition. Even if that argument is not correct, it must be admitted that dwarf-tossing involves much more of an affront to dignity than the type of conduct which was seen in Brown. At its severest, the conduct in Brown included the temporary mutilation of genitalia. Dignity is affronted in this case as the causer of the harm is using the receiver as a means to an end and, perhaps not respecting their humanity. However, this happens in private and dignity is promoted here as it also allows the receiver to choose what they want to do with their own body and allows them to achieve sexual gratification. In the Wackenheim case, there is no harm caused. However, dignity is affronted by human-beings treating other human-beings as objects or toys. Aside from the individuals involved, the people watching are also contributing to the activity. They too must be showing a lack of respect towards the dwarf because they laugh at what they see as the humour of a dwarf—a human-being—being tossed like a toy. The entertainment is wholly derisory of individuals affected by dwarfism. No spectator is watching to see the skill of the person tossing. It may also be borne in mind that these activities usually happened in nightclubs and thus were not taken seriously as sporting competitions. On the other hand, dignity is perhaps once again promoted in this instance by allowing the individual

being tossed the right to do with their body what they please and allowing them to exploit their unusual bodily appearance for profit.

Similar arguments could be employed with regard to the dehumanising of women in pornography. As Baker’s theory requires some level of harm to be caused, it could not cover affronts to dignity such as those that occur in *Wachenheim*, yet it could potentially penalise the conduct in *Brown*. The problem here is Baker’s use of harm as an indicator of disrespect to dignity. Whether or not one believes that the type of conduct in *Wachenheim* should be criminalised, few would doubt that it does seem to deeply offend a sense of dignity. Indeed, the level of disrespect for dignity might appear greater in *Wachenheim* than it does in *Brown*. Harm alone, therefore, appears to be a poor indicator of the level of disrespect to dignity that has been caused. Any account of a criminal legal system that purported to take dignity seriously would therefore be flawed in evaluating dignity by reference to harm, as Baker suggests. Therefore, it is perhaps the case that his theory is inadequate on at least two levels.

**Wright on Dignity**

A more interesting account of the role of dignity in society is offered by Wright. In principle, he refrains from discussing dignity from any particular philosophical perspective. Rather, dignity is taken as a very general concept, where all we can agree upon is that it is something thought to hold a special value. That value, it is argued, is of an ultimate intrinsic nature, in the sense that dignity does not depend upon anything else. He says: “it is hard to see how we could explain why human dignity is rationally preferable to indignity by referring to knowledge, happiness, freedom, consent, or any
other value". This is in contrast to the value of consent, which does require further explanation, according to Wright. This leads him to the hypothesis, which is worth restating, that "dignity underlies and limits the role and value of consent; consent does not in turn underlie or limit the role and value of human dignity". However, while it is argued that consent is a function of dignity, Wright does not go as far as Baker does, in suggesting that affronts to dignity can be used as some justification for criminalisation. He recognises that coercively overriding consent for the sake of dignity itself flies in the face of dignity. Yet he also submits that paternalistic intervention may further long-term dignity. These two contrasting stances seem only to be reconcilable because of the way in which he sees society as paternally interfering. As opposed to the use of the law to restrain individuals from consenting, Wright sees communities and indeed societies built on mutual trust (notwithstanding a healthy distrust of the government) as being the right tools to influence individuals to make decisions which best respect human dignity. As individuals do not come as “fully pre-formed and dignified” agents, they will necessarily be influenced by their social environments. If this social environment is one of mutual respect and trust, it leads the individual to make choices which are not entirely their own, but at the same time not a coerced choice made for them by others. This is best explained in the context of a

parent-child relationship, where the parents place a high value on education.\textsuperscript{731} The child will probably go to university without ever making a positive choice between going and not going. It is merely a natural progression, just as it was to go from primary school to secondary school. At the same time, Wright is correct in saying that to think of the child as having been brainwashed into going to university is probably not correct.\textsuperscript{732}

**Bergelson on Dignity**

Over the course of three related articles, Bergelson develops an argument that dignity should play a role in considering the legal effect of consent to interpersonal violence.\textsuperscript{733} While the general idea may be similar to Baker’s, Bergelson’s theory seems richer. Building on the work of Duff,\textsuperscript{734} and Meir-Cohen,\textsuperscript{735} it is claimed that Feinberg’s model of the harm-principle is incomplete. Duff asserts that this is the reason that Feinberg can not adequately explain why consensual gladiatorial fights could be criminalised.\textsuperscript{736} To complete the principle would require the recognition that the criminal law is not only concerned with setbacks to interests which violate the rights of others, but must also be concerned with setbacks to interests which violate human dignity, but not necessarily the rights of others. Duff argues that:

“To explain why violations of autonomy should be criminal, even if they do not fall under the Harm Principle, we must see them as denials of, or serious failures to respect, the humanity of their victim (or else we cannot understand why autonomy should be so important). 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.”

Bergelson’s argument goes deeper than a mere adjustment (albeit colossal adjustment) to the harm principle. Let us start by clarifying what exactly Bergelson has in mind when speaking of human dignity. For her, it is to be considered as an objective moral concept. Therefore, the subjective attitudes of communities where certain behaviour which affronts dignity is commonplace would not be taken as any type of justification. This leads to the argument that harm to dignity where no rights violation has occurred must be limited to:

“treatment that denies the victim the basic respect to which every person is entitled just by virtue of being a human being, no matter where he lives or to what cultural group he belongs. To be morally convincing, this understanding of dignity has to be shared by the community at large, not merely some of its segments.”

Of course even this broad and general concept of dignity would require significant judicial interpretation. Worse still, in practical terms, it may require a jury to decide whether or not there has been harm to dignity.

738 Interestingly, Duff and Meir-Cohen do not use the word dignity and instead talk about humanity, but they are essentially concerned with the same concept, even if their conceptions of the concept differ.
The State’s Dominion

Deciding what harm to dignity should be considered as meaning, while crucially important, is only the first step in Bergelson’s thesis. It continues to outline the specific role of consent in physical violence crimes. The question is whether consent forms part of the definition of the crime, or whether consent is a defence to the crime. The resolution of this question is extremely important. If the former answer is correct, then the prosecution must prove a lack of consent on the victim’s behalf. If the latter was the correct response, then the defendant would have to prove that the victim consented, and their consent would be seen as a justification for the defendant’s actions. Such actions might be fully, or only partly justified, depending on the nature of the defence of consent.

At this point, it is important to make a distinction made between offences such as rape or theft and offences involving the causing of injury through physical violence. Consent does not play the same role in these cases. If we were to divorce the issue of consent from the particular acts, the moral quality of the acts would not be the same. Having sexual intercourse or taking another’s property are, by themselves, morally neutral acts. It is only when we introduce the concept of consent to these situations and when consent is absent that the law concerns itself with these activities. The causation of physical injury to another, on the other hand, is not a morally neutral act. This is so even before we consider the effect of consent. I would agree with Bergelson when she suggests:

---

741 Parts of this discussion have been published in S. King, ‘The State’s Dominion: Physical Violence and Consent’ in S. King and others (eds), Law, Morality and Power: Global Perspectives on Violence and the State (Inter-Disciplinary Press, Oxford 2010), at 87-93.
“…killing or hurting another is bad per se. The fact that a person may be legally justified in, say, killing another in self-defense does not make the killing as morally neutral as borrowing a book; it is still regrettable. It is still regrettable that a dental patient has to suffer pain, even though the dentist is justified in causing it”.

With these observations made, it can be argued that a lack of consent should be, and normally is, an element of the definition of the offence in cases such as rape and theft, whereas in crimes involving the infliction of bodily harm, consent should not be part of the definition of the offence, but rather it should act as a possible justification for the conduct. This is so as the conduct is regrettable per se and needs justification because it is a societal norm that neither individuals nor society itself want bodily harm to be inflicted on individuals, unless there is justification for the infliction. As Gardner says: “Actual bodily harm is per se an unwelcome turn of events, even when consensual; sexual intercourse is not per se an unwelcome turn of events, but becomes one by virtue of being non-consensual.” It cannot be said that neither individuals nor society itself want people to engage in sexual intercourse, unless engagement in such is justified. There is a further practical element to this argument. If the lack of consent was to form a part of the definition of an offence of causing serious injury or death to another, the prosecution would rarely be able to prove that the victim did not consent if they had already died from the (non-) consensual conduct. In such circumstances, the burden must lie on the defendant to prove that the conduct was consensual, and hence consent would act as a defence.

743 For example, see s. 4(1), Criminal Justice (Theft and Fraud Offences) Act, 2001 (Ireland); s. 2(1), Criminal Law (Rape) Act, 1981 (Ireland); s. 1, Sexual Offences Act, 2003 (England and Wales).
744 J. Gardner, Offences and Defences (Oxford University Press, Oxford 2007), at 144-145; he makes these comments while discussing Kenneth Campbell’s argument in K. Campbell, ‘Offence and Defence’ in I. Dennis (ed), Criminal Law and Justice (Sweet & Maxwell, London 1987).
Livings points to some confusion over this point in contrasting the judgment of Hawkins J. in *R v Coney*,\(^{745}\) with the obiter statements of Lord Jauncey of Tucillichettle in *R v Brown*.\(^{746}\) Hawkins J. took it that assault needed to be defined in terms of a lack of consent, whereas Lord Jauncey was of the opinion that consent should act as a justificatory defence.\(^{747}\) The confusion here arises principally because offences involving the infliction of bodily harm are often phrased in terms of being a more serious “assault”, with simple assault offences often being defined in terms of a lack of consent.\(^{748}\)

Simple assaults cover any touching of the human body. Pats on the back and handshakes involve touching of the body. Neither could be said to be regrettable *per se*. As a counterpoint to the dentist example above, we would not say that although it is a nice sign of camaraderie to see someone pat another on the back, or a nice sign of courtesy to see two people shake hands, it is nevertheless regrettable that these social pleasantries involve touching of the human body. Many of the touchings that could constitute an assault are somewhat trivial and not regrettable *per se*, which perhaps makes simple assault crimes more analogous to rape and theft offences, in the sense that the conduct only becomes the law’s business when it happens without the consent of the individual. However, when the touching amounts to an injury, and thus reaches the level of bodily harm, it becomes regrettable *per se*. Therefore, while the lack of consent may properly be a part of the definition of simple assaults (due to the fact that touching is not regrettable *per se*), once the touching causes an injury and bodily harm is caused, it becomes regrettable *per se* and thus the lack of consent should not be part of the definition but rather a possible justification for the conduct. It might, therefore,

\(^{745}\) (1882) 8 QBD 534, at 549.
\(^{746}\) [1993] 2 All ER 75, at 92.
\(^{748}\) For example, see s. 2(1) Non-Fatal Offences against the Person Act, 1997 (Ireland).
be more appropriate not to phrase crimes of physical violence causing bodily harm in terms of assault.

Given that the infliction of harm, whether justified or not, is always regrettable, the starting position for the state must be that it exercises complete dominion over the causing of injury through physical violence in society as it is conduct which always requires justification. We might therefore criticise Fletcher’s phrasing in the following:

“Notice that consent negates the illegitimate quality of aggression. In the international arena, consent converts invasion into international aid. Consent to the taking of an object transforms theft into a loan or sale. Consent to sexual intercourse transmutes an act that would otherwise be rape into voluntary lovemaking.”

If the argument I have advanced is correct, then consent would not be transforming or transmuting these offences into legal activities. It would be more correct to speak of a lack of consent transforming these activities into offences. The difference is more than semantics. For Fletcher’s approach would seem to presuppose that the act of sexual intercourse, for example, was an offence *per se*, which would require consent to transmute the activity into lovemaking. This cannot be the correct approach to such activities. Of course the problem now becomes, what will constitute justification?

**Consent as a Justification**

Bergelson sees consent to physical harm as being a defence similar to that of necessity or self-defence. It is a defence which justifies the otherwise criminal behaviour and in

---

order for such justification to arise, the defendant must present a *good reason*.

Appealing to a *good reason* for causing harm appears logical as it is argued that while the *victim* may well have waived their right not to have their interests set back, that does not necessarily give the defendant a good reason to set back those interests. An interesting, common-place example would be asking a child to explain why they broke a vase. A reply from the child that someone told them to break it, Bergelson argues, would not be sufficient and a parent might respond “if they told you to jump into the fire, would you do it?” What the parent really wants to know is why, as a morally free agent, the child decided to break the vase. This good reason can have both objective and subjective elements. The objective element requires objectively balancing the evils at stake. The conduct would be justifiable if it produced:

> “an overall positive balance of harms/evils and benefits (to society, a third party, or even the perpetrator) as long as the harm (i) is consensual and (ii) does not significantly set back the victim’s interests while, at the same time, disregarding his dignity.”

The subjective element of the justification defence would require the defendant to show that they acted in good faith. They would show this by demonstrating that they intended to bring about the more positive or lesser of the evils they faced. Furthermore,

---

they would have to demonstrate that they did not intend to significantly set back the victim’s interests or harm their dignity.\textsuperscript{755}

Fulfilling these objective and subjective elements of the \textit{good reason} will provide the defendant with a full justification for the conduct, according to Bergelson’s thesis. If all elements cannot be satisfactorily proved, the defendant’s conduct might only be partly justified. Therefore, in the following cases, there cannot be complete justification:

“(i) the harmful consensual act has brought about more bad than good (e.g., the euthanized patient was not in pain and had excellent prospects of recovery);
(ii) the harmful consensual act has significantly set back the victim’s interests and dignity (e.g., the Meiwes-Brandes case of murder and cannibalism);
(iii) the perpetrator’s conscious goal was to bring about evil results (e.g., killing a consenting terminally ill patient out of sheer hatred for him and his family who will be broke when he dies); or
(iv) the perpetrator’s conscious goal was to set back significantly the victim’s interests and dignity (e.g., hiring the victim for severe and humiliating beating with the intent of injuring the victim’s body and self-esteem).”\textsuperscript{756}

Implementation of such rules, Bergelson argues, would see a departure from a position where the “rules governing individuals’ ability to consent to bodily harm are not merely strict; [but]… morally and conceptually incoherent”\textsuperscript{757} and from the autocratic position where “People are allowed to consent to harm only if their activities are on the list of things approved by the state”.\textsuperscript{758} Bergelson’s new rule would respect both the victim’s and the perpetrator’s autonomy, but it would also give weight to society’s collective

interest in maintaining respect for humanity by protecting the victim’s dignity from serious harm.\textsuperscript{759}

**Criticisms of Bergelson**

There are a lot of positives to be gleaned from Bergelson’s theory of consent. Distinguishing between consent’s role in offences such as rape and offences where bodily harm is caused is an important, and I believe correct, contribution. The force of the argument comes from society collectively being able to agree that any injury causing bodily harm to another individual is in some way regrettable, even if it is completely justifiable. Note that the judgment can be reached by society collectively. The problem with Bergelson’s argument leads on from this notion of a collective judgment. The important, distinguishing part of her theory is the introduction of harm to dignity as being worthy of criminal liability. As noted earlier, an objective understanding of dignity would need to be shared throughout the community at large.\textsuperscript{760}

However, is that enough of an explanation? What of the practical implications? I believe that one implication would be that a jury would have to decide whether an individual’s dignity had been disregarded.\textsuperscript{761} Let us assume that they are directed by the judge as to what they are to understand by harm to dignity along the lines that Bergelson suggests (it bears repeating):

“treatment that denies the victim the basic respect to which every person is entitled just by virtue of being a human being, no matter where he lives or to what cultural group he belongs. To be morally convincing, this understanding of dignity has to be shared by the community at large, not merely some of its segments.”

Despite such a direction, one cannot help but be reminded of Devlin’s jury-box morality and his appeal to the ordinary man in the jury box to discern what was morally acceptable and what was not. Aside from Hart’s complaints about such a thesis, Dworkin powerfully argued that the ordinary man’s “morality” could often be inter alia mere prejudice and personal distaste masquerading as morality. Similar problems would apply with directing jurors as to what constituted dignity, or more importantly, what constituted a disregard for the victim’s dignity. While we may well speak of an objective definition of dignity, and Bergelson’s idea of objective dignity may be just that, it is only objective because it is abstract enough to encapsulate a wide divergence of interpretations of the concept. It is not a far stretch to envisage dignity being used as a crucial argument by both pro-life and pro-choice campaigners. Both sides can interpret Bergelson’s definition to support their own claim. I do not believe it is beyond the realms of the imaginable to have twelve particularly liberal jurors who might find that Miewes did not show an unacceptable disregard for Brandes’s dignity. Such different interpretations of dignity in the same society may have been evident if similar cases arose in New York and Alabama. Although Bergelson uses the caveat that the understanding of dignity must be shared by the community at large, as soon as we try to employ such a caveat in the real world, the whole point of introducing dignity into the criminalisation process would become useless. As people disagree about so much,
particularly in such a diverse society such as the United States, an honest juror might be unable to ever say that they legitimately believe their particular concept of dignity is shared throughout the community. Rather, to be a workable model, jurors would have to decide what their own best interpretation of dignity was like and whether right-thinking people would agree. But this, of course, would be jury box morality.

This whole argument feeds into McCrudden’s idea that dignity today serves as a unifying concept throughout jurisdictions all across the world, despite the fact that most jurisdictions interpret what exactly they mean by dignity, or what claims dignity supports, differently. He argues:

“just as dignity played a significant role politically in smoothing over the transition to human rights in the post-Second World War period at the international level, so too dignity is playing a similar role judicially, enabling rights to be interpreted in a way that domesticates them. Its role, in practice, is to enable local context to be incorporated under the appearance of using a universal principle. Dignity, in the judicial context, not only permits the incorporation of local contingencies in the interpretation of human rights norms; it requires it. Dignity allows each jurisdiction to develop its own practice of human rights.” 766

Notwithstanding the fact that problems interpreting dignity are not dissimilar to problems encountered interpreting what we mean when we speak of equality and justice; 767 we do not ask jurors to decide what “justice” or “equality” mean. We leave those decisions to legislatures and at a secondary level to judges. Alder argues that general concepts such as dignity, equality, justice etc. are best democratically interpreted by the legislature.768 His argument is one against judges attempting to universally or definitively interpret such concepts. If the judiciary are not appropriate

interpreters of such concepts—although I believe they can be—then jurors are certainly not.

I argue here on the basis that Bergelson’s theory for consent’s role as a full or partial justificatory defence seems to require fact-finding by a jury;\textsuperscript{769} i.e. “did the defendant’s conduct setback the victim’s interests or did it violate their dignity in a way that might hurt society at large?”\textsuperscript{770} If dignity is to be taken into account in criminal law, it should not be at the jury stage, rather it needs to be decided upon at the legislative stage, where a collective societal judgment can be made. Therefore, presumably Bergelson would see the Miewes-Brandes case as one where Miewes was charged with murder and the jury could decide that the defence of consent would fail or would only partially justify the killing as in their opinion, Brandes’s dignity had been disregarded. Instead, I would argue that the legislature might proscribe consensual killing and cannibalism to satisfy sexual desires. This will be discussed in more detail below.


Brownsword and Human Rights

As noted above, in stark contrast to the dignitarian alliance, there is the human rights approach to consent. A recent piece of literature which analyses the role of consent in the context of human rights is Beyveld and Brownsword’s Consent in the Law. A chapter of that book, previously published by Brownsword as The Cult of Consent: Fixation and Fallacy is particularly illuminating for our discussion. For him many communities are in danger of becoming “fixated” by the concept of consent. This occurs where:

“consent is viewed as the key to ethical and legal justification. By saying that consent is the key, I mean that consent is no longer seen as an element of a larger theory of ethical or legal justification; rather, consent becomes its own free-standing justificatory standard.”

Such a fixation gives rise to four claims that members of the cult will make, and the one that is interesting for our purposes is Brownsword’s Claim D, that, “An other-regarding action taken with the consent of the other will be justified”. Brownsword argues that this claim suffers from the Fallacy of Sufficiency. This is so as promoters of Claim D see consent as being sufficient to oust the state’s authority when that situation arises. They claim that there can be no public wrong when there is no private wrong. Hence, when A sets back B’s interests with B’s consent, B is not (privately) wronged, therefore how can there be a public wrong? If such a situation is transformed into a public wrong via the public interest, this should be considered as intolerance and repression in

disguise. While admitting that relying on the public interest can be a lazy justification for intervention in consensual violence, he nevertheless outlines a non-exhaustive list of three genuine public interest reasons for interference which would allow for intervention, if such was necessary and proportionate. The good reasons would be:

“(i) in order to secure respect for the rights of fellow agents in the community—covering
• interventions that are designed to discourage violations of rights
• interventions that aim to co-ordinate the community’s activities so that responsibilities to rights-holders are discharged more effectively
• interventions that are designed to assist with the enforcement of rights.
(ii) in order to preserve the context in which autonomous agents may flourish as members of a community committed to human rights and responsibilities—such a context is multi-layered and includes
• interventions that are designed to make essential community choices between morally optional conduct or forms of life
• interventions that provisionally settle the community’s position on a morally contested matter (whether relating to the interpretation of human rights principles or their application)
• interventions that aim to preserve those features of the context from which agents take their identity as members of a ‘consenting community’, that is as members of a community committed to human rights and responsibilities.
(iii) in order to give effect to prohibitions that have been expressly authorised (under strict conditions of consent) by members of the community.”

He applies these rules to controversial examples such as the ban on assisted suicide, outlawing of homosexuality and access to reproductive technology. His observations on assisted suicide are particularly interesting, considering their relevance to consensual violence in general. One point which is beyond dispute is that allowing the situation to be shrouded by the fog of prosecutorial discretion is lazy. Interestingly, these comments were made prior to Keir Starmer’s recent announcement that the Director of

Public Prosecutions would use its discretion in prosecuting cases of assisted suicide.\textsuperscript{778} However, even discussion of assisted suicide is different, as it would not include any application of injury to the \textit{victim} by the perpetrator, it would merely involve facilitating the \textit{victim} to kill themselves. The CPS policy document specifically outlines that it will be murder or manslaughter if the perpetrator actually took the \textit{victim’s} life, as opposed to them taking it themselves.\textsuperscript{779} Nevertheless, Brownsword makes two interesting regulatory observations. First, before a state could be justified in banning certain activities where no private wrong occurs, it must attempt to put in place some form of regulatory regime which would ensure that a valid legal consent was present before the act took place.\textsuperscript{780} It would also have to convincingly explain why regulatory regimes were introduced for certain activities and not others. If the state fails to put in place such a regulatory procedure, it must explain why such scheme is not available.\textsuperscript{781}

This leads on to a second point, which is that a state may explain its decision not to introduce a regulatory scheme in the area because it is not certain that such a regulatory scheme would operate effectively or prove to be foolproof in reality.\textsuperscript{782} Such a decision would have to be supplemented by an argument “that respect for the rights of agents is better secured in a community where a special procedure is not recognised as opposed to one in which it is recognised.”\textsuperscript{783} However, as there is no way to test this claim, the state may be justified in taking a provisional public stance on an uncertain

issue. This would be a good reason for interference in itself, under point (ii) of Brownsword’s criteria. He sums up by saying:

“This problem…presents itself as one of finding the pattern of regulatory overview that least frustrates the legitimate will of agents… If it is unclear what this pattern is, the state must again resort to its responsibility to take a public position provisionally settling moral differences.”

At this point a sceptic may be tempted to point out that this is what occurs when human rights run out. Perhaps it is what happens when human rights collide? It is essentially a richer account of Feinberg’s admission that cases of extreme unreasonableness could justify the state in presuming involuntariness. Despite contributing some helpful observations on steps the state should take before resorting to a prohibition of the conduct which caused no private wrong to those involved, the crux is that Brownsword’s conception of consent’s role within a human rights framework ends, in the case of consensual violence, at the state making a decision to settle moral differences. Such a decision is also a moral decision. Given dignity’s central role in human rights theory, the state may well appeal to human dignity in justifying its provisional decision to settle a moral difference in one direction and not the other.

---

Reconciling Dignity and Rights

Resolutions of the kind Brownsword has in mind need to be made at a legislative stage which will inevitably include considerations of human dignity. Dignity and the human rights approach are thus in fact intertwined. That said, Wright’s conception of dignity being an organising principle is persuasive in a way that the human rights theory cannot account for.\(^{788}\) It is true that autonomy essentially is an interpretation of human dignity. Human rights are not primary moral concepts. They are legal concepts arrived at in interpreting what, *inter alia*, human dignity, equality and justice require. Therefore, human dignity seems to be one of the intertwined primary moral interpretative concepts, from which human rights and other dependant principles such as autonomy flow. However, saying this should not necessarily open the floodgates to the type of argument Baker puts forward. Again, Wright’s argument that disrespecting the autonomy of an individual is one of the foremost affronts to human dignity, is more persuasive.\(^{789}\)

Wright’s theory of human dignity, however, is largely one of ethics. As previously mentioned, by ethics, I mean, what is required to live the good life.\(^{790}\) It is in this context that his theory flourishes. It is not for government to implement laws to instruct us on how to lead the good life. That said, there is no doubt that we do need some instructing on how to lead such a life. That instruction will come largely from our communities. Baker, Bergelson and Brownsword are concerned with moral theory: how we treat others.\(^{791}\) This is something states legislate for all of the time.

There may be a possibility of reconciling Bergelson’s theory with Brownsword’s. This reconciliation would come by introducing Bergelson’s theory of the minimum respect for human dignity to be one of the main considerations at the legislative stage when states take stances on uncertain moral issues.\textsuperscript{792} It seems to me that this would be a better use of Bergelson’s theory and would allow it to escape from whatever criticism there may be of “jury-box” morality. At the same time it would be consistent with Brownsword’s conception of rights which would not see it as a rights violation when the state takes a stance on a morally uncertain issue. The moral decision the state would make would be one based on that state’s best interpretation of what human dignity requires. In this way human dignity is seen as an over-arching principle, from which human rights are drawn and given the utmost respect (for that is what human dignity, equality, justice etc. require) and when those rights conflict so as to leave a particular situation unclear, interpretations of human dignity are relied upon to resolve the problem.

To be sure, the courts would have a role in interpreting what human dignity requires as well, to ensure the constitutionality of the laws passed. In this way the courts would act as a safeguard for minorities from being persecuted by the moral beliefs of the majority.\textsuperscript{793} The courts’ role here would be distinctly different from the role it would play in Bergelson’s theory. Here judges, not juries, would be interpreting the abstract moral concepts, something which they are habituated and trained to do, in order to ensure that certain fundamental rights of the minorities have not been sacrificed in the state taking a temporary stance.


A Normative Argument

It would appear that the state would not be required to take a temporary stance on combat sports. If the regulatory theory for consensual violence presented in this thesis is correct, combat sports as well as boxing must be regulated. If they were to go unregulated, the state would have the difficult task of explaining why other activities where serious harm is caused are regulated, when combat sports are not. It is unlikely that the state could convincingly argue that such regulation would not be effective in reality, considering its apparent effectiveness in Australia and the United States.

While combat sports can be easily accommodated by the theory, sexual and religious consensual violence poses much more of a difficulty. The difficulty is compounded by the approach taken in many common law jurisdictions at the moment, where they set the bar too low at not allowing people to consent to actual bodily harm. Such harm could consist of anything from a sore bruise to a broken bone. While, in principle, as I have argued, it is within a state’s dominion to control interpersonal violence, I have also argued that consent can be a relevant justification. It seems to me that the arguments based on human dignity and autonomy that suggest that the consent of the victim should justify conduct where only actual bodily harm is caused are more persuasive than arguments that suggest that individuals should be barred from

796 See for example, Crown Prosecution Service, ‘Offences against the Person, Incorporating the Charging Standard’ <http://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/>, at ss. 45-46, accessed 28 August 2010; Non-Fatal Offences against the Person Act 1997 (Ireland), S. 1, where “harm” is defined as “harm to body or mind and includes pain and unconsciousness”.

223
consenting to such harm. The reasons that support the latter argument, tend to be extremely unsatisfying, especially when what is considered to be actual bodily harm generally ends at a broken bone.

