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A 'Zone of Legal Exemption' for Sports Violence?
Form and Substance in the Criminal Law

BEN LIVINGS

THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

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DECLARATION

This thesis is submitted to the University of Warwick in support of my application for the degree of Doctor of Philosophy. It has been composed by myself and has not been submitted in any previous application for any degree.

Ben Livings

19 October 2016

ABSTRACT

This study examines the criminal liability that may be incurred by participants in contact sports for violence that results in injury to a fellow participant. For these purposes, I concentrate on boxing, rugby and soccer; sports that involve a level of physicality that risks, and regularly causes, injury. The violence that is intrinsic to their practice is in some senses archetypically criminal, and yet, that self-same violence is also constitutive of sports that are perceived to have enormous personal, social and cultural value, and which have been declared by the House of Lords to amount to 'lawful activities'.

A formal account of the criminal law of sports violence posits the consent of the participants as the primary determinant of the imposition of liability for acts of violence committed during the course of contact sports. In this thesis, I examine this formal account and propose that the substance of the lawfulness of sports violence needs to be understood in terms of its socio-historical development, and the sophisticated rule-systems and pluralistic regulatory backdrop against which modern sports operate.

This thesis contributes a new understanding of the offences that pertain to sports violence, and the normative role and doctrinal function of the participants' consent, in order to understand the way in which the criminal law accommodates violent sports practices. The thesis also suggests new ideas in relation to the 'playing culture' of sport and its relationship to the criminal law, and the role of prosecutorial discretion in effectively shaping the lawfulness of 'legitimate sport'.

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Offences Against the Person Act 1861
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Sexual Offences Act 2003
Suicide Act 1961
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Youth Justice and Criminal Evidence Act 1999

Chapter 1

Introduction

1.1 Introduction

In March 2010, Mark Chapman was convicted of maliciously inflicting grievous bodily harm, contrary to s 20 of the Offences Against the Person Act (OAPA) 1861, and sentenced to six months' imprisonment. Chapman had been playing association football, during the course of which he performed a tackle that caused serious injuries to another player. This tackle broke the opponent's leg in two places; the injury necessitated reconstructive surgery and a skin graft, and meant that the victim would never play the sport again.¹ At Warwick Crown Court, Judge Robert Orme described Chapman's conduct as constituting 'a deliberate act, a premeditated act'; he added: 'A football match gives no-one any excuse to carry out wanton violence.'²

Chapman's case is unusual, not because of the violent conduct or resultant injury, but because of the involvement of the criminal law. Despite a

¹ *R v Chapman* Crown Court (Warwick), 3 March 2010. Chapman pleaded guilty, and there was therefore no real exploration of the substantive legal issues. This is perhaps surprising in light of the precedent he was setting as the first to be convicted for a football tackle. There have been convictions for incidents during the course of a game of football, but these have tended to be for 'off-the-ball' incidents, such as the one examined in the Court of Appeal case of *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910.

² 'Footballer First to be Jailed for On-Field Tackle' *The Telegraph* (London, 4 March 2010) <<http://www.telegraph.co.uk/news/uknews/crime/7369009/Footballer-first-to-be-jailed-for-on-field-tackle.html>> accessed 15 June 2015.

relatively high incidence of interpersonal violence and injury in contact sports,³ criminal prosecutions, and consequently convictions, are rare. This is particularly true in cases where the violence is during the course of play, or 'on-the-ball', as opposed to 'off-the-ball' incidents, where the violent conduct is more easily considered in isolation from the sporting context.

The precise remit of the criminal law is contentious, as is its efficacy in achieving particular goals. Perhaps the most widely accepted justifications for the operation of the criminal law derive from two basic principles: that it acts as a deterrent to those who might otherwise engage in socially harmful behaviour; and that it serves as a form of censure for those who do engage in socially harmful behaviour.⁴ Whatever its role and function, however, the existence of offences that address interpersonal violence is relatively uncontroversial. Tadros describes them as amounting to 'the food and drink of criminal law',⁵ and Dennis writes of 'offences of violence':

These offences are central to the criminal law. They protect the fundamental interests that all people have in the security of their persons

³ It was recently estimated that over six million sports-related injuries are suffered each year (Stefan Fafinski, 'Consent and the Rules of the Game: The Interplay of Civil and Criminal Liability for Sporting Injuries' (2005) 69 *Journal of Criminal Law* 414, 414).

⁴ See, for example: Andrew Ashworth, 'Is Criminal Law a Lost Cause?' (2000) 16 *Law Quarterly Review* 225; PH Robinson and JM Darley, 'Does the Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 *Oxford Journal of Legal Studies* 173; SJM Donnelly, 'The Goals of Criminal Punishment' (1990) 41 *Syracuse Law Review* 741; J Hampton, 'Correcting Harms and Righting Wrongs: The Goal of Retribution' (1992) 39 *University of California Los Angeles Law Review* 1659. For a fundamentally retributivist account of the role of the criminal law, see Michael S Moore, *Placing Blame* (Oxford University Press 1997).

⁵ Victor Tadros, 'The Distinctiveness of Domestic Abuse: A Freedom-Based Account' in RA Duff and Stuart Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford University Press 2005) 119.

... In so far as the content of any of the criminal law is uncontroversial, there is virtually universal acceptance of the necessity for these offences'.⁶

The criminal law addresses violence through a range of offence provisions. Low-level violence might classify as common assault,⁷ with more serious iterations covered by the OAPA 1861,⁸ and those which cause death by the law of homicide.⁹ In addition, there exist offences designed to deal with specific forms of violence, such as sexual violence,¹⁰ the existence and nature of which reflect the particular interests at stake and harms involved.¹¹

In contrast to those which pertain to sexual violence, there exist no offences created specifically to apply to the type of sports violence with which this thesis is concerned. Instead, criminal liability is based upon application of the 'general' offences of violence alluded to above (common assault, statutory offences against the person, homicide), augmented *inter alia* by consideration of the consent of those who are participating in the sport in question.¹²

The application of these offences in the context of violence that occurs during the course of contact sports can be problematic, and this is attributable to

⁶ Ian Dennis, 'The Critical Condition of Criminal Law' (1997) 50 Current Legal Problems 213, 214-15. Dennis also includes offences relating to 'stealing' and 'vandalism' in this characterisation.

⁷ *Fagan v MPC* [1969] 1 QB 539 (DC).

⁸ The key provisions for the purposes of this study are ss 18, 20 and 47.

⁹ For reasons given below, murder and manslaughter are beyond the scope of this study.

¹⁰ See, in particular, the provisions of the Sexual Offences Act 2003. For another example of such specificity, see the recently-enacted 'domestic abuse' provisions under ss 76-77 of the Serious Crime Act 2015.

¹¹ For more on this, see Chapter 6.

¹² The leading authority for this approach is *R v Brown* (1994) 1 AC 212 (HL), which is also the leading statement on the limits of consensual harm.

particular features of sports violence. The first of these pertains to the 'nature' or 'quality' of the violence involved, and the way in which it can be construed as an integral part of a socially valuable activity. Contact sports generally entail a level of violence that exceeds what would normally be deemed acceptable in other contexts, and the space that is created in the criminal law for the practice of such sports is heavily influenced by a widespread acceptance of their social utility. Many and varied claims are made for the personal and social value of participating in, and watching, sport.¹³ These are not uncontested,¹⁴ are difficult to quantify, and are even less easily tied to particular sports, and to the violent practices that are an integral part of contact sports; as Gunn and Ormerod note, '[i]t is quite clear that there are many safer ways of ensuring a fit population'.¹⁵

Another feature of sports violence that may affect the way in which it is viewed as somehow different from other forms of violence derives from the voluntary nature of participation, insofar as those who take part might be seen to have accepted, or consented to, such violence as is commensurate with that participation. Consent has a limited power when it comes to interpersonal violence and the criminal law, which restricts the lawfulness of consensual

¹³ Christoph Lumer, 'Rules and Moral Norms in Sports' (1995) 30 *International Review for the Sociology of Sport* 263. For a contemporary view of the social value of boxing, see: LM Adams and PJ Wren, 'The Doctor at the Boxing Ring: Amateur Boxing' in SW Payne (ed), *Medicine, Sport and the Law* (Blackwell Scientific Publications 1990) 230-77.

¹⁴ In *R v Brown* 1 AC 212 (HL), Lord Templeman expressed the view that '[i]t is questionable whether modern medical and/or public opinion continues to regard the infliction of serious injury in the professional boxing ring as an exercise of the manly diversion of self-defence and pugilistic skill' (228). For other arguments in relation to the existence of boxing, see: British Medical Association, *Boxing: An Update from the Board of Science* (British Medical Association, 2008); Jack Anderson, *The Legality of Boxing: A Punch-Drunk Love?* (Birkbeck Law Press 2007); J Pearn, 'Boxing, Brains and Balls' (2000) 1 *Medicine Today* 146; British Medical Association, *The Boxing Debate* (British Medical Association, 1993); GD Lundberg, 'Boxing Should be Banned in Civilised Countries' (1983) 249(2) *Journal of the American Medical Association* 250.

¹⁵ Michael Gunn and David Ormerod, 'The Legality of Boxing' (1995) 15 *Legal Studies* 181, 192.

violence, largely on the basis of its perceived social utility in a particular context.¹⁶ Thus, the lawfulness of commensurate levels of injury inflicted as a result of sado-masochism, the sexual transmission of disease¹⁷ and sport, for example, will differ, according to a view of the public interest involved. Alongside a consideration of the consent of the participants, therefore, an appraisal of the social utility of the activity provides an important context for moral and legal judgements to be made about the violence that occurs in the context of sport.

A further factor that problematises the application of the criminal law to sports violence derives from the existence of sophisticated rule systems in modern, organised sport, and concomitant regulatory structures that exist to enforce these. The priorities of the rules and regulatory bodies largely correlate with those of the criminal justice system, insofar as both seek to deter excessive violence, and to punish those who engage in violent play that exceeds what might be deemed an acceptable level. The relative effectiveness of this apparatus means that the criminal law is not necessarily the best avenue by which to address sports violence; that the internal mechanisms of sport provide an alternative, and in some circumstances arguably more effective, means by which to deter and censure are matters that have been accepted by the House of Lords¹⁸ and the Court of Appeal.¹⁹ This is not to say that the criminal law has, or

¹⁶ *R v Brown* [1994] 1 AC 212 (HL).

¹⁷ In *R v Dica* [2004] EWCA Crim 1103, [2004] QB 1257, the 'violence' in question was the transmission of a sexually transmitted disease (in this case HIV) during the course of consensual (and thus in itself lawful) sexual intercourse. See: Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge-Cavendish 2007).

¹⁸ In *R v Brown* [1994] 1 AC 212 (HL), Lord Jauncey stated that the presence and function of the referee was a distinguishing feature in the lawfulness of sport, as opposed to sado-masochism (238).

¹⁹ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910.

should have, no role to play. Just as there are limits on the lawfulness of consensual violence, there is a limit to the extent to which the agencies of criminal justice are willing to devolve their responsibilities to sports governing bodies. A key concern here is that these bodies comprise a form of 'private government' whose priorities may not correlate with those of the agencies of criminal justice.²⁰

The complicated relationship between sport, violence and the criminal law problematises the latter's role and function, but the overriding aims of the criminal law are relatively easy to state when it comes to sports violence: it is to be considered lawful to the degree that it can be considered sport, but, as Pill J memorably stated in *Lloyd*, it is not 'a licence for thuggery'.²¹ In seeking this balance, the criminal law defers to the greater expertise and competence of sports governing bodies in regulating what is a valuable social activity, whilst maintaining the broader public interest through acting as the ultimate arbiter of the limits of violence. As Ormerod notes, therefore, '[t]he primary difficulty lies in balancing the benefits of retaining sports, and particularly contact sports, with the fact that sport is not an excuse or cloak for gratuitous violence'.²²

In attempting to uphold these values, and to find the balance this requires, opinion is divided as to when, or indeed whether, the criminal law should intervene when it comes to injuries suffered as a result of the violent

²⁰ Stewart Macaulay, 'Private Government' in Leon S Lipson and Stanton Wheeler (eds), *Law and the Social Sciences* (New York 1986). For more on this, see Chapter 8.

²¹ *R v Lloyd* (1989) 11 Cr App R (S) 36 (CA), 37.

²² David Ormerod, 'Consent and Offences Against the Person: Law Commission Consultation Paper No 134' (1994) 57 *Modern Law Review* 928, 934.

conduct of those engaged in such sports.²³ For James, the answer seems straightforward: 'sports participants are not and never have been above the law'.²⁴ In a strict sense, this is undoubtedly true, since no sport can provide an absolute shield against prosecution and conviction for violence carried out during its commission. However, such straightforward claims mask the complicated way in which sports violence is addressed by the criminal law. To this end, others might reasonably suggest that the violence that takes place in a sporting contest is perceived as somehow different to that which occurs in other aspects of society, and that this is reflected in its treatment under the criminal law. Articulating this view, Connor notes:

It does seem plausible to regard the violence of sport as being transformed as a result of forming part of a sport, or occurring during the playing of it. The laws that govern violent and abusive behaviour in ordinary social life also apply in sports. But, though there is nothing to stop a policeman taking a startled sportsman into custody as a result of particularly dangerous or violent behaviour, *the field of play does seem to act as a zone of legal exemption, where ordinary understandings of violent, aggressive and disorderly behaviour are suspended, or significantly reinterpreted.*²⁵

²³ Examples of views given on this subject are legion, and come from the courts, sports practitioners and administrators and the national press and other media.

²⁴ Mark James, 'The Trouble with Roy Keane' (2002) 1 Entertainment and Sports Law Journal 72, 74.

²⁵ Steven Connor, *A Philosophy of Sport* (Reaktion Books 2011) 201 (emphasis added).

It is the possibility and operation of a 'zone of legal exemption' for sports violence, and how this is accommodated by the criminal law, that is the principal subject of this study.

When it comes to the criminal law, the prevailing view is that any 'suspension' or 'significant reinterpretation' of the 'ordinary understandings of violent, aggressive and disorderly behaviour' that might be understood to constitute the 'zone of legal exemption' to which Connor refers, is justified by, and mediated through, the participants' consent. In other words, by agreeing to take part in a sport such as boxing, rugby or soccer, a person accepts the ordinary risks and incidences of injury which that sport entails; the criminal law respects this, and responds accordingly. The existence of consent on the part of the injured participant therefore serves to vitiate the otherwise criminal violence of the perpetrator, and thus consent can be seen to serve as both the justification for, and the mechanism by which, the courts maintain the distinction between lawful and unlawful forms of sports violence.

The basic premise of what I shall refer to throughout this thesis as the 'orthodox view' of the criminal law of sports violence is therefore easily expressed as follows. Sports violence satisfies the constituent elements of violent offences. Where this violence can be categorised as unserious (causing less than actual bodily harm), the consent of the victim effectively precludes liability. Where it is more serious (causing at least actual bodily harm), sports violence comprises a *prima facie* offence, but this can be defeated by the application of the defence of consent. Judgements as to the lawfulness or otherwise of the

conduct of the defendant therefore fall to be decided according to the quality of the consent of the victim.

The authoritative statement of the orthodox view derives from the leading judgments in *Brown*,²⁶ a House of Lords case that was immediately concerned with the lawfulness or otherwise of sado-masochistic activities between consenting adults. One of the central concerns in *Brown* was in discerning whether, and in what circumstances, consensual violence could be deemed to have social utility. In so doing, the judgment effectively distilled a long line of jurisprudence in demarcating the availability and applicability of consent when it came to physical violence and injury. *Brown* undoubtedly stands as the highest authority for much of the law in this area, but it was not a case concerned directly with sport. Although arguments around sports violence were engaged in relation to the central concern of sado-masochism (most notably in the dissenting judgment of Lord Mustill), the intricacies of their application to sport were not.

More recently, the Court of Appeal case of *Barnes*²⁷ was decided a little over a decade after *Brown*, and has made an important contribution to the criminal law of sports violence. The facts of this case are very similar to those of *Chapman*, described above, in that *Barnes* also concerned a soccer player who had seriously injured a fellow competitor during the course of a match. The judgment ostensibly follows the formal approach laid out in *Brown*, with Lord Woolf referring to the House of Lords' 'exhaustive' treatment of the 'relevant

²⁶ *R v Brown* [1994] 1 AC 212 (HL).

²⁷ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910.

authorities'.²⁸ Lord Woolf drew particular attention to the dissenting judgment of Lord Mustill, but also looked to post-*Brown* case law,²⁹ secondary literature,³⁰ and to Canadian case law.³¹

Much of what Lord Woolf says in his sole judgment in *Barnes* might be considered *obiter dicta*, but it amounts to an important case nonetheless. Ashworth describes *Barnes* as 'the leading case' in relation to the criminal law of sports violence, in which 'the Court of Appeal reasserted the proposition that not every "foul" committed in breach of the rules amounts to a crime'.³² Elliott and Quinn describe *Barnes* as 'the most important recent case on this issue',³³ while Cooper and James consider it to comprise a 'clarification of the law'.³⁴

At the heart of the *Barnes* judgment is the following heuristic and somewhat tautological proposition: 'A criminal prosecution should be reserved for those situations where the conduct is sufficiently grave to be properly categorised as criminal'.³⁵ Insofar as it comprises a statement of the law, this passage hints at the difficulty involved in articulating determinate and precise rules as to what will comprise lawful conduct in the sports arena.³⁶ In light of this, and the availability of alternative means by which to address sports violence, the

²⁸ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 913.

²⁹ *R v Dica* [2004] EWCA 1103; [2004] QB 1257.

³⁰ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994).

³¹ *R v Cey* (1989) 48 CCC (3d) 480; *R v Ciccarelli* (1989) 54 CCC (3d) 121.

³² Andrew Ashworth, *Principles of Criminal Law* (5th edn, Oxford University Press 2006) 321; see also Mike Molan, *Cases and Materials on Criminal Law* (3rd edn, Cavendish 2005) 257; Michael Allen, *Textbook on Criminal Law* (9th edn, Oxford University Press 2007) 361-62; Russell Heaton and Claire de Than, *Criminal Law* (3rd edn, Oxford University Press 2011) 106.

³³ Catherine Elliott and Frances Quinn, *Criminal Law* (8th edn, Oxford University Press 2010) 381.

³⁴ Simon Cooper and Mark James, 'Entertainment - The Painful Process of Rethinking Consent' [2012] *Criminal Law Review* 188, 193.

³⁵ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 911-12 (Lord Woolf CJ).

³⁶ Cooper and James suggest that 'the determination of standards of tolerance in respect of given activities' may be a problem that is 'insoluble' (Simon Cooper and Mark James, 'Entertainment - The Painful Process of Rethinking Consent' [2012] *Criminal Law Review* 188, 199).

statement should also be understood as a message to prosecutors, demonstrating a desire to circumscribe the number of prosecutions brought before the criminal courts.

In December 2013, almost a decade after the Court of Appeal gave its judgment in *Barnes*, the Crown Prosecution Service (CPS), the Association of Chief Police Officers (ACPO), the Football Association (FA) and the Football Association of Wales (FAW) jointly issued a document titled the *Protocol On The Appropriate Handling Of Incidents Falling Under Both Criminal And Football Regulatory Jurisdiction*,³⁷ with the aim that the respective organisations could work together in deciding upon whether criminal proceedings should be brought in relation to ‘incidents falling under concurrent jurisdiction’.³⁸ Whilst it is not made explicit, it is clear that the primary target of this is likely to be on-field violence;³⁹ the protocol quoted *Barnes*, and effectively implemented the approach advocated by Lord Woolf. In October 2015, the protocol was superseded by the *Agreement on the Handling of Incidents Falling under both Criminal and Football Regulatory Jurisdiction*,⁴⁰ which was entered into by the FA, FAW, CPS and the National Police Chiefs’ Council (NPCC), the organisation which effectively replaced ACPO in April 2015. Although the text was amended in a number of respects, the Agreement is

³⁷ *Protocol on the Appropriate Handling of Incidents Falling Under Both Criminal and Football Regulatory Jurisdiction* (2013)

<http://www.cps.gov.uk/publications/agencies/football_protocol.pdf> accessed 15 June 2015

³⁸ *Protocol on the Appropriate Handling of Incidents Falling Under Both Criminal and Football Regulatory Jurisdiction* (2013) 2

<http://www.cps.gov.uk/publications/agencies/football_protocol.pdf> accessed 15 June 2015

³⁹ The protocol offered two ‘illustrative examples’, both of which involved on-field violence (4).

⁴⁰ *Agreement on the Handling of Incidents Falling under both Criminal and Football Regulatory Jurisdiction* (2015)

<http://cps.gov.uk/publications/agencies/football_agreement_02_09_2015.pdf> accessed 20 July 2016.

functionally identical to the protocol.

1.2 The Scope of the Thesis

In this section, I shall set out in more detail the parameters of the present study, what it aims to achieve, and how it adds to the existing literature.

1.2.1 A definition of 'sports violence'

The term 'sports violence' will be used throughout this thesis, and thus needs some definitional and conceptual clarity. 'Violence' is a word that lacks precision; it is a visceral concept, as Emsley notes, 'a catch-all category [that] can be used to cover a variety of behaviour'.⁴¹ This behaviour is, in the normal course of events, perceived as aberrant, subversive and socially harmful.

The criminal law defines violent offences against the person in terms of contact⁴² and injury, rather than by reference to the concept of violence itself, and these have been held to extend to causing psychological harm,⁴³ and to the transmission of disease.⁴⁴ In the context of sports, violence is usually given a more constrained, narrow definition;⁴⁵ Guttman has noted the limitations usually placed on that conduct which is to be considered as 'sports violence':

⁴¹ Clive Emsley, *The English and Violence Since 1750* (Hambledon & London 2005).

⁴² Or, in the case of a common assault, the apprehension of the infliction of immediate contact (*Fagan v MPC* [1969] 1 QB 539 (DC)).

⁴³ *R v Ireland; Burstow* [1998] AC 147 (HL).

⁴⁴ See: *R v Clarence* (1888) 22 QBD 23; *R v Dica* [2004] EWCA Crim 1103, [2004] QB 1257; *R v Konzani* [2005] EWCA Crim 706, [2005] All ER (D) 292 (Mar).

⁴⁵ There is an extensive sociological literature concerning the understanding of violence in sport, for example: J Parry, 'Violence and Aggression in Contemporary Sport' in J Parry and M McNamee (eds), *Ethics and Sport* (Routledge 2001); J Kerr, *Rethinking Aggression in Sport* (Routledge 2005); MD Smith, *Violence and Sport* (Butterworths 1983).

Within the world of sports, it is arbitrary but convenient to restrict the definition to *physical damage done to one's opponent*. The injuries that one brings upon oneself, ranging from the tennis player's blistered thumb to the automobile racer's explosive immolation, can be excluded along with worn-out golf balls and tattered archery targets, but the battering inflicted by a boxer and a baseball player's spiking of the second batsman trying to tag him out are both examples of sports violence.⁴⁶

This conception accords with the somewhat more concise formulations offered by Coakley ('physical assault based on total disregard for the well-being of self and others, or the intent to injure another person'⁴⁷), Smith ('physically assaultive behaviour that is designed to, and does, injure another person or persons physically'⁴⁸) and James ('intentional, reckless or negligent touching by one sports participant of a co-participant, which causes personal injury to that other and occurs during the course of participation in a sport'⁴⁹). Thus, the type of violence that is at the centre of this work can be characterised as interpersonal physical violence that takes place between participants during the course of a sporting contest. Although it is certainly possible that psychological injury may be caused, it is nevertheless the case that this type of injury is unlikely to be

⁴⁶ A Guttman, 'Roman Sports Violence' in J Goldstein (ed), *Sports Violence* (Springer-Verlag 1983) 8.

⁴⁷ Jay Coakley, *Sport in Society: Issues and Controversies* (Irwin, McGraw-Hill 1998) 180.

⁴⁸ MD Smith, *Violence and Sport* (Butterworths 1983) 7.

⁴⁹ Mark James, 'Consent to Injury and an Exemption for Contact Sports' (PhD thesis, Manchester Metropolitan University 2001) 51.

addressed by a court, and this, I suggest, is sufficient reason for it to lie beyond the scope of the present study.

Somewhat like 'violence', the range of activities that might qualify as 'sport' is difficult to specify.⁵⁰ In the sense that it is used in this work, 'sport' denotes a type of recreational activity, though the characteristics of those that qualify as sport are also disputed, and even this narrower definition of the concept is far from straightforward. Of the contested scope of the term, Lord Hailsham has written: 'In a sense there is no such thing as sport. There is only a heterogeneous list of pastimes, with different governing bodies, different ethics and constantly varying needs'.⁵¹ As such, attempts at categorical definition only provide approximations or characterisations of sport,⁵² with the activities connected by similarities referred to as 'family resemblances' by Wittgenstein and linked by virtue of a 'continuous overlapping' of definition and description.⁵³ It is far easier to understand sport by reference to particular forms, and it is partly for this reason that I have chosen to concentrate on the specific sports of boxing, rugby and soccer.⁵⁴

Concentrating on particular sports, which have established rule structures and governing bodies, mitigates the definitional difficulties that attend any

⁵⁰ The word itself is a polyseme; over a century ago, Graves proclaimed that '[t]here are few words in the English language which have such a multiplicity of divergent meanings as the word sport' (H Graves, 'A Philosophy of Sport' [1900] *Contemporary Review* 877, 877).

⁵¹ Lord Hailsham, *A Sparrow's Flight* (William Collins & Sons Ltd 1990), referenced in Edward Grayson, *Sport and the Law* (3rd edn, Butterworths 2000) xii.

⁵² Slusher considers sport 'beyond essence': 'Basically sport, like religion, defies definition. In a manner it goes beyond definitive terminology. Neither has substance that can be identified. In a sense both sport and religion are beyond essence' (H Slusher, *Men, Sport and Existence: A Critical Analysis* (Lea & Febiger 1967)).

⁵³ Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell Publishing 1953) 31-32.

⁵⁴ I shall refer to the sport as 'soccer' throughout, to avoid confusion with the other football codes, and to avoid the awkward deployment of its official title, Association Football.

discussion of sport, but it does not eradicate them. The sports that I consider here are practised at many levels. At the organised level, they follow published rules, and are officiated by referees who enforce the relevant regulations and sanction transgressions on the part of the participants, but the majority of play takes place in a less regulated, more *ad hoc* form, on training grounds and in schoolyards and parks throughout the country. When the law relating to sports violence is considered, there is an inevitable concentration on the more organised forms, but, as is noted at numerous points throughout this thesis, any dispensation on the part of the criminal law must be made in cognisance of these different levels, from the higher echelons of the professional game to the less formal variants.

1.2.2 The choice of sports

Boxing is, in some respects, the most obvious inclusion in this study; as Anderson states, it 'presents a level of physicality that is unparalleled in most contact sports'.⁵⁵ It is also a deeply polarising sport. Aficionados might recognise Gems's description: 'Despite the inherent brutality and countless human tragedies occurring in the ring, some see a work of art in the choreographed performance of ducking, feinting, footwork, and the rhythmic staccato of punches'.⁵⁶ For others, however, the continued existence of the sport is controversial, and its professional form has been banned in a number of countries.⁵⁷ Amateur boxing is less contentious, and an indication of its worldwide social acceptance might be

⁵⁵ Jack Anderson, *The Legality of Boxing: A Punch-Drunk Love?* (Birkbeck Law Press 2007) 1.