As the general rule has been set so that individuals cannot consent to violence against themselves that constitutes harm, if the intentional or reckless causation of harm in sexual or religious consensual violence is to be permitted, the state must specifically legislate in this area. However, if such a legislative move was made in the context of religious and sexual consensual violence, there would be little reason not to see it extend to all harm caused consensually (with the exception of street fighting perhaps). By failing to enact legislation which overturns the \( R \) v \( Brown \) decision, the state implicitly agrees with the outcome and legitimises it. This implicit agreement could constitute the state’s temporary stance on the issue and thus accord with Brownsword’s theory, however, it would seem to fail Bergelson’s due to the fact that the harm caused in \( Brown \) would not have been sufficient to constitute a significant setback to the victims’ interests, while disregarding their dignity.\(^{798}\)

Furthermore, it is not open to the state to allow serious harm in sexual and religious consensual violence through regulatory machinery. Regulatory regimes for such consensual violence would fall into the category of being ineffective,\(^{799}\) I would submit. It would be inappropriate for a democratic state to regulate such intimate details of its citizens’ lives. While the English Sadomasochist Control Board might be

an interesting thought experiment, the thought of regulating citizens’ sex lives in reality should repulse us.

Another option would be to legalise all harm caused consensually in sexual and religious conduct. This, however, it seems to me would be overly permissive. The advantage of a regulatory regime is that it ensures that consent is valid. That must work by ensuring consent is valid prior to the harm taking place. Rights would not be secure in a community which allowed for citizens to be seriously harmed or killed where the consent is not shown to be valid before the act takes places. In such cases, if the serious harm caused brain damage or death, the prosecution would never be able to show that there was a lack of consent on the victim’s behalf. Rights violators would thus avoid justice by ensuring their victims could not testify against them that the harm caused was not consensual. It is for this reason that no community could allow individuals to rely on consent as a justification for causing serious harm in circumstances where the consent was not verified prior to the act taking place. Brownsword submits that “No rational legal regime could adopt such a position, not even for a restricted class of life terminators (such as physicians).”

While the regulatory theory I defend in Chapter Three accounts for the current rules that govern consent in the context of non-fatal offences against the person, it would even better account for those rules in a context where individuals were permitted to consent to any harm, up to, but not including, serious harm. In such a regime the rules governing sexual and religious consensual violence would be more deferential to

800 See Chapter Three, at 92.
802 R. Brownsword, “The Cult of Consent: Fixation and Fallacy” (2004) 15 King’s College Law Journal 223, at 243. Brownsword says this in relation to unlawful killing, as opposed to the causing of serious harm. But if serious harm causes brain damage, leaving the victim unable to testify, the distinction between killing and causing serious harm fades away in terms of establishing, after the fact, whether there was a valid consent.
individual autonomy. That said, individuals would never be permitted to cause each other serious harm in these circumstances. This would be due to the lack of a regulatory regime in this area. A state could justify this lack of regulation owing to the inevitable ineffectiveness of such a system, along with its inappropriateness. Such a position can also be reconciled with Brownsword’s approach under two categories: it is a public stance on a controversial issue, and it can also be claimed that it secures respect for the rights of other individuals in the community.\textsuperscript{803}

However, in a state taking its public stance on a controversial issue, it will inevitably take into account considerations of dignity. For example, it might be the case that effective regulatory systems could be designed to allow for female circumcision/female genital mutilation, gladiatorial bouts or cannibalism. However, a state could decide not to introduce such regulatory systems because the aim of those activities would seem to irreversibly setback the interests of individuals, while at the same time disregarding their dignity: i.e. “the basic respect to which every person is entitled just by virtue of being a human being…”\textsuperscript{804} A particularly liberal community might decide to allow consent to act as a partial justification, as Bergelson suggests.\textsuperscript{805} However, perpetrators of the harm would still be criminally liable, with their conduct not being wholly justified. Furthermore, it would be for the legislature to decide in what circumstances consent would act as a partial defence. For example, a state may create a crime of cannibalism. A central justification for the law would be the disregard for dignity involved in that activity. The law might then provide that consent is a partial

defence, halving the sentence for example. In this way, the interpretation of dignity occurs at the legislative level, and not at a jury level.

The theory I have proposed here has been based on the assumption that the state must quantify and criminalise some amount of harm: i.e. the options for the state are to either criminalise all actual bodily harm, or more serious, grievous bodily harm. Roberts calls this the quantitative-rule approach.\(^{806}\) As there will need to be exceptions, regardless of which quantity of harm the state decides to criminalise, the approach will always inevitably be a quantitative-rule-plus-exceptions approach.\(^{807}\) He criticises this approach by saying: “It effectively reverses the traditional common law presumption, that everything is lawful unless expressly proscribed, by extending criminal sanctions to conduct simply because the legislature has not (yet) had occasion to consider it for exemption”.\(^{808}\) But is this really the case? Is it not the case, in fact, that everything is lawful, unless expressly proscribed, where in these circumstances, that which is expressly proscribed is the intentional or reckless causation of either actual bodily harm or grievous bodily harm? The real question is whether people could reasonably foresee their conduct as being exempt from the normal rules. The regulatory theory I advocate would respond to such concerns.

Roberts continues to criticise the quantitative approach by arguing that: “The basic practical difficulty lies in attempting to legislate in advance for every conceivable category of seriously disabling injury that ought to be excluded from the ambit of the criminal law”.\(^{809}\) Again, the regulatory argument I have advanced allays Roberts’s


concerns here. Indeed, however difficult it might be to legislate in advance for certain situations in which the causation of serious injury is acceptable, it would be even more difficult to legislate in advance for all situations in which the causation of serious injury was to be prohibited. Surely rights in a community are better protected by a scheme which prohibits the causation of such serious injuries at the outset, but then provides an opportunity for the actions to be justified, rather than a scheme in which the causation of serious injury is always permitted, except when there is specific legislation to criminalise it, leaving those who infringe on the rights of others free to infringe until such specific legislation is put in place.

**Conclusion**

In this chapter I have argued that there can be a role for dignity in a legitimate criminalisation project. Its role becomes particularly relevant in the domain of violence. It has been argued that it can be appropriate to have reference to a community’s best interpretation of dignity when trying to settle controversial moral issues which require the state to take a stance one way or the other. In enforcing interpretations of dignity which prohibit individuals from consensually harming each other, the state acts paternalistically, in the hard sense. It imposes a conception of dignity on its citizens in the limited sphere of violence. The justification for this lies in interpreting what humanity requires. Duff argued that dignity, as well as autonomy, is central to humanity. 810 Therefore, in the same way that in a very narrow range of circumstances, and when supported by reasoned argument, it was legitimate to interfere with present autonomy to protect future autonomy, it may also be permissible to interfere with an

individual’s dignity, when certain conduct deprives the individual of the basic respect humanity requires. This again, will require reasoned argument. Application of such a theory must be restricted primarily to legislatures. It will be the courts’ function to ensure that the legislature has not sacrificed more dignity in making the restriction than would be sacrificed without the restriction.

An argument could be made that allowing individuals to attack their opponents’ head/brain for sport/money/the entertainment of others might both significantly set back an individual’s interests and also disregard their dignity. Therefore, the dignity argument might support the banning of the head as a legal target in combat sports. It is particularly effective, however, in explaining why certain types of consensual violence that involve death, or serious injury to a part of the body which is not the brain, may be criminalised.

Finally, an important argument from this chapter has been the state’s legitimacy in claiming dominion over physical violence. It does so because physical violence is regrettable *per se* and always requires justification. It has been argued that states demonstrate better deference to autonomy when they allow individuals to consent to any harm up to, but not including, serious debilitating or life threatening harm. In order to be permitted to consent to such serious harm in the course of an activity, that activity must be regulated. If an activity is not regulated, participants should not be able to consent to serious harm, because if they sustained brain damage or died, they could neither confirm nor deny their consent, and thus rights in the community would be put in jeopardy. In a limited range of situations involving violence, the state may decide not to regulate an activity. It may do so because the establishment of such regulation would be ineffective or inappropriate. It may also do so because on a fundamental level in that community, human dignity requires that certain conduct be prohibited.
SECTION THREE: STUDYING COMBAT SPORTS
CHAPTER SIX - MORALISING COMBAT SPORTS

Immoral Attitudes and Combat Sports

“If he never walked again, I’d be cool with that”

Introduction

In episode six of the “The Ultimate Fighter”, after a hot-blooded out-of-the-ring encounter between competitors Chris Leben and Josh Koscheck, it was decided that as they could no longer live together, they would solve their differences in the ring, with the loser leaving the show. To put things in context, Leben had been the subject of a prank in episode five of the series, where after a drunken argument and Leben being called a “fatherless bastard”, he chose to sleep in the garden for the night. Fellow contestants Bobby Southworth and Josh Koscheck then turned a water hose on him. Leben reacted badly to this and proceeded to try to fight the pranksters there and then. The following morning the UFC President, Dana White, in a far from Solomon-esque judgement, decided the best way for Leben and Koscheck to solve their differences was to fight each other, with the loser being eliminated from the competition. This decision is apparently all the greater, since, in White’s opinion, some of the best UFC fights have

---

811 “The Ultimate Fighter: The Fight is On”, originally aired 21 February 2005, Spike TV. This programme is the Ultimate Fighting Championship’s reality television show. The show brings together the late 1990s lust for reality television with the timeless lust for watching two grown men pit their combat skills against one another. It saw sixteen aspiring mixed martial arts fighters (eight Light Heavyweights and eight Middleweights) live together in a house under the surveillance of television cameras. They would not only live, but train together and fight each other, in their respective weight categories, with the end grand prize being a lucrative Ultimate Fighting Championship (UFC) contract. A contract which is all the more important when one considers that the UFC is unquestionably the largest and most commercially successful franchise in the world to promote professional mixed martial arts fights (see; —, “MMA Organisations – MMA Promotions” MMA Wild Website <http://www.mmawild.com/mma/> accessed 16 February 2009 and —, “The UFC Fact Sheet” UFC Website <http://www.ufc.com/index.cfm?fca=LearnUFCAFactSheet> accessed 16 February 2009).

been ones where there was real hostility or “bad blood” between the fighters. While preparing for his fight, Leben says, along with a torrent of other abuse aimed at Koscheck: “If he never walked again, I’d be cool with that”.

This section examines the different facets of combat sports from a critical moral perspective. The arguments made and conclusions reached are not advanced in order to justify legal intervention necessarily. Indeed, at the outset it is important to clearly distinguish that labelling something as immoral is not the equivalent, nor should necessarily be the equivalent, to labelling it illegal. Whether morality alone should be a basis from which the legislature draws when promulgating laws is a debate too large to deal with or contribute to in this particular work.

The point of the section is to challenge a view that accepts combat sports as activities which are immune from moral condemnation. It will be shown that such views are inconsistent with other moral principles to which people would generally subscribe. The main challenge will arise from an examination of the attitudes of professional fighters towards their opponent’s self.

In the first section, there will be a brief discussion of what is meant by morality, to distinguish critical moral reasoning from some form of accepted conventional morality. Proceeding in a critical moral reasoning framework, in the second section there will be an assessment of the arguments which claim combat sports to be immoral because they promote violence in, and have a brutalising effect on, society. It will be argued that while combat sports may promote violence in a society, there is no reason to think they have any more or less of a brutalising effect than any violent television programme may have. In the third section the objectives of combat sports will be assessed to show that they encourage fighters to have an attitude towards their opponent’s self that has the effect of cheapening the value of that human life. There
will also be an analysis of how combat sports legitimise conduct based on attitudes of anger and revenge towards another’s self. Finally, this section addresses the argument that fighters hold the same attitudes towards their opponent’s self as competitors in any game hold towards each other and concludes that such an argument is unsustainable. In the final section there will be a discussion on the circumstances or conditions that might negate the immoralities found in combat sports, concluding that there can be no negation of the immoralities as long as winning by knockout is a primary method of victory.

As the moral issues touched upon in this chapter are identical for both boxing and combat sports, they will be discussed together here. This is important to note as much of the literature in this area focuses on boxing.

**Critical Moral Reasoning**

The matter which first needs to be addressed is: what exactly is meant by morality? As Dworkin claims, no precise definition of morality is likely to be helpful.\(^\text{813}\) He says: “Morality is a distinct, independent dimension of our experience, and it exercises its own sovereignty.”\(^\text{814}\) Very generally, it might be said that one’s moral judgment is an evaluative judgment as to an action’s quality: its goodness or badness. It is surely that which is meant when one talks of someone making a moral judgement about something. The problem is that you and I might very well make moral judgements about the same situation, and yet draw opposing conclusions. There are two possible reasons for the difference. The first possible explanation for our differing is because one of us has not


made a moral judgement at all. We might think that our judgement is a moral one, but it is not, it is something else. The second explanation for the difference in conclusions is that although we have both made moral judgements, the underlying moral principles to which we subscribe are different.

It has been noted that owing to the growth of cultural pluralism and toleration in Western society, many have turned to moral relativism, particularly students.\textsuperscript{815} The idea that different cultures will subscribe to different moral principles is quite innocuous in itself. However, Simon submits that this moral relativism has been misinterpreted by many to lead them to the conclusion that one has no right to make moral judgements about the morals of others, and people who do are seen to be opinionated and judgmental.\textsuperscript{816} He gives the example of the student who says he does not like Nazis, “but who am I to say they are wrong?”\textsuperscript{817} Bloom points out that many forget that holding the position that truth is relative, is itself a moral position.\textsuperscript{818} Simon shows the faults in arguing that there can be no true moral reasoning, by explaining that while cultures may hold different moral judgements on issues, this does not mean that they hold different moral values on \textit{all} issues.\textsuperscript{819} There can be transcultural, timeless values which most cultures would share. Feinberg might describe this as \textit{true morality}, describing such as “a collection of governing principles thought to be ‘part of the nature of things,’ critical, rational, and correct”.\textsuperscript{820} Furthermore, Simon argues that just because two cultures disagree, this does not mean that neither is right. He gives the

\textsuperscript{815} A. Bloom, \textit{The Closing of the American Mind} (Simon and Schuster, New York 1987), at 25.
example of one culture believing the Earth is flat and one believing it is round. Of course it can be asserted that one culture is wrong and this assertion can be supported by either critical moral or scientific reasoning. Simon submits:

“…commitment to rational inquiry in ethics does not commit us to being arrogant dogmatists who forcibly impose our views on others. If anything, it commits us to be open to new insights of others who may be different from us, so long as we are willing to subject their views as well as our own to the test of reasoned inquiry in ethics. Thus, commitment to moral inquiry can help free us from insular prejudices and allow us to test our views by seeing if they can stand up to the reasoned criticism of others.”

In arguing on the basis of morals, it is important to distinguish between judgements arrived at after critical moral reasoning, and judgements arrived at by other means. For example, Dworkin refers to there being a morality in an “anthropological sense, meaning to refer to whatever attitudes the group displays about the propriety of human conduct, qualities or goals.” Feinberg would describe such morality as “conventional morality”: i.e. the moral principles which are actually shared by a community, even if such principles themselves could be considered immoral from the point of view of “true morality”. There are a plethora of examples where one would judge a group’s anthropological morality as having been immoral, such as apartheid South Africa or Nazi Germany.

Dworkin contrasts this anthropological morality with discriminatory morality which rejects moral reasoning based on “prejudices, rationalizations, matters of personal

---

aversion or taste, arbitrary stands, and the like”.\textsuperscript{825} Reasoning which rejects such biases is what could be called critical moral reasoning. Simon similarly outlines that such critical reasoning must be impartial (considering oneself behind the Rawlsian veil of ignorance),\textsuperscript{826} consistent and not based on any “unanalysed, culturally conditioned response”.\textsuperscript{827}

With the previous section in mind, if the morality of combat sports is to be considered, it must be done so ensuring the following do not cloud one’s judgement. First, the acts and attitudes of fighters must be considered without prejudices. Dworkin excludes prejudices as they “take into account considerations our conventions exclude.”\textsuperscript{828} His second exclusion is perhaps more interesting. He excludes any reason based on a personal emotional reaction. The crux of the matter here is whether this reaction is based on a moral principle, or whether the emotional reaction is being used to justify the moral principle.\textsuperscript{829} So when a fighter chokes someone, cutting off the oxygen supply to their competitor’s brain, if one has an emotional reaction to this, is it based on a moral position? The reaction itself is not sufficient to support the moral reason. Thirdly, rationalisations should be distinguished from proper moral positions.\textsuperscript{830} This would entail excluding positions that are not supported by empirically provable facts. Fourthly, parroting what others say is not a good enough reason on which to base a moral position, as one is merely repeating someone else’s moral position, which is perhaps misguided.\textsuperscript{831} Dworkin also points out that any moral judgment made, will be based on a general principle. It will be important that the general moral principle to

which one subscribes is followed sincerely and applied consistently.\textsuperscript{832} Therefore, if we were to judge combat sports as being immoral because they lead to pain and injury of the participants and pains and injuries are evils to be avoided in a civilised society; applying this moral principle consistently would have the effect of also classifying many other activities such as American football, rugby or body-piercing as being immoral. Finally, Dworkin concedes the need for the inclusion of moral judgements for which most men cannot find reasons.\textsuperscript{833} The act is immoral in and of itself and there is no more reasoning to support it. He gives examples of unnecessary suffering and breaking serious promises, without good reason, as self-evident immoral acts. However, he is quick to point out the difference between something being self-evident and just not having a reason for a belief. He says: “The moral arguments we make presuppose not only moral principles, but also more abstract positions about moral reasoning. In particular, they presuppose positions about what kinds of acts can be immoral in and of themselves.”\textsuperscript{834} If, however, the position cannot find support from even the most general standards, such as rules of law or of a religion, or breaches of duty or causing harm, then it is likely that the position will be condemned as being arbitrary.\textsuperscript{835}

The Promotion of Violence and its Brutalising Effect

What effects can combat sports have on society? Could it be said, for example, that a combat sports fight promotes violence in a society? Take the attitude of Dana White which was described earlier. He clearly thought the best way to solve the argument between the two fighters was to have them fight it out in the ring. The condemnation of promoting violence in society in general would appear to be a legitimate moral position, although that might depend on what violence is interpreted to mean.\footnote{For an interesting discussion on what violence means see R. L. Simon, \textit{Fair Play: Sports, Values and Society} (Westview Press, Boulder 1991), at 52-54.} If such a moral position was accepted, it would certainly seem morally condemnable to promote violence to solve arguments. There is, of course, an anthropological morality which exists which encourages men to be men and to settle disputes like men. A regrettable case has recently been uncovered where between 2003 and 2005 a high-school in Texas had its students \textit{solve} their differences by putting them in cages and having them “duke it out”.\footnote{--–, “US high-school held ‘cage fights’” \textit{BBC News} (20 March 2009) http://news.bbc.co.uk/2/hi/americas/7954902.stm> accessed 24 March 2009.} This case has appalled many and the actions have been widely condemned and labelled unacceptable.

With regard to White’s comments; his attitude may not be as morally reprehensible as it first looks. It could be argued that because of the degeneration of the relationship between the two contestants, they could not go on living together in the same house under the stressful conditions of being filmed. Therefore, one of them had to leave and the fairest means of having one leave was to have them fight, in accordance with the premise of the show: that being that the losing fighter leaves the show. Alternatively, one could view the situation as substituting a fair fight in the ring, for a brawl in the house, which may have ensued if both had been left in the house. Applying
this defensive reasoning somewhat negates the idea that White was suggesting violence should be used to solve the conflict. One wonders though which reasoning White was actually working under when he made the decision. In any case, it certainly appears that the promotion of violence to resolve disputes is almost certainly open to moral condemnation if that condemnation is based on the principle that in a civilised society, violence is not resorted to in order to solve differences with others.

Even if it is agreed that the promotion of violence *per se* is morally condemnable, there is a counter-argument to the whole notion of combat sports promoting violence. The efficient argument is put forward by Davis in *Ethical Issues in Boxing*, when he submits that the disciplined and regulated nature of boxing actually portrays boxing as a sport which can be dangerous and therefore requires careful management. Such an argument paints a different picture of boxing; it goes from being an exhibition of glorifying violence to being a competition which promotes strict rules and obedience, and acknowledges that as it is something which is dangerous, it needs to be tightly controlled. A similar argument can be made for combat sports, considering many such sports come from martial arts with strict disciplinary codes regarding the proper use of techniques both in and out of competition. Gauthier goes so far as to claim that when martial artists are forced to use their skills outside of the ring, they view it as “philosophically degrading, as it indicates that all other means of avoidance have failed”. 838 This is a clever argument and paradoxically purports to stand on firm moral ground. Despite its cleverness, it is submitted that it is still open to criticism as, while the boxing fraternity may claim “that boxing involves the recognition that violent impulses are potentially brutish, and therefore require strict management”, 839 one wonders if that is what the fans and particularly children take from the sport? This is

intuitively doubtful and it is suggested that the promotion of violence probably shines through stronger than does the virtuous strict management of that violence.\textsuperscript{840}

A second problem with the strict management thesis is the lack of difference in essence between fighting as a sport and fighting as general violence in the streets. Of course there are rules, doctors and limited rounds etc. There are, therefore, according to Gauthier, clear boundaries in simulated fighting as a sport.\textsuperscript{841} García and Malcolm also see the standardisation, codification and increased regulation of combat sports as leading to a real distinction between mock fighting as a sport and real fighting.\textsuperscript{842} But it seems to me that the nature of the sports contest is still much the same as real fighting, despite the presence of rules: that is that two people use as much force as they can to pummel the other, so as to knock them down before they themselves are knocked-out. One might argue about the presence of gloves, but few in the boxing fraternity would make such a claim as they realise that the presence of gloves is merely to protect the boxers’ hands, and indeed the bigger the gloves the harder the punches that will be thrown because the boxer need not fear hurting his hands. Simon contrasts this situation with that of fencing and duelling.\textsuperscript{843} There is a marked difference between the sport of duelling (fencing) and the general activity of duelling. Not only is the presence of referees and rules added in the former’s case, there is also the addition of inter alia safer swords, suits of ballistic materials, such as Kevlar, in case a sword breaks and creates a sharp edge that could injure, and also a mask to protect the participant from both an

\textsuperscript{840} A study on the motivational factors for fans attending combat sports events found that for Americans, violence was the fifth most popular reason out of twelve possible reasons for attending; S. Kim and others, “An analysis of spectator motives and media consumption behaviour in an individual combat sport: cross-national differences between American and South Korean Mixed Martial Arts fans” (2009) 10 International Journal of Sports Marketing & Sponsorship 157, at 166.


intact and a broken sword. The essential moral point being made here is that the general activity promotes and celebrates violence which undermines the value of human life, and if one wants to argue that combat sports are different from the general forms of the activities and actually promote discipline over general violence, then they must show some evidence of a difference in the nature of the sports-form of the activity from the general activity itself. Simon goes on to show how boxing might distinguish itself from the general activity of fighting by implementing reforms such as the “prohibition of blows to the head, and emphasis on scoring points through skill rather than on inflicting damage to opponents.”

A related matter to the general glorification of violence is what real effect that glorification has on society. As Dixon might ask, do combat sports have a brutalising effect on a society? The general trend of this argument would be that watching combat sports fights, be it in person or on television, has a general effect of increasing anti-social behaviour. Furthermore, the very fact that such fights are legally sanctioned at all, “may lower the inhibition to anti-social behaviour of even those with no interest in boxing [or other combat sports].” As anti-social behaviour is usually understood as interfering with others’ rights in various ways, for no good reason, such behaviour could be open to moral condemnation. If that argument it accepted, it follows that something which encourages or in some way contributes or causes that behaviour is surely also immoral.

844 In 1982, Vladimir Viktorovich Smirnov was killed during the Fencing World Championships when his opponent’s sword broke and Smirnov was stabbed in the head with the sharp, broken end of the sword. This incident led to dramatic changes in precautions taken to ensure the safety of competitors. Yet, despite many deaths and cases of brain damage over the years in boxing, no such dramatic changes have been introduced: see —, “Vladimir Smirnov”, International Charity Fund for Future Fencing Website <http://fencing-future.com/centroid/eng/zvezdya_feh6/vladimir_smirnov1.html> accessed 21 February 2011.
There are many problems with sustaining such a thesis. First, many movies and television programmes show violence happening all of the time and often in more graphic detail than is ever seen in the ring. Yet, would it be ventured so far as to call such shows immoral? There is a key distinction to be made here and that is between the shows which depict violence and shows which broadcast real violence.848 In the former scenario, what we see is not real, and we know it is not real. The opposite is true of the latter. In an illuminating example, Dixon demonstrates that there is a real distinction to be made here: “A more apt analogy would be between boxing and either ‘snuff’ films in which actors are allegedly injured or killed, or pornographic films in which unwilling actors are allegedly coerced to appear, both of which we would have less hesitation in restricting than mainstream films.”849 It is submitted that there would also be less hesitation in deeming such films as being immoral.

A second argument which would support the thesis of combat sports being immoral because they contribute to anti-social behaviour is based on sociological theory that explains that when society holds up role-models, people, especially children, will emulate such role-models. Therefore, if a society’s role-models are men engaging in violence, “toleration of violence and the tendency to commit it will increase.”850 There is clear evidence on the links between watching violence and the effects that will have on people.851 The problem is that this general theory applies to both the depiction of violence and the showing of real violence. In *The Legality of Boxing*,852 Gunn and
Omerod make reference to the fact that watching ice-hockey has also been shown to increase violent behaviour in young men, as fighting has become an entrenched part of the sport. There is, therefore, nothing peculiar to boxing or combat sports that can differentiate their effect on society from the effect of films where violence is depicted and indeed any sport where there is aggression between competitors, which is frequently the case in contact sports. Both Dixon and Davis also suggest that there is a lack of evidence that boxing specifically leads to an increase in violent or anti-social behaviour. In a somewhat clever argument, Davis quite reasonably asserts that if boxing were removed from the world, there would be no reason to think the world would become less violent. Indeed, he makes the argument that as boxing has a cathartic effect, it is possible that it reduces violence in society, as people with violent propensities can partake in or watch combat sports for that cathartic effect.

854 Although, 10x - x = 9x; therefore if combat sports encourage violence, its prohibition would make for less violence, but of course this would have no effect on violence spawning from other causes.
Objectives and Attitudes

The most morally problematic feature of combat sports is arguably the attitude of the fighters. It is no stretch to say that the objectives of combat sports will influence the attitudes of fighters towards each other. The objectives are relatively clear. There will usually be four ways in which to win. First, one can outscore their opponent. This will mean that a group of judges will decide individually to whom to award the fight. They will take into consideration, inter alia, who landed the most clean punches or kicks and who had a better command of the ring or cage. Judges frequently disagree about which competitor won the fight and there is therefore not always a general consensus about who the true victor was. This uncertainty psychologically gives a fighter an incentive not to allow the judges the opportunity to give their decision. Therefore, it can be more advantageous to use one of the other methods. Victory by causing a submission, for example, would be a better alternative, whereby a fighter causes their opponent to tap-out because they are in a choke-hold or another hold which is causing them too much pain. The final two methods are wins by technical knock-out and knock-out. The former occurs when the referee or medically trained personnel stop the fight because they deem one fighter unable to continue. The latter occurs when one fighter loses consciousness or fails to get back to their feet after a count of usually ten seconds. It will always be in fighter A’s best interest to force fighter B to submit or be technically knocked out or knocked out as soon as possible, because the longer that fighter B is still standing, the more risk there is that B will throw a punch or a kick that will knock fighter A out. Furthermore, the shorter the time they fight, the less chance there is that A will get injured or will have pain inflicted upon them. The ideal situation for A would surely be to start the fight and knock their opponent out with their first punch.
As Dixon says, “the most effective way to incapacitate opponents is by inflicting blows to the head, thus causing (at least) temporary damage to the brain.”\textsuperscript{856} Radford also shows how it is in a boxer’s best interests, especially from a commercial point of view, to stop his opponent by hurting him as much as possible as quickly as possible.\textsuperscript{857} He continues on to say that the boxer “is hoping and trying to hurt [his opponent]”\textsuperscript{858}. Here it is seen how the objectives and rules of combat sports form the attitudes of the fighters towards each other, and it is these attitudes which are of particular interest, given that their attitude is one which validates an intention to “temporarily incapacitate a fellow human being”\textsuperscript{859}.