⁵⁶ Gerald R Gems, *Boxing: A Concise History of the Sweet Science* (Rowman & Littlefield 2014) xi.

⁵⁷ Longstanding bans on the sport have recently been lifted in Sweden (2007), Cuba (2013) and Norway (2014), leaving North Korea and Iran as the only countries in which it is currently banned.

surmised from its inclusion in every Olympic Games but one since 1904.⁵⁸

As long ago as 1928, connections were being made between boxing and brain injury,⁵⁹ and both the amateur and professional forms of boxing have for some time been strongly opposed by the British Medical Association.⁶⁰ The strength of opposition can be gauged from some of the writings in this area, where, for example, Pearn points to a '[p]rogressive evolution towards a more enlightened society' that 'has come to deem as unacceptable the deliberate infliction of brain damage in any publicly sanctioned sport', with the result that '[m]ost responsible medical bodies have policies in place to ban boxing'.⁶¹ For Lundberg, '[b]oxing, as a throwback to uncivilised man, should not be sanctioned by any civilised society'.⁶² Just as representatives of the medical community have seen sufficient commonality between the amateur and professional forms of boxing as posing similar dangers to a participant's health, so the issues the two variants pose for the criminal law are also broadly similar.

Soccer is included as the sport that, above all others, can legitimately claim to have been 'the national game' for well over a century.⁶³ It has also been the subject of some of the most important legal developments in relation to

⁵⁸ Boxing was not part of the 1912 Stockholm Olympics, as it was at that time illegal in Sweden.

⁵⁹ HAS Martland, 'Punch Drunk' (1928) 19 *Journal of the American Medical Association* 1103.

⁶⁰ British Medical Association, *Boxing: An Update from the Board of Science* (British Medical Association, 2008); British Medical Association, *The Boxing Debate* (British Medical Association, 1993). The World Medical Association and the American Association also advocate a ban on boxing.

⁶¹ J Pearn, 'Boxing, Brains and Balls' (2000) 1 *Medicine Today* 146.

⁶² GD Lundberg, 'Boxing Should be Banned in Civilised Countries' (1983) 249(2) *Journal of the American Medical Association* 250, 250.

⁶³ Rachel Vorspan, "'Rational Recreation" and the Law: The Transformation of Popular Urban Leisure in Victorian England' (2000) 45 *McGill Law Journal* 891, 907-08. For Marples, such a status goes back much further, to the fourteenth century (Morris Marples, *A History of Football* (Secker & Warburg 1954) 24).

sports violence,⁶⁴ a fact explicable partly by happenstance, but also no doubt due to its high participation rates and the public profile the game enjoys. Although the physicality of soccer is less blatant than boxing, it is nevertheless a game in which both deliberate and accidental contact between players can, and does, result in serious injury.

The codes of rugby lie at what might be considered a midpoint between the overtly confrontational ethos and practice of boxing and the lower degree of contact that normally takes place in soccer.⁶⁵ For the sake of this work, I will mark little distinction between Rugby League and Rugby Union. Whilst many of those who follow or participate in the codes would no doubt point to important differences between them, the similarities between the codes have led to calls for mergers,⁶⁶ and have resulted in inter-code tournaments⁶⁷ and experimental hybrid games taking place.⁶⁸ The inherent similarities mean that the problems they pose for the criminal law are practically identical.

Young describes boxing and the football codes as ‘outright violent’, and refers to their practice as ‘deeply entrenched in an ethic of competition and

⁶⁴ In chronological order: *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910; *R v Chapman* (unreported) Crown Court (Warwick), 3 March 2010; the Joint Protocol and subsequent Agreement.

⁶⁵ By way of contrast, Dunning and Sheard write: ‘Since it occurs in a minority, middle-class sport, Rugby violence has not been accorded as much prominence by the mass media’ (Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge, 2004) 196).

⁶⁶ Chris Jones, ‘It’s All a Code Merger Mystery’ *London Evening Standard* (London, 9 October 2000).

⁶⁷ Dave Hadfield, ‘Bath Feel Full Force of Wigan Might’ *The Independent* (London, 9 May 1996); Dominic Malcolm, Kenneth Sheard and Andy White, ‘The Changing Structure and Culture of English Rugby Union Football’ (2000) 3 *Culture, Sport, Society* 63.

⁶⁸ Greg Growden, ‘Hybrid Rugby Union-League Experiment’ *Sydney Morning Herald* (Sydney, 12 May 2011).

violence'.⁶⁹ The levels of violence they generally entail are different, and they have been chosen as representative of a rough hierarchy of contact sports, during the course of which the participants engage in conduct that is readily analogous to that which would be deemed archetypically criminal. That is not to say that they are necessarily given equal treatment herein, since each poses slightly different questions for the criminal law, but consideration of each contributes to an overall argument about the lawfulness of sports violence, and how this is accounted for under the criminal law. For instance, whereas boxing was a site of legal conflict in the nineteenth century, soccer has provided the most important recent material. The sports I have chosen are highly 'visible' to the criminal law, insofar as they each have a long history of socio-legal acceptance and are participated in openly and watched in high-profile sporting events. Importantly for their status and treatment under the criminal law, all can be said to have been in the House of Lords' contemplation when proclaiming 'violent sport' a species of 'lawful activity'.⁷⁰

1.2.3 The limits of the thesis

For the purposes of the criminal law, the jurisdictional focus is on England and Wales, though, for stylistic reasons and the sake of simplicity, I shall refer simply to 'English law'. Although this is not a comparative piece, there will be some reference to other jurisdictions, particularly Canada. Anderson points to the

⁶⁹ Kevin Young, 'Violence in the Workplace of Professional Sport from Victimological and Cultural Studies Perspectives' (1991) 26 *International Review for the Sociology of Sport* 3, 4.

⁷⁰ *R v Brown* [1994] 1 AC 212 (HL).

'sophisticated approach of the Canadian courts to violence in sport',⁷¹ and its influence manifests itself in the citation of the Saskatchewan Court of Appeal case of *R v Cey*⁷² in *Barnes*. It should be noted that, where Canadian jurisprudence is cited, whether deriving from cases or commentary, it usually envisages different sports (primarily ice hockey), but the principles are sufficiently similar for them to be extrapolated.

The sports under consideration have been, and remain, dominated by men, a fact reflected in this work.⁷³ Although I am mindful of a potential imbalance, it is contended here that the issues raised for the criminal law are broadly the same irrespective of the gender of the participants. The violence in sport does not go unchallenged, and the typically male virtues of sport in this regard are susceptible in particular to feminist accounts of male violence.⁷⁴ While there is no doubt value to be had in addressing the subject from a gendered perspective, and this is particularly true when it comes to the evolving status of women's boxing,⁷⁵ such an enquiry is outside the scope of this thesis.

Some other omissions from the thesis should be justified. While they are undoubtedly worthy of study, the putative definition of sports violence and the

⁷¹ Jack Anderson J, 'No Licence for Thuggery: Violence, Sport and the Criminal Law' [2008] Criminal Law Review 751, 752.

⁷² (1989) 48 CCC (3d) 480.

⁷³ Michael A Messner, *Power at Play: Sports and the Problem of Masculinity* (Beacon Press 1992); John Nauright and Timothy JL Chandler, *Making Men: Rugby and Masculine Identity* (Routledge 1996); Martin Wiener, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian England* (Cambridge University Press 2005).

⁷⁴ J Hargreaves, *Sporting Females* (Routledge 1994); M Messner and D Sabo, *Sport, Men and the Gender Order* (Human Kinetics 1990).

⁷⁵ Having first appeared as a demonstration sport at the 1904 Olympics, women's boxing was banned in most nations for much of the 20th century. The recent reversal of this has seen women's boxing return to the Olympics, as an exhibition sport in 2008, and as an official Olympic sport in 2012 <http://boxingbeginners.com/history_of_boxing_amateur_boxing.php> accessed 12 January 2015.

sports on which I have chosen to concentrate naturally exclude consideration of blood sports;⁷⁶ incidents of participant/spectator violence;⁷⁷ spectator violence, known colloquially as ‘hooliganism’, and which has attracted considerable legislative,⁷⁸ judicial⁷⁹ and academic attention;⁸⁰ and the often-theatrical violence that has attended boxing events in the run-up to fights.

Although it is a subject that is alluded to sporadically, there will be little consideration of deaths as a result of sports violence, and thus the possibility of liability for homicide. This is partly to avoid repetition within the work, as many of the principles enunciated in relation to non-fatal offences will also be applicable to homicides. It is also for reasons of space, since, where there is divergence, the requirements in particular of the different types of manslaughter would require lengthy exposition. But it is primarily because death is not anticipated in sport; it is particularly abhorrent in a way that injury, even serious injury, is not. Most people engaged in contact sport on a consistent basis can expect to be injured, more or less seriously, at the hands or feet of another at some point, but relatively very few participants die. Despite its sporadic occurrence, death is therefore incompatible with the amalgam of the rules and accepted practice of sport that nevertheless countenances the possibility of (sometimes serious) injury.

⁷⁶ See: Hunting Act 2004.

⁷⁷ Such as Eric Cantona’s infamous ‘kung fu’ kick, aimed at spectator and Crystal Palace supporter Matthew Symons, in 1995.

⁷⁸ See: Football (Offences and Disorder) Act 1999; Football (Disorder) Act 2000.

⁷⁹ See, for example: *Gough and Smith v Chief Constable of Derbyshire* [2002] QB 1213 (CA).

⁸⁰ See, for example: Geoff Pearson and Mark James, *Public Order and the Rebalancing of Football Fans’ Rights: Legal Problems with Pre-emptive Policing Strategies and Banning Orders* (2015) Public Law 458.

The modern role of public order offences is also outside the scope of the study. Although the tendency of sports violence to cause public disorder is a manifest concern in the early stages of the development of modern sports charted in Chapter 2, it is one of the contentions of that chapter, and of the thesis, that this recedes with the subsequent institutionalisation of sports, and it is therefore an element of the modern criminal law that is not addressed.⁸¹

1.3 The Aims and Structure of the Thesis and its Contribution to

Knowledge

This thesis investigates the complex relationship between sports violence and the criminal law, in order to better understand the space that has been created in the criminal law for the practice of contact sports, and thereby answer its titular question: does the criminal law's treatment amount to a 'zone of legal exemption'? As such, the work is primarily analytical and descriptive; the justification for the chosen approach is aptly summarised by Stevenson:

One would not expect a book on scientific method to do the work of science itself; and one must not expect to find here any conclusions about what conduct is right or wrong. The purpose of an analytical study ... is

⁸¹ A breach of the peace occurs when 'harm is actually done or likely to be done to a person or, in his presence, his property or is put in fear of being harmed through an assault, affray, riot, unlawful assembly or other disturbance' (*R v Howell* [1982] QB 416 (Watkins LJ)). Alternatively, the Public Order Act 1986 may apply, in particular ss 4, 4A and 5, which are relevant where there is threatening behaviour which has caused, or was likely to cause, another to fear for their safety, with or without intention (for a more detailed description of these offences, see: David Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Hart Publishing 2010) ch 7; Richard Card, *Public Order Law* (Jordans Ltd 2000); David Ormerod, *Smith & Hogan's Criminal Law* (13th edn, Oxford University Press 2011) ch 32).

always indirect. It hopes to send others to their tasks with clearer heads and less wasteful habits of investigation.⁸²

The primary contribution this thesis makes to the existing literature lies in identifying these ‘wasteful habits of investigation’.

This thesis is not intended to be normatively prescriptive. That is, it does not set out to recommend the level to which sports violence should escape criminal sanction, or prescribe an optimal approach to be taken; to recommend that the criminal law should do more, or less, to bring sports violence under its auspices.⁸³ I therefore express no particular view as to the legality of boxing, for example.⁸⁴ While there is undoubted value in work that attempts to explain the existence of sports violence,⁸⁵ and to justify⁸⁶ or repudiate⁸⁷ the need for legal intervention, I do not seek to recommend a level to which violence causing injury should be accepted, either generally or in relation to particular sports.

Underlying the criminal law’s approach to sports violence is a recognition that sport is a socially valuable phenomenon; Cooper and James point to approval on the part of the courts insofar as sport serves to ‘promote health or exercise ...

⁸² Charles L Stevenson, *Ethics and Language* (Yale University Press 1960) 1. Stevenson is writing here in the context of the analysis of ethics.

⁸³ Simon Gardiner, ‘The Law and the Sportsfield’ [1994] *Criminal Law Review* 513.

⁸⁴ Boxing was included as a ‘lawful activity in *R v Brown* [1994] 1 AC 212 (HL), and it was considered the role of Parliament to decide as to whether this should continue to be the case. See Jack Anderson, *The Legality of Boxing: A Punch-Drunk Love?* (Birkbeck Law Press 2007) for an incisive and thorough treatment of the subject.

⁸⁵ The field of the sociology of sport concentrates on this: Jay Coakley, *Sport and Society* (6th edn, Mosby 1997) ch 7.

⁸⁶ Edward Grayson and Catherine Bond, ‘Making Foul play a Crime’ [1993] *Solicitors’ Journal* 693.

⁸⁷ Simon Gardiner, ‘The Law and the Sportsfield’ [1994] *Criminal Law Review* 513; Simon Gardiner and Alexandra Felix, ‘The Juridification of the Football Field’ (1994-95) 5 *Marquette Sports Law Journal* 189. Gardiner and Felix state their ambition as ‘endeavour[ing] to suggest an exemplar of how on-the-field physical contact can be best regulated without formal legal mechanisms’ (190).

[and] associated values of sporting conduct'.⁸⁸ This social utility facilitates its status as one of a limited number of exceptional 'lawful activities' in which the infliction of harm that would otherwise be considered criminal is held to be lawful.⁸⁹ In *Attorney-General's Reference No 6 (of 1980)*, Lord Lane refers to 'properly conducted games and sports' as being 'needed in the public interest'.⁹⁰ In *Brown*, Lord Mustill refers at length to historical accounts of the value of playing with single-sticks and the evils of prizefighting, and alludes to the 'physical and moral benefits which have been seen as the fruits of engagement in manly sports' in more modern times.⁹¹

In reality, the normative, moral questions as to what is 'right or wrong' about sports violence have been addressed only obliquely by the courts in recent times;⁹² in *Brown*, the House of Lords made it clear that the lawfulness of particular activities involving consensual harm was a matter for Parliament,⁹³ which could 'call on the advice of doctors, psychiatrists, criminologists, sociologists and other experts and ... also sound and take into account public opinion' when deciding whether or not particular activities could lawfully involve the infliction of injury.⁹⁴ As such, what is 'right or wrong' about sports violence is a moral and political question with which the courts have largely refused to

⁸⁸ Simon Cooper and Mark James, 'Entertainment - The Painful Process of Rethinking Consent' [2012] *Criminal Law Review* 188,194.

⁸⁹ *R v Brown* [1994] 1 AC 212 (HL).

⁹⁰ *A-G's Reference (No 6 of 1980)* (1981) 1 QB 715 (CA), 719 (Lord Lane CJ).

⁹¹ *R v Brown* [1994] 1 AC 212 (HL), 265 (Lord Mustill).

⁹² As I demonstrate in Chapter 2, this was not always the case, and the courts played a historical role in determining the lawfulness of a range of sporting practices.

⁹³ Lord Templeman made specific reference to boxing in this context (*R v Brown* 1 AC 212, 228).

⁹⁴ *R v Brown* 1 AC 212 (HL), 234-35 (Lord Templeman)

engage, beyond the basic contention that 'legitimate sport' has social utility and should therefore be lawful.⁹⁵

Given this lack of detail, the opening chapters of this thesis seek to bring definitional and conceptual clarity to the socio-legal place of contact sport, first historically and then in terms of modern sports practices. Valuable in itself, this grounding is also important when it comes to understanding the influences that come to bear in shaping the criminal law's response to sports violence.

To this end, Chapter 2 locates the socio-legal legitimacy of sports violence historically. It examines the evolution of boxing, rugby and soccer, from the primitive practices that existed in pre-Industrial times, through to the more civilised, systematised and standardised modern forms that emerged during the eighteenth and nineteenth centuries. The 'civilising process' undergone by the respective sports took place at a time of great social change and was the product of a number of factors, amongst them the concerns of the authorities over the disruptive leisure practices of the lower classes, the demands of urban living and more regularised employment conditions, and the encouragement of social reformers keen to impart the values of 'rational recreation'. Through this period of change, the predominant concern of the criminal law was with sport as a cause of social disorder, and the potential for this receded as it underwent systematisation and institutionalisation. The period has had a lasting influence on the criminal law's response to sports violence, and this is also true of a number of the cases that came before the courts during this time.

⁹⁵ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910.

In Chapter 3, I move from a historical understanding of the development of sports violence to present a contemporary picture of violence in each of the chosen sports. Sports such as boxing, rugby and soccer are intrinsically violent, routinely involving a physicality that risks and causes injury, and which is not simply incidental, but rather inherent to, and inextricable from, their practice. The governing bodies of each of the sports examined here promulgate rules relating to violent play and sanctions are imposed upon those who disobey them, tiered according to the perceived seriousness of the breach. The chapter begins by looking at the modern rules of the respective sports as they apply to violence, and in terms of the safety provisions that they mandate. It then moves to consider the place of violence that occurs outside of the rules, but within the accepted practices of a sport. It is suggested that a conception of what has been termed the 'playing culture' of a sport is useful to the criminal law in providing a more realistic portrayal, but that the concept is less straightforward than has generally been recognised by those who advocate its adoption by the criminal law. The chapter draws attention to, and analyses, a number of tensions and problematic aspects of the playing culture standard.

The work undertaken in Chapters 2 and 3 provides necessary context for the discussion of the criminal law of sports violence, but it also adds to the existing literature in a number of ways. For instance, Chapter 2 supplements existing historical accounts of the criminal law's treatment of sports violence by pointing to the shifting priorities of the courts, and the way in which important nineteenth-century cases such as *Coney* and *Bradshaw* sought to calibrate the criminal law's approach in accordance with the normative expectations of those

engaged in increasingly sophisticated and codified sports, in a way that continues to resonate through the modern case law.⁹⁶ This historical understanding carries through into the discussion of the modern practices of sport considered in Chapter 3, which notably adds to the existing literature in terms of exploring the meaning and sources of the 'playing culture' of sport and its importance to the imposition of criminal liability. Whether referred to explicitly or not, the idea of a playing culture that draws from more than a strict reading of the rules underlies much of what has been written in this area, but its significance and inherent complexities have been insufficiently analysed by those who argue that the playing culture should be taken into account by the criminal law.⁹⁷

After the necessary groundwork of Chapters 2 and 3, the focus of the thesis moves to an examination of the criminal law principles that have developed in response. A large part of this thesis is concerned with what I term the 'orthodox view' of the criminal law of sports violence, by which I mean the prevailing view of the operation of the criminal law in relation to sports violence. Under this view, the criminal law's formal approach comprises separately assessed offence and defence requirements, and it is analytically expedient to approach the subject according to the same structure. In keeping with this, therefore, Chapter 4 examines the offences that might be held to pertain to incidents of sports violence, concentrating on those which are provided for by ss 18, 20 and 47 of the Offences Against the Person Act 1861. The constituent

⁹⁶ In *Bradshaw*, it was held that 'playing according to the rules and practices of the game' would be instructive in determining the lawfulness of the defendant's conduct (*R v Bradshaw* (1878) 14 Cox CC 83, 85 (Bramwell B)). *R v Coney* (1882) 8 QBD 534 is cited at length in the leading case of *R v Brown* [1994] 1 AC 212 (HL).

⁹⁷

elements of these offences have been applied to sports violence with relative ease, and this chapter adds to the existing literature by in addressing how this has been achieved. When examining the application of these offences, there is a particular focus on the *mens rea* requirements, and the way in which these have been construed narrowly so as to allow for *prima facie* liability to be established in cases of sports violence. This chapter also prepares the way for a consideration of alternative measures of liability in Chapter 7.

Chapters 5 and 6 are concerned with the important subject of consent, a normative and doctrinal concept that is central to understanding the criminal law's treatment of sports violence. I address consent in two parts: Chapter 5 examines the normative role of consent; and Chapter 6 looks to its doctrinal function.

The formal organisation of the criminal law of sports violence around the participants' consent points to an acceptance that persons should be allowed to make decisions for themselves about the activities in which they engage. However, the normative role of consent in the criminal law is problematic, and its availability is generally restricted where the behaviour is such that it entails or risks significant physical harm.⁹⁸ Here, the normative power of consent is complicated by a dichotomy between its significance as an expression of private authorisation and the public censoring role of the criminal law. Consent rightfully plays an important normative role in considerations of the lawfulness of sports

⁹⁸ *R v Brown* [1994] 1 AC 212 (HL).

violence, but its effect is inevitably contingent upon considerations of public policy.

However important the consent that can be said to derive from sports participation is as a normative justification for the lawfulness of sports violence, translating this into coherent and functional legal doctrine is not straightforward. This has not gone unrecognised, and it is now over two decades since Lord Mustill aired his misgivings about the dispositive value of consent in discerning between lawful and unlawful sports violence.⁹⁹ In its examination of the doctrinal function of consent, Chapter 6 adds to the existing literature by analysing the operation of consent in relation to sports violence, and comparing this to the very different types of consent that are relevant to medical treatment and sexual conduct. Unlike in these other contexts in which consent performs an important doctrinal function, consent in sport is inextricably linked to the rules and practice of the activity in such a way as to render an enquiry into the individualised consent of any one participant largely redundant. Rather, consent is imputed to the participants in accordance with the amalgam of rules and practices that comprises that sports's playing culture. This involves the employment of a legal fiction, the operation and utility of which is taken up in Chapter 7.¹⁰⁰

In Chapter 7, I seek to account for the criminal law's recourse to legal fictions in relation to sports violence. I propose three alternative means to the

⁹⁹ *R v Brown* [1994] 1 AC 212 (HL), 259.

¹⁰⁰ For examples where the fiction has been explicitly acknowledged, see: Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004); Stephen King, 'Consensual Violence and the State: A Case Study in Combat Sports' (PhD thesis, University of Limerick 2011). For an implicit acceptance of its operation, see: Jack Anderson, 'No Licence for Thuggery: Violence, Sport and the Criminal Law' [2008] *Criminal Law Review* 751. Anderson writes of 'implied sporting consent'.

orthodox view by which liability could be determined, all of which concentrate on the quality of the defendant's act in the context of sport, taking into account the consent of the participants as one of a number of considerations. Each of the alternative approaches, I argue, better reflects the substance of the lawfulness of sports violence, and I demonstrate this by reference to the Court of Appeal's judgment in *Barnes*. After consideration of these alternative rationales by which to describe and define the lawfulness of sports violence, I return to the fictional representation that characterises the orthodox view, and ask what purpose it serves. I suggest that, as a fiction, its use requires justification, and that this might lie in its dispositive value; that is, its ability better to enunciate the applicable principles, and thus facilitate decisions in individual cases. Alternatively, it may serve as a formal device; a means by which to structure the criminal law so as to cast sports violence as exceptional, allowing greater policy control over the circumstances in which it will be considered lawful.

In analysing the the orthodox view through an immanent critique of its structure and operation, I make a substantial contribution to existing literature. I am able to point to the rationale and implications of its function, engaging an argument that draws on Norrie's account of the criminal law as aspiring to 'technical core offences' and a 'moral defence periphery',¹⁰¹ whereby moral judgement can be removed from the offence categories and considered in separable defence categories. Norrie writes of this as structuring the law according to a 'morality of form',¹⁰² and I suggest that the orthodox view reflects

¹⁰¹ Alan Norrie, *Crime, Reason and History* (3rd edn, Cambridge University Press 2014).

¹⁰² Alan Norrie, *Punishment, Responsibility and Justice* (Oxford University Press 2000).

a desire for a formal account of the criminal law of sports violence that shadows the inherently moral and political judgements that its resolution necessarily entails.

In Chapter 8, I look to Lord Woolf's proposition that a criminal prosecution for sports violence 'should be reserved for those situations where the conduct is sufficiently grave to be properly categorised as criminal',¹⁰³ which is substantiated by the view that there are alternative, more effective means, by which excessively violent behaviour can be deterred and punished. The development of organised sport has entailed concomitant sophisticated systems of rules and regulation which might be better suited to this task, and yet an acceptance of this is balanced by a sense that there should be a place for the criminal law; that sport is not, and should not be, a 'licence for thuggery',¹⁰⁴ and that judgements as to what is to be considered an acceptable level of violence in society ultimately fall to be decided according to the criminal law. The chapter considers the extent to which prosecutorial discretion is an effective or appropriate mechanism by which to regulate the treatment of those who commit acts of sports violence, and looks to the potential impact of the recently-implemented *Agreement on the Handling of Incidents Falling Under Both Criminal and Football Regulatory Jurisdiction*,¹⁰⁵ which aims at coordinated responses to suspected criminal behaviour on the part of sports governing bodies and the

¹⁰³ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 911-12 (Lord Woolf CJ).

¹⁰⁴ *R v Lloyd* (1989) 11 Cr App R (S) 36 (CA), 37.

¹⁰⁵ *Agreement on the Handling of Incidents Falling under both Criminal and Football Regulatory Jurisdiction* (2015)

<http://cps.gov.uk/publications/agencies/football_agreement_02_09_2015.pdf> accessed 20 July 2016.

agencies of criminal justice. Wherever discretion is posited as the answer to difficult problems in the substantive law, there are potentially irreconcilable tensions between the demand for consistency of treatment under the law and a demand that the regulatory function be allowed to do its job wherever possible. The chapter adds to the existing literature in its consideration of recent policy developments, and in engaging in discussion of the relative merits of discretion as a means of obviating indeterminacy in the criminal law. Following this, Chapter 9 concludes the thesis.

Chapter 2

‘Sport is More than Simply Play!’ – From ‘Rough and Disorganised Games’ to ‘Rational Recreation’ and Sport in the Courts

2.1 Introduction

Public involvement in sport has long been regarded by the authorities with what might be described as a concerned ambivalence, simultaneously valued for its benign effects and treated with caution, or even hostility, for its violence and potential for social disruption. In medieval times, the leisure practices of the populace fell to be viewed in terms of the interests of the monarch in preserving public order, and the maintenance of a supply of physically able men to call upon in the absence of a standing army. Against this backdrop, involvement in violent activity was approved insofar as it ‘inculcated bravery and skill and physical fitness’,¹ but weighed against this was the danger of disabling injury. Thus, the ‘act of maim was unlawful because the King was deprived of the services of an able-bodied citizen for the defence of the realm’.² The importance of military preparedness influenced the permissibility of leisure pursuits in other ways; Magoun notes that football in England in the later Middle Ages was ‘constantly legislated against as distracting from the practice of archery, so essential for the national defence’.³

Things have evidently changed since such concerns shaped the authorities’ response to sports violence. In a society in which archery skills are no longer essential

¹ *R v Brown* [1994] 1 AC 212 (HL), 232 (Lord Templeman).

² See: *Hawkins’ Pleas of the Crown* (8th edn, 1824) vol 1, ch 15 (cited in *R v Brown* [1994] 1 AC 212 (HL), 231 (Lord Templeman)).

³ Francis Magoun, *History of Football* (Verlag Heinrich Pöppinghaus OHG 1938) vii.

to the security of the nation, and in which the corporeal integrity of the citizenry is not valued primarily for its ability to provide a well-prepared army,⁴ the specific priorities of the authorities are different today from those which prevailed in medieval times. And yet, the ambivalent view of sport as both socially beneficial and potentially damaging persists.

This chapter looks at the social and legal influences that spurred the development of boxing, rugby and soccer as they morphed from their primitive, uncivilised antecedent forms into the organised and codified sports that are readily recognisable today. The use of the criminal law was a prominent tool amongst the manifold influences that effected and catalysed this development during the great changes that took place as the country underwent the social upheaval of the eighteenth and nineteenth centuries.

2.2 Sport and a ‘Civilizing Process’

As is the case with any socio-cultural product, the practices of sport are inextricable from the socio-political backdrop against which they take place, and this is also true of the concomitant response of the criminal law to their intrinsic violence. A useful conceptual starting point in understanding their history and changing nature is Elias’s theory of the ‘civilizing process’,⁵ an influential sociological concept that has been described as comprising a ‘non-evaluative term which describes an observable

⁴ Traces of this rationale remain. For example, in s 1(1) of the Physical Training and Recreation Act 1937, implemented in anticipation of an impending war with Nazi Germany, there are echoes of the medieval justification for sports when it refers to ‘matters relating to the maintenance and improvement of the physical well-being of the people by means of exercise and recreation’.

⁵ See: Norbert Elias, *The Civilizing Process Vol I: The History of Manners* (Blackwell 1969); Norbert Elias, *The Civilizing Process Vol II: State Formation and Civilization* (Blackwell 1982); Norbert Elias, *The Civilizing Process: Sociogenetic and Psychogenetic Investigations* (revised edn, Blackwell 2000).

unplanned, unintended or blind long-term social process which ... took place in Western European societies between the Middle Ages and modern times'.⁶ Space does not permit a detailed examination of the claims that are made by those who ascribe to the theory of the civilizing process, but its central tenets can be conveyed in a relatively straightforward and concise fashion. In essence, the theory postulates that the history of European societies is one of a move towards greater suppression of emotion and violence amongst the populace. The interrelated, 'central elements' have been described as follows:

An elaboration and refinement of social standards regarding the control of 'natural' functions and the conduct of social relations generally; a concomitant increase in the social pressure on people to exercise self-control; and, at the level of personality, an increase in the importance of 'conscience' as a regulator of behaviour. In the course of this, external constraints grew more subtle and all pervasive, and the use of direct force was pushed increasingly behind the scenes. At the same time, social standards were more deeply and firmly internalized.⁷

Elias and others who subscribe to this approach, chief amongst them Dunning, have written extensively on its impact in the historical development of sport and its

⁶ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 28.

⁷ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge, 2004) 28.

role in society, and have offered ideas as to the place of violence.⁸ Elias emphasises the inevitable interrelation between the violence existent in society and contemporaneous sports, stating that ‘the fluctuating level of civilization in game-contests must remain incomprehensible if one does not connect it at least with the general level of socially permitted violence, of the organization of violence-control, and with the corresponding conscience formation in given societies’.⁹

Elias and Dunning perceive a correlation between the civilising process undergone in society in general and a civilising process in sport; thus, for example, the ‘higher level of violence embodied in Greek game-contests’ reflected a ‘lower level of revulsion against violence in Greek society generally’.¹⁰ Similarly, Dunning and Sheard write of the social backdrop against which pre-industrial leisure pursuits took place as one in which ‘[t]he capacity of the people, especially the “common people”, to exercise emotional restraint was comparatively small. This was reflected in their sudden swings of mood and relatively weak “armour” of internalized restraints’, and meant that ‘[u]nder such conditions, inter-group and inter-personal friction was more liable to lead to open fighting than is the case in societies such as modern Britain’.¹¹

⁸ See, in particular: Norbert Elias and Eric Dunning (eds), *The Quest for Excitement: Sport and Leisure in the Civilizing Process* (Basil Blackwell 1986).

⁹ Norbert Elias, ‘The Genesis of Sport as a Sociological Problem’ in Norbert Elias and Eric Dunning, *The Quest for Excitement: Sport and Leisure in the Civilizing Process* (Basil Blackwell 1986) 143.

¹⁰ Norbert Elias, ‘The Genesis of Sport as a Sociological Problem’ in Norbert Elias and Eric Dunning, *The Quest for Excitement: Sport and Leisure in the Civilizing Process* (Basil Blackwell 1986) 147.

¹¹ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 18. See also: Christina Hole, *English Sports and Pastimes* (London 1949).

2.3 'Rough and disorganised games'

Within this broader view of the civilising process, Elias points to a particular 'civilizing spurt' of the late eighteenth century as affecting contemporary sports,¹² and Dunning likewise regards the ensuing development of soccer and rugby as constituting 'part of a temporally concentrated civilizing spurt'.¹³ During this time of great social change, the primitive, dangerous and uncivilised sports that had been practised with only relatively sporadic and ineffectual interference started to be confronted with more resistance from the authorities, which forced the sports to adapt, and so began the process of transformation that would render the forms of them that exist today.

2.3.1 Polymorphous Folk Games

The various codes of football have a long but uncertain history; Walvin notes that, 'though historians of football have spent an inordinate amount of time seeking them', the origins of football are 'shrouded in mystery'.¹⁴ Although there is little surviving evidence, he points to accounts drawn from the twelfth century, and possibly as early as the ninth.¹⁵ Elias and Dunning trace use of the word 'football' to 'reasonably reliable' sources from the fourteenth century, though they point to 'a very different type of game' that was then in existence; 'a wild game, suiting the temper of the

¹² Norbert Elias, 'The Genesis of Sport as a Sociological Problem' in Norbert Elias and Eric Dunning (eds), *The Quest for Excitement: Sport and Leisure in the Civilizing Process* (Blackwell 1986). See also: Eric Dunning, *Sport Matters: Sociological Studies of Sport, Violence and Civilization* (Routledge 1999) ch 2. Interestingly, boxing was an early example, with the adoption of the 'Broughton rules' in 1743.

¹³ Eric Dunning, *Sport Matters: Sociological Studies of Sport, Violence and Civilization* (Routledge 1999) 62.

¹⁴ James Walvin, *The People's Game: A Social History of British Football* (Allen Lane 1975) 9.

¹⁵ James Walvin, *The People's Game: A Social History of British Football* (Allen Lane 1975) 10. For an account tracing football to even earlier times, see: Morris Marples, *A History of Football* (Secker & Warburg 1954). Marples admits that this can amount to no more than 'plausible conjecture' (1).

people of that age'.¹⁶ As such, the origins of the various codes of football that exist today (amongst them soccer and rugby) are in what Morgan describes as 'incredibly rough and disorganised games that saw huge groups rampaging in pursuit of a ball throughout the Middle Ages'.¹⁷

The rules of the early forms of football have been described as 'virtually non-existent',¹⁸ with local variations to the way in which the game was played and a seemingly unlimited number of participants. They often incorporated elements of modern-day soccer, rugby and boxing into a single game, which could be played on any size of pitch, sometimes spanning miles between neighbouring villages or towns.¹⁹ The fluidity and unstructured nature of these contests was manifested in the ambiguous distinction between participants and spectators, as a result of which the latter may have participated sporadically, while those involved would do so as part of a contest that involved a fluctuating number of participants and unequal teams.²⁰ Howsoever the games were constituted, it is clear that violence was at the centre of the exercise; as Reyburn describes it, 'the players ... went at it with such verve that there was always much property damage, not to mention injury to persons'.²¹

The public setting for these street games made them socially disruptive, and this was an inevitable concern for the authorities; Walvin catalogues the 'battery of laws, proclamations, edicts and regulations against football regularly issued from

¹⁶ Norbert Elias and Eric Dunning, 'Folk Football in Medieval and Early Modern Britain' in Eric Dunning (ed), *Sport: Readings from a Sociological Perspective* (Frank Cass & Co Ltd 1971) 116.

¹⁷ Paul Morgan, *A History of Rugby* (Green Umbrella Publishing 2004) 10.

¹⁸ Wallace Reyburn, *A History of Rugby* (Arthur Barker Ltd 1971) 2.

¹⁹ Eric Dunning, 'Introduction to Part II' in Eric Dunning (ed), *Sport: Readings from a Sociological Perspective* (Frank Cass & Co Ltd 1971) 85.

²⁰ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 22.

²¹ Wallace Reyburn, *A History of Rugby* (Arthur Barker Ltd 1971) 2.

monarchs, governments and local authorities ... backed up by informal though influential denunciations of the game' that occurred from the fourteenth century.²² Indeed, football was proscribed on a national and sometimes local level more than thirty times between 1314 and 1667,²³ and Marples points to the protracted military struggles of the Hundred Years War as a particular influence in stressing the importance of archery, and the banning of football and 'numerous other sports and pastimes'.²⁴ To this end, statutes were issued that both prohibited 'vain games', and mandated that leisure time be used to practise archery.²⁵ Elias and Dunning make reference to the 'many court cases' brought and attempts on the part of the authorities to stop football from the early part of the fourteenth century,²⁶ pointing to an order made in 1608 in Manchester, which refers to 'lewd and disordered persons using that unlawfull exercise of playing with the ffotebale in ye streets'.²⁷ The hostility towards football and later soccer, in particular, was to continue until the second half of the nineteenth century.²⁸

2.3.2 Prizefighting on the frontiers of the law

Though similarly fragmented and patchy, the documented history of boxing is even longer than that of football, and Anderson is justified when he writes that, 'of all

²² James Walvin, *The People's Game: A Social History of British Football* (Allen Lane 1975) 14-30.

²³ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 17.

²⁴ Morris Marples, *A History of Football* (Secker & Warburg 1954) 23.

²⁵ Morris Marples, *A History of Football* (Secker & Warburg 1954) ch 3.

²⁶ Norbert Elias and Eric Dunning, 'Folk Football in Medieval and Early Modern Britain' in Eric Dunning (ed), *Sport: Readings from a Sociological Perspective* (Frank Cass & Co Ltd 1971) 117-19.

²⁷ Norbert Elias and Eric Dunning, 'Folk Football in Medieval and Early Modern Britain' in Eric Dunning (ed), *Sport: Readings from a Sociological Perspective* (Frank Cass & Co Ltd 1971) 119.

²⁸ Morris Marples, *A History of Football* (Secker & Warburg 1954) 25.

sports, boxing probably possesses the deepest and most colourful of histories'.²⁹ The Ancient Greeks introduced a form of pugilism into the ancient Olympic Games in 688 BC, and accounts trace its history to 7,000 BC.³⁰ Arnold points to its demise when Roman Emperor Theodosius the Great terminated the Olympics in 393 AD,³¹ and there is little evidence of its popularity or practice during the Middle Ages;³² Beran and Beran describe it as being 'without a following' until its subsequent re-emergence in the 18th century in the pre-industrial villages of England.³³

Prizefighting was a popular sport at the time of the industrial revolution; Anderson describes the period between 1784 and the implementation of the London Prize Ring Rules in 1838 as 'a "golden age" of prizefighting', reaching its 'zenith' of popularity in the early nineteenth century.³⁴ It enjoyed national publicity and was patronised by the Prince of Wales (later King George IV), inviting the participation of such luminaries as Lord Byron and populist commentary by Hazlitt.³⁵ Beran and Beran portray the unregulated sport of this time as 'opponents fighting with bare knuckles and without time limits and the fight ending when the result was obvious',³⁶ and the inherently violent and uncontrolled nature of prizefighting, and its propensity for causing public disorder, meant that the contests faced pressures from the authorities;

²⁹ Jack Anderson, *The Legality of Boxing: A Punch-Drunk Love?* (Birkbeck Law Press 2007) 1.

³⁰ Gerald R Gems, *Boxing: A Concise History of the Sweet Science* (Rowman & Littlefield 2014) 2.

³¹ Peter Arnold, *History of Boxing* (Chartwell Books Inc 1985). See also: Michael B Poliakoff, *Combat Sports in the Ancient World: Competition, Violence, and Culture* (Yale University Press 1987).

³² Although, for a brief account of its existence in Europe, Africa and Asia during this time, see: Gerald R Gems, *Boxing: A Concise History of the Sweet Science* (Rowman & Littlefield 2014) ch 1.

³³ Roy G Beran and Joshua R Beran, 'The Law(s) of the Rings: Boxing and the Law' (2009) 16 *Journal of Law and Medicine* 684, 686.

³⁴ Jack Anderson, 'Pugilistic Prosecutions: Prize Fighting and the Courts in Nineteenth Century Britain' (2001) 21(2) *The Sports Historian* 35, 36.

³⁵ Jack Anderson, 'Pugilistic Prosecutions: Prize Fighting and the Courts in Nineteenth Century Britain' (2001) 21(2) *The Sports Historian* 35, 36-37.

³⁶ Roy G Beran and Joshua R Beran, 'The Law(s) of the Rings: Boxing and the Law' (2009) 16 *Journal of Law and Medicine* 684, 686.

as Brailsford notes, pugilism ‘offered ample opportunities for legal intervention if the motive was there – as a duel, an affray, as a disturbance of the peace and even a riotous assembly’. As a result, he notes that, as early as the 1770s, ‘pugilism was existing at best on the frontiers of the law’.³⁷

Both prizefighting and the ‘polymorphous English folk game’ that had subsisted in agrarian, rural communities were seen as ‘a waste of time and a threat to public order’.³⁸ They posed a danger to the participants and, more importantly, to society, and were to be forced to adapt in the face of rapid socio-economic and demographic change, which accelerated with the ‘rational recreation’ movement that was to follow.³⁹

2.4 Rational Recreation and the Response of the Courts

By the time of Queen Victoria’s ascension to the throne in 1837, the field of leisure and recreation had already begun to transform and coeval practices were under threat; Brailsford writes of the Georgian period as ‘the age when sport first became a matter of institutions and systems almost as much as of people’.⁴⁰ According to Perkin, there was a radical shift in the socio-cultural practices and attitudinal ethos of the nation, pointing to great change between 1780 and 1850. Of this period he writes that ‘the English ceased to be one of the most aggressive, brutal, rowdy, outspoken, riotous, cruel and blood-thirsty nations in the world and became one of the most

³⁷ Dennis Brailsford, *A Taste for Diversions: Sport in Georgian England* (The Lutterworth Press 1999) 33.

³⁸ Eric Dunning, *Sport Matters: Sociological Studies of Sport, Violence and Civilization* (Routledge 1999) 85. Football was effectively banned by the Act of Edward II 1314.

³⁹ Norbert Elias, ‘The Genesis of Sport as a Sociological Problem’ in Norbert Elias and Eric Dunning, *The Quest for Excitement: Sport and Leisure in the Civilizing Process* (Basil Blackwell 1986) 128.

⁴⁰ Dennis Brailsford, *A Taste for Diversions: Sport in Georgian England* (The Lutterworth Press 1999) 161.

inhibited, polite, orderly, tender-minded, prudish and hypocritical'.⁴¹ This may be an over-simplification of the state of the nation, but it is clear that this period was one of social transformation, which accelerated during the early-to-mid Victorian period. Social change brought about a concomitant push for the spread of 'rational recreation' practices amongst the working population,⁴² with which violent sports such as those described above were incompatible.

2.4.1 Rational recreation and a diminishing space for traditional practices

The work of the rational recreation reformers took place against this backdrop of rapid societal change, and a shift in social attitudes underpinned the movement. It is, as Norrie points out, 'usually bad history to imagine that there is one prime moving force underlying a complex and overlaid social development',⁴³ and it is important to be mindful of the dangers of misleading oversimplification when it comes to the changing practices and legal responses to violent sports. Though historians are in agreement about the existence and nature of this recreational revolution, they diverge in their assessments of different explanatory factors, variously emphasising industrialists, Christian Evangelists, middle-class philanthropic reformers, and commercial entrepreneurs as the most significant agents of change.⁴⁴ Vorspan writes of 'an evangelical middle-class ethos that regarded traditional working-class culture as

⁴¹ Harold Perkin, *The Origins of Modern English Society, 1780–1880* (Routledge & Kegan Paul 1969) 280.

⁴² Peter Bailey, *Leisure and Class in Victorian England: Rational Recreation and the Contest for Control, 1830-1885* (Routledge & Kegan Paul 1978).

⁴³ Alan Norrie, *Punishment, Responsibility and Justice* (Oxford University Press 2000) 55.

⁴⁴ Rachel Vorspan, "'Rational Recreation" and the Law: The Transformation of Popular Urban Leisure in Victorian England' (2000) 45 *McGill Law Journal* 891, 899; Peter Bailey, *Leisure and Class in Victorian England: Rational Recreation and the Contest for Control, 1830-1885* (Routledge & Kegan Paul 1978) 174-75.

socially subversive and morally offensive',⁴⁵ and sought to replace it with a 'middle-class evangelical culture of sobriety, morality, and self-improvement'.⁴⁶ Alongside morally charged disapproval, the pressure for change came from a variety of directions, not least the political and practical realities of urban living in the rapidly growing cities. As Malcolmson explains:

By the middle of the nineteenth century any kind of open space for recreation was very much at a premium. The custom of playing games on public thoroughfares was no longer tolerated; enclosure usually eliminated any public use of agricultural land; and the rapid growth of cities involved the appropriation of much space, some of which had served as customary playgrounds, for commercial building.⁴⁷

Further impetus came from the new working practices, and the immediate pressures of the exigencies and expediencies of an industrialised labour force on the leisure time of the urban working classes. Howkins describes the pressure that regularised working conditions and times exerted on traditional holidays such as Whitsun as an 'attack', emanating from 'the need to impose the work and time disciplines of developing capitalist society on an essentially pre-industrial labouring

⁴⁵ Rachel Vorspan, "'Rational Recreation" and the Law: The Transformation of Popular Urban Leisure in Victorian England' (2000) 45 McGill Law Journal 891, 894.

⁴⁶ Rachel Vorspan, "'Rational Recreation" and the Law: The Transformation of Popular Urban Leisure in Victorian England' (2000) 45 McGill Law Journal 891, 898. See also: JM Golby and AW Purdue, *The Civilisation of the Crowd: Popular Culture in England 1750-1900* (Batsford Academic and Educational 1984) 77-78.

⁴⁷ Robert W Malcolmson, *Popular Recreations in English Society 1700-1850* (Cambridge University Press 1973) 109.

population'.⁴⁸

Public holidays also afforded a space for protest,⁴⁹ and a further push derived from a growing feeling of political insecurity, as the urban middle classes felt threatened by the opportunities for political organisation and unrest:

The older understanding that movements of the lower orders had rational, legitimate, or at least comprehensible ends was replaced in the first half of the nineteenth century by the feeling that they aimed at the utter unraveling of society. To some extent these fears were reflected in a concern that the lower classes had escaped from all social control except the discipline of work. *The activities of workers after their release from the salubrious discipline of the workshop or factory therefore became a matter of both profound interest and apprehension.*⁵⁰

In pre-industrial times, sports such as football and prize-fighting had enjoyed a degree of patronage from the upper classes; they were 'not only ... tacitly sanctioned by the upper classes but openly and sometimes even officially patronized by them'.⁵¹ This largely dissipated in the context of contemporary socio-economic and political

⁴⁸ Alun Howkins, 'The Taming of Whitsun: The Changing Face of a Nineteenth-Century Rural Holiday' in Eileen Yeo and Stephen Yeo (eds), *Popular Culture and Class Conflict 1590-1914: Explorations in the History of Labour and Leisure* (The Harvester Press 1981) 187.

⁴⁹ 'There was one other reason for the concern of the authorities: in some places in the last half of the nineteenth century, Guy Fawkes had been transmuted into a popular celebration with strong overtones of political and social protest' (Robert D Storch, 'The Policeman as Domestic Missionary: Urban Discipline and Popular Culture in Northern England, 1850-1880' (1976) 9 *Journal of Social History* 481, 491).

⁵⁰ Robert D Storch, 'The Policeman as Domestic Missionary: Urban Discipline and Popular Culture in Northern England, 1850-1880' (1976) 9 *Journal of Social History* 481, 495 (emphasis added).

⁵¹ Robert D Storch, 'The Policeman as Domestic Missionary: Urban Discipline and Popular Culture in Northern England, 1850-1880' (1976) 9 *Journal of Social History* 481, 492.

change and, as influential figures dissociated themselves from the sports' traditional forms, so their respectability and acceptability were undermined.⁵² As Brailsford notes, the politics were such that 'the mass football games found few articulate friends',⁵³ and those looking to modify the recreational pursuits of the populace were greatly empowered by the recently-instituted police forces, which could be used in order to enforce compliance. This 'installation of the eyes and ears of ruling elites at the very centers of working-class daily life',⁵⁴ meant that the criminal law was able to exert a greater degree of control over the population, and more effectively discourage undesirable activities and behaviours. As Dunning and Sheard write, '[m]ore or less simultaneously ... those who wished to continue playing lost a powerful ally and were faced with an enemy whose effective power had grown'.⁵⁵

2.4.2 The police and the role of the courts

Storch describes the police of this period as 'domestic missionaries', employed in order to 'act as a lever of moral reform on the mysterious terrain of the industrial city's inner core';⁵⁶ 'an all-purpose lever of urban discipline',⁵⁷ which could be deployed in order to enact the 'attitudes, prejudices, and momentary reformist enthusiasms of the municipalities, magistrates, and local elites who employed them'.⁵⁸ Pressure on

⁵² Douglas A Reid, 'Folk-football, the Aristocracy and Cultural Change: A Critique of Dunning and Sheard' (1988) 5 *The International Journal of the History of Sport* 224.

⁵³ Dennis Brailsford, *A Taste for Diversions: Sport in Georgian England* (The Lutterworth Press 1999) 63. As Brailsford highlights, this is despite the fact that, in most cases, 'they disturbed only one day a year'.

⁵⁴ Robert D Storch, 'The Policeman as Domestic Missionary: Urban Discipline and Popular Culture in Northern England, 1850-1880' (1976) 9 *Journal of Social History* 481, 496.

⁵⁵ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 31.

⁵⁶ Robert D Storch, 'The Policeman as Domestic Missionary: Urban Discipline and Popular Culture in Northern England, 1850-1880' (1976) 9 *Journal of Social History* 481, 496.

⁵⁷ Robert D Storch, 'The Policeman as Domestic Missionary: Urban Discipline and Popular Culture in Northern England, 1850-1880' (1976) 9 *Journal of Social History* 481, 481.

⁵⁸ Robert D Storch, 'The Policeman as Domestic Missionary: Urban Discipline and Popular Culture in

the police to act in this way came both directly from those readily associated with the rational recreation movement and from the wider commercial concerns of 'local merchants and shopkeepers who were forced to close early, suffer the desertion of their shop assistants, lose an evening's custom, and bear the galling expense of boarding up their premises'.⁵⁹

Sports and other activities that were incompatible with the move to rational recreation were effectively marginalised and proscribed through a variety of means. Amongst the manifold drivers, Vorspan highlights the central role of the courts,⁶⁰ and Anderson catalogues numerous prosecutions relating to prizefighting in the first half of the nineteenth century, which 'focussed on the sport's associated evils of gambling, riot and tumult, and later on the violence within the sport itself'.⁶¹

These cases impugned prizefighting in a number of ways, with the criminal courts declaring that prizefighting should be banned, primarily because of the threat it posed as a catalyst for serious public disorder.⁶² Harsh sentences were passed against those involved, such as that of transportation for life for a group of seconds who allowed a seriously injured fighter to carry on in a contest as a result of which he would lose his life.⁶³ A succession of further cases proceeded to criminalise those involved in prizefighting in assorted capacities, and resulted in manslaughter convictions for a man involved in promoting a fight in which one of the combatants

Northern England, 1850-1880' (1976) 9 *Journal of Social History* 481, 481.

⁵⁹ Robert D Storch, 'The Policeman as Domestic Missionary: Urban Discipline and Popular Culture in Northern England, 1850-1880' (1976) 9 *Journal of Social History* 481, 491.

⁶⁰ Rachel Vorspan, "'Rational Recreation" and the Law: The Transformation of Popular Urban Leisure in Victorian England' (2000) 45 *McGill Law Journal* 891, 959.

⁶¹ Jack Anderson, 'The Legal Response to Prize Fighting in Nineteenth Century England and America' (2006) 57 *Northern Ireland Legal Quarterly* 265, 275.

⁶² *R v Billingham, Savage and Skinner* (1825) 2 *Car & P* 234, 172 *ER* 106.

⁶³ *R v Davis*, *The Times*, 11 September 1829.

had died,⁶⁴ and another in which the man convicted had attended in order to support his brother, who was involved in the bout and had caused the death of his opponent.⁶⁵ It was becoming increasingly clear that prizefighting, in particular, was considered incompatible with contemporary sensibilities, and that its propensity to cause harm to the combatants and, more especially, precipitate public disorder was not to be tolerated.

In addition to the convictions of those involved in disruptive sporting activities, Vorspan describes other facets of the courts' concerted and coordinated effort to bolster the move towards rational recreation throughout the Victorian period. For instance, as a part of the courts' 'unwavering support for official attempts to clear the streets of preindustrial pursuits', the offence of criminal public nuisance was enforced, in cases such as *Moore*,⁶⁶ and the later *Walker v Brewster*,⁶⁷ described by Vorspan as 'the first important private nuisance recreational case'.⁶⁸

Those activities deemed respectable were promoted, as the courts 'consistently forced municipalities to establish sites for non-commercial public recreational use', and 'staunchly supported popular communal claims against landlords attempting to preserve their private property'.⁶⁹ Thus, the courts evinced what Vorspan describes as 'a wholly undisguised animosity toward collective activity in the public streets', as '[t]he judiciary viewed disreputable group entertainments in urban thoroughfares as the antithesis to "rational recreation", and eradicating

⁶⁴ *R v Hargrave* 5 Car & P 170, 172 ER 195.

⁶⁵ *R v Edward Murphy* 6 Car & P 103, 172 ER 1164.

⁶⁶ *R v Moore* (1832) 3 B & Ad 184.

⁶⁷ (1867) LR 5 Eq 25.

⁶⁸ Rachel Vorspan, "'Rational Recreation" and the Law: The Transformation of Popular Urban Leisure in Victorian England' (2000) 45 McGill Law Journal 891, 959.