The moral problem that is encountered when assessing a fighter’s attitude towards his opponent is that the fighter must see his opponent as less than a human being. He devalues his opponent’s life. This may seem like a strong claim, or a moral leap, but how would one normally describe someone’s attitude towards another which allowed them to pummel them into unconsciousness for personal gain? Dixon’s account of attitude is accurate when he describes it as seeing one’s opponent as being an object “to be disposed of in order to achieve victory”\textsuperscript{860}. A false analogy here would be with that of contact sports such as American football or rugby. The distinction to be made is that the objective of contact sports is solely to score points. One cannot win a rugby match by beating up every member of the opposing team. The nature of the relationship between the opponents is also completely different. As Anderson submits, in a rugby match, the players’ relationship is defined by the ball. In combat sports, “the

\textsuperscript{856} N. Dixon, “Boxing, Paternalism and Legal Moralism” (2001) 27 Social Theory and Practice 323, at 337.
\textsuperscript{858} C. Radford, “Utilitarianism and the Noble Art” (1988) 63 Philosophy 63, at 70.
\textsuperscript{859} C. Radford, “Utilitarianism and the Noble Art” (1988) 63 Philosophy 63, at 70.
\textsuperscript{860} N. Dixon, “Boxing, Paternalism and Legal Moralism” (2001) 27 Social Theory and Practice 323, at 337.
relationship is a direct one defined by the fist”.

Therefore, in essence, the objectives of contact sports, such as rugby, do not necessarily encourage or promote an attitude among participants to see their competitors as dehumanised objects.

Not only do the objectives of combat sports promote this dehumanisation of the opponent and hence a devaluing of human life, they also afford opponents the opportunity to pummel each other, not just in sport, but in anger and hate. As Davis puts it: “The objective of boxing means that the ring legitimizes an attitude towards another self that is forbidden in other sports and that is generally forbidden in the rest of life”.

The truth of this statement is seen when one considers Davis’s example of Floyd Paterson’s statement to the effect that his anger and hate about being defeated by Swedish Heavyweight Igemar Johanson in 1959, was viciously released upon Johanson in the 1960 rematch. Radford also contributes with the sad example of the 1962 Griffith vs. Parrett fight, in which Parrett had apparently insulted Griffith about supposedly being effeminate which led Griffith to enter the ring with the intention of killing Parrett, which he succeeded in doing. Compare these examples to the story of Irish soccer player Roy Keane, who, while playing for Manchester United against Manchester City in 2001, took revenge against opponent Alf-Inge Haland for a tackle which Haland had made on Keane some three years previous, which had resulted in Keane missing most of the 1997/1998 season. Apparently Haland had accused Keane of faking his injury. In the 2001 game, Keane performed an illegal tackle on Haland, hitting above his knees, for which he was disciplined. He later published his autobiography *Keane – The Autobiography*, in which he said “I’d waited long enough. I

---

fucking hit him hard. The ball was there (I think). Take that you cunt. And don’t ever stand over me again sneering about fake injuries.”

This section of his book quickly gained notoriety and the Football Association charged him with bringing the game into disrepute and suspended him for a further five games (on top of the original three game ban he had received) and he was fined £150,000 (on top of the original fine of £5,000).

The moral point to be taken from this is that the sports field was not treated as an arena in which personal anger and hate could be taken out upon the intended victim. While the fines and match bans may not have been that significant to Keane, considering his personal wealth, the Football Association nevertheless made a stand that such behaviour would not be tolerated. When Keane’s case is compared to that of Paterson’s and Griffith’s, where neither of the boxers were punished for their attitudes in the ring, the distinction between what the ring or cage may ultimately legitimise becomes clear. The act of exacting revenge or giving into anger by physically causing violence to another and in essence viewing their life in a devalued way seems to give rise to moral concern.

Let us turn to Chris Leben’s statement, quoted in the subtitle of this chapter. As it turns out, he lost his fight against Koscheck and no spine damage was caused. This is irrelevant. When Leben uttered his statement, it was a glimpse into his psyche: what he was prepared to do, to win and to teach Koscheck a lesson: that is, releasing his anger and eagerness for revenge upon his opponent. There are of course situations when fighters will make comments in order to garner more publicity for a fight, or in order to excite fans about an upcoming fight. However, it is submitted that was not the case in Leben’s situation. What might the result have been if Leben had injured Koscheck so

---

that he was no longer able to walk? Leben may well have repented and claimed that he said what he said in the heat of the moment and never really intended to injure his opponent so crucially. The fact of the matter is that it probably would not matter what Leben would claim. Like Paterson and Griffith, his conduct would be legitimised due the fact that it happened in the course of a legally regulated sport. But the conduct’s legality would surely not strip it of its immoral character. As in the passage quoted above by Davis, it can be said that had Leben made such a threat in any other sport, he would be banned for a certain period and fined.

From the above discussion, it is proposed that to devalue human life by treating others as dehumanised objects, with no regard to the fact that what one is causing violence to is a self and not merely an object, is inconsistent with the general moral value life is thought to hold. Furthermore, to devalue human life by causing violence to another out of anger or revenge is similarly inconsistent. Perhaps these submissions are controversial, but it is believed that at very least they are based upon critical moral reasoning similar to that suggested by Dworkin and Simon. If these propositions are accepted, then it is clear that the objectives and attitudes which are spawned from the objectives and nature of combat sports can be immoral. Furthermore, it is clear that combat sports can be morally condemned for allowing attitudes formed by anger and revenge to be acted upon in a manifestation of physical violence against another self: something not accepted in any other situation in life.

There has been some criticism of this final point, with it being suggested that in war attitudes of anger and revenge are exacted upon enemy countries and combatants and this is deemed acceptable in societies. In response it is submitted that if war is ever morally justified, then it can only be justified by strong moral reasons, such as self-

---

867 Here I am grateful for the criticism and debate offered when a short version of this paper was delivered at the Visiting Researchers/Visiting Scholars Harvard Law School Colloquium, 9th April 2009.
defence or perhaps to prevent the wanton slaughtering of humans on a large scale. There may be other good moral reasons, and even the ones I suggest will require a good deal of interpretation. For example, is it ever self-defence to strike first? In domestic legal systems such pre-emptive self-defence can provide a defence to criminal charges. While attitudes of revenge and anger may be present in wars, they cannot be moral reasons which justify the war itself. For example, when the United States of America decided to enter World War II, one of the many contributing factors to this decision was most certainly the bombing of Pearl Harbour. It might be claimed that the US’s decision was based on anger and revenge for Pearl Harbour. However, it seems to me that a stronger, morally justifiable, argument would be to claim that the US acted out of self-defence, to prevent future bombins, which must have seemed to them as a real threat. That said, morally justified wars can provide forums in which soldiers exact revenge and act upon anger and these actions are ultimately legitimised by the justified war. This concession made, it seems almost like a self-defeating victory to argue proudly that acting upon revenge and anger is legitimised not only in combat sports, but in war as well, considering war is generally thought to be one of the most abhorrent states of affairs.

I do not, however, mean to claim that feeling anger and wanting revenge are necessarily immoral. But acting unilaterally on these feelings probably is. Case books are filled with criminal and tort actions which have been initiated out of a sense of anger or wanting revenge. The difference here is that we insist on these feelings being processed through some formal settings of justice. For one may be mistaken as to the identity of the wrong-doer or the reasons for which one wants revenge against another. Indeed, perhaps society as a whole is unwilling to condone one’s desire for revenge because it is a desire which is based on reasons seen as trifling by most. It is also this
justice system which ensures the punishment be proportionate to the act for which revenge is sought, in order that the value of life not be cheapened. For a man acting out of revenge or anger may well want to kill or cut the hand off another who has stolen some of his herd, but allowing such action has the result of placing the moral value of property rights before that of the moral value of life. It is for these reasons that it is generally unacceptable in a society for individuals to exact revenge upon one another through the use of physical violence.

Much has been said of the nature of combat sports devaluing human life. Davis puts forward a possible response to this, which if it were successful would rebut the argument put forward in this chapter. That is essentially that boxing is a game and that like in all games, one has an opponent and the opponent in a combat sport need not be viewed differently than an opponent in a chess match; “the attitude towards the self who is one’s boxing adversary needn’t be any different from the attitude towards the self who is one’s opponent in a game of tennis, rugby, chess, or Monopoly.”\(^{868}\) This argument is difficult to sustain. The very nature of the game requires one to have a different attitude towards self than in other games because of the directness of the relationship with the opponent. There is no pawn, top hat or ball that breaks the directness to self. The argument requires belief that a fighter in the ring or cage, who is trying to hit his opponent as hard as he can, as quickly as he can with the ultimate aim of knocking his opponent unconscious, has the same attitude towards his opponent’s self as he would have if he was sitting across the table from his opponent deciding on where to move his pawn.

The argument seems only to have merit at a very general level of abstraction where primarily all people who play games have the same attitude towards their

opponents. What would this attitude be? There may or may not be the presence of respect and indeed one could draw up a long list of what one may or may not find in their attitudes. One thing which will always be present, if it is to be a game in any real sense, is an attitude of desiring to win against his opponent. The way in which a fighter must beat his opponent is fundamentally different from the way in which a chess player must overcome his opponent in terms of how they view their opponent’s self. The fighter is required to kick, punch and choke another human being in order to win. Here the nature of the game encourages an attitude which sees the opponent’s life as less valuable. This attitude to another’s self cannot be compared to a chess player’s, where the nature of the game does not encourage him to regard his opponent as an object, or someone whose life is less important.

Ultimately it is submitted that the attitude to self revolves around the intimate nature of the relationship between fighters. They use their bodies as objects in the game. This would be comparable to somebody saying that they would be willing to act as the football in a football match. This of course is hard to imagine from a practical standpoint but it leads us to create a correct analogy between combat sports and other sports. Think, for example, of the chess-like game of jetan featured in Edgar Rice Burroughs’s *The Chessmen of Mars*. While the game is akin to chess, it is not exactly the same.\(^{869}\) In a special version of the game played in the city of Manator, on Barsoom (a fictional version of Mars) two jetan players control real humans as their chess-like pieces.\(^ {870}\) We are told that “When a warrior is moved to a square occupied by an opposing piece, the two battle to the death for possession of the square and the one that is successful advantages by the move”.\(^ {871}\) The combat sports participant is more akin to

---


the piece here than they are to the chess players because of the directness of the relationship to their opponent and because they use their own bodies as objects. The effect of a chess player losing one of his pieces has only a direct consequence on his game, not to his self. The same cannot be said for the piece or for the fighter; defeat for them comes with a violation of their body, which Davis asserts is the same as, or experienced the same as a violation of self.\footnote{P. Davis, “Ethical Issues in Boxing” (1993-94) XX-XXI Journal of Philosophy of Sport 48, at 54.} It is this proximity to self and directness which cannot be ignored when analysing the attitudes of fighters towards each other and which make their attitudes to self fundamentally different and incomparable to the attitudes of a chess player to his opponent’s self. Interestingly, Davis draws attention to boxer Pat Clinton’s statement that he would not fight his friend Drew Docherty as they were like brothers. The telling observation is that Davis questions whether Clinton would object to a chess match or even a football game against Docherty? One would assume probably not. “Clinton’s comments seem to reveal something fundamental about boxing—something with, perhaps, substantial moral consequences.”\footnote{P. Davis, “Ethical Issues in Boxing” (1993-94) XX-XXI Journal of Philosophy of Sport 48, at 55.}

In conclusion, it has been argued that the attitudes displayed by professional fighters towards their opponent’s self seem to be inconsistent from a moral perspective with the moral value that is generally attributed to the value of human life by most. It has been shown that the objectives of these sports not only support, but encourage fighters to view their opponent’s self as an object, hence dehumanising and cheapening the value of that life. It has also been argued that such sports legitimise physical violence based on an attitude of anger or revenge, which again devalues human life and is inconsistent with behaviour tolerated in any other situation in society. Finally, it has been shown that arguments which proclaim that fighters have the same attitudes towards their opponent’s self as, for example, chess players might have, do not stand up
to critical analysis as it omits the realities of the proximity of the relationship between fighters.

Leben’s comments are indicative of an attitude which is part of, and condoned through legitimisation in, combat sports. Combat sports might be seen as moral in the anthropological sense, in stark contradiction to other moral values people claim to hold. It is clear that the attitudes endorsed by such sports do not stand up to the test of critical moral reasoning and while immorality alone may not endorse legal intervention, it may endorse reform.

Negating Immoralities in Combat Sports

Preliminary Arguments

Arguments have been put forward which suggest that there is nothing morally incongruous about combat sports when looked at from the perspectives of human nature and society in general. Davis responds to these arguments, and it suffices here merely to outline their nature and why they fail to convince that there is nothing immoral about combat sports. First, it is claimed that it is in human nature to be violent and to be excited by violence. This argument proceeds along the grounds that such primeval instincts did not disappear upon man becoming “enclosed within the walls of society”. “It was not that these old instincts had abruptly ceased making their demands; but now their satisfaction was rare and difficult”. As Davis points out,

---

there is nothing in this argument to suggest that boxing or other combat sports are moral means by which to manage these old unquenchable instincts.\(^{877}\)

Similarly, an argument which claims that boxing is merely an honest display of violence compared to hidden psychological violence that is seen throughout society, particularly in business, politics and even philosophy, falls on the same sword: “Like its predecessor...It does not follow from the ugly truth about psychological violence that boxing is morally supportable.”\(^{878}\)

Finally, there is Radford’s objection to a world without excitement; as Electra King puts it in *The World is Not Enough*: “there’s no point in living if you can’t feel alive”\(^{879}\). The argument here acknowledges that combat sports are dangerous, but that equally life would be boring without any dangers. People who engage in such activities do so “because they are so far away from their expected, natural end that they fear death least—danger is a spice to life without which it lacks savour”.\(^{880}\) He continues:

> “Someone might try to defend the existence of the desire to experience danger by saying that without it we should not have explored the widths, heights and depths of our world, we should not have tried experiments, new techniques in many fields, and so much else that has yielded human benefit, and this is true. But we could imagine that substituted for a desire for danger was a sober but passionate desire for knowledge which drove men and women to risk their lives, but not gratuitously. But would that—in some broad, vague, but important sense of “happy”—be a happier situation than the one we are in? What would happen, for example, to rock climbing? This world sounds too careful, too joyless to me.”\(^{881}\)

Davis is correct in his response that this is no moral defence for combat sports as there is a difference between morally supportable dangerous risk taking and morally

\(^{879}\) This quote is taken from the 1999 James Bond film, *The World is not Enough* (MGM/Eon Productions) in which it is used as one of the main villain’s mottos.
unsupportable dangerous risk taking. In defence of Radford, he was not making a moral argument, rather a legal utilitarian one. But as a moral argument, it ultimately fails. Gautier makes a similar point when he denounces full-contact-limited-rules combat sports as being barbaric and immoral. He suggests that there are more morally optimal ways in which to demonstrate one’s physical prowess over others, or to live life dangerously. For example, similar thrills could be experienced in many extreme sports like mountain climbing, or by embarking on dangerous peace or rescue missions. And for those who enjoy the tactics and skills of fighting, he suggests that combat sports where causing serious injury is not the main objective would be morally preferable.

Playing with Immorality in Combat Sports

In the world of sports philosophy, there has been a significant debate as to what exactly the difference is between play, games and sport. The arguments tend to focus on distinguishing between games and sports. However, it is the concept of play which will be focussed on here, in an attempt to show that certain amateur versions of combat

887 For example, Meier argues that all sports are games, but not all games are sports, whereas Suits would argue that there are certain sports which are not games. Suits sees performances, such as diving or gymnastics as not being games, but possibly being sports. Meier refutes such an argument. Both, however, agree that games and sports may or may not be instances of play and that there are instances of play which are neither games nor sports; Suits would describe such play as primitive play.
sports are more likely to lack the immoral attitudes found within the professional versions of these sports.

Play is thought to be characterised as something which is unserious and uninstrumental.\textsuperscript{888} Games and sports may or may not be types of play. Whether or not they are to be seen as play will depend on the attitudes of the participants. If it is an autotelic activity, that is one where the activity is being carried out for its own intrinsic value, then it can be said to be play. Such an interpretation would normally align with people’s traditional perception of amateur games and sports, with such games and sports being carried out for autotelic reasons. Play can be contrasted with “an event or activity valued not only or even primarily for itself but for some further payoff that the event or activity is expected to provide”\textsuperscript{889} (emphasis added). If an activity displays such characteristics it can no longer be described as an instance of play. People would normally associate such a description with professional sports.

Both Suits and Meier agree that instead of a division of games and sports into amateur and professional it would be better to divide them along the lines of play, with Meier saying; “if games or sports are pursued voluntarily and for intrinsic reasons, they are also play forms; if they are pursued involuntarily or engaged in predominantly for extrinsic rewards, they are not play forms.”\textsuperscript{890} The advantages of such a distinction are many fold. For example, the word amateur when applied to Olympians loses all real sense of its meaning. The designation is true only in the sense that they are not directly paid for their performance. Indeed, the same argument could be made for county players in Gaelic football and hurling who dedicate many hours each week to their


\textsuperscript{889} B. Suits, “Tricky Triad: Games, Play, and Sport” (1988) XV Journal of the Philosophy of Sport 1, at 9.

training or the same may be true for college football or basketball players playing in NCAA\textsuperscript{891} tournaments in the US. The word amateur in no way does justice to the level of dedication and skill which they bring to their sports. Furthermore, such a distinction allows Suits to explain the introduction of doping into the Olympics, as it is no longer a competition where the events are forms of play and therefore unserious. Rather, participants are motivated to earn medals for their countries and it is their compulsion to win, which compels some athletes to take performance enhancing drugs:

“For in the Olympics there is a kind of compulsion to win that is absent from a friendly game of tennis, or a pick-up game of baseball or hockey...acting under such a compulsion, rather than the desire to win simply because winning defines the activity one is undertaking, is what turns a game that could be play into something that is not play.”\textsuperscript{892}

It is not claimed that the unseriousness of the activity is what might negate its immorality. Davis outlines arguments to counter such a notion, including that humour may be considered as a paradigm for that which is unserious, and yet racist humour might be thought of as being immoral.\textsuperscript{893} The argument is that when one competes for play, for the intrinsic value of the activity, and for that alone, many of the factors which are of moral concern in the professional form of the activity are no longer as likely to manifest themselves.

To expand on this argument, take the first moral objection, that being that the objectives of many combat sports encourage fighters to see their opponent in a dehumanised fashion and hence cheapen the value of human life. The objectives encourage such an attitude because they facilitate quicker and safer victories by hitting the opponent as hard as possible in the head, so as to lessen the risk of judges having to

\textsuperscript{891} The National Athletic Collegiate Association.
\textsuperscript{892} B. Suits, “Tricky Triad: Games, Play, and Sport” (1988) XV Journal of the Philosophy of Sport 1, at 9.
decide the result, or the risk of being knocked out first. The fighter deduces these latter two risks to be risks because of the financial and general commercial consequences that follow from either winning or losing a fight. It is therefore arguable that if money was to be taken out of the equation, the fighter may be less motivated to hold such an immoral attitude towards his opponent. Indeed, if there were no trophy to be gained by winning, there would be less motivation still, to hit their opponent so hard. If it was merely a fight, or more likely a practice spar, which was being conducted purely for the activity’s intrinsic value, then it is unlikely that either participant would be motivated in the same way as fighters in an instrumental version of the sport would be motivated. In this version, where the activity is purely play, the immoral attitudes which are spawned from the objectives of the instrumental version of the sport are less problematic. The difference, as Suits may put it, is that in the instrumental version of the sport there is some form of compulsion to win. Conversely, in the intrinsic version, there is a desire to win, merely because “winning defines the activity one is undertaking”. Given such an analysis, the only fighting which could be deemed as play would be fighting which would be analogous to kick-around games of soccer, or pick-up games of basketball etc. Of course, just because the activity is play does not necessarily mean that there will not be immoral attitudes present on either side, just as it does not necessarily follow that immoral attitudes are held by fighters at every professional fight. Rather, the likelihood of fighters holding such immoral attitudes is less when the instance is one of mere play. A practical note may also be added here to say that if fighters were engaged in mere play, for the intrinsic value of the sport, it is unlikely that they would be engaging in full contact. Instead the fighters would be more likely interested in trying to score points against their opponent. Where would the fun be in knocking your opponent out after

---

ten seconds in such a match? Similarly, perhaps, in a kick-around game of soccer, if it becomes clear after the first ten minutes that one side is far superior to the other, it is more likely that the players will reorganise themselves into fairer teams. This is common and arises from the fact that no player has an interest in completely dominating the other side to such an extent where there is no longer a challenge in the game. However, if the context was changed to a soccer match of any slight importance, such as between towns, schools or even in the Premier League, it is unlikely that coaches would suggest making the teams fairer by swopping around players. The point being made here is that while it may be easier for fighters to try to finish the fight by hitting the head hard, or for a kick-about team to win against inferior opponents, neither are likely to take advantage of such situations in an instance of play, because if it is truly an instance of play, they will be playing for the good of the game itself and unlikely to want to take advantage of something which, in a very real way, lessens the value of participating in the game for the game’s sake. Indeed it is only within the context of combat sports as play that Gauthier’s argument that fighters often form a bond when fighting each other is convincing. He argues that most combat sports fighters do not fight merely to win. Rather they fight to learn. If this argument/observation is correct, it could only realistically be correct in the context of play. Indeed, Gauthier goes on to say that the professionalization and commercialisation of combat sports leads

---

895 If the analogy with unfair soccer teams is deemed to be unsuccessful by some, another similar analogy could be made between not wanting to knock your opponent out in an instance of play and an instance of play where the players have no properly structured goals, so they decide to put items of clothing on the ground to demarcate the goals. If after ten minutes it is clear that they have set the goals too wide, so that the score is already 9-9, it is likely that both teams would agree to making the goals more narrow, so as to challenge themselves more. They are likely to do this because they play the sport for the good of the sport and for nothing else.


to a “winning-at-all-costs” attitude,\textsuperscript{899} and hence combat sports move away from being play.

The second moral objection to combat sports was that they allow competitors to exact revenge from feelings of hate or animosity upon their opponents. This objection cannot arise in a case of play, by definition: for if a fighter is acting out of revenge or hate, they are fighting for an instrumental reason and not for the intrinsic value of the game itself and hence are not engaging in play. Therefore, it does not matter at what level a fighter fights, be it professional or a practice sparring match, if they fight with an attitude of avenging a past defeat or insult etc., they are not engaging in play.

To conclude, it has been shown that the traditional distinction between amateur and professional games and sports is often disingenuous in respect of high level athletes participating in major amateur sporting events. The only true sense that is conveyed by the word amateur is that the participants are not paid for their performance. The better distinction is between instances of play and non-play. The argument is put forward that when combat sports fighters compete in instances that are truly play, many of the immoral attitudes which are formed and promoted in non-play versions of the sport are unlikely to be present. Such an argument is important as it vindicates the traditional elements of many martial arts where sparring is not seen primarily as a form of the martial art which should be used for the purposes of competition, but instead, it is seen as the practical application of techniques learned in the martial art; an application which allows practitioners to quicken their reaction times and harness and control their techniques against real opponents, so that if they are forced to use those techniques in a

real life situation, they will be fit to do so. The fact that sparring can also be used for competitions is a very secondary derivative of the practice’s main purpose.

**Social Designation as a Sport**

An interesting question which arises in this area is whether or not the social designation of an activity as a sport has the consequence of negating the possible immoralities which are inherent in that activity. To entertain such a notion would involve reasoning an exception to the general principle that human life is to be valued. Outlining an exception is not to apply our general rule inconsistently; it merely shows the presence of a somewhat contradictory position which stems from another general principle which is largely consistent with the general principle already held. As Dworkin puts it:

“Of course, my general moral positions may have qualifications and exceptions. The difference between an exception and an inconsistency is that the former can be supported by reasons which presuppose other moral positions I can properly claim to hold.”

What would such a contradictory position be in the case of combat sports? Presumably it could be argued that such activities are sports and conduct or attitudes displayed in sports are not thought of as being immoral because sport is thought to have intrinsic value within society. Therefore, it would be held that an exception to the moral position of holding the value of human life in the highest esteem would be the moral position of holding the intrinsic value of sports in society in high esteem also. However, could it not also be said that such a valuing of sports flows from the valuing of human life? Sport generally celebrates human life and the sociability of humans. It encourages physical and mental fitness as well as discipline. It demonstrates and promotes the

value of human life. Therefore, in a very real way, a moral exception for sports from
the general principle of valuing human life is actually consistent with valuing of human
life in the broader scheme.

The problem with such an argument is that it is unclear as to what is and is
not a sport. For example, is a gladiatorial fight a sport? If it is a sport, then no amount
of clever arguing can take away from the fact that one participant dies and this clearly
cannot be reconciled with any notion of valuing human life. Indeed it seems all the
more intolerable that a life be sacrificed in the name of sport or for the entertainment of
others.

In order to judge if an activity is or is not a sport, two methods present
themselves. First, the activity can be judged intrinsically. Alternatively or
concurrently, extrinsic factors can be taken into account, such as the activity’s
popularity and the extent to which it has become institutionalised. To judge the activity
intrinsically, it would be necessary to assess the mechanics of the activity and then
compare those mechanics to some accepted definition of sport, to see if the activity
fitted within the paradigm of a sport. While there is disagreement over the exact
definition of a sport, there would be no disagreement that combat sports are indeed
sports. The disagreement centres on whether performance activities such as diving or
gymnastics are more appropriately classified as sports or games. It is submitted that
Suits’s and Meier’s combined definition of sport is accurate when it describes it as:
“...an activity directed towards bringing about a specific state of affairs, using only means permitted by rules, where the rules prohibit more efficient in favour of less efficient means, and where such rules are accepted just because they make possible such activity’... [and which] requires the demonstration of physical skill and, as a consequence, the outcome is dependent, to a certain degree at least, upon the physical prowess exhibited by the participants.”

Clearly combat sports would qualify as sports under such a definition, but so too would a gladiatorial fight, or indeed a gun duel. Yet, neither of the latter two activities would be acceptable in modern civilised society. Is it therefore necessary that the activity must also have a strong following among the public and be institutionalised? Meier is highly critical of using either of these latter tests. He sees the judging of an activity to be a sport by the use of its longevity or popular support as both arbitrary and capricious and is unconvinced by any arguments in support of such discovery tools. Furthermore, he sees regarding the institutionalisation of the activity as being a key to discovering whether the activity is a sport to be pointless, saying that institutionalisation is peripheral to the activity, as opposed to being integral to it.

Taking the above into account, the only clear method of distinguishing sports from other activities is by assessing its intrinsic mechanics. The activity’s popularity and longevity are unhelpful. Therefore, the activity’s unpopularity and sparseness from the public domain are also unhelpful. Gun fighting, gladiatorial fights to the death and sword duelling would all therefore fit within the paradigm of sport. However, such activities have as their aim the destruction of human life or the causation of serious injury and these aims necessarily promote an attitude which sees the value of human life in a cheapened form. Such activities are, therefore, so inconsistent with the moral

principle of valuing human life that it cannot be said that there is a general moral
principle which negates immoralities in sports. Or if such a general moral principle
valuing sports is held, it cannot be held to include sports which are so fundamentally
and diametrically opposed to the valuing of human life, as is gun fighting etc. As
combat sports can promote behaviour such as pummelling an opponent into
unconsciousness with fighters seeing their opponents as mere objects, it is submitted
that their aims and what they permit are fundamentally opposed to the general principle
of valuing human life.

While simply designating an activity as a sport cannot provide that activity
with a shield against critical moral arguments, Bredemeier and Shields argue that within
a sports context, moral meanings can be altered, requiring re-interpretation for the
particular sporting contexts, when inter alia “game actions will be limited to specified
spatial and temporal boundaries”.904 They refer to this as “game morality”.905 Such
morality is a bracketed form of morality, insofar as it involves the temporary suspension
of moral reasoning that we would normally employ.906 This allows us to think only of
ourselves and the game’s rules.907 Using this theory they identify two situations in
which aggression in sport would not be morally legitimate: where “an act...is either (a)
game-transcending in its intended implications or (b) irrelevant to game skills”.908 The
first situation disregards one of the original criteria for the theory, as the game action

Sociology of Sport Journal 15, at 19.
would no longer be limited to a specified spatial and temporal boundary. The second involves a breach of the rules or culture of the game, which negates the reason for the temporary suspension of moral reasoning in the first place. Smith criticises such a theory, pointing out that it cannot account for boxing using such criteria. However, Bredemeier and Shields respond that as it is an objective of boxing to cause game-transcending harm, they would question the moral legitimacy of professional boxing.