⁶⁹ Rachel Vorspan, "'Rational Recreation" and the Law: The Transformation of Popular Urban Leisure in Victorian England' (2000) 45 McGill Law Journal 891, 973.

recreational street crowds became one of its highest priorities'.⁷⁰ The result was an 'unwavering support for official attempts to clear the streets of preindustrial pursuits', manifesting in 'vigorous efforts to forcibly transfer popular recreation from the public thoroughfares to specially designated and regulated urban spaces'.⁷¹ Such powers could be facilitated, directly or indirectly, by local measures,⁷² and by national legislation. For instance, without prohibiting the sport itself, s 72 of the Highway Act 1835 gave broad grounds for the prosecution of those causing 'annoyance' by playing football in the streets:

That if any Person ... shall play at Football or any other Game on any Part of the said Highways, to the Annoyance of any Passenger or Passengers; every Person so offending in any of the Cases aforesaid shall for each and every such Offence forfeit and pay any Sum not exceeding Forty Shillings, over and above the Damages occasioned thereby.⁷³

The combination of pressures described above did not immediately eradicate the traditional forms of recreation,⁷⁴ but they continued the process of diminishing

⁷⁰ Rachel Vorspan, "'Rational Recreation" and the Law: The Transformation of Popular Urban Leisure in Victorian England' (2000) 45 McGill Law Journal 891, 899.

⁷¹ Rachel Vorspan, "'Rational Recreation" and the Law: The Transformation of Popular Urban Leisure in Victorian England' (2000) 45 McGill Law Journal 891, 900.

⁷² For example, s 54(17) of the Metropolitan Police Act 1839 created an offence in the event of the following activities: 'Every person who shall fly any kite or play at any game to the annoyance of the inhabitants or passengers, or who shall make or use any slide upon ice or snow in any street or other thoroughfare, to the common danger of the passengers'.

⁷³ Similarly, s 54(17) of the Metropolitan Police Act 1839 made it an offence to 'play at any game to the annoyance of the inhabitants or passengers'.

⁷⁴ To this day, the traditional forms of football exist as annual events in towns such as Alnwick and Ashbourne, surviving as an 'interesting relic' (Morris Marples, *A History of Football* (Secker & Warburg 1954) 97).

their public popularity, occurrence and visibility. In 1801, Strutt had written of the demise of the traditional forms of football, as a practice that was ‘formerly much in vogue among the common people..., though of late years it seems to have fallen into disrepute and is but little practised’.⁷⁵ Dunning and Sheard regard this as premature, but they concede that the traditional game was in decline and that it was to become ‘virtually extinct’ by the end of the nineteenth century.⁷⁶ These developments led to a radical reimagining of the concept and practice of sport, and heralding the move to standardisation and institutionalisation characteristic of the modern forms.

2.5 The Changing Face of Sports –Standardisation and Codification

2.5.1 From prizefighting to the Queensberry Rules

In comparison to rugby and soccer, boxing (or rather prizefighting) was effectively codified early; one of the first set of named rules was that issued in 1743 by Jack Broughton to control the conduct of prize fights in his London amphitheatre. The Broughton Rules specified the conditions of victory, and forbade hitting an opponent ‘when down or seiz[ing] him by the hair, the breeches, or any part below the waist’, and probably amounted to codification of ‘existing good practice’.⁷⁷ These were superseded in 1838 by the London Prize Ring Rules, a revised version of which was implemented in 1853. However, as Anderson makes clear, these changes were not sufficient to sustain a sport that was losing popularity, and facing increasing pressure

⁷⁵ Joseph Strutt, *The Sports and Pastimes of the People of England* (Methuen & Company 1801) 168.

⁷⁶ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 30.

⁷⁷ Wray Vamplew, ‘Playing with the Rules: Influences on the Development of Regulation in Sport’ (2007) 24 *The International Journal of the History of Sport* 843, 847.

from the authorities. Maladministration and corruption meant that prizefighting had become 'a farce', with '[d]isqualification and downright cheating ... rife within the sport';⁷⁸ the changes in prevailing socio-cultural norms and attitudes meant that 'no amount of tampering with existing rules would bring the sport within the range of "socially acceptable" Victorian sports'.⁷⁹ In this respect, the criminal law had a decisive role in shaping the evolution of boxing; Anderson cites a number of cases from the early-mid nineteenth century, which established that prizefights were illegal, primarily on the grounds that they were 'riotous, unlawful assemblies'.⁸⁰

The rules of modern boxing are based on those promulgated by the Marquess of Queensberry in 1867.⁸¹ These added a number of specifications primarily directed at the safety of the participants, such as the wearing of boxing gloves, rounds of three minutes' duration with a one-minute rest period, and the counting to ten after a knockdown, to the existing Revised London Prize Ring Rules. The new rules did not specify that a contest must take place on turf, as had previously been the practice, and this allowed contests to be staged indoors, a commercially expedient development for those wishing to charge an entrance fee, and enabling boxing to provide entertainment that fitted with the 'new forms of commercial capitalism and a burgeoning consumerism'.⁸² This spatial containment was also a welcome development for the authorities, as it allowed for easier policing by law enforcement

⁷⁸ Jack Anderson, 'Pugilistic Prosecutions: Prize Fighting and the Courts in Nineteenth Century Britain' (2001) 21(2) *The Sports Historian* 35, 37.

⁷⁹ Jack Anderson, 'Pugilistic Prosecutions: Prize Fighting and the Courts in Nineteenth Century Britain' (2001) 21(2) *The Sports Historian* 35, 38.

⁸⁰ Jack Anderson, 'Pugilistic Prosecutions: Prize Fighting and the Courts in Nineteenth Century Britain' (2001) 21(2) *The Sports Historian* 35, 40.

⁸¹ The code was drafted by John Graham Chambers, in 1865.

⁸² Rachel Vorspan, "'Rational Recreation" and the Law: The Transformation of Popular Urban Leisure in Victorian England' (2000) 45 *McGill Law Journal* 891, 898.

officers.⁸³

The instigation of the Queensberry Rules undoubtedly had an effect on maintaining the uneasy legality of the sport, creating further distance between boxing, or sparring, with gloves and the now avowedly-unlawful prizefighting. One reason for this was the perceived benefits in terms of the safety of the participants. In an early case on the subject, medical evidence was adduced that boxing with gloves was not inherently dangerous, which allowed the court to declare that sparring in this way was not unlawful, but rather a display of skill.⁸⁴ That is not to say that this was the only reason that such a contest was afforded relative legitimacy. Crucially, the contest in question had also taken place in a private room, which meant that it was not likely to cause a breach of the peace. In marking the influence of the Queensberry Rules, Golby and Purdue argue that the 'general decline' of prizefighting 'must not ... be exaggerated or ante-dated for it remained enormously popular with working men'.⁸⁵ Similarly, it is easy to overstate the degree and immediacy of legitimacy that the Queensberry Rules brought to boxing, as the sport was still hampered in this respect by the lack of a credible governing body. Two appellate cases heard after the promulgation of the rules illustrate the limited effect of the rules on the sport's legal status.⁸⁶

Orton,⁸⁷ decided over a decade after the coming into existence of the Queensberry Rules, was concerned with a contest in which the fighters had worn

⁸³ Jack Anderson, 'Pugilistic Prosecutions: Prize Fighting and the Courts in Nineteenth Century Britain' (2001) 21(2) *The Sports Historian* 35, 44.

⁸⁴ *R v Young* (1866) 31 JP 215; 10 Cox CC 371.

⁸⁵ JM Golby and AW Purdue, *The Civilisation of the Crowd: Popular Culture in England 1750-1900* (Batsford Academic and Educational 1984) 77.

⁸⁶ *R v Orton* (1878) 39 LT 293; *R v Coney* (1882) 8 QBD 534.

⁸⁷ *R v Orton* (1878) 39 LT 293.

gloves. Notwithstanding this, the court held that the ferocity of the fight meant that it was to be considered as a prizefight and thus unlawful, since the conduct had gone beyond that which was acceptable in sparring. Four years later, *Orton* was cited with approval by the Court of Criminal Appeal in the case of *Coney*.⁸⁸

Coney is an appellate judgment that continues to figure prominently in the jurisprudence and in academic commentary in relation to sports violence, seen rightly as an important statement about public policy and the limits of consensual harm (a subject to which I will turn in Chapters 5 and 6). In this respect, the judgment is particularly significant because of proclamations that were made about how the nature of the contest, and its inherent practices, would colour a determination as to its lawfulness. For the present purposes, therefore, *Coney* is important because the lawfulness of the contest did not appear to be dependent upon the rules in place, but rather the 'character' of the contest, and its tendency to cause public disorder. Thus, it is possible to find approval in *Coney* for the lawfulness of 'sport' and 'boxing with gloves in the ordinary way',⁸⁹ but the characteristics of a contest necessary to satisfy these requirements appear not to be tied to any particular rules. Rather, they depend upon the 'character' of the fight, and the perceived intimate link between this and its tendency to cause public disorder.

The defendants in *Coney* were attendees at a prizefight, and the court was tasked with adjudicating both the lawfulness of the contest and, by extension, the criminal liability for aiding and abetting assault of those who were in attendance. Citing a list of authorities, the court was able to state with confidence that

⁸⁸ *R v Coney* (1882) 8 QBD 534.

⁸⁹ *R v Coney* (1882) 8 QBD 534, 539 (Cave J).

prizefighting was unlawful. Explaining the rationale for this, Mathew J pointed to the inherent danger to the combatants, and equated prizefights with duels, stating that '[t]he fists of trained pugilists are dangerous weapons which they are not at liberty to use against each other'.⁹⁰ It is not clear from the judgment whether the court was familiar with, or even aware of the existence of, the Queensberry Rules. Although *Coney* involved a prizefight, not apparently conducted according to the Queensberry Rules, there is no reference to the legitimacy that might have been conferred by adherence to the rules, which had by then been in existence for over a decade.

In common with several of his colleagues, Hawkins J drew upon the intimate link between fighting and the potential for public disorder, stating his belief that

every fight in which the object and intent of each of the combatants is to subdue the other by violent blows, is, or has a direct tendency to, a breach of the peace, and it matters not, in my opinion, whether such fight be a hostile fight begun and continued in anger, or a prize-fight for money or other advantage.⁹¹

Stephen J also emphasised danger to the participants and the potential for public disorder:

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

⁹⁰ *R v Coney* (1882) 8 QBD 534, 547 (Mathew J).

⁹¹ *R v Coney* (1882) 8 QBD 534, 553 (Hawkins J).

combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds.⁹²

By way of setting out what conduct would be permissible, Hawkins J proposed that ‘persons may lawfully engage in friendly encounters not calculated to produce real injury to or to rouse angry passions in either’,⁹³ but it is not easy to square this characterisation with the still-competitive nature of the Queensberry Rules. Even if the portrayal of lawful sparring put forward in *Coney* does correlate with the Queensberry Rules, the judgment suggests that the court, in any event, reserved the right to look behind them, and at the ‘character’ of the contest. This is evident in the following excerpt from the opinion of Hawkins J:

[I]f, *under colour of a friendly encounter*, the parties enter upon it with, or in the course of it form, the intention to conquer each other by violence calculated to produce mischief, *regardless whether hurt may be occasioned or not*, as, for instance, if two men, *pretending to engage in an amicable spar with gloves*, really have for their object the intention to beat each other until one of them be exhausted and subdued by force, *and so engage in a conflict likely to end in a breach of the peace*, each is liable to be prosecuted for an assault’.⁹⁴

As the italicised parts of this passage demonstrate, strong emphasis is placed upon the true nature of the contest, alongside its potential to cause public disorder,

⁹² *R v Coney* (1882) 8 QBD 534, 549 (Stephen J).

⁹³ *R v Coney* (1882) 8 QBD 534, 554 (Hawkins J).

⁹⁴ *R v Coney* (1882) 8 QBD 534, 554 (Hawkins J) (emphasis added).

and these factors override its formal constitution, insofar as any misleading pretence is to be disregarded. Hawkins J went on to emphasise that the distinctions pointed to above were a matter for the court to decide, stating:

[w]hether an encounter be of the character I have just referred to, or a mere friendly game, having no tendency, if fairly played, to produce any breach of the peace, is always a question for the jury in case of an indictment, or the magistrates in case of summary proceedings.⁹⁵

Although not stated in the same terms, this approach bears similarities to that of the contemporaneous *Bradshaw*, in which it was declared that '[n]o rules or practice of any game whatever can make lawful that which is unlawful by the law of the land'.⁹⁶ As will be seen, the effective reservation of power on the part of the courts to adjudicate on the criminality or otherwise of sporting conduct has been influential, and resonates through the jurisprudence to the present day. In *Brown*, contact sport is held to comprise a 'lawful activity',⁹⁷ in which certain types of, potentially serious, consensual harm are not unlawful, and in *Barnes*, this status is afforded to sport under the label 'legitimate sport'.⁹⁸

The judgment in *Coney* points to the contemporary uncertainty surrounding the lawfulness of boxing, and it was not until the turn of the twentieth century that the Queensberry Rules were given apparently lawful standing. In *Roberts*,⁹⁹ arguments

⁹⁵ *R v Coney* (1882) 8 QBD 534, 554 (Hawkins J).

⁹⁶ *R v Bradshaw* (1878) 14 Cox CC 83, 84 (Bramwell B).

⁹⁷ In *R v Brown* 1 AC 212 (HL), 231, Lord Templeman offers a list of such 'lawful activities'.

⁹⁸ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910.

⁹⁹ *R v Roberts* *The Sporting Life*, 20 June 1901.

before the court stated that there was little to distinguish boxing from prizefighting. The court disagreed, holding that boxing under the Queensberry Rules 'was not prizefighting but was merely an amicable demonstration of the skill of sparring and was accordingly legal'.¹⁰⁰ Although the justifications for the lawfulness of the contests are remarkably close to those put forward in *Coney*, this was sufficient to provide what Gendall describes as 'the somewhat unsteady foundation for the world of boxing in the twentieth century'.¹⁰¹

2.5.2 The Development of the Codes – from a polymorphous folk game to rugby and soccer

Origin myths surround the development and establishment of the various codes of football, as they emerged from their common medieval ancestry and developed into the incipient forms of rugby and soccer.¹⁰² Early organisation of the sports began in the 1820s and 1830s in the English public schools,¹⁰³ enjoying relative immunity from outside pressures due to the fact that 'they were not perceived to be a threat to property and public order'.¹⁰⁴ Thus, even as the antecedent forms in society at large were being subjected to the pressures described above, those that were practised within the school grounds were not threatened in the same way, and were left to

¹⁰⁰ David Gendall, 'The Sport of Boxing: Freedom versus Social Constraint' (1997) 5 Waikato Law Review 71, 76.

¹⁰¹ David Gendall, 'The Sport of Boxing: Freedom versus Social Constraint' (1997) 5 Waikato Law Review 71, 76.

¹⁰² Such as the probably-apocryphal tale of Ellis-Webb. For an account of the inception of the various codes of football, see: Wallace Reyburn, *A History of Rugby* (Arthur Barker Ltd 1971) 1-8. For a history of the move to professionalism in Rugby Union, see: *Mud, Blood and Money: English Rugby Union Goes Professional* (Mainstream Publishing 1997).

¹⁰³ J Paul McCutcheon, 'Sports Violence, Consent and the Criminal Law' (1994) 45 Northern Ireland Legal Quarterly 267.

¹⁰⁴ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 36.

develop.

Within the schools themselves, the embryonic forms of the modern football codes were able to flourish initially because of the lack of control that the masters had over the pupils, and later because of their perceived use in instilling desirable attributes and values in the pupils.¹⁰⁵ As Marples notes, 'football and other games were not merely useful as substitutes for undesirable activities, but might be used to inculcate more positive virtues – loyalty and self-sacrifice, unselfishness, co-operation and *esprit de corps*, a sense of honour'.¹⁰⁶ The public schools were therefore the 'crucial "model-making centres"' for the new forms of football, a state of affairs made possible by their embodiment of what Dunning and Sheard refer to as a 'peculiar balance between freedom and control' that was part of the institutional character of the public schools, and that 'formed the necessary conditions' that would allow this process of development to take place.¹⁰⁷

Birley describes these progenitors of the modern versions as 'not so much a single game as an array of roughly similar tribal codes preferred by different public schools'.¹⁰⁸ The first surviving set of rules of any of the football codes was written at the eponymous Rugby public school in 1845,¹⁰⁹ their distinctive form allowing for the carrying of the ball, and prevailing over rival systems such as those preferred by Harrow and Eton in what has been described as 'an uphill struggle'.¹¹⁰ Indeed, Dunning

¹⁰⁵ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) ch 2.

¹⁰⁶ Morris Marples, *A History of Football* (Secker & Warburg 1954) 122.

¹⁰⁷ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 194.

¹⁰⁸ Derek Birley, *Sport and the Making of Britain* (Manchester University Press, 1993) 257.

¹⁰⁹ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (Martin Robertson 1979) 91-94. See also: Paul Morgan, *A History of Rugby* (Green Umbrella Publishing 2004) 10.

¹¹⁰ Derek Birley, *Sport and the Making of Britain* (Manchester University Press 1993) 258.

and Sheard postulate that the particular rules of rugby may have been formulated in order to be distinct from those of the higher-status public schools and those that existed more broadly in society at that time, where folk-football had become 'a mainly kicking game'.¹¹¹ The rules of rugby, alterations to which were ratified in 1846, contained provisions on violence, placing limitations on 'charging' and 'hacking', and stipulating that a player may only be 'held' if he was in possession of the ball.¹¹² Safety concerns were also present in the proscription of the use of 'projecting nails or iron plates on the soles or heels of ... shoes or boots'.¹¹³

It is difficult to know in absolute terms the levels of violence that existed in any sport at a particular point in the past, and how this changed throughout the developmental stages described here, but Dunning and Sheard point to concerns raised in relation to rugby in the lead-up to the establishment of the Rugby Football Union in 1871. They reference numerous examples of expressions of concern in relation to the possibility of injuries that could be caused, either through rough play or accidents, citing an exchange of letters published in *The Times* newspaper in 1870, and articles in *Punch* and other journals. These evinced particular worries over the legitimacy and dangers of 'hacking',¹¹⁴ and Marples notes there was even a suggestion that Parliament should ban rugby.¹¹⁵

The establishment of regulatory governing bodies and the promulgation of

¹¹¹ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 63.

¹¹² Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 69.

¹¹³ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 69.

¹¹⁴ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 85-88.

¹¹⁵ Morris Marples, *A History of Football* (Secker & Warburg 1954) 153.

uniform rules seem to have subdued these concerns. Just as the Queensberry Rules appear belatedly to have cemented the legitimacy of boxing, so Dunning and Sheard write: 'state intervention was unnecessary for, in 1871, Rugby's own "parliament", the RFU, was formed and one of its first acts was to construct rules for a game in which "hacking" had no legitimate place'.¹¹⁶ The Rugby Football Union was formed as an amateur association, a status it maintained for over a century, until the International Rugby Board removed restrictions on professional players in 1995.¹¹⁷ The desire of the largely northern, working class clubs to professionalise, which was resisted by the predominantly southern, avowedly amateur teams, had resulted in the bifurcation of the sport, and the establishment of the Northern Rugby Football Union (later Rugby Football League) in 1895.

For its part, Taylor describes soccer as having had a 'prolonged, messy and complicated birth'.¹¹⁸ Like rugby, the transformation from a 'polymorphous English folk game'¹¹⁹ took place in the public schools, led in particular by high-status institutions such as Eton and Harrow, with the need for common rules probably driven by the desire to hold inter-school matches.¹²⁰ The modern form was effectively

¹¹⁶ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 88. The newly-formed Rugby Union also banned 'tripping' and 'scragging'; these aspects of play had already been outlawed within soccer on formation of the Football Association in 1863 (Morris Marples, *A History of Football* (Secker & Warburg 1954)).

¹¹⁷ This did not result in worldwide professionalisation. For example, rugby union remains a largely amateur game in Argentina.

¹¹⁸ Matthew Taylor, *The Association Game: A History of British Football* (Pearson Education 2008) 20.

¹¹⁹ Norbert Elias, 'The Genesis of Sport as a Sociological Problem' in Norbert Elias and Eric Dunning, *The Quest for Excitement: Sport and Leisure in the Civilizing Process* (Basil Blackwell 1986) 128.

¹²⁰ Unified and codified rule systems were fundamental to the survival of a sport, allowing for its diffusion amongst the population; as Vamplew notes, 'without standardized rules a game cannot spread' (Wray Vamplew, 'Playing with the Rules: Influences on the Development of Regulation in Sport' (2007) 24 *The International Journal of the History of Sport* 843, 844).

achieved in 1863, with the inception of the Football Association, which brought with it 'codification of the game more or less on a national level'.¹²¹

Almost from its emergence, it appears, soccer became the dominant football code; Vorspan characterises its rapid ascendancy:

[I]n 1863 a group of public school enthusiasts organized the Football Association, which presided over the rapid transformation of the amateur sport into a substantial business involving organized teams and paid professional players. Within twenty years soccer became the English national game, commanding unwavering loyalty from the working classes of London and northern and midland towns.¹²²

Industrial legislation, including the Factory Acts of 1847 and 1850, regulated the hours that could be worked by those employed in factories, and meant that large sections of the public were guaranteed Saturday afternoons free from work, leaving them able to participate or spectate. Dunning and Sheard offer some explanations for the differing levels of popularity of rugby and soccer across different locations and social strata, postulating that the old Etonians and Harrovians who presided over the inception of the FA felt more secure in their station than the status-anxious bourgeoisie of less prestigious and more recently founded public schools such as

¹²¹ Norbert Elias, 'The Genesis of Sport as a Sociological Problem' in Norbert Elias and Eric Dunning, *The Quest for Excitement: Sport and Leisure in the Civilizing Process* (Basil Blackwell 1986) 128.

¹²² Rachel Vorspan, "'Rational Recreation" and the Law: The Transformation of Popular Urban Leisure in Victorian England' (2000) 45 McGill Law Journal 891, 907-08.

Rugby, and therefore associated more readily with the working classes.¹²³ Holt, meanwhile, points to the central role of the church in the establishment of a number of soccer clubs,¹²⁴ and Marples describes how embedded soccer had become in religious and other, traditional festivals.¹²⁵

Well before the turn of the twentieth century, soccer, like rugby, had secured legal and social acceptance, but approval was by no means unanimous. It was perhaps a combination of its rapid adoption by the masses and the early move to professionalisation that fuelled the polarised views of soccer that are occasionally still in evidence today.¹²⁶ Vorspan writes that, in its rationalised and disciplined form, ‘soccer eventually secured middle-class approval; indeed, late Victorians came to view it as promoting the values of fair play, self-reliance, endurance, and even sobriety’.¹²⁷ However, writing shortly after the turn of the twentieth century, Spencer gave soccer as an example of the ‘re-barbarization’ of society, holding it to be ‘most brutalizing’, and continuing: ‘for the merciless struggles among the players, and the intensity of their antagonisms, prove, even without the frequent inflictions of injuries and occasional deaths, that the game approaches as nearly to a fight as lack of weapons allows’.¹²⁸ Brailsford is more equivocal, suggesting that soccer ‘seems generally to have been dismissed as an informal activity, largely for the young, and allowable so

¹²³ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004).

¹²⁴ Richard Holt, *Sport and the British: A Modern History* (Clarendon Press 1989) 138. Holt points to football clubs such as Aston Villa, Barnsley, Birmingham, Bolton Everton and Fulham as being ‘originally church-based’.

¹²⁵ Morris Marples, *A History of Football* (Secker & Warburg 1954) ch 3.

¹²⁶ Soccer remains the ‘national game’. However, although it is not known who coined the expression, it is often remarked that soccer is a gentleman’s game played by thugs, whereas rugby is a thug’s game played by gentlemen.

¹²⁷ Rachel Vorspan, ‘“Rational Recreation” and the Law: The Transformation of Popular Urban Leisure in Victorian England’ (2000) 45 McGill Law Journal 891, 908.

¹²⁸ Herbert Spencer, *Facts and Comments* (1902) 128-29.

long as it did not disturb the peace'.¹²⁹

2.5.3 The criminal law legacy

As well as indelible changes to the practice of sport, the cases that came before the courts during the period described above have bequeathed an enduring legacy to the criminal law. *Coney*, in particular, has been influential, and is often used as a historical reference point in order to establish that there are accepted limits to consensual harm in the criminal law. The most widely quoted passage from the judgment is probably the following:

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.¹³⁰

Numerous parts of the *Coney* judgment are drawn upon in the House of Lords' judgment in *Brown*, and this particular excerpt is cited twice, by both Lord Templeman¹³¹ and Lord Jauncey,¹³² who take it to establish two principles in particular: that the violence that takes place in sport is potentially unlawful; and that there are limits that are placed on the availability of consent when it comes to its

¹²⁹ Dennis Brailsford, *A Taste for Diversions: Sport in Georgian England* (The Lutterworth Press 1999) 63.

¹³⁰ *R v Coney* (1882) 8 QBD 534, 539 (Cave J).

¹³¹ *R v Brown* [1994] 1 AC 212 (HL), 237 (Lord Templeman).

¹³² *R v Brown* [1994] 1 AC 212 (HL), 237 (Lord Templeman).

ability to counter this. Read in this way, the case assists in elucidating the founding principles of the orthodox view of sports violence under the criminal law that is referred to in Chapter 1, and that is given shape in *Brown*.

What is to some extent overlooked here is that, in *Coney*, the court asserts that consent is no defence to an offence that has a tendency to cause public disorder. In *A-G's Reference (No 6 of 1980)*, the Court of Appeal noted the historical influences at play in the contemporary priorities of the criminal justice system, and the extent to which these had changed since *Coney*:

[Cases such as *Coney*] reflect the conditions of the times when they were uttered, when there was little by way of an established police force and prize fights were a source of civil disturbance. Today, with regular policing, conditions are different. Statutory offences, and indeed by-laws, provide a sufficient sanction against true cases of public disorder, as do the common law offences of affray, etc.¹³³

Thus, the development of more sophisticated methods of law enforcement and public order laws, and the radical remodelling of the practice of sport mean that there is a danger in relying too heavily on the balance in *Coney* between violence, consent and public order issues when it comes to appraising the approach that should be taken to modern sport. This is something that Lord Mustill recognised in his dissenting opinion

¹³³ *A-G's Reference (No 6 of 1980)* (1981) 1 QB 715, 719 (Lord Lane CJ). The 'two cases cited' referred to are *R v Coney* (1882) 8 QBD 534 and *R v Donovan* [1934] 2 KB 498, concerning 'prize-fighting' and 'beating for the purposes of sexual gratification', respectively.

in *Brown*, when he stated of *Coney*: ‘there is nothing here to found a general theory of consensual violence’.¹³⁴

A concentration on consent and its limits when it comes to harm may obscure the suggestion, noted above, that the sporting nature of the conduct is also acknowledged as a factor to be considered; something that *Coney* shares with the contemporaneous judgment in *Bradshaw*, which held that, although they could not dictate the shape of the criminal law, ‘playing according to the rules and practices of the game’ would be instructive in determining the lawfulness of the defendant’s conduct.¹³⁵ This type of approach also feeds through into the more recent conceptions of ‘properly conducted games and sports’¹³⁶ and ‘legitimate sport’.¹³⁷

2.7 Conclusion

Over the course of the eighteenth and nineteenth centuries, the primitive sports that had remained largely unchanged for centuries appeared increasingly anachronistic and, more importantly, threatening to the emergent social order. Within this period, the mid-to-late nineteenth century, in particular, represents a period of change in English sport that is unparalleled in terms of the transformation it wrought upon both their practice and status, and this is particularly evident in the cases of boxing, rugby and soccer.

This chapter points to the criminal law as one of a number of factors that contributed to shaping and changing the leisure pursuits of the populace, and

¹³⁴ *R v Brown* [1994] 1 AC 212 (HL), 264.

¹³⁵ (1878) 14 Cox CC 83, 85 (Bramwell B).

¹³⁶ *A-G’s Reference (No 6 of 1980)* [1981] 1 QB 715 (CA), 719 (Lord Lane).

¹³⁷ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910.

primarily those of the working classes, in order to align them with prevailing social mores. The practice of sports such as prizefighting and the traditional forms of football were inextricably tied to concerns about public disorder, and the criminal courts and emergent police forces were a means by which to address it. This fear suffuses discussion about the pre-modern forms of football that became intolerable as the industrial revolution wrought its changes upon society, and the numerous reported criminal cases concerned with prizefighting, another victim of the evolving sensibilities of the age.

The football codes were left to develop in the public schools, away from the streets and subject to broader social forces but insulated from the direct intervention of the law. They emerged and spread amongst the population in their 'more domesticated, commercialized, and spatially contained' forms,¹³⁸ and an increasing standardisation was brought about, enabled by technological developments in transport and communication, and the concomitant rise of associations, clubs and leagues. Meanwhile, what Anderson characterises as a 'legitimising equation' was arrived at in relation to pugilism: 'boxing, as regulated by the Queensberry Rules was not prize fighting; it did not incite social disturbance nor act as a threat to general public morality; it no longer required participants to fight to a standstill nor could it be considered unacceptably dangerous'.¹³⁹

Amongst the dangers seen to be presented by sports violence in the period covered here, the principal change in the attitudes of the courts relates to a

¹³⁸ Rachel Vorspan, "'Rational Recreation' and the Law: The Transformation of Popular Urban Leisure in Victorian England' (2000) 45 McGill Law Journal 891, 907.

¹³⁹ Jack Anderson, 'The Legal Response to Prize Fighting in Nineteenth Century England and America' (2006) 57 Northern Ireland Legal Quarterly 265, 265-66.

diminishing concern around the tendency of sports to cause civil disorder, and a greater respect and tolerance for the lawfulness of sport in its more contained form and the nature of the violence this entailed. Importantly, this lawfulness was linked to the organisational development of sport, and the diminution of violence and better regulation that this was perceived to entail.

Chapter 3

Modern Sports Violence and the Playing Culture

3.1 Introduction

The preceding chapter charted the evolution of the sports in question from their disorderly precursors to the modern, more contained and less socially disruptive forms, and the standardisation and organisation that this entailed is a prominent feature of boxing, rugby and soccer. Indeed, some have drawn upon a contrast with their more primitive antecedents and variants in order to define modern sport; Parry offers one such definition: 'sports are rule-governed competitions wherein physical abilities are contested. They are more formal, serious, competitive, organized and institutionalized than the games from which they sprang'.¹⁴⁰

In *Brown*, Lord Templeman declared there to be a principled difference between 'violence which is incidental and violence which is inflicted for the indulgence of cruelty';¹⁴¹ this was a key justification for the House of Lords in distinguishing unlawful sado-masochism from 'lawful activities' such as contact sports. However, it is clear from the rules, safety provisions and practices of each of the sports examined here that this is a misleading characterisation, and understates the very nature of competitive sport; sports such as boxing, rugby and soccer are intrinsically violent,

¹⁴⁰ Jim Parry, 'Violence and Aggression in Contemporary Sport' in MJ McNamee and SJ Parry, *Ethics and Sport* (E & FN Spon 1998) 205. Sports sociologists Coakley and Pike also emphasise the organisational backdrop when they define sport as comprising 'institutionalized competitive activities that involve rigorous physical exertion or the use of relatively complex physical skills by participants motivated by internal and external rewards' (Jay Coakley and E Pike, *Sports in Society: Issues and Controversies* (McGraw-Hill 2009) 5).

¹⁴¹ *R v Brown* [1994] 1 AC 212 (HL), 237 (Lord Templeman).

routinely involving a physicality that risks and causes injury, and that is not simply incidental, but rather inherent to, and inextricable from, their practice.

This chapter begins by looking at the modern rules of boxing, rugby and soccer as they apply to violence, and in terms of the safety provisions they mandate. The existence of sophisticated rules and attendant enforcement mechanisms are powerful justifications for the lawfulness of sports practices, important in a number of respects. They are seen to diminish the dangerousness of participation, through active regulation on the part of a referee.¹⁴² They also act as a reference point for assessing the legitimacy of the participants' conduct and, importantly, serve to make them aware of the expected standards of conduct. Since the rules are published and widely known, participation might be seen as signalling consent to what they allow.¹⁴³

The chapter then moves to consider the place of violence that occurs outside of the rules, but within the accepted 'playing culture' of a sport, a conception that looks beyond the published rules to the working culture of a sport in order to provide a more realistic portrayal of the. This is helpful to the criminal law in determining the lawfulness or otherwise of violent conduct. However, the analysis I undertake reveals the playing culture of a sport to be a somewhat more complex concept than has generally been recognised by those who have advocated its adoption by the criminal law.

¹⁴² *R v Brown* [1994] 1 AC 212 (HL), 238 (Lord Jauncey).

¹⁴³ The relationship between the actual consent of the participant, the way in which this is perceived and the way in which this is treated by the criminal law, are considered in Chapters 5 and 6.

3.2 The Rules and the Acceptance of Violence and the Risk of Injury

3.2.1 Violence and the rules

Rules are of fundamental importance to a sport; Connor points out that they ‘determine the purpose of the game, what it means to win, and the way it is to be played’.¹⁴⁴ The rules determine every aspect of the sport in question: ‘the size of the space on which the sport is played; the length of time that a contest can last; the actions that are permitted; and how a result is determined. They identify the legitimate means by which targets can be attained’.¹⁴⁵ As such, the rules of a sport serve not only to ‘differentiate one sport from another’,¹⁴⁶ but also to impose boundaries on the normative expectations of the participants; to differentiate the practice of sport from the standards of conduct that pertain in general society, away from the sports arena.

Boxing, rugby and soccer all anticipate and legitimate a degree of violence, and their rule systems are designed to demarcate the standards expected of players and to provide sanctions for those participants who are held to have transgressed. It is not necessary for the present purposes to engage in an exhaustive examination of these rules, but a more limited exploration of those which pertain to the permissibility of violence is helpful in establishing the normative role which it plays in their practice, and also helps to bridge the definitional deficit inherent to discussions about sport. In addition, some of the safety provisions contained in the rules are worthy of

¹⁴⁴ Steven Connor, *A Philosophy of Sport* (Reaktion Books 2011) 146.

¹⁴⁵ Wray Vamplew, ‘Playing with the Rules: Influences on the Development of Regulation in Sport’ (2007) 24 *The International Journal of the History of Sport* 843, 844.

¹⁴⁶ Wray Vamplew, ‘Playing with the Rules: Influences on the Development of Regulation in Sport’ (2007) 24 *The International Journal of the History of Sport* 843, 843.

consideration, as they point to an expectation of violence and the attendant risk of injury within the respective sports

The sporting rules set out in this chapter are upheld on the field by a referee, whose role is described in World Rugby's *Laws of the Game* as that of 'the sole judge of fact and of Law during a match';¹⁴⁷ a description that can also be applied to the other sports under consideration. Violent offences also fall within the remit of the sports authorities, who may bring to bear additional penalties to those imposed by the referee during the course of a contest, and the imposition of which may be influenced by the view of the referee.

As was noted in the previous chapter, the Queensberry Rules of 1843 are the basis for the modern rules of boxing in both its professional and amateur forms. The labyrinthine administrative structure of world professional boxing comprises four main associations,¹⁴⁸ which are licensed by national regulatory bodies to stage professional bouts. As the Court of Appeal noted in *Watson v British Boxing Board of Control*,¹⁴⁹ the British Boxing Board of Control (BBBofC) 'has been and continues to be the sole controlling body regulating professional boxing in the United Kingdom'.¹⁵⁰ Thus, continued the court, '[n]o one can take part, in any capacity, in professional boxing in this Country who is not licensed by the Board'.¹⁵¹ As the Court of Appeal noted, however, there is 'no statutory basis for this', and '[t]he Board's authority is essentially based upon the consent of the boxing world'.¹⁵² It has been suggested that

¹⁴⁷ Rule 6.A.4(a).

¹⁴⁸ The World Boxing Council (WBC), International Boxing Federation (IBF), World Boxing Association (WBA) and the World Boxing Organization (WBO).

¹⁴⁹ *Watson v British Boxing Board of Control Ltd and Another* [2001] QB 1134 (CA).

¹⁵⁰ *Watson v British Boxing Board of Control Ltd and Another* [2001] QB 1134 (CA), 1143 (Lord Phillips).

¹⁵¹ *Watson v British Boxing Board of Control Ltd and Another* [2001] QB 1134 (CA), 1143 (Lord Phillips).

¹⁵² *Watson v British Boxing Board of Control Ltd and Another* [2001] QB 1134 (CA), 1143 (Lord Phillips).

the influence and ability to regulate of the BBBofC has been diminishing in recent years, with a number of low-level 'unlicensed' professional fights taking place.¹⁵³ However, the BBBofC remains the effective regulatory body responsible for professional boxing in the UK, and it is the rules of this organisation that are referred to here.¹⁵⁴

On an international level, amateur boxing has been more unified than the professional sport, since the formation in London of the Association Internationale de Boxe Amateur in 1946. It is governed in the UK by the Amateur Boxing Associations of England, Northern Ireland, Wales and Scotland, and the sport is different to its professional equivalent, in terms of the rules and the protective equipment used by the participants. The rules under which contests are governed are those of the International Amateur Boxing Association (AIBA).¹⁵⁵ Those that pertain to conduct in the ring are sufficiently similar to those of professional boxing as not to need further description here.

In both its professional and amateur form, boxing is an overtly and unavoidably violent sport, in which punches are allowed to the head and body; as Anderson notes, 'the most efficient means of victory ... is to render one's opponent unconscious'.¹⁵⁶ There is no limitation on the ferocity and strength of these punches, and a more aggressive fighter is likely to be rewarded, both in terms of points accrued and the likelihood of winning the fight by knocking out the opponent. However, the rules of

¹⁵³ Charles Jay, 'Haye vs Chisora: A Step Toward Obsolescence for the BBBofC?' (5 July 2012) <<http://www.boxinginsider.com/columns/haye-vs-chisora-a-step-toward-obsolence-for-the-bbbofc/>> accessed 19 May 2015.

¹⁵⁴ *Rules of Boxing* <<http://www.bbbofc.com/content/rules-boxing-0>> accessed 19 May 2015.

¹⁵⁵ *AIBA Technical Rules* <<http://aiba.s3.amazonaws.com/2015/02/AIBA-Technical-Rules-01.02.2015.pdf>> accessed 19 May 2015.

¹⁵⁶ Jack Anderson, *The Legality of Boxing: A Punch-Drunk Love?* (Birkbeck Law Press 2007) 1.

boxing do contain other limitations when it comes to the infliction of blows. BBBofC rule 3.38 specifies a number of acts that are not permitted during a contest, including types of blow¹⁵⁷ and areas that may not be hit,¹⁵⁸ points during the contest at which punches may not be thrown,¹⁵⁹ and measures aimed at ensuring the continuity of the contest.¹⁶⁰ These restrictions serve the dual purpose of encouraging a 'fair fight' and protecting the participants from obviously and immediately dangerous conduct. In addition to this, there is a discretion given to the referee, comprising the ability to take action against 'any other conduct which a Referee may deem foul'.¹⁶¹ The rules also state that the number of rounds must be specified in advance, and refer to the permissible duration of a contest. This latter stipulation gives considerable scope for variation, insofar as the time spent boxing can range from eight to 36 minutes.¹⁶²

In common with boxing, the rules of rugby allow for forceful physical contact between players. The foreword to the 2015 edition of World Rugby's *Laws of the Game* acknowledges the overt physicality inherent in the sport and, alluding to the risks that this presents to participants, states: 'Rugby Union is a sport which involves physical contact. Any sport involving physical contact has inherent dangers'.¹⁶³ The

¹⁵⁷ Using the 'pivot blow'; hitting with the open glove, the inside, or the butt or the back of the hand, or with the wrist or elbow; holding, butting, or careless use of the head, shouldering, wrestling or roughing; striking or attempting to strike an opponent on the break.

¹⁵⁸ Hitting below the belt; hitting on the back of the head or neck; kidney punching.

¹⁵⁹ Striking or attempting to strike an opponent on the break; deliberately striking an opponent when he is dropping to the floor or when he is down; hitting an opponent after the termination of a round.

¹⁶⁰ These include: not trying; persistently ducking below the waistline; intentional falling without receiving a blow; failing to break when so ordered.

¹⁶¹ Rule 3.38(m).

¹⁶² Rule 3.7, which states: 'No contest shall exceed 12 rounds nor be less than 8 minutes of actual boxing. Rounds shall be of 3 minute duration with an interval between each round of 1 minute. In Contests of 10 rounds or less the rounds may be of 2 minute duration'.

¹⁶³ *Laws of the Game* (World Rugby 2015) 3.

rules permit direct physical contact in the form of tackles, rucks, mauls and scrums, and dictate the unacceptable forms that this might take.

Law 10.4 deals with 'dangerous play and misconduct', and specifies that players must not: 'strike an opponent with the fist or arm, including the elbow, shoulder, head or knee(s)';¹⁶⁴ 'stamp or trample on an opponent'; 'kick an opponent'; or 'trip an opponent with the leg or foot'. Law 10.4 also proscribes 'dangerous' conduct;¹⁶⁵ 'retaliation'; 'acts contrary to good sportsmanship' and 'misconduct while the ball is out of play'. The sanction for each of these offences is the award of a 'penalty kick' to the opposition. Additionally, the referee must admonish the offending player, and may choose to 'temporarily suspend' or 'send-off' the player for egregious or repeat offences. The rules relating to permitted physical contact in Rugby League are sufficiently similar to those of Rugby Union to render it unnecessary to reproduce them here.

The Fédération Internationale de Football Association (FIFA) is the international governing body of soccer,¹⁶⁶ and promulgates its *Laws of the Game*, comprising 17 'Laws', augmented by a lengthy section titled *Interpretation of the Laws of the Game and Guidelines for Referees*.¹⁶⁷ Soccer is a sport in which the anticipated physical contact is generally lower than that in rugby, and Law 12 makes reference to various types of foul play, and the referee's guidance in relation to these specifies a hierarchy

¹⁶⁴ 10.4(a). The sanction for such an offence is the award of a 'penalty kick' to the opposing team.

¹⁶⁵ Such as: 'dangerous tackling'; 'playing an opponent without the ball'; 'dangerous charging'; 'tackling the jumper in the air'; 'dangerous play in a scrum, ruck or maul'.

¹⁶⁶ Although soccer in the UK is administered at a national level by the Football Associations of England, Wales, Scotland and Northern Ireland, they are affiliated to UEFA at a European level and FIFA at a world level; it is the overarching authority of FIFA that promulgates the rules by which the sport is conducted.

¹⁶⁷ FIFA, *The Laws of the Game 2015/2016* (FIFA 2015)

<http://www.fifa.com/mm/Document/FootballDevelopment/Refereeing/02/36/01/11/LawsofthegamewebEN_Neutral.pdf> accessed 19 May 2015.

of violent offence-types that will incur sanction on the football field. They are, in ascending order of seriousness: 'careless', 'reckless' and 'using excessive force'. What is meant by these terms is set out as follows:

'Careless' means that the player has shown a lack of attention or consideration when making a challenge or that he acted without precaution ... 'Reckless' means that the player has acted with complete disregard to the danger to, or consequences for, his opponent ... 'Using excessive force' means that the player has far exceeded the necessary use of force and is in danger of injuring his opponent.

Only in the final case (that of 'using excessive force') is the sanction expulsion from the game; this will also usually be accompanied by a short playing ban.¹⁶⁸

In addition to these, the guidance accompanying Law 12 refers to the offences of 'serious foul play', 'playing in a dangerous manner' and 'violent conduct'. 'Serious foul play' is described as using 'excessive force or brutality against an opponent when challenging for the ball when it is in play'. This may amount to endangering the safety of an opponent or 'lunging' at a player 'with excessive force' and endangering their safety, and will result in the offending player being 'sent off'. 'Playing in a dangerous manner' amounts to 'any action that, while trying to play the ball, threatens injury to someone (including the player himself)'. The offence is committed whilst another player is 'nearby', but when no physical contact has been made. It may incur no

¹⁶⁸ The rules state that 'No further disciplinary sanction is needed if a foul is judged to be careless', whereas 'a player who plays in a reckless manner must be cautioned'.

disciplinary sanction or the administration of a caution, depending upon the perceived severity of the offence. 'Violent conduct' is described as the use of 'excessive force or brutality against an opponent when not challenging for the ball'. This allows for punishment of a player where the physically violent conduct is unconnected with the playing of the game, and results in the player being 'sent off'. Soccer, in common with the other sports under consideration, also has disciplinary bodies that may investigate and sanction participants.

3.2.2 Safety and an acceptance of the risk of injury

Beyond the rules pertaining to the conduct of the sports, the rule systems of the sports under consideration contain measures which are primarily targeted at improving the safety of the participants. Law 4 of the FIFA rules states: 'A player must not use equipment or wear anything that is dangerous to himself or another player (including any kind of jewellery)'. Also specified under this rule, the only mandated pieces of safety equipment are 'footwear' and 'shinguards', with the latter required to be made from a 'suitable material' and to 'provide a reasonable degree of protection'. Perhaps surprisingly, the rules of Rugby Union do not mandate any safety equipment, though Law 4 permits players to use a range of items, provided that they comply with World Rugby's standards. This adoption of safety equipment is a recent development, taking place in the late 1990s, before which time protection was 'not only against the regulations of the RFU but regarded by many in the game as 'effeminate'.¹⁶⁹ Rugby League's *Laws of the Game* do not mandate particular safety equipment, but Section

¹⁶⁹ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 228.

4(4)(a) does not permit players to ‘wear anything that might prove dangerous to other players’.¹⁷⁰

As might be expected, the rules relating to participant safety are more extensive in boxing. Rule 3.1 of the BBBoFC rules mandates that ‘[t]he opponents in any one Contest must be engaged at the same weight’,¹⁷¹ and the same is true of the amateur variant.¹⁷² Under both the BBBoFC and the AIBA rules, ‘seconds’ should carry a specified range of basic medical equipment,¹⁷³ the primary use of which is to prevent or treat cuts to the face, and boxers must wear a gumshield¹⁷⁴ and gloves appropriate to the weight designation;¹⁷⁵ the AIBA also mandates the use of a ‘cup protector’.¹⁷⁶ Starting at the Los Angeles Olympic Games in 1984, amateur boxers had worn headguards, primarily to protect them from cuts to the face. However, their use is no longer mandated, and is banned in the ‘Elite Men’ category from June 2013, after a study led by the chairman of the AIBA medical commission concluded that discontinuing the use of the headguard ‘would result in a decreased number of concussions’.¹⁷⁷

Both the AIBA and the BBBoFC demand the involvement of medical practitioners and stipulate that doctors with relevant qualifications and experience must be present

¹⁷⁰ <http://www.therfl.co.uk/the-rfl/rules/official_laws> accessed 15 May 2015.

¹⁷¹ Under WBC, WBA, IBF and WBO rules, there are 17 weight categories.

¹⁷² The weight categories are specified in Rule 1.2.

¹⁷³ BBBoFC Rule 3.13;

¹⁷⁴ BBBoFC Rule 3.20; AIBA Rule 19.

¹⁷⁵ BBBoFC Rule 3.23; AIBA Rule 21.

¹⁷⁶ AIBA Rule 20.

¹⁷⁷ Shirley S Wang, ‘Boxing Group Bans Headgear to Reduce Concussions’ *Wall Street Journal* (New York, 14 March 2013)

<<http://www.wsj.com/articles/SB10001424127887323393304578360250659207918>> accessed 21 February 2015; cf Mike Loosemore, Charles H Knowles and Greg P Whyte, ‘Amateur Boxing and Risk of Chronic Traumatic Brain Injury: A Systematic Review of Observational Studies’ (2007) 335 *British Medical Journal* 809.

at the ringside in order to give treatment to an injured boxer.¹⁷⁸ In addition, the rules specify minimum periods between contests, dependent upon the duration of the previous contest and whether the boxer has suffered a 'knockout',¹⁷⁹ and require that boxers undertake medical examinations before being allowed to participate.¹⁸⁰

3.2.3 The level of violence in modern sports

The rules and safety provisions described above give some idea of the level of violence that is anticipated in the respective sports. It is unequivocally the case that the modern forms of boxing, rugby and soccer are less violent, and less dangerous, than the antecedent forms described in the previous chapter,¹⁸¹ but it is equally clear that, although the respective rules seek to control or manage it, violence is an intrinsic part of boxing, rugby and soccer. In *Brown*, the House of Lords sought to distinguish contact sports from the sado-masochism with which the case was concerned. Lord Jauncey stated that, in contact sports, 'any infliction of injury is merely incidental to the purpose of the main activity',¹⁸² and Lord Templeman declared there to be a principled difference between 'violence which is incidental and violence which is inflicted for the indulgence of cruelty'.¹⁸³ Assessed away from the moral opprobrium with which sado-masochism was viewed in the case, these are at least contentious, and at most unsupportable, distinctions.

¹⁷⁸ BBBoFC Rule 3.8; AIBA Rule 2.

¹⁷⁹ BBBoFC Rule 5.9; AIBA Rule 2.

¹⁸⁰ AIBA Rule 2; BBBoFC Rule 3.9, which also states: 'Each Boxer must also be medically examined after every Contest'.

¹⁸¹ H Clausen, P McCrory, V Anderson, 'The Risk of Chronic Traumatic Brain Injury in Professional Boxing: Change in Exposure Variables over the Past Century' (2005) 39 *British Journal of Sports Medicine* 661.

¹⁸² *R v Brown* [1994] 1 AC 212 (HL), 241.

¹⁸³ *R v Brown* [1994] 1 AC 212 (HL), 237 (Lord Templeman).

The level of violence in modern, contemporary sport is difficult both to assess and to generalise. Gardiner is of the view that violence and consequent injury are diminishing. He points to the 'recent past', and changes in the rules that have 'outlawed' aspects of sports that were 'part and parcel of the game in the 1950s'.¹⁸⁴ He gives as examples the 'shoulder charging [of] the goalkeeper into the net by burly forwards in [soccer] and the running and wheeling of the scrum in rugby'.¹⁸⁵ A change to soccer's Law 12, which aimed at removing much of the physicality involved in tackling further substantiates Gardiner's view,¹⁸⁶ as does the effective outlawing of 'spear tackles' in rugby.¹⁸⁷ Developments undertaken in order to make boxing a safer and less brutal sport have included a reduction in the number of rounds, such as the change from 15 to 12 that took place in the 1980s, and an increased willingness on the part of referees to stop bouts.¹⁸⁸

This suggested diminution of violence is disputed by others, and Dunning and Sheard cite what they describe as a widely-held belief that 'we are currently witnessing an increase in violence in and around sport'.¹⁸⁹ Although they are equivocal as to whether this is true, Dunning and Sheard point to reasons for believing that sports violence has increased in recent times, and attribute this to:

¹⁸⁴ Simon Gardiner, 'Criminalisation of Sports Field Violence' (1996) 23 *Criminal Justice Matters* 20, 20.

¹⁸⁵ Simon Gardiner, 'Criminalisation of Sports Field Violence' (1996) 23 *Criminal Justice Matters* 20, 20.

¹⁸⁶ FIFA, 'The Laws: From 1863 to the Present Day' <<http://www.fifa.com/classicfootball/history/the-laws/from-1863-to-present.html>> accessed 15 June 2015.

¹⁸⁷ 'History of the Laws of Rugby Football' <<http://www.rugbyfootballhistory.com/laws.htm>> accessed 15 June 2015.

¹⁸⁸ H Clausen, P McCrory and V Anderson, 'The Risk of Chronic Traumatic Brain Injury in Professional Boxing: Change in Exposure Variables over the Past Century' (2005) 39 *British Journal of Sports Medicine* 661.

¹⁸⁹ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 194.

the growing cultural centrality of sport, to the fact that sport in modern societies has become a phenomenon which, *pace* Huizinga, can be described without exaggeration as quasi-religious. This has led people to pursue their sports seriously and to place an increasing emphasis on success. In its turn, this has led to a growth in the competitiveness of sports, contributing to an increase in the rate and intensity of sporting interaction, in that way leading to a growth of violence, both intentional and accidental'.¹⁹⁰

The commercialisation of professional sport, along with scientific and technological advances in preparation and training, has led to athletes who are stronger and faster, and thus capable of doing more damage to their opponents.¹⁹¹ This is particularly evident in the case of rugby union, the development of which has been expedited as a result of its recent amateur past.¹⁹² Some of the safety equipment that has been adopted in sports may also serve to increase their physicality and the risk of injury; Anderson writes of the adoption of gloves in boxing:

At first instance, it seemed that the wearing of padded gloves negated the increased intensity of the sport; yet, gloves were soon seen to protect the fighter's hands more than his head. In fact gloves, especially when soaked with

¹⁹⁰ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 198.

¹⁹¹ Although Gardiner disagrees, writing: 'Higher levels of fitness and physical endeavour in professional sport contribute to more frequent but less serious injuries than in the past' (Simon Gardiner, 'Sports Participation and Criminal Liability' (2007) 15 *Sport and the Law Journal* 19, 28).

¹⁹² Andrew D Murray, Iain Robert Murray and James Robson, 'Rugby Union: Faster, Higher, Stronger: Keeping an Evolving Sport Safe' (2014) 48 *British Journal of Sports Medicine* 73; WM Garraway and others, 'Impact of Professionalism on Injuries in Rugby Union' (2000) 34 *British Journal of Sports Medicine* 348. Having been an amateur sport for the first century of its existence, Rugby Union turned professional in 1995.

sweat, in effect became a club and allowed the fighter to hit areas of the opponent's skull, which previously were out of bounds because of the danger of breaking a knuckle or fingers.¹⁹³

A similar effect can be seen in the more recent adoption of protective padding in rugby; in the same way that gloves protect the hand from becoming damaged, so the padding in rugby means that tackles can be carried out more forcefully,¹⁹⁴ and the introduction of pads has coincided with a rise in shoulder impact injuries.¹⁹⁵

3.3 Violent Conduct Beyond the Rules

It is evident from the rules and provisions relating to conduct and participant safety that the modern forms of boxing, rugby and soccer anticipate physical contact during their respective practices that fulfils the characterisation of sports violence presented in Chapter 1 of this thesis. It is also clear that, in each of the sports, the rules envisage at least three recognisable categories of violent conduct. Firstly, there is conduct lying within the rules of the game, such as punching to the head and body in boxing, or tackles in rugby or soccer, which may involve heavy physical contact and cause injury to an opponent, but will result in no penalty. Secondly, there is foul play that is dealt with by the referee, and may result in a form of in-game sanction, such as the deduction of points (boxing), or the award of a penalty kick or free kick (soccer and

¹⁹³ Jack Anderson, 'Pugilistic Prosecutions: Prize Fighting and the Courts in Nineteenth Century Britain' (2001) 21(2) *The Sports Historian* 35, 43.