Making the distinction that Bredemeier and Shields make would allow us to use social designation as a sport to allow for partial and temporary suspensions of moral reasoning. However, it would not lead to us falling foul of the worry that social designation would legitimise conduct that cannot be reconciled with more general moral values, as gladiatorial fights and gun duelling etc. contain inherent aims to cause death or serious harm which transcend the spatial and temporal boundaries of the sports.

In conclusion, it has been argued that to hold the position that behaviour or attitudes that would normally be thought of as immoral, need not be thought of as such when they occur in sports, is fallacious. Principally this is due to the fact that some activities fit within the paradigm of sports which are so fundamentally contrary to the general principle of valuing human life, that one could not legitimately hold both positions. Therefore, while it is quite acceptable to have exceptions to general moral principles, two moral principles which are fundamentally opposed cannot both be supported by the same person. If we are to accommodate a partial and temporary suspension of morality in sports, it will be necessary to exclude from the suspension any

---

activity which has the causation of death or serious harm as an inherent part of its objectives.

**Conclusion**

It has been argued that if we accept a very general moral principle that the value of human life must be respected, and derived from this the principle that it is immoral to treat individuals as objects, we would be on firm ground for morally criticising combat sports. The nature and objectives of full-contact combat sports appear to foster an attitude of dehumanisation among participants. It is argued that in order to win, they must effectively treat their opponent as an object by beating or choking them until they submit or until they suffer some form of temporary brain damage. Attempts to deflect these criticisms have proved to be unconvincing. For example, it was shown that the directness of fighters’ relationships with one another distinguish them from chess players and the like. This is so as they use their bodies as tools of the sport. Further, any argument which relies on there being a special department of morality for sports, which allows for a temporary suspension of normal moral reasoning, would have to throw full-contact combat sports to the lions. This is because such an argument cannot accommodate sports where the causation of death or serious harm is an inseparable outcome from the intrinsic objectives of the sport, as such consequences affect the day-to-day lives of the harmed participants and so the conduct is no longer confined to the game.

While nothing I have said in this chapter is supposed to indicate that the law should intervene on these grounds alone, a moral analysis of combat sports is arguably still an element that should be elucidated and considered. While the arguments
advanced may not solely be grounds for legal intervention, they are strong grounds for reform from within the combat sports industry. There is nothing inherently immoral about martial arts or other fighting/wrestling activities. It is only when these activities are transformed into competitive sports that the immoral attitudes start to creep in. But exercising techniques against real opponents can be fun and beneficial as well, not to mention that it helps prepare students for real-life situations. As noted earlier, many of the moral criticisms dissipate when combat sports bouts can be classified as play. The real problem with combat sports, when they are not instances of play, appears to be their competitive rules (in both some amateur and all professional competitions). It is the rules that allow full contact blows to the head and techniques which choke or could potentially break the neck of an opponent, that promote immoral attitudes such as dehumanisation in combat sports. It is only through reforming these rules to prohibit knock-outs and emphasise point scoring that combat sports can avoid this moral criticism. On a final note, many mixed martial arts enthusiasts claim that because fighters can win through submissions that there is less of a focus on winning by knock-out in that sport. This may be true and it may be the case that combat sports are to some degree less morally objectionable than boxing. But I do not see how this grants any real reprieve. First, some submission techniques are as dangerous, if not more dangerous than punching to the head. Second, as long as knock-outs are retained as a legitimate way to win in such sports, there will always be an incentive for one fighter to punch his opponent as hard as possible in the head, before he gets so punched, or before he gets trapped by a submission hold, or before judges have an opportunity to decide. If punching to the head is really as redundant in mixed martial arts as some claim it to be, then why not prohibit the technique anyway? In any case, even if combat sports
promote slightly less immoral attitudes than professional boxing, those attitudes are still immoral. Theft is less immoral than murder, but theft is still immoral.
CHAPTER SEVEN: INJURIES IN COMBAT SPORTS

Introduction

In this chapter I will explore the literature on the incidence of brain injuries in combat sports. The terms combat sports and martial arts embrace so many different sports and styles that they would be analogous to using “ball games” as a catch-all term. Therefore, when it is said that this chapter will review the literature dealing with the incidence of injuries in combat sports, it really reviews the literature pertaining to some of the more frequently written about combat sports. The martial arts studied include karate, judo and kick-boxing. There is also a significant focus on mixed martial arts, considering that this is the sport that spurred most legislatures in Australia and the US to regulate the combat sports industry. However, the literature is most voluminous on the subject of Taekwon-Do. In particular, a lot of writings deal with the full contact form of the sport. Special attention will be paid to these latter styles as they are examples of full contact combat sports, where the head is a primary target.

The significance of what can be learnt from this review and analysis of the combat sports medical literature will be great. The significance will be great because the empirical evidence reviewed here plays a fundamental part in the reasoned arguments that would either commend the use of autonomy-based paternalism in combat sports, or refuse it. If Saxon is correct, for example, that: “The assumption that martial arts (other than boxing) practices are highly injurious is not one supported by the available and verifiable statistics”, then it may be the case that a state would not be justified in enforcing hard paternalistic laws against fighters. It would also not be

realistic for a state to interfere on grounds of dignity if fighters were only sustaining minor injuries such as bruises and cuts. It would be hard to take seriously any argument that purported that such injuries were fundamental affronts to dignity. Indeed, if it was accepted that individuals should be allowed to consent to anything up to, but not including, serious harm, there would be no doctrinal need to establish regulatory machinery. It is, therefore, crucially important to understand the nature and frequency of the risks in combat sports, in order to understand how the theories advanced thus far can be applied to combat sports.

First, there will be a description of how damage is caused to the brain. There will then be a discussion on how punches and kicks to the head can cause such damage, and the extent to which that damage can be cumulative. Second, there will be an analysis of the general literature on martial arts which focuses on brain injuries. In particular, there will be a focus on concussion rates and injury rates to the head and neck area. The latter findings are important as the more these areas are attacked, the more chance that a concussion will ensue. The literature pertaining to mixed martial arts will then be examined, as well as the literature on Taekwon-Do. Finally, there will be an attempt to draw out recurring themes from the literature. The different methodologies employed by the various authors discourage direct comparison of their studies. Instead, these studies will be outlined and assessed with the objective of identifying general trends.
Brain Injuries

The Australian National Health and Medical Research Council have described the effect on the brain of being hit with force at a high velocity. Force transmitted to the skull can cause linear or rotational acceleration of the brain. The brain is a jelly-like organ which is surrounded by displaceable fluid, which means the brain can move and swirl within the skull. Sudden accelerations can cause veins to tear and bleed into subdural space, which can cause death. Acceleration can also cause damage to nerves and fibres in the brain, which could lead to chronic encephalopathy (also known as punch drunk syndrome). However, McCrory et al argue that the damage caused to the head in combat sports is due not only to the velocity of the fist or foot, but also to “the mass of the colliding bodies involved, and the mechanical properties of the colliding bodies.”

Acute brain injuries give rise to symptoms immediately. They include injuries such as concussions, intracranial haemorrhage and diffuse brain swelling.
Concussions are the most prominent type of acute brain injury, accounting for between 15.9% and 69.7% of injuries in professional boxing, and about 25% of other combat sports injuries. While concussions are caused by functional damage to the brain, chronic brain damage usually reflects both functional and structural changes to the brain and/or nervous system.

Accelerations to the head

In 1986, a study compared violent accelerations of the head from punches and kicks in full contact karate, with the accelerations of the head from blows in boxing. The study used a dummy on an axis, which replicated the human head, and had karate experts kick the dummy with and without padding for their hands and feet. In accordance with other studies, the padding for the feet only increased the acceleration, with participants viewing the padding as being for their own protection when they perform a technique. However, 10-ounce boxing gloves did significantly reduce the acceleration of the head. 90 G was the most frequently recorded level of acceleration. However, on one occasion 120 G was recorded: “This corresponds to the force to which the head of an unrestrained passenger in a low speed automobile

collision might be subjected in striking the dashboard." The researchers concluded that violent accelerations to the head would produce injury, by whatever means the blow was struck. Therefore, boxing and full contact karate were considered similar in the level of potential brain dysfunction that could be caused. Indeed, it was predicted that with the growth of full contact karate, future studies would find “insidious progressive damage to virtually all participants.”

Pieter and Lufting noted, in their study published in 1994, that helmets in martial arts are generally ineffective in preventing brain injuries. The authors recognised that helmets would not offset the acceleration of the head. They reported that accelerations of 80G can cause knockouts and concussions. However, punches were seen to be able to generate 260G, when travelling at a velocity of 8m/s. This demonstrates the potential dangerousness of roundhouse kicks, as their velocity has been measured as 16 m/s in men and 13 m/s in women. Such kicks would certainly exceed the “accepted indices of injury severity”. Kicks and punches to the head may, therefore, cause a much greater acceleration of the brain than was originally thought in the 1986 study.

---

Zemper and Pieter made related observations when they noted that the impact of high velocity kicks were associated with “subdural haematoma, intracerebral haemorrhages and diffuse axonal injury.”

Studies were also quoted to suggest that padding was ineffective to protect against concussions after only five impacts.

**Cumulative Concussions**

In 1998 Pieter and Zemper warned that repetitive blows to the head in martial arts could lead to cumulative concussions. This may eventually lead to brain damage or indeed could be fatal due to second impact syndrome (where an individual dies when they are hit in the head while already suffering from a previous concussion). The damage of a concussion is said to be irreversible, but not necessarily easy to detect, if it is slight. For this reason, EEG, CT, and MRI scans were advised. The authors also suggested the introduction of schemes to ban athletes for certain periods after sustaining various levels of concussions (three standing 8 counts in 1 round or 4 in a bout – 30

---

942 Electroencephalography: this is used to record the electrical activity from the brain.
943 Computed Tomography: this is used to create 3-D images of internal structures.
944 Magnetic Resonance Imaging: this is used to create detailed images of internal structures, such as the brain.
days; second concussion – 90 days). A knockout passport recording a fighter’s knock-out history was also recommended.

The possible occurrence of cumulative concussions also arose in Koh and Watkinson’s study of the rate of head blows and incidences of concussions during the Olympic style Taekwondo 1999 World Championships. They expressed concern about the occurrence of repetitive head blows, as this is thought to be the primary cause of cerebral dysfunction in boxers. It was recommended that organising authorities should consider introducing rules to stop a participant from continuing to fight in a competition if they receive two direct blows to the head in the same tournament. It was also recommended that athletes, referees and coaches be better informed about the risks and consequences of concussion in Taekwondo.

Interestingly, a recent study has suggested that there does not appear to be any cumulative effects from a previous, or two previous concussions. This study looked at high school and university students in America who played American football, ice-hockey, soccer and a small percentage of other sports. Other, more recent,

---

publications suggest, however, that second impact syndrome is still a real concern in the medical community.\textsuperscript{954}

**The Head as a Target**

The information presented in the previous two subsections is thought to be of particular concern given the frequency with which the head is attacked in many combat sports. For example, in a study on light contact Shotokan karate, 57\% of the injuries were to the head,\textsuperscript{955} and 7.5\% of the injuries were concussions. The authors noted the high percentage of head injuries as a concern.\textsuperscript{956} Another general review of literature on injuries in combat sports reported injuries to the general head region were highest in Karate, with a survey of 33 participants recording 90.9\% of all injuries occurred to the head region and another of 76 participants recording 51.3\%.\textsuperscript{957} Judo and Taekwondo recorded highest head region injuries of 37.0\% and 34.3\% respectively.\textsuperscript{958} Indeed, a similar rate of around 50\% was found in a third study, where face, head and neck injuries combined accounted for 51.6\% of all injuries and intracranial injury (or traumatic brain injury) occurred in 18\% of fight participations, or 19.2 per 1000 fight participations.\textsuperscript{959} Therefore, at least three studies point to the general head region as sustaining around 50\% of all injuries sustained, which demonstrates the frequency with

which the head is attacked. This must increase the risk of accelerations of the brain within the skull, and the risk of cumulative concussions.

**Brain Injury Patterns**

**General Studies**

Birrer estimated in 1996 that there were at least 75 million martial arts participants worldwide, with 8 million in the US.\(^{960}\) He conducted the only international study I have found. The study was conducted over a period of 18 years. It included 15,017 participants, representing 41,086 injuries.\(^{961}\) 47 countries participated, representing many different styles of martial arts, although the three most prominent arts were karate, taekwondo and judo.\(^{962}\) 74% of injuries happened while fighting.\(^{963}\) Injuries to the head/neck region accounted for 12% of all injuries.\(^{964}\) However, out of the 12,176 injuries that were sustained in competitions, 44% were head injuries and 7% were neck injuries.\(^{965}\) The risk of injury was confirmed to increase with the length of time practising and the higher the rank.\(^{966}\) The rate of severe injuries was low, at 0.033

injuries per participant per year.\footnote{R. B. Birrer, “Trauma Epidemiology in the Martial Arts: The Results of an Eighteen-Year International Survey” (1996) 24 American Journal of Sports Medicine S72, at S74.} That said, 63% of severe injuries were concussions.\footnote{R. B. Birrer, “Trauma Epidemiology in the Martial Arts: The Results of an Eighteen-Year International Survey” (1996) 24 American Journal of Sports Medicine S72, at S74.} Further 0.17% of the overall injuries were life-threatening.\footnote{R. B. Birrer, “Trauma Epidemiology in the Martial Arts: The Results of an Eighteen-Year International Survey” (1996) 24 American Journal of Sports Medicine S72, at S74.} There were 6 fatalities over the course of the study period, with 4 dying from trauma to the head, 2 of which were caused by kicks and punches, and 2 by falling.\footnote{R. B. Birrer, “Trauma Epidemiology in the Martial Arts: The Results of an Eighteen-Year International Survey” (1996) 24 American Journal of Sports Medicine S72, at S74.} One person died from a blow to the neck, and one from a blow to the chest.\footnote{R. B. Birrer, “Trauma Epidemiology in the Martial Arts: The Results of an Eighteen-Year International Survey” (1996) 24 American Journal of Sports Medicine S72, at S74.} Reference is also made to the National Electronic Injury Surveillance System which recorded 4 martial arts deaths from sparring during the period of 1979 to 1992.\footnote{R. B. Birrer, “Trauma Epidemiology in the Martial Arts: The Results of an Eighteen-Year International Survey” (1996) 24 American Journal of Sports Medicine S72, at S75-76.} Furthermore, Birrer references studies from the 1980s which reported a number of instances of life-threatening injuries and indeed fatalities.\footnote{R. B. Birrer, “Trauma Epidemiology in the Martial Arts: The Results of an Eighteen-Year International Survey” (1996) 24 American Journal of Sports Medicine S72, at S77.}

The overall results of Birrer’s survey are not negative. We are told that martial arts have lower rates of injuries per 1000 participants than golf and general exercise.\footnote{R. B. Birrer, “Trauma Epidemiology in the Martial Arts: The Results of an Eighteen-Year International Survey” (1996) 24 American Journal of Sports Medicine S72, at S77.} The author emphasises the need to ensure instructors and officials are suitably qualified and that they suitably supervise sparring classes. Safe training environments and stringent enforcement of the rules are also suggested.\footnote{R. B. Birrer, “Trauma Epidemiology in the Martial Arts: The Results of an Eighteen-Year International Survey” (1996) 24 American Journal of Sports Medicine S72, at S77.}

McCrory and others assessed the literature regarding acute and chronic brain injuries in combat sports in 2009.\footnote{P. McCrory and others, ‘Acute and Chronic Brain Injury in Combat Sports’ in R. Kordi and others (eds), Combat Sports Medicine (Springer, London 2009).} A typical example of a chronic brain injury, often
thought to affect boxers, is chronic traumatic encephalopathy (CTE). It is argued that the reported cases of CTE in martial arts cannot be confirmed with diagnostic certainty. While there were reports and studies of the occurrence of CTE in boxers, and the pathophysiological changes that CTE causes in the brains of boxers, it seems to be that the presence and severity of the condition is directly linked to the length of the boxer’s career and the number of fights they participated in. The researchers also point to the Apolipoprotein E ε4 gene, which may give rise to an increased risk of chronic brain injury in boxers. If this increase of risk is proved, it may lead to participants being screened for the presence of the gene before fighting.

The major point to be gleaned from McCrory et al’s study is that the traditional link between CTE and boxing may no longer be valid. This is due to the fact that modern boxers have a much lowered exposure time compared to the boxers of the early and middle twentieth century. While boxers used to have careers spanning 20 years and 1000 fights, modern boxers tend to have 10 year careers, with about 20 fights.

With the dramatic decrease in exposure rate comes a substantial decrease in the risk of CTE. Added to the decrease in exposure time comes new safety regulation which also decreases the risk of CTE. However, this is really an argument for regulation, to

---

979 J. Corsellis and others, “The Aftermath of Boxing” (1973) 3 Psychological Medicine 270.
ensure that exposure rates are decreased through safety regulation. The authors conclude that a lot more serious study is required to investigate the occurrence of acute and chronic brain injuries in combat sports and that whatever information that is available at the moment is either insufficient or scientifically inappropriate.\textsuperscript{986}

Concussion rates in amateur and recreational combat sports must be taken most seriously of all. Unlike the professional fighters who may only fight once or twice a year, amateurs may take part in double this amount, and therefore there is an increased risk of exposure at this level. This is important considering the possible effects of repeat concussions.\textsuperscript{987}

Koh \textit{et al} methodologically reviewed the literature on the incidence of concussions across 8 sports: American football; boxing; ice hockey; rugby; karate; tae kwon do; judo; and soccer between 1985 and 2000.\textsuperscript{988} The study defined a concussion as a “traumatically induced physiological disruption of brain function with a short period of altered or loss of consciousness.”\textsuperscript{989} The physiological changes that might possibly be experienced include the following:

“any period of loss of consciousness (30 minutes or less); any loss of memory for events immediately before or after the injury (post-traumatic amnesia not greater than 24 hours); any alteration in mental state at the time of the event (e.g. feeling dazed, disoriented or confused); focal neurological deficit(s) that may or may not be transient; and an initial Glasgow Coma Scale (GCS) of 13–15. There should be no evidence of skull fracture or intra-cranial pathology.”\textsuperscript{990}

\textsuperscript{987} See above, at 274-276.
Of the eligible publications selected, the review showed that at an amateur level, ice hockey had the highest incidence of concussion among high school athletes. However, at a professional level, the incidence was similar in both ice hockey and rugby. Among the combat sports, boxing had the highest incidence of concussion. The incidence of concussions in taekwondo generally appeared to be higher than that in karate. The authors note that there is a high incidence rate in sports where protective clothing is worn, and they suggest that the reason for this may be that the participants get a false sense of security from the padding and hence tackle harder etc. Concerns are also expressed about appropriate equipment being used correctly.

The Effects of Choking

Judo-chokes have been reported as giving rise to substantially serious injuries and deaths. However, the evidence from a range of studies seems to be somewhat contradictory on this issue.

A study in 1991 investigating the effects of choking techniques in Judo came to the conclusion that cerebral functioning was not affected by competitive Judo. However, the study only used 10 participants and thus the researchers acknowledged

---

that the findings would need substantiating with further research. They also contrast their findings to those in boxing, where there were both structural and functional modifications to the central nervous system.

However, neck holds have been judged to be dangerous by some studies. In 1997, research showed that an otherwise healthy 29 year old man, non-smoker, light drinker, with no family history of strokes, suffered an ischaemic stroke as a result of a strong neck holding technique performed on him, which caused a non-penetrating carotid trauma. The study recommended the use of single photon emission computed tomography (SPECT) to identify strokes caused by such traumas, as computed tomography (CT) scans would only show the problem 24 hours after the trauma occurred. The best treatment, thrombolysis, however, must be administered within three hours of the stroke. It was recommended that supervising authorities be made aware that this was the best course of action and that “prolonged or vigorous neck holds” should be avoided in order to reduce the risk of such strokes occurring.

The effects of choking in Judo on the brain were also studied in 1998. The study used Electroencephalography (EEG), a spectral analysis of digitised brain waves and a calculation of the global field power to compare the electrical activity of the brain

---

1001 This is where there is a decrease of blood supply to the brain, causing dysfunction.
at rest with it after having been choked. The results revealed statistically significant figures up to the 20 seconds after choking, and changes were traced up to 70 seconds after choking. A reduction in cerebral perfusion pressure causes ischemic strokes, as the brain is not receiving an adequate blood supply. Landa criticises the conclusions of this study, arguing that as there was no loss of function, the changes may lack relevance.

An Italian study attempted to compare the long term effects of amateur and professional boxing with that of being subjected to judo chokes. All participants had their regional cerebral blood flow (CBF) measured and 18 of the boxers and all of the judoka underwent electroencephalography (EEG). About 29% of the amateur boxers studied showed regional hypoperfusion in different regions of the brain, most commonly the frontocentral region. Their global CBF was somewhat lower than the control group’s, however, it was not statistically significant. 35% of the professional boxers studied exhibited hypoperfusion, again mostly in the frontocentral region. All professional boxers were found to have lower levels of global CBF than the control group. The 10 judoka studied displayed normal regional and global CBF.

---

Slower than normal results were recorded with the EEG in 1 amateur and 2 professionals.\textsuperscript{1018} EEG readings were normal in all judoka.\textsuperscript{1019} The findings suggest that despite participants being choked by different manoeuvres in judo until syncope is induced, there are no long terms effects, insofar as no participant demonstrated stable hypoperfusion or stable EEG abnormalities.\textsuperscript{1020} On the other hand, not only did amateur and professional boxers display hypoperfusion, they displayed it in a region of the head which is most frequently hit in boxing matches.\textsuperscript{1021}

**Mixed Martial Arts**

Buse conducted a helpful survey of the causes that brought televised bouts to an end in mixed martial arts (MMA) competitions over a 10 year period.\textsuperscript{1022} The results were as follows:

\begin{quote}
“Of the 642 matches, 182 (28.3±3.4\%) were stopped because of head impact…106 (16.5±2.9\%) because of musculoskeletal stress…91 (14.1±2.7\%) because of neck choke…83 (12.9±2.6\%) because of miscellaneous trauma…173 (27.0±3.4\%) because of expiration of match time, and seven (1.0±0.8\%) because of disqualification. Of the 182 matches stopped because of head impact, 62 (34.1±6.8\%) involved KO and 120 (65.9±6.8\%) involved TKO.”\textsuperscript{1023}
\end{quote}

\begin{footnotesize}
\textsuperscript{1017} G. Rodriguez and others, “Long-Term Effects of Boxing and Judo-Choking Techniques on Brain Function” (1998) 19 Italian Journal of Neurological Sciences 367, at 369.
\textsuperscript{1018} G. Rodriguez and others, “Long-Term Effects of Boxing and Judo-Choking Techniques on Brain Function” (1998) 19 Italian Journal of Neurological Sciences 367, at 369.
\end{footnotesize}
As far as the risk of sustaining injuries to the brain and central nervous system go, head impact and choke holds combined accounted for approximately 42.5% of all bout stoppages. Buse notes that his results show that stoppages because of head impact are about 20% higher in mixed martial arts than in boxing or kickboxing.\(^{1024}\) He also indicates that most competitors who suffered a knockout, demonstrated visible signs of concussions.\(^{1025}\) The risk of a concussion was judged to be approximately 48.3 per 1000 fights.\(^{1026}\) This compared to 19.2 concussions per 1000 fights in a kickboxing review.\(^{1027}\) Interestingly, Buse discusses the introduction of gloves in MMA fights after the death of a participant. However, tests have shown that the gloves do not mitigate against the risk of sustaining brain injuries.\(^{1028}\) While regulation seems to have been ineffective insofar as the gloves are concerned, it may have been more effective in the controlling of choking techniques in the ring. Buse notes that “stringent regulation in MMA probably averts prolonged deficits in cerebral blood flow or neuropsychological status.”\(^{1029}\)

The results of Buse’s research may be tempered, however, by the fact that his results come from a period spanning pre- and post-regulation.\(^{1030}\) The first study to take account of this and base its research on Nevada statistics after regulation was Bledsoe\(^{1024}\) et al. (2008) 42 British Journal of Sports Medicine 686, at 687-688.


The injury rate was found to be 28.6 injuries per 100 fight participations. However, this injury rate does not include incidences of knockouts or technical knockouts. The authors justify this decision due to the injuries caused from such incidences being unverifiable because of a lack of post match testing.

Considering that over 45% of the fights studied ended due to a technical knockout or a knockout, the total injury rate may well be much higher once post-fight studies are carried out to analyse the effects of the TKOs and KOs on the fighters. Indeed, it would be an odd thing if a facial laceration was described as an injury, but some form of temporary brain dysfunction was not. Chokes accounted for 2.3% of stoppages. In this study, “chokes” only referred to instances where competitors refused to tap out and as a result of the choke-hold suffered syncope. The study concluded that the injury rate was similar to that in other martial arts, but that the rate of knockouts was considerably lower than that in boxing, chiefly due to the tap-out method of victory. The rate of TKOs was similar to the rate in professional boxing. The authors pointed out the importance of distinguishing between well regulated mixed martial arts competitions and unregulated toughman competitions, which are often poorly run, with little protection for the fighters and inexperienced “officials” being used.

---

some 10 states had banned or attempted to ban such activities. The weakness of the study is its dependence upon reports made by ringside physicians and the lack of post-fight testing.

A 2008 study also takes account of the fact that mixed martial arts pre- and post-regulation are quite different, especially in terms of risk. Its review period is between 2002 and 2007 and the figures analysed come from Nevada, where mixed martial arts were regulated in 2001. The results were as follows:

“225 (35.4%) matches ended by submission, 214 (33.7%) matches ended by TKO, 155 (24.4%) matches ended by decision, 21 (3.3%) matches ended by KO, 10 (1.6%) matches ended by physicians stoppage, 5 (0.8%) with disqualification, and 6 (0.9%) with draw or no decision”

Interestingly, this longer study shows submissions as being the dominant form of fight stoppages, at 35.4%, up from 30.4% in Bledsoe et al’s survey, and up from approximately 29.4% in Buse’s study spanning pre- and post-regulation. In Bledsoe et al’s survey, technical knockouts were the dominant form of fight stoppage, with 39.8%, which dropped to 33.7% in the longer survey. In Buse’s study the figure for

---

technical knockouts due to head impact was approximately 18.6%.

The injury rate in Ngai et al’s study was found to be 23.6 per 100 fight participations. This injury rate is comparable to the injury rate statistics from boxing which range from 17.1 to 25 injuries per 100 fights. It was noted by the researchers that no death or critical sports injury, such as a persistent acquired brain injury occurred in the test group. The authors claim that due to the bouts being stopped by submissions, the risk of fighters sustaining serious injuries decreases. This is particularly important as almost 60% of the fights studied ended by decision or submission. The authors also appear to suggest that technical knockouts also reduce the risk of serious injury by stopping the fight. However, they appear to gloss over the fact that technical knockouts frequently occur when the referee judges the competitor unfit to continue. Among other things, the referee may be persuaded to take this action when the competitor displays an inability to defend or balance himself. These appear to be signs of concussions. The rate of concussion was found to be 16.5 per 1000 athlete-exposures. This was found to be comparable to taekwondo statistics. However, it was much less than Buse’s approximate concussion rate of 48.3 per 1000 athlete-exposures.

---

The authors argue that further studies are needed, and that these studies will need to be conducted by researchers at the ringside and with follow-up testing. While they believe the risk of critical injuries are low in regulated mixed martial arts, it is nevertheless admitted that much more study is required.

The distinction that Bledsoe *et al* and Ngai *et al* drew between pre- and post-regulation may, finally, be misleading. This is explained in Buse’s reply to the criticism that his 10 year review had not made the distinction. He argues that many of the rule changes in mixed martial arts had already been in existence prior to formal regulation in 2000. Rule changes actually started to occur in 1995 with the introduction of time limits for rounds. Weight classes and protective gloves were introduced from 1997. This, of course, does little to exonerate the findings, as there is still a *ruleless* two-year period between 1993 and 1995 that is included in the study, and the piecemeal introduction of other changes around 1997 also causes statistical problems. To overcome these difficulties, Buse revisits his statistics and divides them into a 1993-1997 period and a 1998-2003 period. Interestingly, 20% of fights were stopped due to head impact in the former period and a significantly higher, 34.1% were stopped due to head impact in the latter, *safer* period. This leads Buse to conclude that the:

---

“mandatory wear[ing] of MMA gloves and subsequent sanctioning of [the studied mixed martial arts] events were not associated with a reduction in match stoppages due to head impact. Sanctioned or not, the sport will remain inherently risky so long as the primary intent of the MMA encounter is to inflict trauma on one’s opponent.”