¹⁹⁴ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 228.

¹⁹⁵ DA Harris and R Spears, 'The Effect of Rugby Shoulder Padding on Peak Impact Force Attenuation' (2010) 44 *British Journal of Sports Medicine* 200.

rugby). Thirdly, there is more serious foul play, which may result in a participant being cautioned, sent off (soccer and rugby) or disqualified (boxing), and which may then also be referred to the appropriate bodies for further disciplinary action. These are standards that are generated from within sport. They point both to accepted practice at a general level, and the normative expectations of those who participate. One of the principal challenges for the criminal law is whether, and if so how, to calibrate its response to sports violence by reference to them.

3.3.1 Sports violence in the criminal courts

The case of *Chapman*,¹⁹⁶ referred to in Chapter 1, is an egregious example of the third type of offence (that is, serious foul play) in the course of a game of soccer; others have come before the appellate courts on numerous occasions in the relatively recent past, in relation both to soccer and to rugby.

In *Lincoln*, the appellant had been convicted of assault occasioning actual bodily harm, contrary to s 47 of the OAPA 1861, after he punched an opponent during a low-level game of soccer. Sentenced at first instance to four months' imprisonment, this was reduced to 28 days by the Court of Appeal.¹⁹⁷ *Lincoln* was cited unsuccessfully by the appellant in *Cotterill*,¹⁹⁸ where a term of imprisonment of four months was upheld following a conviction for inflicting grievous bodily harm, contrary to s 20 of the OAPA 1861; Cotterill, a semi-professional playing for Barrow in the FA Cup, had punched an opposition player, fracturing the victim's jaw in two places. Aggravating

¹⁹⁶ *R v Chapman* Crown Court (Warwick), 3 March 2010.

¹⁹⁷ *R v Lincoln* (1990) Cr App R (S) 250. It is notable that the court explicitly took into account the fact that Lincoln had been banned from football for a year, and faced the possibility of civil action from the victim; these factors will be considered in Chapter 6.

¹⁹⁸ *R v Cotterill* [2007] EWCA Crim 526; [2007] 2 Cr App R (S) 64.

factors cited in this case were that the attack was from behind, and had taken place in front of young spectators, and that the victim was a professional player, whose career may have been adversely affected by the injury.

Similar cases have also arisen in the context of rugby. In *Johnson*,¹⁹⁹ the defendant was legitimately tackled in the course of a game of rugby union, and bit the victim, tearing away part of the latter's ear lobe. He was sentenced to six months' imprisonment, which was upheld by the Court of Appeal. In *Calton*,²⁰⁰ the defendant kicked the victim in the face, whilst he was prone, in the course of a rugby union match. This resulted in a broken jaw, and the defendant was sentenced to 12 months' detention in a Youth Offenders' Institution (reduced to three months on appeal). In *Gingell*,²⁰¹ repeated punches to an opposition rugby player resulted in a fractured nose, cheekbone and jaw. Gingell was sentenced to six months' imprisonment, which was reduced to two months by the Court of Appeal. In *Moss*,²⁰² the victim was involved in a scrum during a game of rugby. As he got to his feet, the defendant punched him in the face, causing a fractured right eye socket, which required the insertion of a titanium plate. Moss was sentenced to eight months' imprisonment, which was upheld on appeal. In *Garfield*,²⁰³ the appellant had been convicted of unlawful wounding, contrary to s 20 of the OAPA 1861, after 'stamp[ing] on the head of a defenceless man' during the course of a game of rugby, causing an injury described as

¹⁹⁹ *R v Johnson* (1986) 8 Cr App R (S) 343.

²⁰⁰ *R v Calton* [1999] 1 Cr App R (S) 64.

²⁰¹ *R v Gingell* (1980) 2 Cr App R (S) 198.

²⁰² *R v Moss* [2000] 1 Cr App R (S) 307.

²⁰³ *R v Garfield* [2008] EWCA Crim 130 [2008] 2 Cr App R (S) 62.

‘a 10cm laceration between his left eye and the back of his head’,²⁰⁴ and which required 30 stitches. Despite accepting that there were ‘substantial mitigating factors’,²⁰⁵ the Court of Appeal upheld his sentence of 15 months’ imprisonment.

Cases such as these furnish examples of sports violence that have been deemed criminal, and the judgments provide an indication of the way in which such conduct is perceived by the courts. In *Moss*, for example, after noting the physical nature of rugby, Potts J quoted the trial judge in stating that it was ‘not a licence for thuggery and was a game covered by strict rules; the offence involved an assault off the ball and after play had moved on; serious injury had been inflicted; the offence was so serious that only a custodial sentence could be justified’.²⁰⁶

The cases demonstrate that even if it can be said that there is a ‘zone of legal exemption’ when it comes to sports such as soccer and rugby, it is not absolute, in that simply being on the field of play will not bring exemption from the application of the criminal law. Beyond this, however, they yield little insight in terms of the substantive law, for two reasons. Firstly, in each the defendant had pleaded guilty, and the appeal simply concerns sentencing. Secondly, they are egregious examples of conduct well outside of the rules. As such, they are beyond what is or can be consented to by the participants. Of more interest when it comes to the imposition of criminal liability is how the criminal law approaches conduct that amounts to a lower order of serious foul play; that which falls into the second of the categories suggested above (foul play that incurs an in-game sanction); and play that is within the rules of the game, but which nevertheless causes injury.

²⁰⁴ *R v Garfield* [2008] EWCA Crim 130 [2008] 2 Cr App R (S) 62, 365 (Walker J).

²⁰⁵ *R v Garfield* [2008] EWCA Crim 130 [2008] 2 Cr App R (S) 62, 366 (Walker J).

²⁰⁶ *R v Moss* [2000] 1 Cr App R (S) 307, 309 (Potts J).

3.3.2 Beyond the rules, to the playing culture

Since the rules are constitutive of the sport, a straightforward approach to the imposition of liability would be to declare that those aspects of the rules that deal with violence feed directly into the shape of the criminal law, effectively delineating the extent of any zone of legal exemption that might be said to apply. Thus, violent play that is within the rules is lawful, and that which is not is unlawful. This might be justified in two ways: that adherence to the rules implies lawfulness in itself; or that it accords with the normative expectations of those involved and thus, in the language of the criminal law, with the ambit of the consent given by the participants. While some have subscribed to an approach whereby the rules are determinative of criminal liability,²⁰⁷ it is one that is described as ‘untenable’ by McCutcheon, since ‘the acceptability of violence is a matter of legal policy not of private regulation’. Thus, ‘[t]o use the rules of the sport as a test would be to confer on a private agency, the sport's governing body, the power to license violence’.²⁰⁸

The rejection of a strict correlation between the rules and lawfulness is also found much earlier, in the nineteenth-century case of *Bradshaw*, in which it was declared: ‘No rules or practice of any game whatever can make lawful that which is unlawful by the law of the land’.²⁰⁹ According to the approach taken in *Bradshaw*, the lawfulness of violence is determined independently of the rules, but the rules may

²⁰⁷ For example, Grayson first proposed his Draft Safety of Sports Persons Act in 1977; legislation that would criminalise reckless or intentional conduct ‘committed by any participant during the course of any authorised sporting or recreational activity when it occurs in breach of the rules or laws of such sporting or other activity’ (Edward Grayson, *Sport and the Law* (3rd edn, Butterworths 2000) 567).

²⁰⁸ J Paul McCutcheon, ‘Sports Violence, Consent and the Criminal Law’ (1994) 45 Northern Ireland Legal Quarterly 267, 273. See also: Ben Livings, ‘“Legitimate Sport” or Criminal Assault? What Are the Roles of the Rules and the Rulemakers in Determining Criminal Liability for Violence on the Sports Field?’ (2006) 70 Journal of Criminal Law 495.

²⁰⁹ (1878) 14 Cox CC 83, 85 (Bramwell B).

nonetheless be persuasive in deciding upon such lawfulness. Bramwell B went on to say:

If a man is playing according to the rules and practices 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'.²¹⁰

In some ways, this approach is also reminiscent of the contemporaneous case of *Coney*,²¹¹ discussed in the previous chapter,²¹² in that, notwithstanding the rules, liability is still dependent upon 'malicious motive or intention' as to the likelihood of 'death or injury'. Thus, as in *Coney*, the court reserves the right to look beyond the formal constitution of the sport in question, and assess the lawfulness of the contest according to its underlying character, and thus come to a judgement as to how to view the conduct of the defendant. However, *Bradshaw* goes further than *Coney* insofar as it encourages reference to the 'rules and practices' when coming to a decision as to the lawfulness of a participant's conduct. The issue was revisited more recently by the Court of Appeal in *Barnes*, in which Lord Woolf stated:

the fact that the play is within the rules and practice of the game and does not go beyond it, will be a firm indication that what has happened is not criminal

²¹⁰ (1878) 14 Cox CC 83, 85.

²¹¹ *R v Coney* (1882) 8 QBD 534.

²¹² In *Coney*, I suggested that liability was dependent upon the 'character' of the contest, not according to the rules.

... conduct outside the rules can be expected to occur in the heat of the moment, and even if the conduct justifies not only being penalised but also a warning or even a sending off, it still may not reach the threshold level required for it to be criminal.²¹³

Again, this does not imbue the rules and practice with legal force, but it does seem to go yet further in emphasising their relevance to the lawfulness of the conduct. Notably, it does not directly tie this to the presumed intent of the defendant, as the court had in *Bradshaw*, suggesting that it is a freestanding test, which can be applied objectively to the participant's conduct. Lord Woolf continued by saying that 'there could lawfully be breaches, even serious breaches, of the rules of the sport without there necessarily being the commission of a criminal offence'.²¹⁴ In making these statements, the *Barnes* judgment has been hailed as an acceptance of the 'playing culture' of a sport as a standard by which the criminal courts can adjudge the suitability of the criminal sanction.²¹⁵

The term 'playing culture' is redolent of Williams's conception of a 'working culture' that he employed when looking at the response of the criminal law to sports violence; Williams suggested in 1962 that legitimate, and thus lawful, play may extend to 'an application of force that is in breach of the rules of the game, if it is the sort of

²¹³ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 914-15 (Lord Woolf CJ).

²¹⁴ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 917 (Lord Woolf CJ).

²¹⁵ See: Ben Livings, 'Legitimate Sport or Criminal Assault? What are the Roles of the Rules and the Rule-Makers in Determining Criminal Liability for Violence on the Sports Field?' (2006) 70 *Journal of Criminal Law* 495; Adam Pendlebury, 'Perceptions of Playing Culture in Sport: The Problem of Diverse Opinion in the Light of *Barnes*' [2006] 4 *Entertainment and Sports Law Journal* <www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume4/number2/Pendlebury> accessed 4 May 2015.

thing that may be expected to happen during the game'.²¹⁶ More recently, Gardiner has written extensively about the 'playing culture' of sport, and has advocated strongly for its use as a means by which to calibrate the response of the criminal law to sports violence.²¹⁷

Gardiner is opposed in principle to the interference of the criminal law in sport, and he sees a respect for that which is done within the limits of the playing culture as an effective means by which to protect sport from what he perceives as undue legal interference. In delineating what he means by the playing culture, Gardiner writes that 'the commission of fouls in [soccer] due to "illegal tackles" and the consequential injury have inevitability, and although are outside the legalistic interpretation of the rules, are inside the working or playing culture of the game'.²¹⁸ For Gardiner, it is important that the criminal law respects this playing culture, since '[b]y ignoring the wider playing culture in specific sports and reifying the rules alone as a determining guide, what may seem as being an attempt to provide consistency in application of the law may well lead to "too specific" an intervention by the criminal law'.²¹⁹

3.4 The Usefulness of the Playing Culture Paradigm

Before discussing the potential utility of the playing culture to the determination of criminal liability, it is necessary to be able to state what the term signifies, as those

²¹⁶ Glanville Williams, 'Consent and Public Policy' [1962] *Criminal Law Review* 74, 80.

²¹⁷ Simon Gardiner, 'Not Playing the Game: Is it a Crime?' [1993] *Solicitors' Journal* 628, 629. For this reason, Gardiner asserts that they 'are likely to be seen as consensual'. The importance of such consent will be seen later.

²¹⁸ Simon Gardiner, 'Sports Participation and Criminal Liability' (2007) 15 *Sport and the Law Journal* 19, 23.

²¹⁹ Simon Gardiner, 'Sports Participation and Criminal Liability' (2007) 15 *Sport and the Law Journal* 19, 24.

who advocate its use are rarely clear about precisely what they mean.²²⁰ At its most straightforward, according to Pendlebury, '[t]he playing culture of sport refers to the way that the game is played and how it is expected to be played by those who are in some way involved in it'.²²¹ Gardiner suggests it is in evidence where those participating in sport seek to gain a competitive advantage, and thus push their behaviour beyond that which is technically allowed by the rules; as this behaviour is accepted, so it becomes an entrenched part of the accepted way of playing.²²²

In what follows, the term has been taken to signify something that correlates with an immanent standard of legitimacy that is internally generated from within sport. An understanding of the playing culture of a sport may assume particular importance in areas where the rules are silent, or are unclear. It may also play an important role in signifying a zone of tolerance or elasticity, even where the written rule is ostensibly clear. This will usually mean an acceptance of conduct beyond that which is allowed by the rules, but the playing culture could also be more restrictive than the rules. This would be the case where a strict reading does not outlaw something, but it would nevertheless be deemed unacceptable for a participant to do it. For example, in the civil case of *Affutu-Nartey v Clarke*,²²³ it was held to be a breach of the duty of care where an adult coach took part in a game of rugby alongside schoolboys, and caused serious injuries when carrying out a robust tackle that was within the rules of the game.

²²⁰ Anderson points to some confusion over the way the term is used (Jack Anderson, 'No Licence for Thuggery: Violence, Sport and the Criminal Law' [2008] *Criminal Law Review* 751).

²²¹ Adam Pendlebury, 'The Regulation of on-the-ball Offences: Challenges in Court' (2012) 10 *Entertainment and Sports Law Journal* <<http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume10/pendlebury/>> accessed 4 May 2015.

²²² Simon Gardiner and others, *Sports Law* (Cavendish Publishing 2006) 66.

²²³ (1984) *The Times*, 9 February (DC).

3.4.1 'Unwritten conventions' and a more realistic portrayal

The idea of the playing culture as a standard by which to measure the lawfulness of sports violence is potentially useful in a number of respects. Firstly, it has been suggested that the rules cannot fully reflect the way in which a sport is expected to be played; Dunning and Sheard refer to 'unwritten conventions'²²⁴ that are not easily captured by reference to the rules alone, and can only be understood by those who understand the playing culture of a sport. An illustration of the potential gap between the substantive rules and the realities of participation is given by Riesman, who attributes the invention of American Football to a lack of clarity in the written rules of rugby that had been imported from Britain, and which made it difficult for those inexperienced in the game to understand how it should be played.²²⁵ This points to an understanding of the way that a sport should be played, beyond a straightforward literal interpretation of the written rules, as essential to presenting a realistic portrayal of that sport. Insofar as the playing culture is something that is better understood by those who participate or are otherwise involved in a particular sport, Gardiner suggests that it can be employed to 'help demarcate what is legitimate or illegitimate'.²²⁶ In terms of the criminal law, mutual understanding of the playing culture, and the reciprocal normative expectations of the players this generates, might be said to underpin an inference of consent to that which accords with the playing culture of the sport in question.

²²⁴ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 29.

²²⁵ David Riesman and Reuel Denney, 'Football in America: A study in Cultural Diffusion' in David Riesman (ed), *Individualism Reconsidered* (The Free Press 1954).

²²⁶ Simon Gardiner, 'Sports Participation and Criminal Liability' (2007) 15 *Sport and the Law Journal* 19, 27.

The criminal courts have on occasion made recourse to something like the playing culture of sport, as seen in the Saskatchewan Court of Appeal in *Cey*,²²⁷ a case that was cited with approval by the Court of Appeal in *Barnes*.²²⁸ In *Cey*, Gerwing JA noted that in certain sports (in this case ice hockey), ‘intentional bodily contact and ... the risk of injury therefrom’ is a normal part of the sport, expected to take place by those who participate. In demarcating the legitimacy of these, the court held that ‘[t]hose forms sanctioned by the rules are the clearest example’, but continued by expanding this to cover ‘[o]ther forms, denounced by the rules but falling within the accepted standards by which the game is played’.²²⁹ More recently, the Provincial Court of British Columbia applied *Cey* in *TNB*.²³⁰ In this case, which concerned injuries inflicted during the course of a rugby match between two high school teams, the judge held that, in order to establish criminal liability, it was necessary to look beyond the rules, and decide whether the conduct of the defendant was ‘legitimate play within the amalgam of the “rules” of this game’.²³¹ This ‘amalgam’ was held to comprise the ‘written rules, unwritten code of conduct and guidelines set by a referee in a particular game’,²³² and the court was notably liberal in its construction of this, holding it to include ‘the legitimate strategy of intimidation of the opposite team by head-butting, eye gouging, elbowing, raking and punching’.²³³ Although the judge accepted that ‘[n]one of these infractions is permitted by the written rules’, he asserted that they were ‘accepted by the unwritten code of conduct at this level of play in the game of

²²⁷ *R v Cey* (1989) 48 CCC (3d) 480, 490 (Gerwing JA).

²²⁸ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910.

²²⁹ *R v Cey* (1989) 48 CCC (3d) 480, 490 (Gerwing JA).

²³⁰ *R v TNB* (2009) BCPC 0117.

²³¹ *R v TNB* (2009) BCPC 0117 [22] (Honourable Judge SD Frame).

²³² *R v TNB* (2009) BCPC 0117 [93] (Honourable Judge SD Frame).

²³³ *R v TNB* (2009) BCPC 0117 [94] (Honourable Judge SD Frame).

rugby'.²³⁴ As these Canadian cases demonstrate, reference to a standard such as the playing culture offers a portrayal of a sport and its attendant practice, as distinct from a strict adherence to the rules, that may better reflect the 'realities' of sports participation, and thus the normative expectations of those who participate, though this depends upon some sort of consensus, and of course on the authenticity of the playing culture presented.

3.4.2 Varying practices and appropriate responses

A second advantage of the playing culture standard draws from its inherently contingent nature, which may allow for a flexibility of approach when it comes to assessing the legitimacy of physical contact, and whether it might warrant the attention of the criminal courts. Brailsford writes of 'definitions of sport' as 'never easy and seldom stable'.²³⁵ This statement can be construed in two ways, both of which highlight the dynamic and changing practices that exist within, and across, sports. In the historical sense in which it was meant, reference to the playing culture might help to capture the norms of a sport where the accepted practice, but not the substantive rules, have changed; an example of this can be found in the clarification issued by the rugby authorities in 2005 over whether a 'spear tackle' constituted 'dangerous play'.²³⁶

In addition, the idea of contingency that the broader concept of the playing culture enables can also be applied across contemporary sports in terms of the level

²³⁴ *R v TNB* (2009) BCPC 0117 [94] (Honourable Judge SD Frame).

²³⁵ Dennis Brailsford, *A Taste for Diversions: Sport in Georgian England* (The Lutterworth Press 1999) 7.

²³⁶ 'History of the Laws of Rugby Football' <<http://www.rugbyfootballhistory.com/laws.htm>> accessed 15 June 2015.

at, and conditions under, which the sport is being played. The rules of boxing, rugby and soccer are compiled with organised, if not elite, play in mind, but they also govern lower-level sport, and inevitably act as the reference point for *ad hoc* games played in parks and schoolyards.²³⁷ They also influence the form that training for a sport may take, such as the ‘sparring’ that is part of the training regime for professional and amateur competitive boxers, and those who engage in the sport recreationally. In common with the informal varieties of rugby and soccer, sparring might take any number of forms. As Stiller and others observe, ‘there are notable variations in sparring practices’, even when it takes place in a dedicated boxing gym under the supervision of coaches, and there may be marked differences in its practice, intensity and degree of regulation and supervision.²³⁸

Acknowledging and seeking to accommodate these variations in the normative expectations of the participants, the court in *Cey* held that the expected conduct of the players would ‘vary, for example, from setting to setting, league to league, age to age, and so on’, and it was therefore necessary ‘to have regard for the conditions under which the game at issue is played’.²³⁹ In this way, an assessment of the playing culture can be adapted to fit the normative expectations of the players involved, dependent upon the context of the game; these are likely to be different in a top-level professional game to one that takes place between teams in which there is a mixture of junior and senior players, for example. The court in *TNB* went further in taking into account ‘the context of this game itself and the parameters permitted by the referee’,

²³⁷ Rigauer describes the practice of ‘recreational sport’ as ‘a miniature version of top-level sports’ (Bero Rigauer, *Sport and Work* (translated by Allen Guttmann) (Columbia University Press 1981) 107).

²³⁸ John W Stiller and others, ‘Sparring and Neurological Function in Professional Boxers’ (2014) 2 *Frontiers in Public Health* 69.

²³⁹ *R v Cey* (1989) 48 CCC (3d) 480, 490 (Gerwing JA).

which included ‘an examination of the rivalry between [the two schools involved] as well as the intensity and aggression of the game played that day’.²⁴⁰

This flexibility of approach is something that can be claimed of a playing culture standard that is construed more broadly than simply the rules of the game, and takes into account the way in which a particular contest should be played. ‘If’, as McCutcheon writes, ‘a sport is of such intrinsic worth as to merit legal recognition as being “properly constituted” it must follow that its normal attributes, incidents and inherent spirit attract equal legal recognition’.²⁴¹ A key advantage of a standard such as that represented by the playing culture is that it may facilitate a more harmonised and coordinated approach on the part of those involved in sport and the criminal law when it comes to the common interest in deterring and punishing excessive or otherwise inappropriate violence. When it comes to the criminal law principles analysed in later chapters, the more realistic portrayal generated by the playing culture may assist in assessments of culpability and the nature of any (informed) consent that can reasonably be inferred from participation.

As well as guiding the appropriate imposition of criminal liability, use of the playing culture may enhance its effectiveness, since it has been suggested that calibrating the response of the criminal law to the normative expectations of particular groups ‘enhances obedience’; Robinson and Darley assert that ‘people obey the law not so much because they are fearful of being apprehended by the criminal justice system, but because they care about what their social group thinks of them

²⁴⁰ *R v TNB* (2009) BCPC 0117 [51] (Honourable Judge SD Frame).

²⁴¹ J Paul McCutcheon, ‘Sports Violence, Consent and the Criminal Law’ (1994) 45 Northern Ireland Legal Quarterly 267, 274.

and because they regard obedience as morally appropriate'.²⁴² As a result, they advocate criminal law that is 'based on community standards of deserved punishment', as this will 'enhance this obedience'.²⁴³

3.5 Limitations of the Playing Culture Standard

The concept of the playing culture is a potentially useful tool when it comes to delineating between lawful and unlawful sports violence, insofar as it can provide a more realistic and contextual view of sports practice, and may provide a responsive and flexible standard that is informative and useful when it comes to harmonising and coordinating the efforts of the criminal law and the governing bodies in relation to violence and participant safety. However, in order for the concept to be one that can be usefully adopted by the criminal law, it must be a standard that is acceptable to the criminal law, and one that is useful in coming to a judgement about the individual defendant. Here, the playing culture is inhibited in a number of respects.

3.5.1 The playing culture and the problem of definition

The most obvious and immediate problem with the playing culture is one of definition. Put simply, it may be difficult to know what it is in any particular set of circumstances. On a practical level, this is especially likely to be an issue when it comes to informal variants of the sports, such as in the case of sparring referred to above. In general, sparring involves safeguards such as the use of more protective equipment than that

²⁴² Paul Robinson and John Darley, 'The Utility of Desert' (1996-97) 91 *Northwestern University Law Review* 453, 498.

²⁴³ Paul Robinson and John Darley, 'The Utility of Desert' (1996-97) 91 *Northwestern University Law Review* 453, 498.

worn in the ring, the avoidance of too great a disparity of strength and skill on the part of those taking part and 'limiting the intensity, and quantity, of exposure to head blows'.²⁴⁴ These may be governed by 'codes of conduct' on the part of particular boxing gyms,²⁴⁵ but such codes may not routinely be followed. For instance, Stiller and others point to the commonality of 'poorly supervised mismatching of boxers with either weight or skill discrepancies'.²⁴⁶ Due to the inherent variability of such contests, it may be difficult to ascertain what the playing culture is in such circumstances. This is exacerbated in sport that takes place away from supervisory control altogether; as Lumer states:

Often it is not clear what game the players have agreed to play, and even the players themselves may have divergent opinions about this. This divergence may give rise to moral reproaches or indignation because one player thinks that another player acts contrary to his (moral) duties, as is the case in soccer if the other player follows rougher informal rules.²⁴⁷

The implications of this are twofold. Firstly, disagreements about the nature of a contest and the limits of acceptable behaviour potentially cause problems for a

²⁴⁴ John W Stiller and others, 'Sparring and Neurological Function in Professional Boxers' (2014) 2 *Frontiers in Public Health* 69 <<http://www.ncbi.nlm.nih.gov/pubmed/25101253>> accessed 25 January 2015.

²⁴⁵ John W Stiller and others, 'Sparring and Neurological Function in Professional Boxers' (2014) 2 *Frontiers in Public Health* 69 <<http://www.ncbi.nlm.nih.gov/pubmed/25101253>> accessed 25 January 2015.

²⁴⁶ John W Stiller and others, 'Sparring and Neurological Function in Professional Boxers' (2014) 2 *Frontiers in Public Health* 69 <<http://www.ncbi.nlm.nih.gov/pubmed/25101253>> accessed 25 January 2015.

²⁴⁷ Christoph Lumer, 'Rules and Moral Norms in Sports' (1995) 30 *International Review for the Sociology of Sport* 263, 269.

criminal law of sports violence that is grounded in the consent of the participants. Secondly, any such uncertainty threatens to undermine the playing culture's primary virtue of flexibility; as I have written previously:

The degree of flexibility that the standard purports to offer would ... appear contrary to the characteristic of certainty with which Gardiner ... imbues the concept: the two virtues are difficult to reconcile ... *the greater the degree of flexibility, the less predictable the outcome; the more certain a rule, the less this allows for flexibility.*²⁴⁸

It is interesting to note that the Court of Appeal in *Barnes* did little to mitigate the possibility of uncertainty when it came to accommodating the playing culture of soccer. Lord Woolf notes that, at the trial, '[t]he jury were not given any examples of conduct which could be regarded as "legitimate sport" and those which were not "legitimate sport" for the purposes of determining whether they were criminal',²⁴⁹ but this seems to cause him little concern. Lord Woolf considered that '[t]he jury did not need copies of the rules, but they did need to be told why it was important to determine where the ball was at the time the tackle took place',²⁵⁰ and that '[t]hey should have been told the importance of the distinction between the appellant going for the ball, albeit late, and his "going for" the victim'.²⁵¹

²⁴⁸ Ben Livings, "Legitimate Sport" or Criminal Assault? What Are the Roles of the Rules and the Rulemakers in Determining Criminal Liability for Violence on the Sports Field? (2006) 70 *Journal of Criminal Law* 495, 501 (emphasis added).

²⁴⁹ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 918.

²⁵⁰ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 918.

²⁵¹ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 918.

Here, the Court of Appeal effectively emphasises that any understanding of the 'rules and practices' of a sport, and how they come to be viewed under the criminal law, is not a matter to be decided within sport, but is a standard that will be imposed by the courts; 'legitimate sport' is not to be viewed as being synonymous with the playing culture, or at least not in the manner that is advocated by Gardiner. Whilst the criminal law might be willing to be informed by broader understandings of the practice of sport, it is apparently not willing to defer to external standards of conduct.

3.5.2 The source of the playing culture

A further issue that is problematic when it comes to its adoption by the criminal law is the source of the norms that might be seen to constitute the playing culture. The Canadian cases cited above advocate an approach that has a high degree of specificity and contingency as to context, insofar as the conduct of those involved should be considered in light of 'the conditions under which the game at issue is played'.²⁵² If an individual's criminal liability is to be considered in this light, it is worth asking about the sources of these 'conditions'. In other words, asking what it is that gives a particular contest its playing culture. In order for the concept to be of use to the criminal law's function of ascribing liability to the individual participant, the courts must accept a legally relevant connection of the playing culture with the attitudes, choices and practices of individual participant defendants and victims.

A full-scale study of norm-creation within sports is beyond the scope of this work, but some discussion and analysis is illustrative, insofar as it suggests that the

²⁵² *R v Cey* (1989) 48 CCC (3d) 480, 490 (Gerwing JA).

playing culture is not solely a product of those taking part, and therefore casts doubt on its usefulness as a normative standard that can be used to judge the behaviour of individual participants. This contention is particularly enlightening insofar as it can inform discussions in later chapters when it comes to addressing questions concerning the quality of the consent that is said to be given by those who participate in contact sports, and the legal standard of 'legitimate sport' tacitly approved in *Barnes*, and that, in practice, largely correlates with the prevailing understanding of the playing culture.

When it comes to the organisational structure of modern professional sports, the participants are in a minority; as early as 1955, Stone remarked of the 'unique occupational morphology' of professional sports: 'Those engaged first hand in the production of the commodity – the game or the match – constitute a minority within the industrial complex, while those engaged in the administration, promotion, and servicing of the production constitute a sizable majority'.²⁵³ Since Stone wrote this, this 'occupational morphology' has become ever more pronounced. Rigauer asserts that 'the individual who resolves to participate in top-level sports has already subordinated himself to a high degree to the reigning system of values and conventions of behavior'.²⁵⁴

Rigauer, Stone and Huizinga all document the increased 'seriousness' of sport, and suggest that this serves to move decision-making away from the individual competitors, and into the hands of the administrators, particularly in relation to the commercial, entertainment-focused aspects of sport.²⁵⁵ Following this, Dunning and

²⁵³ Gregory P Stone, 'American Sports: Play and Display' (1955) 9(3) *Chicago Review* 83, 86.

²⁵⁴ Bero Rigauer, *Sport and Work* (translated by Allen Guttmann) (Columbia University Press 1981) 16-17.

²⁵⁵ Johan Huizinga, *Homo Ludens: A Study of the Play Element in Culture*, (trans RFC Hull, London, 1949); Bero Rigauer, *Sport and Work* (translated by Allen Guttmann) (Columbia University Press 1981);

Sheard describe 'the dominant trend in modern sport' in terms of the 'growing competitiveness, seriousness of involvement and "achievementorientation" of sports-participation'.²⁵⁶ The changing place of sport in the public imagination and its increasing financial importance are evident, and these have accelerated in recent times. Morgan notes of the economic growth of Rugby Union: 'The Rugby World Cup is now a multi-million pound global extravaganza that is only topped, in the sporting world, by the Olympics and the Football World Cup'.²⁵⁷ Similarly, Gendall writes of modern professional boxing as being 'a world away from what has been described in the early cases as amicable demonstrations of the skill of sparring'.²⁵⁸ As a result, he argues, '[t]he pressures from promoters, spectators, the media and others involved in boxing today are to see action, excitement and overwhelming knock-outs'.²⁵⁹

Although one of the advantages of the playing culture standard was noted above as allowing common ground for the sports authorities and the law to pursue their shared goals when it comes to deterring and reducing instances of overtly violent and dangerous conduct, there are inevitable discrepancies between those goals; in some sports, violence beyond that which is permitted strictly within the rules is encouraged, for commercial and entertainment reasons. Young points to 'gratuitous violence in the work of athletes' that is 'approved of and demanded by coaches,

Gregory P Stone, 'American Sports: Play and Display' in Eric Dunning (ed), *Sport: Readings from a Sociological Perspective* (University of Toronto Press 1972).

²⁵⁶ Eric Dunning and Kenneth Sheard, *Barbarians, Gentlemen and Players: A Sociological Study of the Development of Rugby Football* (2nd edn, Routledge 2004) 29.

²⁵⁷ Paul Morgan, *A History of Rugby* (Green Umbrella Publishing 2004) 170.

²⁵⁸ David Gendall, 'The Sport of Boxing: Freedom versus Social Constraint' (1997) 5 *Waikato Law Review* 71, 77.

²⁵⁹ David Gendall, 'The Sport of Boxing: Freedom versus Social Constraint' (1997) 5 *Waikato Law Review* 71, 77.

owners and sponsors, and that ... assists in the sale of professional sport'.²⁶⁰ As Young notes, 'many [violent] incidents routinely occur, and are encouraged to occur as "part of the game"'.²⁶¹ It is therefore arguably the case that there is a disconnect when it comes to the levels of violence and both the individual and aggregated desires and expectations of the participants, and this may be said to affect the consent that they give in respect of the risk of harm.

3.5.3 The playing culture and the regulatory function of the referee

The fact of regulation is often given as a justification for the existence of any 'zone of legal exemption' when it comes to sports violence,²⁶² and Gardiner suggests that this is an adjunct to the self-control of the participants; he describes modern sport as 'highly regulated and controlled, both by a set of official rules external to players and self-control by the players themselves'.²⁶³ This is a reasonable observation when it comes to organised variants, but the form of this regulation is susceptible to the pressures outlined above. In other words, it is not only the conduct of the players that is influenced by the manifold social, commercial and other influences that surround sport; these also come to bear on the role of the referee, which Gendall describes as 'increasingly difficult'.²⁶⁴ In the context of boxing, he points to the tensions that arise in the role: 'Referees are officially required to ensure that a fight ends before someone

²⁶⁰ Kevin Young, 'Violence in the Workplace of Professional Sport from Victimological and Cultural Studies Perspectives' (1991) 26 *International Review for the Sociology of Sport* March 3, 6.

²⁶¹ Kevin Young, 'Violence in the Workplace of Professional Sport from Victimological and Cultural Studies Perspectives' (1991) 26 *International Review for the Sociology of Sport* March 3, 6.

²⁶² In *Brown*, a ground for differentiating between sado-masochism and sport was that 'there was ... no referee present such as there would be in a boxing or football match' (*R v Brown* [1994] 1 AC 212 (HL), 238 (Lord Jauncey)).

²⁶³ Simon Gardiner, 'Criminalisation of Sports Field Violence' (1996) 23 *Criminal Justice Matters* 20, 20.

²⁶⁴ David Gendall, 'The Sport of Boxing: Freedom versus Social Constraint' (1997) 5 *Waikato Law Review* 71, 77.

is seriously injured, whilst at the same time they must meet the demands of the fans to see that the contest lasts the scheduled number of rounds'.²⁶⁵

It may be argued that the extensive regulatory regime that exists, particularly in high-level sport, also serves to diminish a player's moral agency, and the sense of responsibility for their own actions. This is because the role of the referee is more than simply that of arbiter when it comes to infringement of rules; rather, the referee takes an active role in managing the contest. The AIBA rules state that amongst the primary roles of the referee are: that he 'care for both Boxers and ... make the health of both Boxers a primary concern throughout the Bout';²⁶⁶ see that all rules and fair play are strictly observed';²⁶⁷ and 'maintain control of the contest at all its stages'.²⁶⁸ This involves an almost-constant dialogue with the participants and frequent interventions on the part of the referee, who must, as well as calling foul play, effectively manage the fight.

The active engagement of the referee in a rugby match is analogous, and civil claims for negligence have found success where the referee has failed to implement the rules of the scrum;²⁶⁹ a feature of the sport that has been recognised as particularly dangerous.²⁷⁰ In a similar vein, the FIFA laws state that the referee 'controls the match',²⁷¹ and across sports it is often said that players should 'play to the whistle', a colloquialism that refers to the player's duty to respect the decisions of

²⁶⁵ David Gendall, 'The Sport of Boxing: Freedom versus Social Constraint' (1997) 5 *Waikato Law Review* 71, 77.

²⁶⁶ Rule 10.2.1.

²⁶⁷ Rule 10.2.2.

²⁶⁸ Rule 10.2.3.

²⁶⁹ *Smoldon v Whitworth* [1997] PIQR 133; *Vowles v Evans and Welsh Rugby Union* [2003] EWCA Civ 318.

²⁷⁰ Colin W Fuller and others, 'Contact Events in Rugby Union and their Propensity to Cause Injury' (2007) 41 *British Journal of Sports Medicine* 862.

²⁷¹ FIFA Law 5.

the referee, whether or not they believe a rule infringement has occurred, and even if they believe that they have infringed the rules themselves.

This is not to suggest that the practice of sport permits for a complete abdication of individual moral and legal accountability, and it is notable that the foreword to the rules promulgated by World Rugby state: 'It is very important that players play the Game in accordance with the Laws of the Game and be mindful of the safety of themselves and others'.²⁷² However, it does point to the tensions and sometimes conflicting pressures and imperatives that exist in officiated, competitive sport, the practice of which is likely to permeate attitudes at all levels and in all forms of the respective sports.²⁷³

The commercial imperatives and 'fair play' norms feed into the conduct of sporting contests in another way. Lumer asserts that '[k]eeping agreements and thereby being formally fair is one of the most important moral norms in sport',²⁷⁴ and suggests that this 'norm of formal fairness' stretches to 'the relation between players and spectators'. This means that there is 'an (at least tacit) agreement between them that the players do their best in striving for victory, thereby usually giving an exciting competition, and that the spectators pay for this by money or by acknowledgement'.²⁷⁵ This symbiotic relationship between participant and spectator is redolent of the concerns evinced in *Coney*, and other prizefighting cases in the nineteenth century, in which there was said to be encouragement to fight on the part

²⁷² *Laws of the Game* (World Rugby 2015) 3.

²⁷³ Karin AE Volkwein, 'Ethics and Top-Level Sport - A Paradox?' (1995) 30 *International Review for the Sociology of Sport* 311.

²⁷⁴ Christoph Lumer, 'Rules and Moral Norms in Sports' (1995) 30 *International Review for the Sociology of Sport* 263, 274.

²⁷⁵ Christoph Lumer, 'Rules and Moral Norms in Sports' (1995) 30 *International Review for the Sociology of Sport* 263, 269.

of the crowd, and encouragement to civil disorder by the fight itself.²⁷⁶ As a result of this quasi-contract, Lumer argues that participants can be seen to owe a moral duty to both fellow participants and others involved in the sport (including spectators) to try his best against the opposition, and that this may, somewhat paradoxically, entail putting that opponent at more risk of injury.²⁷⁷

3.6 Conclusion

The norms of boxing, rugby and soccer are clearly different to the norms of society more broadly, in that they encompass a far greater degree of physical contact, and as a result countenance the risk of (serious) injury as an inherent part of their practice. It is clear from an examination of the rules of the sport that violence is not incidental to their practice, but rather intrinsic. As Connor notes, 'sport and violence [are] dissociable ... violence is always at issue wherever there is sport. Violence is what gives modern sport its meaning, purpose and necessity.'²⁷⁸ The most striking example of this is boxing, but the examination of the rules undertaken above makes it clear that rugby and soccer also involve violence that is more than incidental.

At the same time, however, their practice is also controlled by a sophisticated set of rules, designed to minimise the risks involved, while allowing for the essential character of the sport. Participation in formally constituted sport involves the acceptance of its rules, and might in itself thereby permit for the inference of (informed) consent on the part of the participants. The rules are not the only force

²⁷⁶ *R v Coney* (1882) 8 QBD 534, 544 (Mathew J).

²⁷⁷ Christoph Lumer, 'Rules and Moral Norms in Sports' (1995) 30 *International Review for the Sociology of Sport* 263.

²⁷⁸ Steven Connor, *A Philosophy of Sport* (Reaktion Books 2011) 205.

that shapes the way that a sport is played, and standards of accepted practice derive from the normative expectations of those who play, administer, watch and otherwise participate in it. These expectations and practices generate the norms or 'playing culture' of a particular sport, and it is perhaps not unreasonable to suggest that a participant should also be taken to have accepted, and thus consented to, the risk of injury that this entails.

The playing culture of a particular sporting contest has therefore been posited as a useful metric by which to calibrate the response of the criminal law to sports violence, but its use in this way is problematic for two main reasons. Firstly, its sources and contents are not easy to discern. The principal appeal of the playing culture is its ability to track the particular features of the sport to which it is being applied. Therefore, it is inevitably contingent upon any number of variables, such as the age and ability of those participating, the presence or otherwise of a referee, and whether it is a professional, amateur or more informally constituted contest.

Since it draws from such a broad range of influences, the playing culture is not simply a concept that can be derived from the individual or aggregated views of those participating, and is in some respects influenced by factors that are either out of their control, or that are tied to the context in which the contest takes place. This is potentially problematic when it comes to the criminal law, especially insofar as the standard is useful when considering the consent that has been held to derive from participation. This does not amount to an advocacy of moral unaccountability on the part of those who perpetrate violent, injurious acts, but rather points to the realities of sports participation, particularly at the elite, professional level.

Chapter 4

Sports Violence, Criminal Offences and the First Part of the 'Orthodox View'

4.1 Introduction

The preceding chapters set out the development and current shape of sports violence; I now turn to the way in which the substantive criminal law is structured and operates in order to differentiate between that which is lawful and unlawful. Under what I term the 'orthodox view', the criminal law relating to sports violence has been divided into separately assessed offence and defence requirements, and it is analytically expedient to approach the subject according to the same structure.

In keeping with this, therefore, the present chapter examines the offences that are likely to pertain to sports violence perpetrated during the course of boxing, rugby or soccer, concentrating on those which are provided for by ss 18, 20 and 47 of the Offences Against the Person Act (OAPA) 1861, the requisite elements of which have been applied to sports violence with relative ease. Following this, Chapters 5 and 6 look at the role of consent. In Chapter 7, I will draw together the elements considered in Chapters 4, 5 and 6 and return to some of the themes that have emerged from them, as the law grapples with the propriety of sports violence that is rooted in the historical and cultural acceptability of the violence they entail, and the parallel rule systems and regulatory bodies that exist in relation to the constitution of sports such as boxing, rugby and soccer.

When examining the application of the offences of violence with which this chapter is concerned, there is a particular focus on the *mens rea* requirements, and the way in which these have been construed so as to allow for *prima facie* liability to be established in cases of sports violence. I examine the way in which intention might be interpreted when it comes to sports violence, particularly when it comes to boxing, the intentionality of which has been disputed. The *mens rea* standard of recklessness was addressed in a straightforward and peremptory manner by the Court of Appeal in *Barnes*, but I suggest that some of its under-explored nuances reveal its potential to capture the substance of the lawfulness of sports violence, in a way that is further explored in Chapter 7.

4.1.1 'Input wrongs' and 'output wrongs'

In order to shed light on the aims and some of the contentions of this chapter, it is useful to make reference to a simple analytical device employed by Edwards, who writes of the construction of criminal offences according to 'input wrongs' and 'output wrongs'.¹ Under Edwards's formulation, input wrongs comprise those *moral* wrongs that an offence is created in order to combat, and output wrongs connote the actual range of conduct caught by the offence provisions; what, through criminalisation, the *law* formally portrays as wrongful. For example, the input (moral) wrong when it comes to the offence of murder might be characterised as the intentional and wrongful killing of a person; the output wrong (that is, precisely in what circumstances the criminal law defines somebody as having committed murder) depends upon the

¹ James Edwards, 'Justice Denied: The Criminal Law and the Ouster of the Courts' (2010) 30 Oxford Journal of Legal Studies 725.

way in which such a law is framed. Changing the output wrong changes the range of conduct to which it applies; if, for instance, it was decided that some forms of euthanasia should be accommodated within the criminal law, and that those who kill in certain circumstances and from a benevolent motive should not be liable for murder (and thereby exclude such persons by creating a narrower input wrong), it would be necessary to alter the way the law was framed in order that the output wrong could reflect this.

Since output wrongs are designed to generate criminal liability on the part of those who engage in input wrongs, it might be expected that the scope of input and output wrongs would correlate closely, but Edwards points out that this is not always so. By way of illustration, he cites s 1(2) of the Terrorism Act 2006, which makes it an offence for a person to 'publish' a statement that is likely to 'encourage or otherwise induce' a person to 'commit, prepare or instigate' acts of terrorism, where that person intends or is reckless as to whether such encouragement or inducement will take place. Edwards describes the scope of this offence as 'breathtakingly wide', and suggests that the output wrong captured by the offence is deliberately broader than the conduct (or input wrong) it is designed to capture.²

Edwards also offers the example of s 13 of the Sexual Offences Act 2003, which relates to 'child sex offences committed by children or young persons'. He suggests that the provision, though it technically criminalises all sexual conduct between persons under the age of 16, is not aimed at prosecuting everybody for everything it

² James Edwards, 'Justice Denied: The Criminal Law and the Ouster of the Courts' (2010) 30 *Oxford Journal of Legal Studies* 725, 730.

technically covers. Rather, it was created in order to render it possible to ‘convict those who *manipulatively* engage in sexual conduct with young persons’.³

A degree of divergence between input and output wrongs is unsurprising, since it is difficult to craft criminal provisions in a way that will perfectly capture every instance in which liability should attach; this is a compelling justification for the importance of discretion at various points in the criminal justice process.⁴ However, in both of the examples he offers, Edwards asserts that the output wrong is deliberately over-inclusive, in order that those who are held to have committed the input wrong can more expeditiously be caught within its ambit. This he describes as a ‘transparently facilitative move’ on the part of the ‘offence-creators’,⁵ in that it removes potentially problematic aspects from formal offence requirements, making them easier to satisfy. In both examples, Edwards suggests that, in order to maintain the correlation between input and output wrongs, the onus is on the police and prosecutors to bring only those who satisfy this additional requirement before the criminal courts.

Edwards uses the analytical tool of input/output wrongs in order to point to what he considers a trend whereby the criminal courts are being ‘ousted’ from performing their proper function, through the creation of offences that are formally easier to satisfy than the normative basis for their existence. Edwards writes: ‘legal rights can be defined so as to detach the law on the books from that which is really

³ James Edwards, ‘Justice Denied: The Criminal Law and the Ouster of the Courts’ (2010) 30 *Oxford Journal of Legal Studies* 725, 731.

⁴ W La Fave, ‘The Need for Discretion’ in G Sykes and T Drabek, *Law and the Lawless: A Reader in Criminology* (Random House 1969) 299-303. The importance and implications of discretion when it comes to the legality of sports violence are explored in Chapter 8.

⁵ James Edwards, ‘Justice Denied: The Criminal Law and the Ouster of the Courts’ (2010) 30 *Oxford Journal of Legal Studies* 725, 731.

taken to justify both the defendant's presence in court, and his potential treatment as a criminal'. Simply put, his argument is that the creation of offences such as those referred to above serves to remove decisions about criminal liability from the ambit of the courts and vest them instead in enforcement bodies such as the police and prosecutors.

In this chapter, I make an analogous but more modest claim concerning the construction of the offences that are most likely to pertain to instances of sports violence. My argument is that the offences of violence that have been held to apply to sports violence have been interpreted in a highly inclusive manner, excluding consideration of the more nuanced nature of sports participation and its attendant violence. This over-inclusiveness stems from the broad applicability of the offences that pertain to sports violence; the relevant non-fatal offences against the person that are the subject of this chapter are not particularised provisions of the type that Edwards cites, but generalised prohibitions on violence. The rules of a sport, an appreciation of its broader playing culture and the fact of voluntary participation are all necessary in constructing the input wrong when it comes to incidents of sports violence, but this is not allowed to shape the operation of the offences directly. *Prima facie* offences of violence therefore apply quite readily to sports violence, and a deeper consideration of the appropriateness of the imposition of criminal liability is formally located within a consideration of the victim's consent. The output wrong, therefore, is carved out of the defence, rather than the offence.

The effects of this formal structure are explored in subsequent chapters (and particularly Chapter 7), but can be noted briefly here. Firstly, it means that the offence requirements retain moral and political neutrality, in keeping with what Norrie

describes as a desire for ‘technical core offence categories’, while more politically and morally contentious aspects of liability are left to be dealt with in the ‘moral defence periphery’.⁶ This does not necessarily mean that liability will be imposed more readily or frequently on those who engage in contact sports, but rather moves the focus from the offence requirements to the separable question of the participant-victim’s consent. One respect in which the effects of this are similar to that which is described by Edwards is in relation to the importance of discretionary judgement; the significance of the use of (particularly prosecutorial) discretion to the effective lawfulness or otherwise of sports violence is a topic taken up in Chapter 8.

4.2 Sports Violence and the ‘Statutory Assaults’

The range of offences likely to pertain to sports violence perpetrated during the course of boxing, rugby or soccer was enumerated in straightforward terms by the Court of Appeal in *Barnes*:

When criminal proceedings are justified, then, depending upon their gravity, the prosecution can be for: assault; assault occasioning actual bodily harm contrary to Section 47 of the 1861 Act; unlawfully wounding or inflicting grievous bodily harm contrary to Section 20 of the 1861 Act; or wounding or causing grievous bodily harm with intent contrary to Section 18 of the 1861 Act. If, unfortunately, death results from the assault, the charge could be one of manslaughter or even murder depending upon the defendant's intent.⁷

⁶ Alan Norrie, *Crime, Reason and History* (3rd edn, Cambridge University Press 2014).

⁷ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 913 (Lord Woolf CJ).

In this passage, Lord Woolf alludes to a spectrum of generally applicable violent offences against the person. At the lower end of this spectrum is the summary offence of common assault,⁸ which can comprise one or both of a technical assault (intentionally or recklessly causing the victim to apprehend the immediate infliction of unlawful personal force) and a battery (intentionally or recklessly inflicting unlawful force).⁹ In the context of sports violence, common assault has been seen as relatively unproblematic. It is by definition a low-level offence that causes little or no harm to the victim, and is for the most part easily accommodated within the context of the sports in question; as James notes, ‘issues such as these only become “live” where injuries, usually serious, are caused’.¹⁰

At the upper end of the spectrum, death resulting from sports violence may bring liability for homicide, with the applicability of manslaughter or murder dependent, as Lord Woolf notes, ‘upon the defendant’s intent’.¹¹ As I noted in Chapter 1, the death of participants (and thus potential liability for homicide) is beyond the scope of this work, though many of the principles that apply to injuries caused through sports violence will also apply in the event of death.

Occupying the midpoint on the spectrum of seriousness are the indictable offences demarcated by ss 18, 20 and 47 of the OAPA 1861. In what follows, I shall concentrate on these ‘statutory assaults’,¹² as they have formed the basis for the

⁸ Common law assaults are acknowledged for the purposes of sentencing in the Criminal Justice Act 1988, s 39: ‘Common assault and battery shall be summary offences and a person guilty of either of them shall be liable to a fine ... to imprisonment for a term not exceeding six months, or to both’.

⁹ *Fagan v MPC* [1969] 1 QB 539 (DC).

¹⁰ Mark James, ‘The Trouble with Roy Keane’ (2002) 1 Entertainment and Sports Law Journal 72.

¹¹ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 913 (Lord Woolf CJ).

¹² This may be considered a problematic term, given the association of the word ‘assault’ with the very specific meaning under the common law, but it is used for convenience.

majority of the jurisprudence that has built up around the criminal law's response to the phenomenon of sports violence.¹³ The prevailing view is that the ambit of ss 18, 20 and 47 is relatively clear, and the courts (and indeed the majority of academic commentators¹⁴) have viewed their application to instances of sports violence as straightforward. Indeed, what is striking about this is quite how easily they have been held to apply to the type of sports violence that is, as was explored in the preceding chapter, intrinsic to, and constitutive of, the playing culture of sports that have been accorded the status of 'lawful activities'.¹⁵

4.2.1 The OAPA 1861 – 'laudable but untidy'

In *Brown*, Lord Lowry describes the OAPA 1861 as 'one of several laudable but untidy Victorian attempts to codify different areas of the law',¹⁶ and the Act owes much to the historical legacy bequeathed upon it as a piece of consolidating legislation that drew from a broad range of existing law and retained the concepts and terminology of much of what it replaced. Roberts considers it 'particularly remarkable' that the provisions of the OAPA 1861 have survived so long, considering that they 'then fell short – and still fall short – of the standards of clarity, certainty and accessibility to be expected of modern law'.¹⁷ Indeed, almost from its inception, the OAPA 1861 was subject to criticism; in 1877, Stephen wrote of the offences:

¹³ Much of what I will say can be extended to cover the lower-level common law offences, and the various homicides.

¹⁴ Fafinski marks it out as 'a low threshold of criminal liability that would be easily satisfied in the context of the majority of sporting injuries' (Stefan Fafinski, 'Consent and the Rules of the Game: The Interplay of Civil and Criminal Liability for Sporting Injuries' (2005) 69 *Journal of Criminal Law* 414).

¹⁵ *R v Brown* [1994] 1 AC 212 (HL).

¹⁶ *R v Brown* [1994] 1 AC 212 (HL), 249.

¹⁷ Paul Roberts, 'Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform' (2001-02) 5 *Buffalo Criminal Law Review* 173, 193.

Their arrangement is so obscure, their language so lengthy and cumbrous, and they are based upon and assume the existence of so many singular common law principles that no one who was not already well acquainted with the law would derive any information from reading them.¹⁸

More recently, Smith has described the OAPA 1861 as ‘a rag-bag of offences brought together from a wide variety of sources with no attempt ... to introduce consistency as to substance or as to form’. As a result, he considers it ‘deplorable that so much of it remains the law’.¹⁹

Writing of its structure and content, Horder notes the ‘vice of particularism’ that the statute inherited from its precursors.²⁰ Such a concern echoes that of the Law Commission, which refers to the ‘bewildering array of special offences of assault’, and notes that ‘such particularisation ... [is] ... contrary to principle’.²¹ Despite the tendency to particularity alluded to by Horder and the Law Commission, there is no mention of sport in the OAPA 1861. Its concerns, insofar as they are made explicit within the statute, reflect those of the period of its inception, and sport was then outside the purview of specific criminal legislation. As explored in Chapter 2, significant developments in sports organisation and governance were at this point

¹⁸ Cited in *R v Brown* [1994] 1 AC 212 (HL), 249 (Lord Lowry).