A study published in 2005 is also of some note. The researchers attempted to assess the risk of cervical injuries from three throws (a hip toss, a suplex, and a souplesse) and one choke hold (a guillotine). Unlike the other medical surveys mentioned in this section, the study used practitioners in a controlled environment. During testing, one of the practitioners sustained a mild cervical injury when thrown using the suplex move. The results from the other two throws led the researchers to the conclusion that they had a similar effect on the cervical region as being involved in a rear end motor vehicle collision. The types of hyperextension (whiplash) injuries arising from such motor car collisions are also likely to occur as a

---

1066 “The fighter and the opponent face each other. The fighter steps into the clinch and, using his shoulders, swings the opponent over his hips. The opponent is driven on to his back. It is a simple and common manoeuvre”: T. Kochhar and others, “Risk of cervical injuries in mixed martial arts” (2005) 39 British Journal of Sports Medicine 444.
1067 “The fighter grabs his opponent around his waist, lifts him up over his shoulder. As their combined centre of gravity moves, the fighter falls backwards on to his back, maintaining his hold on his opponent, who falls forward, on to his face”: T. Kochhar and others, “Risk of cervical injuries in mixed martial arts” (2005) 39 British Journal of Sports Medicine 444.
1068 “The fighter reaches around the back of the opponent’s neck with one hand and completes the choke with the other hand. With the choke complete, the fighter falls backwards, raising the opponent off of his feet, flexing the opponent’s neck and forcing him to the floor. The fighter drives backwards, tightening the choke”: T. Kochhar and others, “Risk of cervical injuries in mixed martial arts” (2005) 39 British Journal of Sports Medicine 444.
result of these techniques.\footnote{1073} While the experiment with regard to the suplex move could not be continued, it was felt that there was a substantial risk of similar hyperextension being caused by the manoeuvre (as indeed it was in the trial).\footnote{1074} A final observation of interest was that the testing had been carried out by experienced practitioners in controlled circumstances. Injuries may well be exacerbated when the techniques are carried out in uncontrolled circumstances (such as in the heat of the moment in a ring) and/or by less experienced practitioners.\footnote{1075}

**Taekwon-Do**

In 1991 Oler et al published a paper warning against the proposition that all martial arts were safe.\footnote{1076} Along with citing videotape evidence of a participant being killed by a spinning hook kick to the head, the authors presented results gathered from two national Taekwondo tournaments.\footnote{1077} In these tournaments, gloves were not permitted, however, participants were only permitted to kick to the head, and not to punch to the head.\footnote{1078} The results showed that 126 fighters presented with 183 clinical problems.\footnote{1079} Given the emphasis on hitting the head, it was unsurprising that the head and neck sustained a large number of injuries. The authors blamed, among other things, the

dangerousness of the techniques being used.\textsuperscript{1080} The spinning hook kick, we are told, was developed to kill and disable soldiers on horseback.\textsuperscript{1081} This combined with an inability to control this manoeuvre once commenced could lead to deadly consequences.\textsuperscript{1082} Further, it was claimed that many competitors are not sufficiently well trained and thus make mistakes such as leaving their head unguarded which leads to serious injury also.\textsuperscript{1083} The paper, thus, warned against broad slogans that martial arts were safe and reminded us that the techniques were originally designed to kill and seriously injure, and perhaps such techniques have not yet been fully adapted for sporting conditions.\textsuperscript{1084}

A study carried out by analysing injuries in children competing in Taekwondo, showed that head and neck injuries were the second most sustained injuries.\textsuperscript{1085} It was once again noted that much of the injury resulted from competitors not being sufficiently well trained in blocking.\textsuperscript{1086} A number of cerebral concussions were also recorded, leading to the recommendation that the head should not be a target when children play the sport.\textsuperscript{1087} Mouth guards were also suggested as a method of reducing the severity of a concussion from blows to the jaw.\textsuperscript{1088}

Further study was carried out on the types of injuries sustained by young taekwondo athletes during national and world championships in 1989 and 1990. The study included 4264 participants, all under the age of 16. Combining all injuries sustained, it was found that 35.37% occurred to the head and neck. The importance of such findings is demonstrated by reference to Tator and Edmonds’s study that concluded that spinal injuries in hockey players with a mean age of 17, were caused by blows to the head. It was also noted that more injury can occur if the competitor loses consciousness before falling to the ground, as they will no longer be able to control how they fall. 24.36% of the injuries to the head and neck resulted in cerebral concussions. These findings led to a conclusion that injuries causing cerebral concussions in taekwondo were three times higher than in American college football. Cerebral concussions were also the leading cause of “time-loss” injury in the competitors, with the injured being unable to train or compete for a time period after the injury. Once again, the researchers advised that most injury was caused due to a lack of blocking skills and recommended that trainers take greater care to ensure that their athletes have attained a certain standard of blocking, as well as


293
attacking techniques before allowing them to compete. As well as this, it was advised that kicks to the head be banned, or that properly tested helmets be mandatory, if it were proven that they were effective against causing brain injuries.

One of the earlier Taekwondo studies included in this literature review is a review of the injuries sustained at the 1991 World Taekwondo Federation World Championships. The review focuses on serious injuries such as concussions and fractures. The exposure rate was calculated based on the number of bouts actually fought. The formula used is (no. of injuries / no. of athletes-exposures) x 1000 = no. of injuries per 1000 athlete-exposures (A-E). One athlete exposure would be one person being exposed to the possibility of sustaining an injury. Every match has two athlete exposures because there are two participants. The rate of serious injuries was 26.38/1000 A-E. The rate of cerebral concussions in males was thought to be very worrying at 15.27/1000 A-E. This was found to be a much higher rate than that found in American footballers. The high rate of cerebral concussions was attributed

---

to the lack of matting at the world championships. This meant participating on concrete floors which increased the chance of cerebral concussions when falling to the floor.\footnote{1108}  

Similar research was carried out at the 1993 European Taekwondo Cup, held in St Petersburg.\footnote{1109} 67 men took part and the injury rate was 139.54/1000 A-E.\footnote{1110} 30 women also took part, with an injury rate of 96.49/1000 A-E.\footnote{1111} The injury rate for men was higher than most previous studies.\footnote{1112} The cerebral concussion injury rate in men was 15.50/1000 A-E, compared with 8.77/1000 A-E in women. This was one of the highest rates of concussion for both males and females per 1000 athlete-exposures, when compared to other studies, excluding those on mixed martial arts.\footnote{1113} Taking other reported concussion rates into account, the authors suggest that there is approximately one cerebral concussion per 100 competitors at all taekwondo competitions.\footnote{1114} Round kicks were shown to be instrumental in causing cerebral concussions.\footnote{1115} The authors identify a trend that the cerebral concussion rates in men tend to be higher than those in women and that the general rate of concussion seems to be much higher than that in American college football, which is at 1.69/1000 A-E.\footnote{1116}

\footnote{1109 W. Pieter and others, “Injury Situation and Injury Mechanism at the 1993 European Taekwondo Cup” (1995) 28 Journal of Human Movement Studies1.}  
\footnote{1110 W. Pieter and others, “Injury Situation and Injury Mechanism at the 1993 European Taekwondo Cup” (1995) 28 Journal of Human Movement Studies1, at 3.}  
\footnote{1111 W. Pieter and others, “Injury Situation and Injury Mechanism at the 1993 European Taekwondo Cup” (1995) 28 Journal of Human Movement Studies1, at 3.}  
\footnote{1112 W. Pieter and others, “Injury Situation and Injury Mechanism at the 1993 European Taekwondo Cup” (1995) 28 Journal of Human Movement Studies1, at 3.}  
\footnote{1113 W. Pieter and others, “Injury Situation and Injury Mechanism at the 1993 European Taekwondo Cup” (1995) 28 Journal of Human Movement Studies1, 7 and 11.}  
\footnote{1114 W. Pieter and others, “Injury Situation and Injury Mechanism at the 1993 European Taekwondo Cup” (1995) 28 Journal of Human Movement Studies1, at 18.}  
\footnote{1115 W. Pieter and others, “Injury Situation and Injury Mechanism at the 1993 European Taekwondo Cup” (1995) 28 Journal of Human Movement Studies1, at 17.}  
\footnote{1116 W. Pieter and others, “Injury Situation and Injury Mechanism at the 1993 European Taekwondo Cup” (1995) 28 Journal of Human Movement Studies1, at 18.}
The further testing of equipment, the use of mats and mouth guards as well as proper instruction as to how to block were all advised.\textsuperscript{1117}

Six American taekwondo tournaments were studied between 1988 and 1991.\textsuperscript{1118} However, in this study, the researchers were concerned only with injuries to the head and neck. 30.25\% of all injuries recorded for men were head and neck injuries, and for women it was 25.86\%. The injury rate for men was 28.76/1000 A-E, and for women 27.27/1000 A-E.\textsuperscript{1119} The rate of cerebral concussions was 7.04/1000 A-E in men, but only 2.42/1000 A-E in women.\textsuperscript{1120} They were the second most common type of injury sustained by men, and fourth most common in women.\textsuperscript{1121} Combining both male and female figures, 19.58\% of all head and neck injuries were concussions.\textsuperscript{1122} While injury rates specific to the neck area were low for men and women (1.17/1000 A-E and 1.21/1000 A-E respectively), the authors nevertheless express concerns about cervical spine injury due to kicks to the head.\textsuperscript{1123} This could occur when an athlete is moving into an opponent and receives a kick or a punch to the head, which stops the head while the body is still in motion.\textsuperscript{1124} This can lead to the cervical spine being crushed.\textsuperscript{1125} The authors also note the uselessness of helmets to protect against accelerations of the head when being struck by kicks with a velocity of between 13 and 16 m/s: “The helmets

\textsuperscript{1119} W. Pieter and E. D. Zemper, “Head and Neck Injuries in Adult Taekwondo Athletes” (1997) 2 Coaching and Sport Science Journal 7, at 8.
\textsuperscript{1120} W. Pieter and E. D. Zemper, “Head and Neck Injuries in Adult Taekwondo Athletes” (1997) 2 Coaching and Sport Science Journal 7, at 8.
\textsuperscript{1121} W. Pieter and E. D. Zemper, “Head and Neck Injuries in Adult Taekwondo Athletes” (1997) 2 Coaching and Sport Science Journal 7, at 8.
\textsuperscript{1122} W. Pieter and E. D. Zemper, “Head and Neck Injuries in Adult Taekwondo Athletes” (1997) 2 Coaching and Sport Science Journal 7, at 8.
worn by the competitors will neither protect against cerebral concussions secondary to rotational accelerations of the head nor will it protect against cervical spine injuries.\textsuperscript{1126} As is frequently seen, coaches were advised not to enter inexperienced fighters in free sparring competitions, but more controversially, the authors also recommend to international governing bodies to ban the head as a target.\textsuperscript{1127}

The same authors investigated the incidence of cerebral concussions in Taekwondo over 6 competitions in the US, over a four year period.\textsuperscript{1128} The study included 1,665 men and 742 women, some of whom may have been counted twice by virtue of entering competitions in consecutive years.\textsuperscript{1129} The concussion rate among men was 7.04/1000 A-E, and 2.42/1000 A-E among women.\textsuperscript{1130} For both men and women, most concussions were sustained due to receiving a blow from an unblocked attack.\textsuperscript{1131} 16.7% (at a rate of 1.17/1000 A-E) of the concussions sustained would result in a time loss of 21 days or more.\textsuperscript{1132} When compared with other studies, the rate of cerebral concussions is substantially lower and the authors explain that injury rates tend to be lower when more than one tournament is studied.\textsuperscript{1133} The authors report that an eight year study of American football reveals a concussion rate of 9.80/1000 A-E, which is similar to that of Taekwondo.\textsuperscript{1134}

\textsuperscript{1127} W. Pieter and E. D. Zemper, “Head and Neck Injuries in Adult Taekwondo Athletes” (1997) 2 Coaching and Sport Science Journal 7, at 11.
Beis et al investigated injury rates among Greek Taekwondo practitioners over the course of national championships from 1994-1995. There were 2739 participants, and the most frequently injured parts of the body were the head/neck region and the lower extremities, which both had incidence rates of 6.85/1000 A-E. Concussion rates were highest among the girls from 14-17, at 9.85/1000 A-E.

A 2004 study of elite Canadian Taekwondo athletes showed injury rates of 62.9/1000 athlete-exposures. Injuries to the head and neck were the second most common type of injuries sustained, at 24.9/1000 A-E. Cerebral concussions were the 6th most common injury at 6.9/1000 A-E. This rate of concussions was high compared to other similar studies. Most injuries that were delivered by mechanism of a kick, were to the head at 18.3/1000 A.E.

Unsurprisingly, the rates of injury in taekwondo competitions do appear to be low, when most of the dangerous elements are eliminated. In their 2003 study, Burke et al find an injury rate of just 0.4/1000 A-E, from data collected over national and regional tournaments in 1993 and 1994. They claim that taekwondo is the most widely participated in martial art in the United States and their study tries to capture the

---

injury experience of the average participant. Therefore, instead of focussing on elite athletes, amateurs as well as experienced participants, of all ages (18 to 66) were surveyed. The rate of trauma was 1.3% of all participants (2498). Almost half of the injuries were to the head and neck region, but none of these required disqualification from the tournament. The very low injury rates are easily explainable. The rules of the particular style of taekwondo (which appears to be distinct from Olympic Taekwondo) only allow for light contact. The rules of the tournaments studied did not permit for any kicks to the face and referees were told prior to the competitions to strictly enforce the rules. Doctors and an emergency medical technician were also present. Given the fact that contact was so light and rules were so strictly enforced, the results are unsurprising. However, the study compares itself to studies carried out on styles of taekwondo that do not adhere to the same rules. To claim that taekwondo, generically, is safe on this basis is misleading. That particular style may be safe, but the rules are so different to other styles (particularly Olympic-style), that comparisons are somewhat meaningless.

One of the most methodologically comprehensive investigations is Koh and Cassidy’s 2004 study. The authors collected data from competitors prior to the competition, which inter alia asked them about previous blows to the head or

---

concussions or symptoms of concussions sustained. Matches were videotaped and participants who received blows to the head were identified. These participants were then interviewed after the bout. Finally, after the tournament, videotapes were analysed to identify the incidence of head blows and possible concussions. However, this study has two weaknesses. First, the survey only covers one tournament, the 12th middle and high school taekwondo tournament. Second, it is a pity that the strict methodology was not applied to adults as well as young people, as nobody over the age of 19 partook in the study. This is significant because, as we shall see, the injury rates are high, but this could be misleading as a general survey because other studies have shown that injury rates tend to be high within the 14-17 age group.

1616 participants responded to the pre-competition survey, with 71% stating they received a blow to the head in the preceding 12 months. About 45.30% said they experienced signs and symptoms of concussions and about 40% admitted to having potentially suffered a concussion from a blow to the head in taekwondo or some other activity. The result of the analysis was a finding of 226 head blows per 1000 A-E. This was lower than some other studies, but was explainable due to the shorter

exposure time of 1.30 minutes per round, instead of 3 minutes. The authors report that in middle and high school taekwondo competitions in Korea, 1 in 10 would experience a blow to the head and sign/symptoms of a concussion. There were 50 concussions per 1000 A-E. This was substantially higher than other studies. Apparently, 50% of those who received a head blow and 41% who sustained a concussion, were not trained or advised by their coaches on protecting the head region. A serious concern is also noted with regard to recognising concussions. About 34% of participants received more than one substantial blow to the head. However, only 2 competitors admitted to experiencing the symptoms of a concussion from a past match in the same competition. This supports other research that indicates that many individuals do not recognise when they have concussions. Aside from the potential for cumulative effects of concussions, fighting while concussed may increase their risk of injury due to slower reaction times, but more importantly, the athlete runs the risk of being fatally injured from second impact syndrome. Interesting suggestions are made about awarding points for blocking attacks and strictly enforcing rules that referees stop matches after multiple head blows.

In a 2007 study Beis et al recorded injury rates at a national Taekwondo championship in Greece of 2739 young and adult males and females.\textsuperscript{1171} Men were found to be at a higher risk of sustaining an injury to the head or neck.\textsuperscript{1172} Boys and girls between the ages of 14 and 17 sustained more cerebral concussions than any other groups.\textsuperscript{1173} Concerns are expressed by the authors about the change in the World Taekwondo Federation’s rules awarding two points for kicks to the head and additional points for knockdowns.\textsuperscript{1174} This is particularly worrying, as the study showed that kicks to the head region caused cerebral concussions in almost all categories studied.\textsuperscript{1175}

**Recurring Themes**

While it is difficult to directly compare some of the results above, a number of themes seem to recur throughout the literature. One of the most popular touched upon themes is that many injuries occur in combat sports due to students being ineffectually trained.\textsuperscript{1176} This ineffectualness manifests itself on many layers. First, it appears that many competitors have not been adequately trained to use blocking techniques.

Further, their inability to effectively control the techniques that they use will lead to injury, despite classifications such as light-contact. The general theme thus appears to be that many individuals are entered or permitted to enter competitions before attaining a level of skill appropriate to competitions.

Another popular theme in the literature is the realisation that protective head gear is ineffective in preventing concussions and other brain injuries.\textsuperscript{1177} It has already been described how high velocity punches and kicks to the head cause accelerations of the brain inside the skull, causing it to swirl and knock against the skull. Protective head gear only provides protection against surface damage to the head. Two recommendations for actually reducing head injuries were to ban the head as a target,\textsuperscript{1178} or to award points for blocking techniques.\textsuperscript{1179} Another equipment-based theme is the importance of having matted areas for training and competitions, as injuries to the head from falling on hard wooden surfaces were reported.\textsuperscript{1180}

The seriousness of the lack of effectiveness of head gear is compounded by the rate at which the head is attacked.\textsuperscript{1181} Attacks to the head are frequent and indeed natural, when many competitions award more points for contact to the head. As the


\textsuperscript{1178} W. Pieter and E. D. Zemper, “Head and Neck Injuries in Adult Taekwondo Athletes” (1997) 2 Coaching and Sport Science Journal 7, at 11.


head is so frequently the recipient of blows, multiple authors express concerns about repetitive head blows and the effects of cumulative concussions. Some have even suggested that fights be stopped if one fighter receives two direct blows to the head in one match or tournament. Although there is some evidence pointing against any cumulative effects from concussions, second impact syndrome is generally considered to be a real concern.

A frequently cited possible solution to prevent injuries in combat sports is to ensure rules are strictly enforced by referees and officials. This is an area in which regulation could be effective. Regulatory systems in the US and Australia require referees to be registered after having undergone training. Furthermore, it appears as though effective regulation is an important factor in ensuring that choke-holds do not give rise to the serious types of injuries that would be possible from prolonged subjection to such holds.

---


1187 See, for example, Chapter Eight, at 324.

There also appears to be some agreement that the exposure to the possibility of developing chronic traumatic encephalopathy (CTE) is lower now than it once was in certain combat sports. Professionally, it is thought that as fighters do not fight competitively as frequently as they once did, the risk of developing CTE has dramatically decreased. However, while fighters might have less professional bouts, they are likely to receive heavy blows to their head in training, in order to be conditioned to take a head blow during a proper fight. Also, as noted previously, amateurs are likely to fight much more frequently than professionals, and it is submitted that they may continue to be at risk of developing CTE if they are frequently participating in full contact competitions where the head is a primary target. The risk may be lessened, however, in combat sports that permit wins via submissions.

Concussion rates have also been a strong theme throughout the literature. This is unsurprising considering they are direct visible or recognisable effects from an injury to the brain, and the head has been shown to be one of the most frequently attacked parts of the body in many studies. Of the authors that presented concussion rates in terms of percentages of the total number of injuries that occurred, the rate varied between 1.2% to 9.6%. A substantial number of publications presented the concussion rates in terms of 1000 athlete-exposures. I list these in Table 1 below. The concussion rates vary substantially between the studies. This could be due to a number of factors, including the number of participants, the number of years or the number of

---


tournaments studied. Three surveys claim that the concussion rates in full contact Taekwondo are similar or higher than those found in American football. Only an older study, from 1989 states that rate of concussion is higher in American football. Another study found the concussion rate to be lower than in ice-hockey and rugby.

**Conclusion**

There have been a substantial number of publications on the incidence and type of injuries commonly sustained in combat sports in the last 20 years. While certain themes arise from the literature, it is difficult to come to any overall conclusive figure on the true rate of injuries, or more importantly, the true risk of sustaining a brain injury. Furthermore, it is often difficult to make meaningful comparisons between different studies due to the difference in important input factors authors use. While this may be unfortunate, it is in no way detrimental to this study. The lack of any conclusive statistic is not overly important. Most studies reveal that concussions are a significant risk to be associated with combat sports. It is not necessarily an overwhelming risk, but a risk worth taking seriously all the same due to the potential damage to the brain that may be caused. As noted before, brain injuries can play an important role in political philosophy. They give rise to situations where a person continues to live, but lacks autonomy.

---


Concussions and chronic traumatic encephalopathy will always be a serious risk in activities where individuals are encouraged to attack the head, with techniques travelling at high velocities causing rapid accelerations of the brain within the skull. This explains why many medical bodies, and in particular the British Medical Association, have consistently advocated a complete ban on boxing and other combat sports. However, these risks mentioned must be tempered with the statistical reality that these serious injuries are not occurring in every match, or indeed anything like every match. A balance must be drawn which attempts to curtail serious risk, by ensuring combat sports participants are provided with the correct equipment, training and advice, and that competitions are conducted by properly trained officials enforcing proper standards. These proper standards may require that certain inherently dangerous techniques be tempered; that the head be removed as a legal target; or that innovative measures be put in place to detract from the emphasis of striking the head, such as points for blocking, or victories by tap-out.

It is submitted, on the basis of the above, that a state would be justified in establishing a regulatory regime which enforced hard paternalistic laws against combat sports participants in line with autonomy-based paternalism. While the risks are serious, they can be adequately responded to without banning these forms of sports. Similarly, the lack of frequent serious brain injuries reported to date should dissuade us from banning such sports on grounds of dignity, as long as those sports can be adequately regulated. The medical evidence, therefore, generally appears to support regulation rather than prohibition.

## Table 1. Rates expressed per 1000 Athlete-Exposures

<table>
<thead>
<tr>
<th>Author</th>
<th>Injury</th>
<th>Concussion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pieter(^{195})</td>
<td>26.8</td>
<td>15.27</td>
</tr>
<tr>
<td>(^{196})</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pieter(^{197})</td>
<td>Male</td>
<td>Female</td>
</tr>
<tr>
<td>(^{198})</td>
<td>139.54</td>
<td>96.49</td>
</tr>
<tr>
<td>Beis(^{199})</td>
<td>Male</td>
<td>Female</td>
</tr>
<tr>
<td>(^{200})</td>
<td>28.76</td>
<td>27.27</td>
</tr>
<tr>
<td>Kazemi(^{201})</td>
<td>Male</td>
<td>Female</td>
</tr>
<tr>
<td>(^{202})</td>
<td>20.55</td>
<td>36.41</td>
</tr>
<tr>
<td>Beis(^{203})</td>
<td>Male</td>
<td>Female</td>
</tr>
<tr>
<td>(^{204})</td>
<td>6.85</td>
<td>2.43</td>
</tr>
<tr>
<td>Koh(^{205})</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Buse*(^{206})</td>
<td></td>
<td>Estimated 48.3</td>
</tr>
<tr>
<td>Ngai*(^{207})</td>
<td></td>
<td>16.5</td>
</tr>
<tr>
<td>Zazryn(^{208})</td>
<td></td>
<td>109.7</td>
</tr>
</tbody>
</table>

\(^{195}\) All studies were of Taekwondo, except those marked *, which studied mixed martial arts, and ○, which studied kickboxing.


CHAPTER EIGHT - COMPARATIVE REGULATORY SCHEMES

Introductory thoughts on Regulatory Schemes

An important aspect of the regulatory exemption argued for earlier, is a political community’s confidence that the regulatory scheme is effective in minimising unnecessary risk and ensuring individuals are fully informed. As noted, regulatory schemes do not need to be legislatively sanctioned schemes, as is the case in ritual male circumcision for example. Indeed, boxing is also self-regulated in the United Kingdom and Ireland. While there may be a certain degree of confidence in self-regulated boxing, it is on the wane.\textsuperscript{1206} I will now briefly outline some of the main regulatory options for combat sports, considered in two separate reports in Australia concerning the combat sports industry specifically.\textsuperscript{1207} The reports attempt to grapple with the overall effectiveness of each type of regulation. The seven approaches were: self-regulation (code of conduct); industry incentives; information campaigns; quasi-regulation; co-regulation; negative licensing legislative regulation; and positive licensing legislative regulation. Industry incentives\textsuperscript{1208} and information campaigns will not be considered as they were judged to be too costly and generally ineffective by a Victorian regulatory impact report, which dismissed the options quickly.\textsuperscript{1209}

\textsuperscript{1207} Department of Local Government, Planning, Sport and Recreation, Safety for Boxing and Combat Sports: A Discussion Paper to Review Regulatory Options (Queensland, 2007), referred to in the text as the “Queensland report” and Department of Planning and Community Development: Sport and Recreation Victoria, Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement (Melbourne, 2008), referred to in the text as the “Victoria report”.
\textsuperscript{1208} This would involve an offer of economic incentives for compliance with some form of good practice code; Department of Planning and Community Development: Sport and Recreation Victoria, Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement (Melbourne 2008), at 29.
\textsuperscript{1209} Department of Planning and Community Development: Sport and Recreation Victoria, Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement (Melbourne 2008), at 29.
Both reports investigate the idea of self-regulation for the combat sports industry. Self-regulation refers to some form of code of practice being accepted and adopted throughout an industry, which is also acceptable to the political community in general.\textsuperscript{1210} Enforcement of standards is carried out by the industry itself, and hence there is very little cost to the state under such a scheme.\textsuperscript{1211} This was one of the advantages recognised in both reports.\textsuperscript{1212} Another major advantage would be the direct control by experienced industry experts, which can lead to innovation in the industry.\textsuperscript{1213} However, the requirement that a code be accepted throughout the industry appears to account for why self-regulation is not appropriate in the combat sports industry. Boxing and martial arts are notoriously fragmented.\textsuperscript{1214} There is no one body that represents or exercises governing authority over these activities. This would lead to the state being unable to effectively communicate with industry participants, or assess the effectiveness of any self-regulatory code.\textsuperscript{1215} The same argument would apply against quasi-regulation and co-regulation in the combat sports industry.\textsuperscript{1216} The Victoria report comments that self-regulation is usually more appropriate in unified

\textsuperscript{1210}Department of Planning and Community Development: Sport and Recreation Victoria, \textit{Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement} (Melbourne 2008), at 36. \\
\textsuperscript{1211}Department of Planning and Community Development: Sport and Recreation Victoria, \textit{Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement} (Melbourne 2008), at 36. \\
\textsuperscript{1213}Department of Planning and Community Development: Sport and Recreation Victoria, \textit{Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement} (Melbourne 2008), at 36. \\
\textsuperscript{1214}Department of Planning and Community Development: Sport and Recreation Victoria, \textit{Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement} (Melbourne 2008), at 36 and Department of Local Government, Planning, Sport and Recreation, “Safety for Boxing and Combat Sports: A Discussion Paper to Review Regulatory Options (Queensland, 2007), at 17. One notable exception in Ireland is perhaps the Irish Martial Arts Commission, which does attempt to bring many different styles of combat sports under its umbrella. However, it by no means accounts for all martial arts in Ireland and therefore is only partially successful. \\
\textsuperscript{1215}Department of Planning and Community Development: Sport and Recreation Victoria, \textit{Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement} (Melbourne 2008), at 36. \\
industries, which have common interests and goals. It further says that it is more suitable to low risk activities. Given that the combat sports industry involves high risks, and these risks can lead to “catastrophic consequences”, self-regulation was deemed to be an ineligible option. Saxon is also critical of self-regulation, noting the opportunity for vested interests to influence decisions or a type of old-boy’s club to develop. He also notes that self-regulatory bodies often lack the legal powers required to enforce sanctions. Ultimately, the Victoria report comes to the conclusion that self-regulation would not fulfil the Victorian State’s objectives of reducing the risk of injury and malpractice. The Queensland report was also negative about this approach, doubting if it would improve practices in Queensland.

Negative licensing, interestingly, penalises those who have been found incompetent or irresponsible, and so are precluded from participating in the industry. While this regulatory approach would require a legislative act enacting a code of practice, it would not require any licensing or registration body. Rather, when breaches of the Act are identified, the perpetrators can be closely monitored and depending on the severity or length of the breach, can be ordered to cease any involvement with the industry. The Victoria report voices concerns that this approach would be too reactive,

1217 Department of Planning and Community Development: Sport and Recreation Victoria, Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement (Melbourne 2008), at 36.
1218 Department of Planning and Community Development: Sport and Recreation Victoria, Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement (Melbourne 2008), at 36.
1219 Department of Planning and Community Development: Sport and Recreation Victoria, Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement (Melbourne 2008), at 36.
1222 Department of Planning and Community Development: Sport and Recreation Victoria, Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement (Melbourne 2008), at 37.
1224 Department of Planning and Community Development: Sport and Recreation Victoria, Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement (Melbourne 2008), at 37.
and thus severe injuries might have to occur before breaches of the act would be detected.\footnote{1225}{Department of Planning and Community Development: Sport and Recreation Victoria, \textit{Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement} (Melbourne 2008), at 38.}

I use the term “positive-licensing” legislative approach merely to distinguish it from the negative licensing approach which would also be legislative. The positive licensing approach does much more, however, than establish licensing procedures for industry participants. It tends to require the establishment of some form of commission to oversee this licensing procedure to ensure individuals have met certain requirements before being licensed. In this sense, this approach is much more proactive than reactive, and therefore has much more potential for avoiding serious injuries. As the Queensland report pointed out, not only does the establishment of such commissions ensure better compliance with regulations, but it can also operate as a tool to foster strong relations with the industry.\footnote{1226}{Department of Local Government, Planning, Sport and Recreation, \textit{"Safety for Boxing and Combat Sports: A Discussion Paper to Review Regulatory Options} (Queensland, 2007), at 20.}

The Victoria report estimated that this form of regulation would cost the industry and government AUS1,547,000 over a 10 year period.\footnote{1227}{Department of Planning and Community Development: Sport and Recreation Victoria, \textit{Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement} (Melbourne 2008), at 32.} However, the actual cost to the state would be considerably less, as the monies received from the industry would be in excess of the administrative costs.\footnote{1228}{Department of Planning and Community Development: Sport and Recreation Victoria, \textit{Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement} (Melbourne 2008), at 31-32.} Although recognising the philosophical issues involved in attempting to put a price on a human life, the Victoria report nevertheless adopts the figure of AUS3.5 million for illustrative purposes, from international research.\footnote{1229}{Department of Planning and Community Development: Sport and Recreation Victoria, \textit{Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement} (Melbourne 2008), at 33.} At this value, the report says, “if the proposed Regulations alone contribute to the prevention of one death over a 25 year period, then the benefits
would outweigh the costs”. Similarly, if the legislation prevented one serious brain injury every 15 years, the benefits would outweigh the costs.1231

Of course, the potential benefit of legislation of this kind can only be judged in relation to its content, but if the content was effective it could give rise to:

- improved safety to participants and lower mortality;
- better quality of life for contestants;
- reduced long-term costs of health care to the community; and
- a better quality of event for spectators.”1232

Indeed, in the vast majority of Australian states, this positive licensing legislative scheme has been the preferred regulatory option. The same can be said for the majority of the states in the United States of America.

**Regulation in Australia**

Most Australian states and territories have regulated the combat sports industry. In fact some states have been regulating combat sports since the mid 1980s,1233 long before regulation was considered in the USA. However, Queensland, the Northern Territory and Tasmania have not regulated these sports, which may potentially lead to border hopping in order to conduct promotions that might not have been sanctioned in regulated states. The style of regulation in Australia generally consists of establishing a board to licence industry participants and ensure that combatants are medically fit to fight. Victoria was the first state to consider regulating combat sports aside from

---

1233 Martial Arts Control Act 1986 (Vic).
boxing, and has since developed standard-setting legislation in this area. There will therefore be an in-depth analysis of how regulations work in that state, and what is required of industry participants. This will be followed by briefer looks at other regulatory regimes in Australia, noting peculiarities and innovations.

Victoria

The Professional Boxing and Combat Sports Act 1985

The Australian state of Victoria has had a relatively long and active history when it comes to regulating the combat sports industry. Since 1986 there have been seven acts passed by the Victorian legislature regarding martial arts. Most of these acts were amendment acts, but it is still noteworthy that the legislature took the time to pass through so many legislative instruments in this area.

The current Act which regulates the combat sports industry in Victoria is the Professional Boxing and Combat Sports Act 1985. Section 3 sets out that the purpose of the Act is to control, reduce risks and promote safety in professional boxing and combat sports. Combat sports are defined as kickboxing, or:

“any sport or activity (other than boxing) in which each contestant in a contest or exhibition of that sport or activity is required to strike, kick, hit, grapple with, throw or punch the other contestant, and that is determined by the Minister to be a combat sport for the purposes of this Act”.

The Act’s provisions essentially revolve around contests, as it only regulates professional contests. A contest will be professional if is it conducted for profit, if the

---

1234 Martial Arts Control Act 1986 (Vic); Martial Arts Control (Amendment) Act 1989 (Vic); Martial Arts Control (Amendment) Act 1990 (Vic); Martial Arts Control (Further Amendment) Act 1991 (Vic); Professional Boxing and Martial Arts Act 1996 (Vic), creating the Professional Boxing and Martial Arts Act 1985 (Vic); and Professional Boxing and Martial Arts (Amendment) Act 2001 (Vic), creating the Professional Boxing and Combat Sports Act 1985 (Vic); Professional Boxing and Combat Sports (Amendment) Act 2008.
contestants fight for a monetary reward, or if the public is admitted for a fee. There are two exceptions to the latter criterion. If the fee is charged for a charitable purpose, then the contest will not be a professional one. More interestingly, if the contest is being organised by an amateur association, that association can apply to the Minister to be recognised as such, and therefore be excused from the remit of the Act. Section 5A provides for the Minister to recognise, or withdraw recognition from, an amateur association. However, the Minister can only recognise an amateur association, on the advice from the Board that the particular association is suitable for such recognition.

The use of the word “amateur” here is a misnomer, as it often is when used in sport. It appears that the Minister/Board are not so much interested in whether the sport is amateur. Rather they are interested in whether the sport is full-contact. Further, they are interested in how the sport is self-regulated. These are the criteria that were taken into account when the Board rejected an application for Kyokushin Karate to be classified as an amateur combat sport. The Board noted that this style of karate is full contact and that contestants can win by knockout. This gives rise to the same health concerns that occur in the professional sports, and thus the Board wanted to be able to control, *inter alia*, how frequently competitors fought for their own safety. They also note that the particular style of karate in question is fragmented, with no clear governing organisation in place and instructors operating independently of each other. This leads to questions about the accreditations of those officiating at the event. The Minister accordingly, on the advice of the Board, denied the request. The

---

1237 Professional Boxing and Martial Arts Board, “Declaration of a Martial Art for the Purposes of the Act” (Memo to the Minister for Sport and Recreation, 3 April, 2000), at [5].
1238 Professional Boxing and Martial Arts Board, “Declaration of a Martial Art for the Purposes of the Act” (Memo to the Minister for Sport and Recreation, 3 April, 2000), at [13].
1239 Professional Boxing and Martial Arts Board, “Declaration of a Martial Art for the Purposes of the Act” (Memo to the Minister for Sport and Recreation, 3 April, 2000), at [13].
Minister also exercised his powers under section 5A, to recognise any variant of cage fighting as a professional combat sport for the purposes of the Act.\(^{1240}\)

Promoters, trainers, match-makers, referees and judges all must hold licences granted by the Board.\(^{1241}\) There are exceptions to these rules for people involved in the industry in other states.\(^{1242}\) However, there are no exceptions for promoters.

Promoters are arguably one of the most heavily regulated industry participants. They are required to have an appropriate knowledge of the 1985 Act, the 2008 Regulations, and any rules or conditions prescribed by the Board.\(^{1243}\) A permit for a promotion will only be issued if the promoter can show, \textit{inter alia}, that the contestants have been properly matched with regard to experience and weight,\(^{1244}\) and that female contestants will not be pitted against male contestants.\(^{1245}\) The promoter is also under a statutory duty to ensure there is a medical practitioner at the promotion.\(^{1246}\) A variety of very detailed conditions attach to a promoter’s licence. One of the more important conditions is that the promoter is prohibited from dealing with unlicensed trainers and contestants, and it is the promoter’s responsibility to ensure that trainers and contestants they are dealing with are fully registered.\(^{1247}\) Further, the promoter must ensure there is


\(^{1241}\) A person who acts in any of these roles in the context of a professional contest or contestant without a licence, will be liable to imprisonment for a term of 12 months, and/or payment of a fine of 120 units, which at the time of writing would be worth approximately AU$14,334, or €10,463: S.8(1) Professional Boxing and Combat Sports Act 1985 (Vic).

\(^{1242}\) S.8 (2) Professional Boxing and Combat Sports Act 1985 (Vic).

\(^{1243}\) S.5 (2) Professional Boxing and Combat Sports Regulations 2008 (Vic); S.5 also provides that they must pay a fee of AU$225 to attain a licence which lasts for three years and S. 6 provides that a fee of AU$100 is payable for a permit for each individual promotion.

\(^{1244}\) S.6 (c) Professional Boxing and Combat Sports Regulations 2008 (Vic).

\(^{1245}\) S.6 (g) Professional Boxing and Combat Sports Regulations 2008 (Vic).

\(^{1246}\) S.13 (1) (d) Professional Boxing and Combat Sports Act 1985 (Vic).

\(^{1247}\) Professional Boxing and Combat Sports Board, “Conditions Attached to the Promoter’s Licence”, at [5].
a stretcher by the ringside, and that the nearest hospital is informed five days prior to the promotion, of the date, start time and venue of the promotion. They must also provide contestants with gloves, and competitors must have the same weight and make of glove. Weigh-ins must be held 24 hours prior to the contest. Finally, promoters may not bring the sport into disrepute, by, for example, questioning decisions of officials.

Trainers, match-makers, referees and judges all must be acquainted with the Act, regulations, rules and conditions, just as the promoter must be. Trainers also must have a current First Aid certificate. Again, important conditions attach to a trainer’s licence, including ensuring that their contestant is fit for all contests, and that they are properly matched. They also have a duty not to allow their contestants to compete within a month (or longer if a doctor prescribes it) after being knocked-out or suffering heavy punishment. Match-makers must have sufficient experience in the industry and a good knowledge of contestants and their skills. Ensuring that contestants are properly matched is a strong theme throughout the regulations and conditions.

1248 Professional Boxing and Combat Sports Board, “Conditions Attached to the Promoter’s Licence”, at [7(d)].
1249 Professional Boxing and Combat Sports Board, “Conditions Attached to the Promoter’s Licence”, at [17].
1250 Professional Boxing and Combat Sports Board, “Conditions Attached to the Promoter’s Licence”, at [12(i)].
1251 Professional Boxing and Combat Sports Board, “Conditions Attached to the Promoter’s Licence”, at [12(i)].
1252 Professional Boxing and Combat Sports Board, “Conditions Attached to the Promoter’s Licence”, at [14].
1253 Professional Boxing and Combat Sports Board, “Conditions Attached to the Promoter’s Licence”, at [18].
1254 S.7 (2) (a) Professional Boxing and Combat Sports Regulations 2008 (Vic).
1255 S.7 (2) (b) Professional Boxing and Combat Sports Regulations 2008 (Vic).
1256 Professional Boxing and Combat Sports Board, “Conditions Attached to a Trainer’s Licence”, at [1(iii)].
1257 Professional Boxing and Combat Sports Board, “Conditions Attached to a Trainer’s Licence”, at [1(iv)].
1258 Professional Boxing and Combat Sports Board, “Conditions Attached to a Trainer’s Licence”, at [9].
Referees must also be licensed and the conditions that attach to the licence may include a psychological examination, but more importantly dictate the circumstances in which the referee must bring a contest to an end. These include situations where a contestant cannot rise after a 10 second count; they are unable to defend themselves and there is a risk of serious injury being sustained if the contest continues; serious injury has been sustained, and in consultation with the doctor, the contest is ended to ensure further serious injury is not caused; they are knocked to the floor 3 times in one round; or the medical practitioner orders that the fight be stopped.

Section 10 of the 1985 Act provides that it is an offence for anyone to participate in a professional contest without being registered, with a penalty of 120 penalty units, or 12 months imprisonment, or both. This section does not apply to individuals registered with authorities in another state or territory. However, interestingly, it seems as though individuals from states and territories that do not regulate combat sports will have to register with the Board under the 1985 Act, as there is no provision for such an exemption. An applicant must pay a fee of AU$50 to be registered, and must submit a certificate from a medical practitioner declaring their fitness to participate in a professional contest, signed not more than 14 days before the application is submitted. Furthermore, they must meet certain prerequisites that the Board sets down. The 2008 Regulations set out these prerequisites which include informing the Board of all recent amateur and professional contests competed in, and

1259 Professional Boxing and Combat Sports Board, “Conditions Attached to a Referee’s Licence”, at [2]; similar requirements are attached to a judge’s licence, see Professional Boxing and Combat Sports Board, “Conditions Attached to a Judge’s Licence”, at [1].
1260 Professional Boxing and Combat Sports Board, “Conditions Attached to a Referee’s Licence”, at [4].
1261 Currently AU$14,334, or approximately €10,463.
1263 S.10 (2) Professional Boxing and Combat Sports Act 1985 (Vic).
1264 S.8 (1) (b) Professional Boxing and Combat Sports Regulations 2008 (Vic).
1265 S.10A (2) (d) Professional Boxing and Combat Sports Act 1985 (Vic).
1267 S.8 (2) (a) Professional Boxing and Combat Sports Regulations 2008 (Vic).
the submission of a form certifying that the contestant does not have (or it is not expected that they will develop within the next 6 months), blood infected with HIV, Hepatitis B or Hepatitis C. Of particular interest is the requirement set out at S. 8 (2) (c) which requires:

“that the applicant possesses an adequate level of the following skills for professional contests—
(i) defensive skills, including evasive skills and speed of reaction;
(ii) mobility and ring generalship;
(iii) strategic and tactical awareness;
(iv) endurance and stamina.”

These criteria certainly speak to a major concern that arose throughout the medical literature of contestants actually having attained a certain level of skill before competing (or competing professionally). In order to ensure the integrity of medical and fight records, contestants registered in Victoria who compete outside of Victoria must enter the details of the contest, its result and if any injuries were sustained. It is also of interest to note that in order to be registered, contestants must sign the following clause:

“I understand that boxing and combat sports are hazardous activities that may lead to serious injury. In particular, successive blows to the head may lead to movement of the brain within the skull of a contestant, rupturing veins, and in rare cases, arteries. The resulting bleeding may lead to the formation of blood clots, causing pressure inside the skull, restricting the supply of oxygen to the brain and causing serious damage to the brain and even death. In seeking registration as a professional contestant I knowingly accept this risk.”

---

1268 S.8 (2) (b) Professional Boxing and Combat Sports Regulations 2008 (Vic) and Form 7 of the Regulations.
1270 Form 4, Professional Boxing and Combat Sports Regulations 2008 (Vic).
Again there are specific conditions attached to a contestant’s registration. After a contest, they must not leave the stadium until the doctor has examined them.\textsuperscript{1271} If they are knocked out, they must stay at the venue until the doctor permits them to leave, and must go to hospital if so directed by the doctor.\textsuperscript{1272} They are also required to wear groin guards and dentist or advanced dental technician fitted mouth guards in every contest.\textsuperscript{1273} Contestants who lose six contests in a row will be required to pass an examination by the Board.\textsuperscript{1274} If a contestant fights for 6 rounds or less, they are prohibited from fighting again for 7 days, and for 14 days if the contest was 7 rounds or more.\textsuperscript{1275} They are prohibited from fighting for one month (or longer if so directed by a doctor) if they are knocked out by a blow to the head.\textsuperscript{1276} This rule is restated in the conditions that attach to promoters’, match-makers’ and trainers’ licenses.\textsuperscript{1277} If there is a second loss by knockout or technical knockout, the contestant may not compete for two months after the loss.\textsuperscript{1278} If there is a third loss by the same means, they are prohibited from fighting for three months. On a fourth occasion the contestant’s registration will be reassessed by the Board and the contestant will be prohibited from

\textsuperscript{1271} Professional Boxing and Combat Sports Board, “Conditions Attached to the Issue of a Contestant Registration”, at [1].
\textsuperscript{1272} Professional Boxing and Combat Sports Board, “Conditions Attached to the Issue of a Contestant Registration”, at [6] & [7].
\textsuperscript{1273} Professional Boxing and Combat Sports Board, “Conditions Attached to the Issue of a Contestant Registration”, at [2].
\textsuperscript{1274} Professional Boxing and Combat Sports Board, “Conditions Attached to the Issue of a Contestant Registration”, at [4].
\textsuperscript{1275} Professional Boxing and Combat Sports Board, “Conditions Attached to the Issue of a Contestant Registration”, at [8].
\textsuperscript{1276} Professional Boxing and Combat Sports Board, “Conditions Attached to the Issue of a Contestant Registration”, at [9].
\textsuperscript{1278} Professional Boxing and Combat Sports Board, “Conditions Attached to the Issue of a Contestant Registration”, at [10].

320
fighting for four months. Having been knocked-out, a contestant must be cleared by a
doctor before being permitted to compete again.  

Contestants must undergo medical tests within 24 hours before and after every
contest, and must undergo a fitness test at least once a year. If the medical
practitioner finds the contestant to be unfit, they must declare them to be so, and give
notice to the contestant, the Board, and if relevant, the promoter. Failure to do so will
attract a fine of 120 penalty units and/or 12 months imprisonment. The pre- and
post-contest testing applies to all contestants taking part in contests in Victoria, even
those normally resident in other states or territories. In a post-contest examination,
the medical practitioner must note details such as the result and how the result was
achieved. They must also make suitable arrangements for the observation,
transportation and medical treatment of any contestants that were knocked-out or were
subject to heavy punishment in the contest.

Contestants must also undergo a blood test before each contest, unless they have
had one within the previous six months. The medical practitioner must decide
whether the contestant is fit, having regard to any virus the contestant’s blood has been
exposed to, the treatment they are receiving for it, and whether it is infectious.

The 1985 Act provides for the establishment of the Professional Boxing and
Combat Sports Board, for the purposes of: advising the Minister on all issues
relating to professional contests; exercising powers, duties and functions under the 1985

---

1279 Professional Boxing and Combat Sports Board, “Conditions Attached to the Issue of a Contestant
Registration”, at [11].
1284 S.12 (2) Professional Boxing and Combat Sports Regulations 2008 (Vic).
1285 S.12 (3) Professional Boxing and Combat Sports Regulations 2008 (Vic).
1286 S.14 (1) & (2) Professional Boxing and Combat Sports Regulations 2008 (Vic).
1287 S.14 (3) Professional Boxing and Combat Sports Regulations 2008 (Vic).
Act; and to supervise conduct at weigh-ins and contests.\textsuperscript{1289} It has all the powers necessary to carry out its functions.\textsuperscript{1290} The Minister appoints all members to the Board.\textsuperscript{1291} It may consist of 5 to 7 members, and must include a member of the Victorian police, and 3 to 5 others who, in the Minister’s opinion, have a good knowledge of boxing, or one or more combat sports.\textsuperscript{1292} Certain decisions of the Board relating to promotions, like cancelling a permit for a promotion, can be appealed to the Minister.\textsuperscript{1293} In turn, similar decisions and decisions regarding registering (or refusing to register) contestants can be appealed to the Victorian Civil and Administrative Tribunal.\textsuperscript{1294} Section 23 of the 1985 Act provides that the Board may make rules for the proper conduct of professional contests. This potentially gives the Board the power to regulate what techniques are used, and what legal target areas are.

Ultimately, the question of consensual violence in the context of combat sports does not depend upon consent in Victoria. The lines are rather clearly drawn in the sand between regulated, exempted and illegal conduct. Conduct which does not fall into the first two categories, falls into the last.

I will now briefly survey some of the most interesting aspects of the regulatory schemes in other Australian states.

\textsuperscript{1289} S.14A (1) Professional Boxing and Combat Sports Act 1985 (Vic).
\textsuperscript{1290} S.14A (3) Professional Boxing and Combat Sports Act 1985 (Vic).
\textsuperscript{1291} S.14 (4) Professional Boxing and Combat Sports Act 1985 (Vic).
\textsuperscript{1292} S.14 (3) Professional Boxing and Combat Sports Act 1985 (Vic).
\textsuperscript{1293} S.15 (8) Professional Boxing and Combat Sports Act 1985 (Vic).
\textsuperscript{1294} S.16 (1) Professional Boxing and Combat Sports Act 1985 (Vic).
Other States

In Western Australia the membership of the Professional Combat Sports Commission\textsuperscript{1295} must include a medical practitioner and individuals who have actually participated in boxing and combat sports.\textsuperscript{1296} The inclusion of a medical practitioner on the Commission, gives the Commission the benefit of their professional insight into medical health issues and the new literature published in this area. The Act also provides for contestants to be issued with medical record books,\textsuperscript{1297} which is an effective way of keeping a detailed account of a fighter’s medical history while competing. The regulations attaching to the Act are also comprehensive, and among other things, provide for referees, judges and timekeepers to present details of their experience, qualifications and accreditation when applying to be licensed.\textsuperscript{1298} It is also noteworthy that most offences under the Western Australian legislation attract substantially less punishments than the Victorian equivalents.\textsuperscript{1299}

In 2009 it was proposed that the 1987 Act be replaced by the Professional Combat Sports Amendment Bill. This Bill, however, has not yet been enacted. If it is enacted, it will extend the scope of regulation into the amateur arena. One of the aims of the Bill is to increase harm minimisation by subjecting amateur contests to the same regulations as professional contests.\textsuperscript{1300} Most amateur, non-full contact, combat sports would therefore have to apply to be put on a prescribed list so that their contests do not

\begin{footnotesize}
\begin{itemize}
\item This Commission is the equivalent to the Professional Boxing and Combat Sports Board in Victoria.
\item S. 4 (iii), (vi), (vii) Professional Combat Sports Act 1987 (WA).
\item S. 35 Professional Combat Sports Act 1987 (WA).
\item S. 10 Professional Combat Sports Regulations 2004 (WA).
\item For example, individuals not registered to compete in professional contests face a punishment of AU$1000 and/or 6 months imprisonment; S. 24 Professional Combat Sports Act 1987 (WA); the similar offence in Victoria attracts 120 penalty units (currently AU$14,334) and/or 12 months imprisonment; S. 10 Professional Boxing and Combat Sports Act 1985 (Vic).
\end{itemize}
\end{footnotesize}
come within the Bill, which would give the Commission an opportunity to assess those sports’ self-regulatory structures. The 2009 Bill also misguidedly purports to introduce rules whereby the Commission could access police records on an applicant to ensure that they are a “fit and proper person”.\footnote{S. 55 Professional Combat Sports Amendment Bill 2009 (WA). The New South Wales legislation contains similar (although less powerful) provisions at S. 68 (1) (c) (i) Combat Sports Act 2008 (NSW).} It is submitted that such a power is not within the proper remit of a sports regulatory commission, and is certainly outside the scope of the philosophical framework presented in previous chapters, as such a power has nothing to do with ensuring participant safety.

An interesting feature of the New South Wales (NSW) legislation in this area is the requirement that first-time-registering industry participants (apart from promoters) must undertake an obligatory combat sport medical accreditation course, conducted by or on behalf of the Authority,\footnote{The Combat Sports Authority, which is the NSW equivalent to Professional Boxing and Combat Sports Board in Victoria.} or indeed any other course the Authority might deem appropriate.\footnote{S. 25 Combat Sports Regulations 2009 (NSW).} Such training would be useful to ensure referees and judges had reached a unified standard before officiating at professional contests. It should also be noted that the fines imposed by the NSW legislation are easily the greatest among the regulating states in Australia. The potential fine for conducting a promotion without a permit is 500 penalty points, or, at the time of writing, AU$55,000.\footnote{S. 34 Combat Sports Act 2008 (NSW).} It also applies to promoters who allow unfit combatants to fight,\footnote{S. 45 Combat Sports Act 2008 (NSW).} or who allow combatants to fight who have not undergone a medical exam within 24 hours of the fight.\footnote{S. 43 Combat Sports Act 2008 (NSW).}

The most notable feature of South Australia’s regulatory scheme is the welcome requirement that medical practitioners take into account the results of an MRI scan before declaring the contestant fit to be registered under the Act.\footnote{S. 5 (4) Boxing and Martial Arts Regulations 2002 (SA).} The MRI scan...
must have been taken within three years before the medical examination. This is a development that is not seen in the other equivalent pieces of legislation in Australia. Considering the possible cumulative effects of brain injuries, such a development is a step in the right direction. Furthermore, as the contestant must renew their registration every three years, this means that they will have to undergo MRI scans every three years, which may be crucial in identifying any brain-related problems that develop over the course of the contestant’s career.

**United States of America**

Regulation of combat sports in the United States has been of a different evolutionary character to that in Australia. There is something organic in the way that Australian states have developed regulatory frameworks, from an original recognition that martial arts were potentially dangerous fighting sports to more sophisticated pieces of legislation inspired by the experiences of the local commissions and the input of industry experts. The situation in the United States is radically different. The story of the regulation of combat sports (other than boxing) seems to be inextricably linked to exponential growth and popularity of mixed martial arts from the early 1990s up to the present. It should be noted, that when I started working on this project only 22 states regulated mixed martial arts. They are now regulated in 43 states. New York is one of the few remaining states that ban these activities. However, this ban may not last

---

1309 See Chapter Seven, at 274-276.
much longer. Similarly in Canada, for quite some time Ontario was recognised for staunchly enforcing its ban on mixed martial arts. However, it appears as though they will be legalised there too in 2011. “Why the sudden change of heart?”, you might ask.

The growth in regulation in the United States can be almost exclusively attributed to the Ultimate Fighting Championship (UFC). The UFC is actually a profit-driven, promotional company. It therefore organises fights and awards winners its own UFC titles. It is to be distinguished from sanctioning bodies such as the International Sports Combat Federation, the International Boxing Federation, the World Boxing Organisation, World Boxing Council or World Boxing Association. Since 2001, the UFC has been a powerful lobby group for the sport of mixed martial arts. It presents itself as an organisation that state legislatures can have confidence in, as it has a stringent set of rules and a strong policy of not organising promotions in states where mixed martial arts are not regulated. Further, its Vice-President of Regulatory Affairs is the highly experienced Marc Ratner, who, with his strong regulatory background and attitude of running “toward regulation, not away from it” has given the organisation a huge amount of credibility. And while it seems that the UFC will...


1317 See Chapter One, at 18.

organise events outside of the USA in jurisdictions where mixed martial arts are not regulated, it self-regulates by operating as if the event were being hosted in Nevada.

Broadly speaking there are two types of regulatory regimes in the US. The differences are merely administrative. One model delegates all rule making powers to an administrative regulatory body, which are generally the state athletic commissions in the US. The other, more familiar model, is more similar to the Australian approach, where the legislature creates all of the applicable rules and standards via statute and regulations. However, again the act and regulations are generally administered by a state athletic commission which has received delegated powers. In any case, when lobbying legislatures to legalise mixed martial arts, the UFC seems to be chiefly interested in the implementation of the Unified Rules for Mixed Martial Arts. This is one of the chief differences between acts and regulations in the US and Australia: that is the state specifically adopting a list of rules for the conduct of the sport itself.

Nevada

As the UFC self-regulates as if it were operating in Nevada, and as the vast majority of their events are held in Nevada, the Nevada regulatory regime will be taken as being paradigmatic in the US. Smith points out that “the UFC has found the Nevada regulations have been the most complete, efficient, and workable regulations because they have been refined over the hundreds of events that have been hosted in

---

1319 There have been nine UFC events in England and Ireland, where mixed martial arts are not regulated: UFC 38 – London; UFC 70 – Manchester; UFC 75 – London; UFC 80 – Newcastle; UFC 85 – London; UFC 89 – Birmingham; UFC 93 – Dublin; UFC 105 – Manchester; UFC 120 – London.


Further, as the UFC encourages legislatures to follow the Nevada model, the majority of states have adopted laws which are “similar to the language and substance in New Jersey and Nevada’s regulations, therefore sharing many common features”.

**The Revised Statute**

The Nevada Revised Statute, Chapter 467 establishes the Nevada Athletic Commission, also commonly known as the Nevada State Athletic Commission. While the Commission is to consist of only 5 members, it may employ an Executive Director, as well as inspectors. Both members of the Commission and inspectors are prohibited from having any financial interest in any unarmed combat contest of exhibition, and the Executive Director may not pursue any other business or occupation that is inconsistent or in conflict with his or her duties.

The Commission is handed the substantial power to create its own regulations, so as to administer the Chapter. Its jurisdiction covers the direction, management and control of all unarmed combat contests and exhibitions. It therefore possesses the general industry licensing powers, including the responsibility of checking the suitability of an applicant’s character and integrity. Licences can be revoked or suspended if contestants are judged not to have been participating honestly, or indeed if they have committed a foul or engaged in unsportsmanlike conduct. It may also

---

impose penalties of up to $250,000, or in some circumstances, confiscate the entire purse.\textsuperscript{1332}

There are exemptions from the Chapter for unarmed combat contests that take place in schools, colleges or universities, if the participants are bona fide students.\textsuperscript{1333} There is also an exception for “Oriental self-defence” exhibitions, where no dangerous blows are intended to be struck.\textsuperscript{1334} Therefore, the Statute will not apply to most amateur light-contact combat sports.

\textit{The Administrative Code}

Chapter 467 of the Administrative Code is comprised of the regulations that the Commission have adopted in order to administer the Revised Statute. In terms of depth and specificity, these regulations are far more advanced than any of the current Acts or regulations set down in Australia. Martial arts were made subject to the Code with the introduction of § 467.792. It requires any full contact martial arts contests or exhibitions, and its participants, to be registered in accordance with the Code. Further, a copy of the contest’s rules must also be submitted to the Commission for approval. Mixed martial arts have also been brought within the remit of the Code, although they are considered separately from martial arts, but they are subject to the same licensing requirements.\textsuperscript{1335}

\textit{Licensing}

All key industry participants are required to be licensed under the Code, and this includes announcers and seconds, as well as the more typical participants such as

\begin{footnotes}
\footnote{1332} Nev. Rev. Stat. § 467.158. \\
\footnote{1333} Nev. Rev. Stat. § 467.170. \\
\footnote{1334} Nev. Rev. Stat. § 467.173. \\
\footnote{1335} Nev. Admin. Code § 467.795.
\end{footnotes}
matchmakers and referees etc.\textsuperscript{1336} The Commission will review applications from combatants if they have not reached the age of 18; if they have reached the age of 36; if they have competed in more than 425 rounds of unarmed combat; or if they have not competed for 36 months.\textsuperscript{1337} It will also review applications where the applicant has suffered a serious head injury.\textsuperscript{1338} Further, licences will not be granted to an applicant who is blind in one eye, or who has suffered a cerebral haemorrhage.\textsuperscript{1339} As the Commission must be satisfied that an applicant has the ability to compete, the Code provides for a hearing to be held to determine an applicant’s ability, if their ability is questioned.\textsuperscript{1340} With regard to medical testing, applicants must have their physical and mental health examined by a physician, and their eyes tested by an ophthalmologist.\textsuperscript{1341} They must also have had an MRI scan within 5 years preceding the application, as well as blood tests for HIV and the hepatitis virus.\textsuperscript{1342} The requirement of an MRI scan is a welcome addition to the more frequently seen obligations of an applicant, which is only replicated in one Australian state at the moment.

In what is presumably another attempt on the industry’s behalf to distance itself from allegations that it is tied up with criminality, the first requirement that a promoter must fulfil is the ability to prove his/her integrity.\textsuperscript{1343} They must also show their financial security.\textsuperscript{1344} Referees, judges and timekeepers will not be licensed if they have been convicted of a felony or some other crime involving “moral turpitude”.\textsuperscript{1345}

\textsuperscript{1336} Nev. Admin. Code § 467.012(1); Licences only last for one year and the fees range from $25 for contestants and promoters of amateur boxing contests, to $100 for matchmakers, announcers and managers, and $500 for promoters, see Nev. Admin. Code § 467.012(6), § 467.052(4), (5).
\textsuperscript{1337} Nev. Admin. Code § 467.017(1).
\textsuperscript{1338} Nev. Admin. Code § 467.017(4).
\textsuperscript{1339} Nev. Admin. Code § 467.017(2), (3).
\textsuperscript{1340} Nev. Admin. Code § 467.022.
\textsuperscript{1341} Nev. Admin. Code § 467.027.
\textsuperscript{1342} Nev. Admin. Code § 467.027.
\textsuperscript{1343} Nev. Admin. Code § 467.052.
\textsuperscript{1344} Nev. Admin. Code § 467.052.
\textsuperscript{1345} Nev. Admin. Code § 467.062.
Ringside physicians must maintain their cardiopulmonary resuscitation certification or an equivalent or higher qualification in order to be licensed.1346

Sections 467.093 to 467.151 cover contracts and financial arrangements. The tenor of these sections is largely to protect (vulnerable) contestants from unfair exploitation from promoters and managers. For example, managers may not participate in more than 33.3% of a contestant’s earnings,1347 and promoters may neither manage a contestant,1348 nor pay a contestant in advance or loan them money, without the express written consent of the Commission.1349 This could be to avoid situations where a fighter has received an advance and therefore is forced to fight, even though they no longer wish to, but cannot repay the advance. A final important section is the obligation on the promoter’s behalf to have insurance coverage of at least $50,000 per contestant for medical, surgical and hospital care.1350 The terms of the policy must not require the contestant to pay any deductibles.1351 If the contestant pays his medical expenses, they (or their estate) must be reimbursed from the insurance policy.1352 Promoters of amateur contests or exhibitions are subject to similar requirements, although the amount of the insurance need only be $25,000.1353 This is another innovative obligation to place on the promoter which is not a feature of Australian regulation, broadly understood.

Promotions

There are also detailed provisions with regard to organising and promoting a contest or exhibition, including what provisions are required for facilities and equipment at a program. For example, specific requirements are set out with regard to gloves to be used. Further, an ambulance must be present at every program, as well as two advanced emergency medical technicians. Indeed, if the ambulance leaves at any point, the program may not continue, until one returns. If an ambulance and/or the medical technicians cannot attend due to the program’s location, the highest level of medical transport available in that area must be present and the highest trained medical technicians in that area must be present. The promoter must also contact the nearest local ambulance or emergency service to put them on notice of the event and to ascertain the length of time it will take for one of their vehicles to reach the site. Notice must also be given to the nearest hospital and the people in charge of its emergency room.

Similar, but more strict, to requirements in Australian jurisdictions, mixed martial arts contestants may not compete, without the Commission’s special permission, unless 4 days for every round they fought in their last fight has elapsed. The pre-fight medical examination is also to take place at the weigh-in. As is to be expected, a finding by a medical practitioner that the contestant is unfit to compete will prevent the contestant from competing.

1355 Nev. Admin. Code § 467.427; the gloves used must be between 8 and 10 ounces, new and expected by a Commission representative.
Familiar regulations include the obligatory wearing of a mouth guard and abdominal protector, not extending above the umbilicus.\textsuperscript{1364} Unfamiliar, however, is the requirement that contestants be “clean and present a tidy appearance”.\textsuperscript{1365} Indeed, if it is the Commission’s view that head or facial hair represents a safety hazard, the contestant will not be able to compete until the hair is tidied or removed, depending on the particular case.\textsuperscript{1366} The reasoning behind this rule appears to be the difficulty in dealing with cuts on the face or head obscured or hard to treat due to excessive hair.

The way in which the program is to be conducted is quite thoroughly set out in the Code, with the method of judging and the length of rounds all set down.\textsuperscript{1367} Referees are given discretion under the Code to stop a contest if one of the contestants has been injured.\textsuperscript{1368} Further, they may stop a contest where it has become one-sided, or where it appears that one or both of the contestants are not competing honestly.\textsuperscript{1369} The latter reason may also lead to the Commission changing the decision of a contest afterwards.\textsuperscript{1370}

Sections 467.792 to 467.7968 broadly represent Nevada’s implementation of the Unified Rules of Mixed Martial Arts. Again, there is a lot of attention to detail. The contest may take place in a fenced area (a cage) as well as a ring, and strict requirements are set out.\textsuperscript{1371} The duration of bouts will depend on whether it is a championship contest or not. Championship contests must be five rounds, while non-championship

\textsuperscript{1364} Nev. Admin. Code § 467.592(4).
\textsuperscript{1365} Nev. Admin. Code § 467.598(1); in Victoria a contestant’s hair may not obstruct their vision or put their safety, or that of their opponent’s at risk; Professional Boxing and Combat Sports Board, “Conditions Attached to the Issue of a Contestant Registration”, at [2(f)].
\textsuperscript{1366} Nev. Admin. Code § 467.598(3).
\textsuperscript{1367} Nev. Admin. Code § 467.7958, § 467.7954.
\textsuperscript{1368} Nev. Admin. Code § 467.713.
\textsuperscript{1369} Nev. Admin. Code § 467.718, § 467.723.
\textsuperscript{1370} Nev. Admin. Code § 467.770(1); A decision may also be changed after the fight in circumstances where there has been an error in calculating the scorecards (Nev. Admin. Code § 467.770(2)); the provisions of the Code have been misinterpreted (Nev. Admin. Code § 467.770(3)); or where an individual has been found to have taken prohibited substances (Nev. Admin. Code § 467.850(6)).
\textsuperscript{1371} Nev. Admin. Code § 467.7952.
contests may not exceed 3 rounds. A round is to last 5 minutes in either case.

Section 467.7962 adopts the Unified Rules’ list of fouls. These fouls are not only an important part of the rules, they also form a basis on which there can be serious disciplinary action taken against the perpetrator. Unlike in the early days of the UFC, when the intentional gouging of an eye might attract a fine of $1,000 (from a winning prize of $60,000), the Code allows for the perpetrator to be disqualified and for the purse to be withheld. Not only can the referee decide to deduct the number of points he sees fit, given the severity of the foul, if he decides that a contestant cannot continue due to an injury sustained from an intentional foul, he may disqualify the contestant who committed the foul. The disqualified contestant would thus lose the contest. Indeed, if the intentional foul causes an injury which leads to the contest being stopped in a later round, the injured contestant will win by a technical decision if he is ahead on points. The contest will be deemed a technical draw if the contestant who

---

1374 These fouls are: 1. Butting with the head; 2. Eye gouging of any kind; 3. Biting; 4. Hair pulling; 5. Fishhooking; 6. Groin attacks of any kind; 7. Putting a finger into any orifice or into any cut or laceration on an opponent; 8. Small joint manipulation; 9. Striking to the spine or the back of the head; 10. Striking downward using the point of the elbow; 11. Throat strikes of any kind, including, without limitation, grabbing the trachea; 12. Clawing, pinching or twisting the flesh; 13. Grabbing the clavicle; 14. Kicking the head of a grounded opponent; 15. Kneeing the head of a grounded opponent; 16. Stomping a grounded opponent; 17. Kicking to the kidney with the heel; 18. Spiking an opponent to the canvas on his head or neck; 19. Throwing an opponent out of the ring or fenced area; 20. Holding the shorts or gloves of an opponent; 21. Spitting at an opponent; 22. Engaging in any unsportsmanlike conduct that causes an injury to an opponent; 23. Holding the ropes or the fence; 24. Using abusive language in the ring or fenced area; 25. Attacking an opponent on or during the break; 26. Attacking an opponent who is under the care of the referee; 27. Attacking an opponent after the bell has sounded the end of the period of unarmed combat; 28. Flagrantly disregarding the instructions of the referee; 29. Timidity, including, without limitation, avoiding contact with an opponent, intentionally or consistently dropping the mouthpiece or faking an injury; 30. Interference by the corner; 31. Throwing in the towel during competition. This list has recently been amended to include rule 32, which forbids: “Applying any foreign substance to the hair, body, clothing or gloves immediately prior to or during a contest or exhibition that could result in an unfair advantage”, see Nev. Admin. Code §467.7962.
intentionally fouled is level, or ahead on points.\textsuperscript{1380} In order to assist the referee in making a determination as to whether the foul was intentional, he may view a replay at the end of a contest or exhibition which was stopped immediately due to the injury sustained.\textsuperscript{1381}

If a contestant is accidentally fouled, the referee may give that contestant up to 5 minutes to recover, if the referee believes the injury is not serious enough to warrant stopping the fight.\textsuperscript{1382} If the fight must be stopped in the first 2 rounds of a 3 round contest, or in the first 3 rounds of a 5 round contest, the contest will be declared “no decision”.\textsuperscript{1383} If the contest must be stopped after the completion of the 2\textsuperscript{nd} or 3\textsuperscript{rd} rounds, respectively, the contest will be scored on the previous rounds and the round during which the contest was stopped.\textsuperscript{1384} The same method is used if a contest is stopped in a later round because of an injury stemming from an accidental foul earlier.\textsuperscript{1385}

Finally, the Commission may suspend or revoke the licence of a person who is “a reputed underworld character”.\textsuperscript{1386} This appears to allow the Commission to treat rumour as fact. As noted above in relation to Western Australia, such powers seem to be outside the scope of a sporting commission’s legitimate aims. It is not altogether clear why an independent regulatory body would or should have such an interest in avoiding the name of a particular sport being tarnished. Perhaps the reason lies in the state not wanting to play a role in legitimising an activity which has been brought into disrepute throughout the political community?

\textsuperscript{1380} Nev. Admin. Code § 467.698(3)(b).
\textsuperscript{1381} Nev. Admin. Code § 467.682(4).
\textsuperscript{1382} Nev. Admin. Code § 467.7966(1).
\textsuperscript{1383} Nev. Admin. Code § 467.7966(2).
\textsuperscript{1384} Nev. Admin. Code § 467.7966(3).
\textsuperscript{1385} Nev. Admin. Code § 467.7966(4).
\textsuperscript{1386} Nev. Admin. Code § 467.885(5)(d).
Other States

Most states take the Nevada model as instructive when forming their own regulations.\(^{1387}\) While taxes and licence fees may vary, the adoption of the Unified Rules of Mixed Martial Arts is standard. New Jersey is also taken to be instructive. Its adoption of regulations is very similar to that of Nevada, with some technical differences.\(^{1388}\) There are some states, however, where mixed martial arts are legal, but are not regulated under the Unified Rules. Smith points to Colorado as an important example. Colorado uses a system whereby promoters submit a copy of the rules under which the contest will be fought to the Boxing Commission, for its approval.\(^{1389}\) Smith argues that this leaves the promoters with too much discretion and could allow them to conduct fights under rules which put the participants at risk.\(^{1390}\) Although it seems that the real discretion here is with the Boxing Commission. The question is whether the Boxing Commission considers the approval of a competition’s rules as a paper-pushing task, or whether they seriously consider each set of rules submitted. If the latter approach is taken, it could be assumed that the Commission would not allow a contest to go ahead where the rules were unreasonably risky. It should be noted that this style of regulation is similar to that used in South Australia and is also a popular technique for regulating amateur martial arts contests.

Why does Smith think the Unified Rules are so sacrosanct compared to other rule systems? It must be remembered that the Unified Rules are essentially the rules of


\(^{1389}\) 4 Code of Colorado Regulations 740-1(10.009).

the UFC, the most powerful lobbyists for mixed martial arts regulation. But of course the UFC is not the only mixed martial arts promotion company. There are many others. By having the UFC rules adopted in a state, that essentially requires other promotion companies with different rules to change those rules, or indeed it may restrict another promotion company from entering that particular market. Hess provides two interesting examples of this in practice. A Japanese promotions company, the Pride Fighting Championship\textsuperscript{1391} wanted modifications to the Unified Rules before they were adopted in California.\textsuperscript{1392} These modified rules would allow, \textit{inter alia}, kicking a grounded opponent in the head. The UFC opposed these rule modifications and the Californian Athletic Commission sided with them, rejecting the Pride modifications, despite Pride asserting that they would not conduct promotions in that state.\textsuperscript{1393} Further, when Pride promoted a contest in Nevada, it had to amend its rules, so as they complied with the Unified Rules which the Nevada Athletic Commission strictly enforces.\textsuperscript{1394} Therefore, while other organisations have to bend or amend their rules in order to be sanctioned, the UFC does not. Indeed, the UFC will not change its rules for any state. A notable incident occurred in Quebec where their Athletic Commission decided it would not allow UFC 97 to go ahead unless the UFC amended its rules to ban knees and elbows to the head.\textsuperscript{1395} The Commission did this despite having previously allowed a UFC fight to take place, under the normal Unified Rules. The UFC refused to change its rules and

\textsuperscript{1391} The company was subsequently effectively bought out by the owners of the UFC and made defunct.


persuaded the Commission to allow the contest to go ahead in a last moment emergency meeting.\textsuperscript{1396}

The adoption of the Unified Rules also has the advantage of allowing the UFC to live up to its name of “ultimate fighting”, as in states that have adopted the Unified Rules, the UFC is the ultimate form unarmed combat in that state. No other promotion company can go beyond what the UFC allows. Although, of course from the perspective of reducing unnecessary risk, this is not a bad thing.

As noted above, New York is one of the last big states to maintain a ban on mixed martial arts. Section 5-a(2) of Chapter 912 of 1920 prohibits combative sports, which mixed martial arts would be, as they fall within the definition of combative sports outlined in section 5-a(1). There has recently been a big push to get the sport regulated in this important state. Chief among the reasons to regulate appears to be money. A UFC commissioned report points to regulation leading to a total economic output of $16.1 million,\textsuperscript{1397} with the state directly earning about $836,000 in taxes.\textsuperscript{1398} Indeed financial motivation seems to be a reason championed by the sport’s supporters.\textsuperscript{1399} It would be unfortunate if legislators allowed themselves to be blinded by purely economic reasons in confronting this problem. There are much more important issues to be taken into account. In any case, the debate rages on with a stronghold of democrats, led by Assemblyman Bob Reilly, determined to defeat any further attempt to legalise mixed martial arts. They have already defeated two bills to legalise the sport in


\textsuperscript{1397} UFC Event Impacts: Economic Study for New York State” (10 November 2008)

\textsuperscript{1398} UFC Event Impacts: Economic Study for New York State” (10 November 2008)

\textsuperscript{1399} See A. Krause, “MMA Ban and Economic Hard Times” Philosophy of Sport (17 July 2010)
\url{<http://philosophyandsports.blogspot.com/2010/07/guest-post-mma-ban-and-economic-hard.html>}
New York. Reilly published “The Case against Ultimate Fighting in New York State” to counter the UFC’s event impact report, questioning the safety of the sport, the effect of violence on citizens, as well as the validity of the taxation figures in that report. While he has his detractors, he also has his supporters.

The English and Welsh Law Commission Proposals

The English and Welsh Law Commission has published two consultation papers on the area of consent, one in 1994 and one in 1995. The 1994 paper sent shockwaves through the martial arts community despite only one paragraph being devoted to the area. The Commission stated, in reference to martial arts, that:

“Under the present law, and under the proposals made later in this Paper, serious injuries deliberately inflicted during...[dangerous martial arts] would appear, in the absence of an express exemption such as is enjoyed by boxing, to be plainly criminal. The legal status of these sports is thus at present controversial...At the moment we are minded to think that they, like boxing, should be the subject of special consideration by Parliament”.

Farrell rightly asserts that this is merely stating the stark reality that there is neither a statutory nor a common law exemption for martial arts at the moment. In its

chapter on suggested reforms, the Paper went on to state that the exemption for sports from criminal liability would “extend to any activity conducted under the rules of a recognised sport”. What is interesting here is the term “recognised sport”, differentiating between activities which are sports and activities which are not. As shall be seen, this became of paramount importance in the follow-up consultation paper.

The 1995 Consultation Paper was much more comprehensive and gave considerable focus to the whole area of martial arts. The Paper mentions from the outset that the organisation and control of particular martial arts have become very fragmented, with many groups claiming to be governing bodies. Such an assertion acknowledges the reality in the UK and in Ireland which was also apparent to those who formulated the report on the need for combat sports legislation in Queensland. The paper notes the Sports Council’s conclusions that martial art disciplines can be divided into three broad categories, when judged under criteria such as safety, coaching standards, insurance standards and democracy in the governing bodies. In the first category, there is such a level of confidence that recognition can be awarded to both the activity and the governing body. In the second, only the activity could receive recognition, but not the governing body. In the third, the activity itself does not

fulfil the criteria for recognition. It goes on to say that the risk in most light-contact or semi-contact martial arts is not great, as there is a low chance of receiving “repeated heavy concussive blows”, and while heavy blows may be received occasionally, the level of risk remains within acceptable boundaries, and could be considered safer than amateur boxing. However, in the same vein the paper mentions the inadequacy of refereeing at these events. As noted in Chapter Seven, “slack” refereeing increases the danger of such activities significantly. It concludes its discussion by outlining that:

“…our proposals in this paper will provide no protection from the criminal law in relation to those who cause injuries to those who consent to injury or the risk of injury in the course of unrecognised activities of the type we have described, because they will not have the protection afforded to lawful sport. We see no reason why there should be any protection under any new regime for the recognition of sports and martial arts unless those who are involved in the activity are willing to submit it to the discipline of a recognition procedure and to achieve the designation of a ‘recognised sport’…”

The Paper goes on to outline a system of recognition for new activities to become legally sanctioned sports. Farrell submits in his second paper on the area, that “it is the more violent types of martial arts activities which are at greatest risk of running foul of the criminal law”. The Commission clearly indicates that the key factor is that the

1414 See Chapter Seven, at 304.
risk being consented to is “controllable and containable”\textsuperscript{1417}. It was proposed that a recognition system be set up whereby the rules and organisation of activities where there is a substantial risk of injury being caused through intentionally inflicted blows would be examined.\textsuperscript{1418} In particular it was noted that this was necessary due to the lack of anything like the British Boxing Board of Control for these activities.\textsuperscript{1419} Therefore, there was no trusted body exercising control in this area. It noted:

“If the rules of a recognised lawful sport permit the intentional infliction of injury, or even of serious injury, then the infliction of such injury should be sanctioned by the criminal law, and it should be for the expert recognition body to ensure that such risks are appropriately controlled.”\textsuperscript{1420}

It is clear that the Commission had in mind that the Sports Council\textsuperscript{1421} would play the role of the recognition body, as it was already accustomed to recognising new sports.\textsuperscript{1422} However, the Council’s criteria for recognition seem to be more geared towards whether the sport and its governing body should be entrusted with state funding. There are, however, references to safety standards, with two main questions being asked: first, whether the organisation actively encourages awareness and observance of safety standards and rules among participants and spectators and with

\textsuperscript{1421} The Sports Council has now been replaced by UK Sport, and four home country councils; Sport England, Sport Northern Ireland, Sport Wales, Sport Scotland. See ——, “How We Recognise Sports” Sport England <http://www.sportengland.org/about_us/recognised_sports/how_we_recognise_sports.aspx> accessed 11 December 2010.
regard to equipment and facilities?” 1423 Secondly, whether the organisation provides insurance cover for all of its members, and if so, what type? 1424 The Commission felt that while a recognition system for the criminal law may be developed along such lines, there would have to be much more of a focus on safety and “the steps necessary to contain the risk of avoidable injury.” 1425 The Council also had a list of key points for determining whether a sport should be recognised, but the Commission states that only two of these points would actually be helpful for recognising the lawfulness of a sport, those being: “risk (does the activity involve any degree of risk? is this level acceptable? what safeguards are employed by those taking part to minimise any risk?”), 1426 and other considerations, such as, “are there any political, moral or other ethical considerations which might prohibit the Sports Council from recognising the activity?” 1427

Therefore, while some of the current criteria being employed by the Sports Council could be helpful, it is clear that the Commission saw these criteria as merely useful starting blocks which could be (and had to be) built upon. However, as of yet, these criteria have not been developed.

The law reform proposals were that:

“(1) the expression “recognised sport” should mean all such sports, martial arts activities and other activities of a recreational nature as may be set out from time to time in a list to be kept and published by the UK Sports Council in accordance with a scheme approved by the appropriate minister for the recognition of sports, and the rules of a recognised sport should mean the rules of that sport as approved in accordance with the provisions of such a scheme;
(2) when carrying out its duties in relation to the recognition of any such activity the UK Sports Council should consult such organisations which appear to it to have expert knowledge in relation to that activity.”

A regulatory scheme using a recognition system is an interesting alternative to the methods of regulation so far studied. It would actually be a form of self-regulation. The Commission pointed out that the creation of a new public body to regulate combat sports was unlikely. Instead, what was really being sought was a governing body, or several governing bodies akin to the British Boxing Board of Control, which would self-regulate their respective sports. These governing bodies in turn would be recognised by the Sports Council, which would give a public body an opportunity to assess the organisation’s structure, but more importantly, the sport’s rules. These rules would have to be evaluated according to or conform to a scheme approved by an appropriate minister.

The scheme certainly makes a better case for self-regulation than has so far been seen. It does so by rectifying one of the key problems identified previously: the lack of any credible governing body. By ensuring there are unified governing bodies, it would be easier for states to work in cooperation with those bodies to ensure policy goals were fulfilled. That said, there would remain the problem of transparency in enforcing rules and disciplining rule-breakers.

It seems as though the recognition approach set out by the Commission would be very useful for approving non-full-contact amateur combat sports. However, as I will discuss below, it is questionable whether it would be appropriate for regulating professional combat sports, or indeed, full-contact amateur competitions.

**Some Comparisons**

It seems that in states where combat sports promotions are recognised as being popular, financially rewarding enterprises, legislatures have felt the need to introduce legislation. Not only that, but the regulating states examined here, all introduced positive-licensing legislative regulation. The proposals by the English and Welsh Law Commission would disrupt this trend by allowing self-regulation by a governing body in which it could have confidence. However, what the Law Commission failed to take into consideration was the ineffectiveness of self-regulation in achieving the aims of minimising and controlling risk. It would appear as though they were operating under the delusion that the British Boxing Board of Control (BBBC) was a paradigm example which could/should be emulated in the wider combat sports industry. Anderson argues that the BBBC has clearly shown an “inability to control malpractice and promote safety”,\(^\text{1430}\) and that if the industry is to survive in the UK, the Board must be replaced by a statutory licensing scheme.\(^\text{1431}\) This criticism is also reflected in the case of *Watson v BBBC*,\(^\text{1432}\) in which the court found that due to the BBBC’s negligence in providing medical care to the plaintiff boxer, Watson, he suffered permanent brain damage.\(^\text{1433}\) It

---


\(^{1432}\) [2001] QB 1134.

\(^{1433}\) [2001] QB 1134, at 1167, 1173.
was found that the Board should have been prospective in its thinking with regard to medical information and regulation, and not merely reactive.\textsuperscript{1434}

To ensure that participants’ safety is always the main priority and that this priority is effectively achieved, an independent, legislatively sanctioned commission appears to the best regulatory option. Indeed, it would appear as though the commissions established in Australia and in the USA have been quite successful. While regulating jurisdictions in both countries appear to be achieving their aims, they have been achieving them differently. The first difference to note is the detail of prescription that is present in the Nevada regulations. It is clear that the Nevada regulations have been honed through industry experience from boxing. They provide exactly how a contest will be conducted. They also provide a baseline of rules and specific directions to the referees on how to implement those rules and in general, how to referee a contest. As we have seen, regulation in Australia is much more broad. An advantage of this broad approach allows commissions to be more flexible when dealing with new forms of combat sports with different rules. A disadvantage may of course be that industry participants are not as informed on all aspects of best practice as possible. Further, the lack of any minimum standard of rules, may give rise to some potentially very dangerous manoeuvres being allowed. However, as noted above in relation to Colorado, if an Australian commission is doing its job properly, then this last criticism should not arise. Indeed, to turn a negative into a positive, it may be argued that the lack of any minimum standards may allow an Australian commission to refuse to regulate a sport with dangerous manoeuvres that do not amount to breaches of the minimum rules set down in Nevada. For example, Australian commissions would be able to introduce rules banning full-contact techniques to the head. Further, it should

\textsuperscript{1434} [2001] QB 1134, at 1167.
always be remembered that the Nevada position is largely the outcome of UFC monopolistic influence, which is ultimately protective of the UFC model. Such a major influence on rules from a promotions company may be undesirable.

One advantage of having a minimum set of rules, clearly set out, is the Nevada commission’s ability to heavily penalise intentional fouls. This is an important step forward in combat sports regulation, as it makes clear the repercussions for intentionally trying to injure someone outside of the rules of the sport. This delineation between intentionally injuring within and outside of the rules marks a factor that legitimises the sport.

Two other significant differences between most of the Australian legislation and the majority of the US legislation, are the insurance and MRI scan requirements. Most Australian legislation is silent with regard to obligatory insurance for competitors. That said, in Victoria applications for permits are set out in a prescribed form in the regulations, and that form asks for the details of the insurance that the promoter intends to provide for the participant and for public liability. While this may provide for flexibility, perhaps it gives flexibility to an area that should be rigid. Given the nature of the type of injuries that could occur, the Nevada model of requiring a minimum set amount of $50,000 for professional fights and $25,000 for amateur contests that come within the regulation would be preferable. It would also be more transparent for all involved. Indeed, it might be questioned if these amounts were enough.

With regard to MRI scans, as noted above, South Australia is the only jurisdiction in Australia to currently require that fighters undergo scans. They must do so every three years, while in Nevada, they must have a scan every five years. While it is strongly recommended that regulating states follow suit, one might question if it

---

would not be better to implement a formula for deciding how often or when a combatant must undergo a scan. For example, the formula might depend on the number of professional fights that a combatant fights in, on a yearly basis, and/or if the combatant had suffered a knockout. Such an approach may afford better protection to combatants.1436

Another welcome innovation in the Nevada regulatory scheme is the requirement that an ambulance or the best form of medical transport be present at the fight. This facility, which would allow the immediate transport of an injured combatant to a hospital, could potentially prevent death or serious brain damage. Australian statutes typically just require a nearby hospital to be put on notice and for attending physicians to arrange for an injured combatant to be transported to hospital. It is submitted that the time saved by not having to wait for an ambulance to arrive in Nevada could be crucial.

Innovation in some of the Australian legislation includes Western Australia’s requirement that a medical practitioner sit on the commission. This is useful as a commission will generally be made up of individuals who have had some experience with the industry. Given a medical practitioner’s professional experience, they may be able to give insights into health issues that would not have otherwise occurred to a commission. Further, they are better suited to keeping up to date with current medical research and therefore could advise the commission on changes in best practice standards. As noted above, it was the lack of keeping up to date with best practice standards that resulted in the BBBC being found to be negligent.1437 They would also provide a greater deal of accuracy in interpreting medical reports and deciding whether

---

1436 Cost issues would arise with the introduction of a scheme which called for more frequent MRI scans. It is submitted that a scheme would need to be established to pass a portion of these costs on to promoters, fans and other financial backers.

a combatant is fit for a contest. Indeed, they may also help the commission to ensure that the fitness tests which fighters must undergo are rigorous enough. While the Nevada State Athletic Commission is advised by their Medical Advisory Board, they are not bound by the Board’s recommendations, and thus vote on the recommendations.1438 It is submitted that while a medical advisory board is a good innovation in and of itself, it might also be helpful to have a medical practitioner on the Commission to aid in interpreting the Board’s recommendations and to ensure that all recommendations are taken seriously at least, even if all are not approved.

The medical record book, medical passport, or some form of commission controlled medical record database is also a welcome development. This is a common feature of many of the Australian regimes which appears to be lacking from the Nevada model. A complete record of a combatant’s fight and injury history is an invaluable resource for making decisions as to a combatant’s fitness or skill levels to compete in future competitions. It is also a much needed resource for researchers, so that more medical research can be done in the area of incidence rates and types of injuries in combat sports.

A theme running throughout this chapter has been what regulation is required for amateur combat sports. Most regulating states seem to resolve this issue by leaving an exemption for amateur contests, subject to evaluation by a minister or a board. This provides an opportunity to assess the rules of the sport, its dangerousness and the effectiveness of its governing body. Most semi/light-contact combat sports will receive exemptions, with these measures chiefly operating to regulate full-contact or particularly dangerous combat sports. It is submitted that it is in this context that the English and Welsh Law Commission’s proposals work best. With their recognition

scheme, a commission could ensure that proper standards were being maintained in self-regulating governing bodies. Therefore, refereeing standards, as well as facilities, equipment and insurance standards could all be evaluated before an amateur governing body or association would qualify for recognition. Further, a code of conduct for amateur combat sports could be developed and enforced by a regulating commission. This would provide a proportionate response to the risks of participating in semi/light-contact combat sports.

**Conclusion**

This chapter has focussed on jurisdictions that have realised the potential dangers of an unregulated combat sports industry for competing athletes. Special attention was paid to states in Australia which regulated the industry, as some of those states have a long history of specifically regulating combat sports (as well as boxing). While the legislation in these states is far more progressive than that in Ireland or the UK, it seems to lack the precision of regulation in the USA. Taking Nevada as a paradigm, it is clear that their long established athletic commission’s experience is one of the primary reasons for their regulations being so precise. However, the Nevada rules are not without their criticism. It is possible that their minimum obligatory rules have been set too low, under the influence of the UFC, which is ultimately just a profit driven company. Finally, it appears as though the regulatory scheme set out by the English and Welsh Law Commission is unsatisfactory as far as professional combat sports go. It is submitted that by adopting the most positive aspects from the regulatory schemes in the USA and Australia, it will be possible to create an effective control commission in
Ireland and the UK, in order to protect participants from unnecessary or unconsented to risks, by ensuring these risks are controlled and contained.
CHAPTER NINE - CONCLUSION

The aim of this thesis was to investigate whether a state would be acting legitimately in criminalising or regulating consensual violence. Consequently, it was to be questioned in what circumstances and to what degree it might do so. As a case study, these questions were explored predominantly in the context of combat sports, although there was also focus on contexts such as consensual sexual and religious violence. First there was an assessment of the current legal doctrinal approach to consensual violence. At first glance, it may have appeared as if there was much discord between cases dealing with somewhat similar issues. Much of this discord arose from the courts depending on public policy reasoning for affirming or denying that particular acts of consensual violence had been caused for a good reason. In many cases, and in particular R v Brown, one might have been left with the impression that it was the judges’ own tastes that were being applied to the controversial issues they faced. In Chapter Three I advanced a different theory to reconcile these cases. In applying Dworkin’s theory of law as integrity, an attempt was made to find a general principle that was common to the cases reviewed in Chapter Two and that could be reconciled with the general doctrinal approach. This theory suggested that there was only ever one exception to the general rules that the intentional or reckless infliction of physical harm could not be consented to. That exception was a regulatory exception. It purports that any activity in which (actual bodily) harm is caused intentionally or recklessly must be regulated in a form which the state can have confidence in. This may involve self-regulation, or state regulation, but the key is that there be competent regulation capable of controlling and containing the risks that arise. It was suggested that the theory would be normatively better if a state allowed individuals to consent to the intentional or reckless causation of
(actual bodily) harm, and reserved the regulatory theory for situations in which serious harm was intentionally or recklessly caused with consent. That said, as a descriptive theory of current legal doctrine, it was argued that the regulatory theory held true once we distinguished between true exceptions and decoy exceptions. The contact sports exception and the dangerous exhibitions exception were both found to be decoy exceptions on further investigation.

As the current legal system accommodates regulated consensual violence, it is submitted that if a combat sport was regulated by an organisation in which the state could have confidence, then it could fall within the regulatory exception and participants would be unlikely to see their behaviour criminalised. Amateur combat sports in which full-contact is prohibited might easily fulfil a state’s confidence standards. However, professional and amateur full-contact combat sports may have to show a particularly sophisticated self-regulatory framework in order to satisfy the current legal standards.

Having assessed how the current legal regime responds to consensual violence and how it might respond to combat sports in the future, there was then a move from the descriptive analysis to a normative analysis. Much of the argument in Section Two was predicated upon the harm principle proving insufficient as an indicator of what a state might legitimately criminalise. Many arguments were reviewed that showed the weakness of the harm principle as a standalone principle. In particular the argument was advanced that the justification for the harm principle is based upon the intuition that individuals do not want their self-regarding choices interfered with by the state. However, it was noted that we also have competing intuitions about scenarios when we would say it was reasonable for the state to intervene. With no knock-down argument available for either intuition, it became apparent that a theory with more dimensions
than the harm principle had to be developed. A richer theory of the limitation on state
power was advanced involving concepts that were ultimately fundamental to the harm
principle: autonomy and dignity. The harm principle normally justifies the
criminalisation of acts which try to harm or destroy either of these two concepts. The
major exception to this is when consent is present, as in such cases it might be said that
the concepts are, in turn, harmed or destroyed by not giving full legal effect to the
consent. I argued that in a narrow range of situations, when future autonomy is put in
jeopardy, a state might act legitimately in interfering with present autonomy if that
interference was to promote future autonomy so that the individual could continue to
live an autonomous life and therefore continue to take responsibility for their own life.
If this could be established, there would then have to be reasoned argument to determine
the reasonableness of interfering in current autonomy. This would involve assessing the
fecundity of the options potentially being closed off or whether the interference could
be minimal. Most importantly, however, it would have to be considered, whether on
balance, the loss to current autonomy in general would outweigh the loss of autonomy
in the future.

Even if the autonomy-based paternalism argument is not accepted, harm
principle theory would also acknowledge that regulation was required in order to ensure
the consent given was valid in cases of consensual violence. Consenters would
therefore have to be fully informed about the risks they were taking. Liberals who
endorse nudge paternalism might also suggest the introduction of incentives not to
engage in certain types of consensual violence. So-called soft paternalists would
therefore authorise regulatory machinery to validate consent in combat sports and
certain soft-paternalists might also authorise licensing procedures for those who want to
compete in full-contact competitions where the head is a target, in order to nudge them
towards competing in semi-contact competitions, where there would be no such licensing procedures. The problem is, of course, that once the competitor is fully informed, and they have paid their fee, soft-paternalism permits the state to go no further. So for instance, if a doctor strongly advised that a competitor not fight due to some pre-existing cerebral medical issue, once informed, the competitor would be at liberty to ignore this advice.

Autonomy-based paternalism recognises the jeopardy in which combat sports participants put their future autonomy. Reasoned argument, however, shows us that such activities do not require banning, but instead regulation. In situations where doctors advise that a competitor not fight, it seems reasonable to restrict the competitor from fighting because the potential loss of future autonomy seems to far outweigh the loss to present autonomy in general. Autonomy-based paternalism might also justify the prohibition of full-contact techniques to the head in combat sports. If helmets were effective, they would be a preferable choice: but as they are not, and as the option of striking an opponent on the head as hard as possible appears not to be a fecund option, a prohibition might be permissible.

Chapter Five focussed on the role dignity plays in the criminalisation process. As dignity plays a major role in rights-based theories, it was suggested that there may be circumstances in which an affront to dignity which compromises an individual’s ability to act on their own choices is outweighed by the significance and degree of the affront to dignity committed with the individual’s consent. However, as dignity is such an interpretative concept, arguments were rejected that proposed to allow juries to interpret when dignity had been fundamentally affronted. Instead it was argued that when a state is confronted with a morally controversial issue, on which it must take a public stance one way or the other, it may be acceptable for that state to decide the issue
according to its best interpretation of what dignity requires in the particular situation. So for example, in cases of consensual gladiatorial battles to the death, or consensual cannibalism for whatever reasons (be they sexual or otherwise), the state may be permitted to take a public stance that human dignity is fundamentally degraded by such activities and may thus prohibit them. However, any such decision would have to be made by a legislature legislating for specific incidences and it would be for the courts to determine if the state’s temporary stance interfered with fundamental human rights. Juries, however, would not be an appropriate forum in which to decide what dignity requires, as that would give rise to the concerns that arose from the Hart-Devlin debate, and in particular Dworkin’s observations that jury-box morality could too easily become prejudice, among other things, in disguise.

However, while it is my view that any sensible theory that acknowledges the state’s role in fostering autonomy and respecting dignity must account for serious affronts to autonomy and dignity in some special cases, we must always be on guard that autonomy and dignity are not used to override consent in non-serious and non-special cases. It has been argued that it is an intolerable affront to both autonomy and dignity that individuals are not permitted to consent to being intentionally or recklessly harmed with their consent, when that harm does not reach the level of serious harm. Such harm does not need regulation. The lack of any real long term consequences from such harm means that it is not a proper candidate for autonomy-based paternalism, and the causation of mere (actual bodily) harm is unlikely to raise any real controversial issue that would require a state to take a temporary stance.

In Section Three the thesis turned more directly to its case study aspect, in dealing with combat sports. The place of combat sports in society and the moral attitude we should have towards combat sports were analysed in Chapter Six. While the
argument presented was one chiefly to promote reform in the industry, it may also be an argument that legislatures should take into consideration. It was argued that there are good, consistent moral arguments that should force us to question the moral acceptability of some types of combat sports. For example, if we take a general moral principle to be that the value of human life is incommensurable and that as such humans should not be dehumanised or objectified, then it follows that objectives of combat sports which encourage participants to view their opponents as dehumanised objects should be morally criticised. Similarly, if the nature of combat sports legitimises two individuals causing serious harm to each other out of a sense of anger or revenge, that is also morally criticisable. I defended these claims against arguments which tried to negate the immorality pointed to. In particular, I rejected the argument that as combat sports were sports, a different type of morality, or no morality at all, applied to them. Such an argument had to be in some way reconcilable with the value attributable to human life. As the argument could also apply to sports such as gladiatorial bouts or duelling, it was submitted that there could be no reconciliation with the general moral principle, unless the sports exception for morality did not include sports where the causation of serious harm was an inherent objective of the sport. Indeed, it is the causation of serious harm as a primary objective that is at the root of moral arguments against combat sports. Many of these arguments would be answered by industry reform, where the head was no longer designated as a legal target in the sport, for full contact techniques. Moral objection would also fade away as combat sports moved closer to being instances of play, where participants partake in the particular combat sport for autotelic reasons.

Continuing with a focus on combat sports, there was a review of the medical literature pertaining to injury rates in certain popular combat sports. This research
painted a clear picture of how being struck in the head can affect one’s brain. Findings were also reported to suggest that being kicked in the head could produce even more acceleration of the brain within the skull than a punch. Of particular interest were the concussion rates that were found to be relatively high in many studies on combat sports. Concussions were noted as being instances of functional damage to the brain. Concerns were also raised about the possible effect of cumulative concussions, which can cause a swelling of the brain and death. While vastly differing input factors meant that no clear overall picture could be discerned from the results, a common theme in many of the findings was that concussions were common injuries in combat sports. This was unsurprising as the head was revealed to be a popular target in competitions. It was recommended that the head cease to be a target, and/or that rules be developed to award points for blocking techniques. Many of the other recommendations, including the need to ensure participants are competent to compete (and have sufficient blocking skills) and the need for better refereeing and rule enforcement standards, seem to endorse the need for regulation. An effective regulatory scheme would ensure that rules were strictly implemented and that only those competent to fight would be permitted to do so.

Chapter Eight involved a comparative analysis of regulatory schemes which have been established in Australia and the US, and the proposed scheme for the UK. There were several purposes for this analysis. First, it provided an opportunity to assess how current regulatory systems address the problems identified in the medical literature review. Second, it was an opportunity to determine if the regulatory schemes adhered to the normative framework described in Section Two. Third, as combat sports have become particularly popular and commercially successful in Australia and the US, it was interesting to see how these mature legal jurisdictions reacted to the challenges that these new sports brought. It quickly became clear that industry self-regulation is not a
popular option. This is due mainly to the fragmented nature of the combat sports industry. Such fragmentation leaves it almost impossible for a state to have confidence in a self-regulatory system. The popular trend is to establish state commissions to oversee the implementation or the creation of industry regulations. As commissioners often attend fights and licence referees, this responds to the medical concern of rules being properly implemented and strictly enforced. Further, the commission usually uses licensing procedures to ensure competitors are fit to compete. The more one is knocked-out while fighting, the longer one has to wait before their next fight. In many regulatory situations, if a fighter is knocked-out on a certain number of consecutive occasions, the commission will review that fighter’s fitness to fight. No regulatory scheme, however, bans the head as a target or promotes blocking techniques by awarding points for successful blocks. Elements of the schemes which appear to be legitimate instances of hard autonomy-based paternalism would include situations where a commission deems a fighter unfit to participate, due to his fight record; where a doctor deems a fighter unfit to fight; where a doctor stops a fight; and where mouth guards must be worn to reduce the chance of a concussion. The general prohibition on eye-gouging or biting might be examples of prohibitions based on dignity. Of the several issues that arose from the comparisons between the differing approaches to regulation, some were of particular note. Regular MRI scans were not a feature of most regulatory systems, so it was suggested that they should be. Also, it was uncommon for medical practitioners to be appointed to regulating commissions. It was recommended that this be rectified. The establishment of a medical advisory board was also an impressive feature of the Nevada system. Other innovations such as having ambulances on standby at fights were also thought to be worth adopting in other jurisdictions.
In conclusion, how have the main questions of this thesis been answered? First, can the state legitimately interfere against consensual violence? Legitimacy in this context has two dimensions: do the current laws of the state permit it to interfere; and should the laws of the state permit it to interfere. The current legal rules of the Irish, English and Welsh legal systems do permit the state to interfere in consensual violence. It interferes by criminalising incidents of intentionally or recklessly caused (actual bodily) harm,\(^{1439}\) regardless of consent. It also interferes by having an exception to the just mentioned rule, as that exception requires that the consensual violence be regulated in some fashion acceptable to the state. The philosophical question of whether the laws of the state should permit it to interfere in consensual violence can also be answered in the positive. The harm principle and hard paternalism alike both condone state regulation of consensual violence. Where these two theories differ is in relation to the degree of regulation, which was the second main question.

The theory offered in this thesis is that the state may enforce hard paternalistic laws against its citizens when future autonomy is put in serious jeopardy and reasonableness supports a curtailment of present autonomy. This type of regulation differs from that supported by the harm principle, which would only use regulation to ensure a true consent was present, not to override it. It was also suggested that a community might legislate on the basis of its best interpretation of dignity, in situations involving moral controversy. This type of interference might justify banning or partially criminalising certain activities.

Understanding our moral attitude to combat sports, as well as their risks to our health and autonomy helps in applying the answers to the two main questions to combat sports. Self-regulation will probably not be adequate for our current legal regime, as the

\(^{1439}\) Although the level of harm to which one can consent is controversial at the moment in Ireland. See Chapter Two, at 67-68.
fragmented industry does not lend itself to such regulation. State regulation is required, but it is argued that that regulation may do more than merely ascertain whether the consent given was a true consent. Rather, when combat sports put future autonomy in danger, and where reasonable, minor incisions can be made, it is argued that the state will be justified in paternally interfering in the hard sense. Therefore, the prohibition on fighting without a doctor’s approval would be justified. It has been pervasively argued throughout the thesis that the head could also be prohibited from being a legal target in full contact combat sports. Such a prohibition might also be justified by recourse to an argument about what dignity requires. The analysis in Chapter Eight gave a better picture of how we might regulate combat sports in Ireland, England and Wales. As we have the luxury to pick and choose among the best types of regulations in place in Australia and the US, we could establish a very effective regulatory scheme.

Such a regulatory scheme would almost certainly require the establishment of a legislatively sanctioned, independent regulatory commission. It could be named the Combat Sports Commission (CSC) and it would have complete regulatory purview over all competitive combat sports competitions in the jurisdiction, including the power to formulate regulations. The composition of the CSC could be no fewer than five and no more than nine persons. Importantly, however, one of those members should be a medical practitioner. The medical practitioner should also sit on the CSC’s Medical Advisory Board, whose role would be to advise the CSC on best practice medical procedures to have in place and new research findings which may be of importance to the combat sports industry. The Medical Advisory Board could consist of three or five members (including the medical practitioner member of the CSC).

The CSC would have two classes of registration: Class A and Class B. Class A status would be reserved for organisations only, and it would be generally envisaged to
accommodate *amateur* light-contact combat sports. On attaining Class A registration, organisations could be left to be generally self-regulating.

In order to attain Class A status, a number of evaluations would have to be carried out by the CSC. First, the self-regulatory capacity of the governing organisation would have to be established. This would entail questioning any international affiliations the organisation might have and its organisational structure. In carrying out such an evaluation, the CSC could ensure techniques are taught by competent, accredited, practitioners who will train students effectively, ensuring they have defensive skills as well as attacking skills, and who will not allow students to compete in competitions if they do not possess the required skill-set. Other organisational features such as arrangements for adequate accident and legal liability insurance, considering the dangerousness of the particular sport as determined by the CSC, could be investigated. Refereeing standards would also be an important feature, with an organisation having to show that referees had undergone proper training and that a code of refereeing conduct had been put in place, which mandated strict application of the rules of the sport.

Indeed, a key factor for recognition of a Class A organisation would be an analysis of the rules of the sport the organisation governed. Any organisation which permitted full-contact techniques in competition would automatically be ineligible for Class A recognition. Rules which permitted inherently dangerous techniques according to a CSC determination, even in a light-contact context, might also deprive an organisation from being recognised as a Class A organisation.\textsuperscript{1440}

\textsuperscript{1440} Here I have in mind techniques such as reverse round-house kicks which aim to strike the head of the opponent with the ball of the foot while the attacker moves in a spinning motion. Even in a light-contact context, these techniques are often extremely hard to control once started, leading to a high possibility of heavy contact to the head.
While Class A recognition would permit organisations to be self-regulating, they would also have to adhere to a general code of conduct, which ensured that the standard of self-regulation in place at the time of evaluation was maintained (and bettered) after recognition was granted. It would always be within the CSC’s power to investigate a Class A organisation’s self-regulatory process and derecognise such an organisation if it were deemed to no longer be competently self-regulating its sport.

Any combat sports competition that is not organised by an organisation with Class A recognition will be required to attain Class B recognition. Similarly, certain individuals involved in a competition that is not organised by a Class A recognised organisation, will also require Class B recognition. Such recognition would essentially be a licensing procedure, where events are licensed on an individual basis, and individuals are licensed on a yearly basis.

In order to have events licensed, promoters would have to ensure that at least one medical practitioner attended the event. This medical practitioner would have to be on a CSC-approved list of medical practitioners. They would be responsible for examining contestants prior to, and after fights, in accordance with a medical examination procedure approved by the CSC, based on the advice of the Medical Advisory Board. The medical practitioner would also have the power to prevent a fighter from fighting who was judged to be unfit to fight, and the power to end a fight in circumstances where it appeared as though serious harm had been caused, or that there was a high risk that serious harm was about to be caused, due to a fighter’s inability to defend himself/herself. Appropriate medical equipment would have to be provided at ringside, as well as an ambulance being on standby, staffed by appropriately trained individuals.

1441These individuals would certainly include: promoters, fighters, referees, judges, trainers, and might include anyone else involved in a competition where the CSC deemed it appropriate that they require a licence.
emergency medical technicians. The nearest hospital would also have to be put on notice of the event.

In order for fighters to be licensed, they should undergo thorough annual medical checks, including MRI scans. They should also be issued with medical record books, in which medical practitioners record the results of annual fitness tests, pre- and post-fight fitness tests, fight results and methods of loss, where appropriate. Fighters could also be required to attend an information day about the combat sports industry, organised by the CSC. The purpose would be to make fighters acutely aware of the risks they take, the financial realities of the industry, what they should expect from promoters and what is expected of them by the CSC. Such an innovation would go a long way to ensuring the voluntariness of a fighter’s consent.

Firm standards should also be put in place for referees. This should encompass more than regulations as to when to end a fight prematurely. Referees should be required to undergo CSC sanctioned training, in order to ensure that rules are strictly enforced, and that the referee has the competency to enforce those rules.

What about the rules themselves? While the CSC should retain a degree of flexibility in deciding whether to approve a set of rules for a certain event, I think that a minimum standard should be set. This minimum standard might be better set by the legislature, as a more appropriate institution for prescribing limits on the basis of autonomy-based paternalism and dignity. I think a state would be on firm moral grounds in prohibiting full-contact strikes to the head. This would, of course, alleviate the need for MRI scans, and other measures could be tailored for such a system. But of course, if such a stance was not taken by a state’s legislature, it would not be the first time that principle was sacrificed for practicalities. Indeed, unless enough legislatures followed suit, major promotion companies such as the UFC would be likely to simply
not promote events in a state which prohibited full contact techniques to the head. Only a wide-scale acceptance of a prohibition on full-contact to the head would force worldwide organisations to reconsider their rules. If such a prohibition was not put in place, the CSC might well insist on rules which promote the protection of the head, such as rules awarding points for protecting the head.

Consent matters. Rights matter. Autonomy matters. Dignity matters. These are not inconsistent philosophies. Balanced together, they establish that the value of a person matters and that the value of that person’s life matters. None of these concepts can always play a trumping role. There must be interplay, with balance being brought through reasoned argument so that the value of a person and their life is shown in their best light.

The best way forward, to show the value of a person and their life in their best light, it is submitted, is to allow consent to play a full justificatory role in all consensual violence where only (actual bodily) harm is caused. The default position for the intentional or reckless causation of serious harm must be that it is a criminal offence. The only exception to this can be where the violence is caused within a regulatory scheme. The nature and extent of that regulatory scheme will depend upon the extent to which future autonomy is jeopardised, and the extent to which reasoned argument determines that hard paternalistic interference is reasonable. In certain highly contentious instances of moral controversy in a community, the state’s legislature may use its best interpretation of dignity to determine whether to ban or to partially criminalise some conduct. This would be a legal system which respected consent, rights, autonomy, dignity and ultimately the value of a person and their life, and represented the latter in its best light.
BIBLIOGRAPHY


C., T.J. “Assault - Consent as a Defence” (1934-1936) 1 Alberta Law Quarterly 38.


Charleton, P. Offences against the Person (Round Hall Press, Dublin 1992).

Charleton, P., P. A. McDermott and M. Bolger, Criminal Law (Butterworths, Dublin 1999).


Corsellis, J. and others, “The Aftermath of Boxing” (1973) 3 Psychological Medicine 270.


Cox, N. and A. Schuster, Sport and the Law (First Law, Dublin 2004).


Department of Planning and Community Development: Sport and Recreation Victoria, Professional Boxing and Combat Sports Regulations 2008: Regulatory Impact Statement (Melbourne, 2008).


Fotion, N. “Paternalism” (1979) 89 Ethics 191.


James, M. *Sports Law* (Palgrave Macmillan, Hampshire 2010).

Jones, L. *Cannibal - The True Story Behind the Maneater of Rotenburg* (Berkeley Publishing Group, New York 2005).


McAuley, F. and J. P. McCutcheon, Criminal Liability (Round Hall Sweet & Maxwell, Dublin 2000).


Professional Boxing and Martial Arts Board, “Declaration of a Martial Art for the Purposes of the Act” (Memo to the Minister for Sport and Recreation, 3 April, 2000).


Scoccia, D. “Paternalism and Respect for Autonomy” (1990) 100 Ethics 318.


Suits, B. *The Grasshopper: Games, Life and Utopia* (University of Toronto Press, Toronto 1978).


NEWSPAPER ARTICLES AND WEBSITES


—, “In What USA States Are Kickboxing and or MMA Legal?” <http://www.ifightsports.com/USAStates.htm>.


Foley, M. “Gomez controversy a body blow to boxing” TimesOnline (5 February 2006) <http://www.timesonline.co.uk/tol/sport/article726946.ece>.


Robinson, G. “The Mohel: This man or woman on the ‘cutting edge’ of Jewish ritual, performs Judaism's oldest rite”, <http://www.myjewishlearning.com/life/Life_Events/Newborn_Ceremonies/Liturgy_Ritual_and_Customs/For_Boys/The_Mohel.shtml>.


Wilson, P.B. “Q&A with Dana White, the President of the Ultimate Fighting Championship” *Indianapolis Star* (16 September 2010).
PARLIAMENTARY DEBATES

Ireland


England and Wales