¹⁹ JC Smith, ‘Case Comment – *R v Parmenter*’ [1991] *Criminal Law Review* 41, 43.

²⁰ Horder draws attention to s 39 of the OAPA 1861, which covers the offence of ‘Assaults with intent to obstruct the sale of grain, or its free passage’ (Jeremy Horder, ‘Rethinking Non-Fatal Offences Against the Person’ (1994) 14 *Oxford Journal of Legal Studies* 335).

²¹ Law Commission, *Legislating the Criminal Code: Offences Against the Person and General Principles* (Law Com No 218, 1993) para 22.1. In making this observation, the Law Commission stated itself to be in agreement with the Criminal Law Revision Committee, *14th Report: Offences Against the Person* (Cmnd 7844, 1980).

ongoing, with change accelerating and then crystallising in the latter half of the nineteenth century.

The criticism of particularism is a valid one, especially when applied to the Act in its original form, but it is of little concern in relation to the current context. Large parts of the OAPA 1861 have now been repealed, and much of that which remains is little used and of marginal importance to the criminal law. The standout exceptions to this are ss 18, 20 and 47, characterised by the Law Commission as ‘virtually the only significant part of the extensive series of criminal law statutes passed in 1861 that still remains on the statute book’.²² These ‘vitally important’²³ provisions have been broadly interpreted, and are used to prosecute a wide range of violent conduct, from that which causes relatively minor injury (s 47 requires actual bodily harm) to that which causes grievous bodily harm. Roberts writes of sections 18, 20 and 47 as offences which are ‘prosecuted daily ... throughout the land’.²⁴

4.2.2 Sections 18, 20 and 47 and criticism of the ‘statutory assaults’

Sections 18, 20 and 47 of the OAPA 1861 form a rough ‘ladder of offences’,²⁵ with the seriousness of the offence determined by a combination of the gravity of the resultant injury and the requisite *mens rea*; the notional hierarchy is, to some extent, reflected

²² Law Commission, *Legislating the Criminal Code: Offences against the Person and General Principles* (Law Com CP No 122, 1992) para 7.4.

²³ AP Simester and others, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (4th edn, Hart Publishing 2010) 46.

²⁴ Paul Roberts, ‘Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform’ (2001-02) 5 *Buffalo Criminal Law Review* 173, 193.

²⁵ ‘Making due allowance for the incongruities in these provisions, the sections can be described as “a ladder of offences graded in terms of relative seriousness”’ (Andrew Ashworth, *Principles of Criminal Law* (2nd edn, Oxford University Press 1995) 313). This is misleading, in that the offences are more specific than such a simplistic reading would suggest, and not characterised simply by their harms, or even by the mental state of the offender. This point is made in some detail by Gardner (John Gardner, ‘Rationality and the Rule of Law in Offences Against the Person’ (1994) 53 *Cambridge Law Journal* 502).

in the sentencing provisions tied to the offences.²⁶ At the lower end of seriousness is s 47,²⁷ the *actus reus* requirement of which is that the defendant 'occasion' actual bodily harm (ABH) to the victim.²⁸ ABH is any harm that interferes with the health or comfort of the victim;²⁹ in *Chan-Fook*,³⁰ Hobhouse LJ said that the word 'harm' is a synonym for 'injury' and that 'actual' indicates that, although there was no requirement that the injury should be permanent, it should not be so trivial as to be wholly insignificant.³¹ ABH therefore refers to a wide range of injuries, such as serious bruising or fractures. These may be relatively minor or more serious; in *Davies*,³² during a game of soccer, the defendant had punched another player who had just fouled him, and fractured his cheekbone. The defendant was found guilty of an offence under s 47 and was sentenced to six months' imprisonment. The *mens rea* for an offence under s 47 is intention or recklessness as to whether contact is made with another person;³³ there is no requirement that any degree of harm be intended or even foreseen.³⁴

²⁶ Conviction for an offence under either s 47 or s 20 brings a sentence of up to five years' imprisonment; the maximum penalty under s 18 is life imprisonment.

²⁷ 'Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable ... to be kept in penal servitude [to imprisonment for a term not exceeding 7 years]'.

²⁸ Occasioned has been deemed to mean caused (*R v Roberts* (1972) 56 Cr App R 95). S 47 allows for remote causality (John Gardner, *Offences and Defences* (Oxford University Press 2007) 41).

²⁹ *R v Miller* [1954] 2 QB 282 (DC).

³⁰ *R v Chan-Fook* [1994] 2 All ER 552 (CA).

³¹ It was held in *R (on the application of T) v DPP* [2003] EWHC 266, [2003] Crim LR 622 that a momentary loss of consciousness would be sufficient to amount to ABH.

³² *R v Davies* [1991] Crim LR 70 (CA).

³³ *R v Venna* [1976] QB 421 (CA).

³⁴ *R v Savage; Parmenter* [1992] 1 AC 699 (HL). As will be seen below, this has caused concern in light of its apparent disregard for the 'correspondence principle'.

The level of injury envisaged under s 20³⁵ is the same as for a s 18 offence,³⁶ and generally more serious than that for s 47,³⁷ as ss 18 and 20 require either a 'wound' or 'grievous bodily harm' (GBH); a wound is present when the skin is broken,³⁸ and GBH means 'really serious harm'.³⁹ The *mens rea* for s 18 is intent to do GBH,⁴⁰ whereas the lower-level offence provided for by s 20 requires an intention or recklessness as to the causing of some harm.

Perhaps because of their longevity, breadth of application and widespread use, ss 18, 20 and 47 have been the subject of a considerable amount of judicial and academic scrutiny.⁴¹ Whilst the view is not unanimous, Gardner points to the fact that the provisions are 'much disparaged by today's criminal lawyers';⁴² they have been characterised as anachronistic and confused, and their nomenclature barely suited to the modern world.⁴³ Simester and others consider the provisions to be 'riddled with

³⁵ 'Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and being convicted thereof shall be liable ... to be kept in penal servitude . . . [shall be guilty of an offence and liable, on conviction on indictment, to imprisonment for a term not exceeding 7 years]'.

³⁶ 'Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, ... with intent, ... to do some ... grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable ... to be kept in penal servitude for life'.

³⁷ With the possible exception of a relatively minor wound.

³⁸ *Moriarty v Brooks* (1834) 6 C&P 684. A bruise or burst blood vessel in an eye does not constitute a wound (*C (a minor) v Eisenhower* [1984] QB 331 (DC)).

³⁹ *DPP v Smith* [1961] AC 290 (HL).

⁴⁰ It is not relevant for the present purposes, but an alternative *mens rea* exists where the defendant demonstrates 'intent to resist or prevent the lawful apprehension or detainer of any person'.

⁴¹ As Gardner notes, critics of the OAPA 1861 usually concentrate on 'just a few of its provisions ... namely ss 18, 20 and 47' (John Gardner, *Offences and Defences* (Oxford University Press 2007) 33).

⁴² John Gardner, *Offences and Defences* (Oxford University Press 2007) 33. Gardner argues that much of the criticism the OAPA 1861 has received has been unwarranted. He asserts that, whilst they should be understood in the historical context in which they arose, the provisions still offer a logical approach to more serious assaults.

⁴³ See: CMV Clarkson and HM Keating, 'Codification: Offences Against the Person under the Draft Criminal Code' (1986) 50 *Journal of Criminal Law* 405, 415: 'Each of the non-fatal offences against the person is, to varying degrees, confused and uncertain ... [I]n relation to each other, they are incoherent'.

uncertainty and unhelpful overlaps and duplication'.⁴⁴ For Clarkson, they are 'incoherent and irrational and ... uncertain'.⁴⁵ Meanwhile, the Law Commission has written of its concern over the 'very poor quality of the law relating to offences against the person',⁴⁶ and alludes to 'antique and obscure language and the irrational arrangement'.⁴⁷ A widespread and longstanding dissatisfaction with the legislation is reflected in repeated and ongoing attempts to reform the OAPA 1861.⁴⁸

Critics of ss 18, 20 and 47 point to their imperfect interrelation and question their ability to capture gradations in the gravity of violent offences.⁴⁹ There has been criticism of their archaic and abstruse language where, for example, the provisions variously stipulate that the harm should have been 'caused',⁵⁰ 'inflicted'⁵¹ or 'occasioned'⁵² by the conduct of the defendant.⁵³ Ashworth criticises s 47, in particular, on the ground that it does not conform to the 'correspondence principle',

⁴⁴ AP Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th edn, Hart Publishing 2010) 46.

⁴⁵ CMV Clarkson, 'Law Commission Report on Offences Against the Person and General Principles: Part 1: Violence and the Law Commission' [1994] *Criminal Law Review* 324, 324.

⁴⁶ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para 1.14.

⁴⁷ Law Commission, *Legislating the Criminal Code: Offences Against the Person and General Principles* (Law Com No 218, 1993) para 2.1.

⁴⁸ In 1998, the Home Secretary declared: 'This is a difficult and important area of the law that takes up much of the time of the courts; after 137 years it is incumbent on us to get the reform of this law right' (Home Office, *Consultation Paper. Violence: Reforming the Offences Against the Person Act 1861* (HMSO 1998) Introduction). See the recent consultation: Law Commission, *Reform of Offences against the Person: A Scoping Consultation Paper* (Law Com CP No 217, 2014). For discussion of the arguments around codification, see: CMV Clarkson and HM Keating, 'Codification: Offences Against the Person under the Draft Criminal Code' (1986) 50 *Journal of Criminal Law* 405; Ian Dennis, 'The Case for Codification' (1986) 50 *Journal of Criminal Law* 161; ATH Smith, 'The Case for a Code' [1986] *Criminal Law Review* 285; JC Smith, 'Codifying the Criminal Law' [1984] *Statute Law Review* 17.

⁴⁹ See, for example: Michael Jefferson, 'Offences Against the Person: Into the 21st Century' (2012) 76 *Journal of Criminal Law* 472.

⁵⁰ S 18.

⁵¹ S 20.

⁵² S 47.

⁵³ Andrew Ashworth, 'A Change of Normative Position: Determining the Contours of Criminal Culpability in Criminal Law' (2008) 11 *New Criminal Law Review* 232. The 'malice', 'proportionality' and 'labelling' principles, discussed above in chapter three, all stand as possible counters to concerns raised in this respect (see: Jeremy Horder, 'Two Histories and Four Hidden Principles of Mens Rea' (1997) 113 *Law Quarterly Review* 95).

and writes: 'if there were a crime with a conduct element of "causing serious injury", the correspondence principle would require that the fault element should be intention or recklessness as to causing serious injury and not as to some lesser degree of harm'.⁵⁴ Ashworth's criticism is particularly pertinent in the rarefied context of sport, where a high degree of physical contact is normalised, and fast-moving play can mean that small errors of judgement can lead to more serious consequences than were anticipated by the participants.

A further example of purported internal incoherence is found in the attendant sentencing provisions; Ormerod writes: 'the co-existence of s 47 with that of maliciously inflicting grievous bodily harm contrary to s 20 of the same Act, also punishable with a maximum of five years' imprisonment, makes little sense'.⁵⁵ Similarly, the prominence given to 'wounding' in ss 18 and 20 is an anachronistic legacy of more primitive scientific and medical understanding and treatment, which meant that the danger of infection rendered even a minor wound a potentially life-threatening proposition for the victim.

Concerns such as those outlined above have necessitated a flexible approach to the interpretation and use of ss 18, 20 and 47. For instance, when it comes to the challenges posed by the variable language employed, the coherence that is arguably missing from their drafting has been read into the provisions. The prevailing view is that 'occasion' and 'inflict' can be viewed as effectively synonymous with 'cause',⁵⁶

⁵⁴ Andrew Ashworth, 'A Change of Normative Position: Determining the Contours of Criminal Culpability in Criminal Law' (2008) 11 *New Criminal Law Review* 232, 236. This criticism can be extended to s 20, for which the *mens rea* requirement is intention or reckless as to some harm, as opposed to the resultant wound or GBH (*R v Savage* [1992] 1 AC 699 (HL)).

⁵⁵ David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, Oxford University Press 2011) 652.

⁵⁶ For discussion, see: David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, Oxford University Press 2011) 645-52. Unlike the more particularised parts of the OAPA 1861, ss 18, 20 and 47 specify neither to whom the harm is done, nor the means by which it is achieved, rather than considering

and the adaptability that has been read into the offences has brought a breadth of application that allows them to encompass an expanding range of injury-causing behaviours, such as the sexual transmission of diseases,⁵⁷ and the psychological harm caused by threatening phone calls.⁵⁸

In light of the pragmatic and flexible interpretation that has been afforded to these offences, the application of the statutory assaults to instances of sports violence has proven relatively straightforward and uncontroversial, and this is in evidence in the leading appellate judgments.⁵⁹ Potential sites of conflict, such as the ambiguous demand in ss 18 and 20 that the conduct be ‘unlawful’,⁶⁰ and the unclear relationship of s 47 both to the other statutory assaults, and to the offence of common assault,⁶¹ have been marginalised. The same is true of the role of consent, which, as noted above, is discussed in the next two chapters.

Instead, the straightforward and inclusive approach taken in *Barnes* means that the elements of a statutory assault can be made out relatively easily, since establishing a *prima facie* case comprised no more than satisfaction of causation of the requisite level of harm, allied to the presence of the requisite *mens rea*. The former appears to have been dealt with succinctly, satisfied by ‘the fact that it was not

complicating matters such as the use of poison (ss 23 & 24), or the targeting of a particular class of person, such as a clergyman (s 36).

⁵⁷ See: *R v Clarence* (1888) 22 QBD 23; *R v Dica* [2004] EWCA Crim 1103, [2004] QB 1257; *R v Konzani* [2005] EWCA Crim 706, [2005] All ER (D) 292 (Mar).

⁵⁸ *R v Ireland; Burstow* [1998] AC 147 (HL).

⁵⁹ *R v Brown* [1994] 1 AC 212 (HL); *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910.

⁶⁰ In *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, the requirement for unlawfulness is mentioned in relation both to the activity and in light of the consent of the victim, with no acknowledgement of any problematic ambiguity that this might cause. In *Brown* [1994] 1 AC 212, Lord Jauncey draws on *Collins v Wilcock* [1984] 1 WLR 1172 in collapsing deliberate action, unlawfulness and hostility as effectively the same thing (244).

⁶¹ *R v Brown* [1994] 1 AC 212 (HL). For discussion of this point, see: John Gardner, *Offences and Defences* (Oxford University Press 2007) ch 2.

in dispute that the appellant had caused the victim's injury',⁶² and that injury was sufficiently serious to amount to GBH. A similarly straightforward approach was taken to the question of *mens rea*. However, even without an in-depth examination of consent, there is reason to think that this should not necessarily be the case. Although the *mens rea* demands of ss 18, 20 and 47 have not yet much troubled the courts when it comes to sports violence, they have the potential to be somewhat more complex than they at first appear, and this is the subject with which the rest of this chapter will be concerned.

4.3 Mens Rea – Intention and Sports Violence

4.3.1 Mens rea – a cognitive concept

The concept of *mens rea* is central to the prevailing liberal ethos of the criminal law;⁶³ an account of its function is given by Ormerod:

The literal meaning of '*mens rea*' – 'a guilty mind' – is misleading unless it is kept in mind that we are concerned with legal, not moral, guilt. A person may – though only in exceptional circumstances – have *mens rea* even though neither he, nor any reasonable person, would regard this state of mind as

⁶² *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 916 (Lord Woolf CJ).

⁶³ As Lord Birkenhead stated: '... a person cannot be convicted of a crime unless the *mens was rea*' (*DPP v Beard* [1920] AC 479 (HL), 504). Ashworth also emphasises the importance of *mens rea* to the criminal law: 'Starting from respect for the moral autonomy of all individuals, subjectivists argue that criminal liability should not be imposed in respect of a given harm unless D intended to cause or knowingly risked causing that harm (the principle of *mens rea*)' (Andrew Ashworth, 'A Change of Normative Position: Determining the Contours of Criminal Culpability in Criminal Law' (2008) 11 *New Criminal Law Review* 232).

blameworthy. *Mens rea* is the mental element required by the definition of the particular crime – typically, intention to fulfil the *actus reus* of that crime, or recklessness whether it be fulfilled.⁶⁴

Thus, continues Ormerod, '[t]he word "*rea*" refers to the criminality of the act, not its moral quality', and this means that 'English courts focus on the accused's cognitive state – whether he foresaw risk, etc – rather than whether he was acting in a morally culpable manner'.⁶⁵ This characterisation represents an account of the prevailing orthodox subjectivist view of criminal law. It represents an approach that demands answers to factual questions when it comes to determining a defendant's guilt; an approach designed to promote certainty of application, and, as Norrie explains, to remove potential sites of political conflict from the 'technical core' of the offence categories.⁶⁶

In keeping with this approach, the term 'maliciously' that describes the *mens rea* of ss 18 and 20 has been given an interpretation that can accord with degrees of foresight, and the accused's 'cognitive state'; Kenny is attributed with the first enunciation of this, in 1902:

[I]n any statutory definition of a crime 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (i) an actual intention to do the particular *kind* of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not (ie the accused has

⁶⁴ David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, Oxford University Press 2011) 105.

⁶⁵ David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, Oxford University Press 2011) 105.

⁶⁶ Alan Norrie, *Crime, Reason and History* (3rd edn, Cambridge University Press 2014).

foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill-will towards the person injured.⁶⁷

For a sports participant charged with one of the statutory assaults, it is necessary for the prosecution to prove one or other of intention or recklessness.⁶⁸ Intention alone will suffice for s 18, which specifies that the causing of grievous bodily harm should have been done 'with intent', whereas either intention or recklessness will satisfy ss 20 and 47.⁶⁹ The *mens rea* for s 20 is that the defendant foresaw some injury as the result of their action; the harm foreseen need not be serious.⁷⁰

4.3.2 Intention and its intuitive application to sports violence

Under the orthodox subjectivist approach set out above,⁷¹ it is unsurprising to find that intention to cause harm brings the highest form of censure from the criminal courts.⁷² This is an intuitive position insofar as the person who brings about harm

⁶⁷ Courtney Stanhope Kenny, *Kenny's Outlines of Criminal Law* (1902) 186. Cited in *R v Cunningham* [1957] 2 QB 396 (CA), 399 (Byrne J).

⁶⁸ Samuels offers a pithy characterisation of the prevailing subjectivist view of *mens rea*: 'The criminal law is concerned with culpability, moral culpability, blameworthiness and punishment. It follows that the criminal law must be subjective. Ergo, the prosecution must prove intention or recklessness. What is the meaning of recklessness in the subjective context? The authority on the matter is *R v G*' (Alec Samuels, 'The Meaning of Recklessness' (2005) 169 *Justice of the Peace* 918, 918).

⁶⁹ In the case of s 20, this derives from the term 'maliciously'; the *mens rea* requirement in s 47 is identical to that required for a common law assault.

⁷⁰ *R v Savage; Parmenter* [1992] 1 AC 699 (HL). For Ashworth, this may be seen to offend against the 'correspondence principle'; see: Andrew Ashworth, 'A Change of Normative Position: Determining the Contours of Criminal Culpability in Criminal Law' (2008) 11 *New Criminal Law Review* 232, 238.

⁷¹ What Lacey refers to as a 'subjectivised, psychologised conception of *mens rea* with its paradigm of intention' (Nicola Lacey, 'Responsibility and Modernity in Criminal Law' (2001) 9 *Journal of Political Philosophy* 249, 271).

⁷² For a critique of the problems of the orthodox subjectivist approach to intention, in this case in the context of the offence of murder, see: Alan Norrie, 'Between Orthodox Subjectivism and Moral Contextualism: Intention and the Consultation Paper' [2006] *Criminal Law Review* 486.

intentionally may be considered more culpable than the person who does so recklessly. A finding of intention is sufficient to ground any of the statutory assaults, and establishing its presence is likely to mean that a more serious crime has been committed.⁷³ It is required in order to establish an offence under s 18, where the intention must be to 'do some grievous bodily harm' to a person.⁷⁴

The intentions that lie behind acts of sports violence might be construed in a number of ways. In one respect, and particularly in the professional context and operating under the pressures outlined in the previous chapter, the overriding intention of the participants is presumably to win. In less serious contests, the reason for participating might be enjoyment, or a desire to improve a person's level of physical fitness. Whichever of these pertain, within this overarching intent, more immediate intentions may change from moment to moment, within the changing context of the contest, and in response to the actions of the other participants. Thus, even the most casual participant might develop an overwhelming desire to win, or the dedicated professional might become annoyed by the behaviour of an opponent, and wish to cause him discomfort, by means either inside or outside the rules of the sport.

These intentions might manifest a desire to land a scoring punch, to carry out a legitimate tackle, or to intimidate, hurt or injure an opponent. Within the context of an inherently violent contest, intentions will frequently be difficult to discern, either

⁷³ Should intentional violence lead to the death of another during the course of sport, there may be a charge of murder. Should serious injury eventuate, such as will satisfy the *actus reus* requirements of the offence, a charge may be brought under s 18 of the OAPA 1861. In *Legislating the Criminal Code: Offences Against the Person and General Principles* (Law Com No 218, 1993), the Law Commission stated: 'We do not think that it can be questioned that the most serious conduct consists of causing injury, and *a fortiori* serious injury, intentionally' (para 14.3).

⁷⁴ As Lord Diplock noted in *Mowatt*, this means that, '[i]n section 18 the word "maliciously" adds nothing', and 'is best ignored' (*R v Mowatt* [1968] 1 QB 421 (CA), 426).

for evidential reasons,⁷⁵ or, more fundamentally, because divergent intentions may exist concurrently. The problem with differentiating concurrent intentions within the same series of acts has been highlighted by Gardner and Jung:

The fact that I act intentionally under a given description ... does not entail that I act intentionally under other descriptions which may apply to what I am doing. One and the same action may be both the moving of my foot (intended) and the kicking of the cat (unintended). But the individuation of intentions and other mental states, the isolation of a particular description under which what I do is intended or foreseen or known or whatever, will often be extremely difficult.⁷⁶

In the ordinary conduct of the sports examined here, intention to cause harm is most intuitively linked to boxing. In a submission to the Law Commission's Consultation Paper *Consent in the Criminal Law*, which was in part aimed at investigating and remediating the legal rules around the lawfulness of sports violence, the BBBofC described boxing as a sport in which 'the essence ... is not the ultimate infliction of serious injury'.⁷⁷ Although I shall suggest that this is an argument that can be sustained when it comes to an appraisal of the intentions of the individual boxers under the criminal law, it appears intuitively disingenuous. Writing about boxing, Beran and Beran point to the 'ultimate goal' and 'aim of the sport' as being 'to land

⁷⁵ Don Eugene-Nolan Gibson, 'Violence in Professional Sports: A Proposal for Self-Regulation' (1980-81) 3 *Comm/Ent LS* 425, 437.

⁷⁶ John Gardner and Heike Jung, 'Making Sense of Mens Rea: Antony Duff's Account' (1991) 11 *Oxford Journal of Legal Studies* 559, 579.

⁷⁷ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para 12.35.

blows upon the opponent with the expressed purpose of inflicting a concussive head injury or at least causing sufficient damage to render an opponent incapable of further self-defence'.⁷⁸ Similarly, Anderson states that 'it is an intrinsic and conditional element of a boxing match that a boxer wounds or causes GBH to another with intent'.⁷⁹

Anderson adopts an essentialist view of boxing when it comes to the intent of the participants, and suggests that to deny the intentional nature of a boxer's conduct in punching his opponent is a perversion of reality. He pre-empts any suggestion that the combatants do not intend harm, and refutes it in making a powerful argument about the intention involved in boxing:

To suggest that a boxer's motivation or desire or purpose is anything other than the physical degradation of the opponent or to entertain the idea that boxers do not expect the consequence of serious harm is to fundamentally misunderstand – even patronise – the sport and its participants.

Anderson agrees with Lord Mustill in *Brown* in pointing to the attempt of McInerney J, in the Australian case of *Pallante v Stadiums Pty Ltd (No 1)*,⁸⁰ to explain

⁷⁸ Roy G Beran and Joshua R Beran, 'The Law(s) of the Rings: Boxing and the Law' (2009) 16 *Journal of Law and Medicine* 684, 686.

⁷⁹ Jack Anderson, *The Legality of Boxing: A Punch-Drunk Love?* (Birkbeck Law Press 2007) 90. Gendall makes a similar assertion: 'There is no doubt that, in a boxing match, a fighter trying to knock out his or her opponent clearly intends to cause harm and probably serious harm' (David Gendall, 'The Sport of Boxing: Freedom versus Social Constraint' (1997) 5 *Waikato Law Review* 71, 79-80); as do Beran and Beran: 'It is indisputable that the intent of the boxer is to cause harm to an opponent' (Roy G Beran and Joshua R Beran, 'The Law(s) of the Rings: Boxing and the Law' 16 *Journal of Law and Medicine* 684, 692). Cf Michael Gunn and David Ormerod, 'The Legality of Boxing' (1995) 15 *Legal Studies* 181. Anderson criticises the approach here as not reflecting the reality of professional boxing.

⁸⁰ [1976] VR 331.

the lawfulness of professional boxing by reference to the absence of ‘personal animosity’⁸¹ as laudable, but unconvincing.⁸² He is also dismissive of the frequent equation of the violence inherent in the respective practices of boxing and rugby, exemplified in the following excerpt from Warburton:

If a rugby player tackles another to stop him or her scoring a try, knowing that there is a significant risk of injuring his or her opponent, it is not instantly clear how this is different from a boxer deliberately punching an opponent hard because this is the best way of winning a fight. In the first, the risk of injury is foreseeable, but not the point of the sport; in the second, the risk of injury is foreseeable, and causing injury is one way of winning the bout.⁸³

In rejecting Warburton’s argument, Anderson discriminates between the physicality of boxing and rugby by invoking the presence of the ball (‘the single item that distinguishes rugby from boxing’⁸⁴) and argues that this mediates the relationship between the players on the field in rugby (and by extension soccer).

Anderson’s argument is a strong one, and his citation of the rugby ball as a distinguishing feature is helpful. It highlights the direct and unmediated confrontational nature of boxing, and also points to reasons why convictions for violence committed ‘on-the-ball’ in the football codes are rare. Rather, successful prosecutions for violent offences requiring intention have more usually been brought

⁸¹ [1976] VR 331, 343.

⁸² For a similar criticism, see: J Paul McCutcheon, ‘Sports Violence, Consent and the Criminal Law’ (1994) 45 Northern Ireland Legal Quarterly 267.

⁸³ Nigel Warburton, ‘Freedom to Box’ (1998) 24 Journal of Medical Ethics 56, 58.

⁸⁴ Jack Anderson, *The Legality of Boxing: A Punch-Drunk Love?* (Birkbeck Law Press 2007) 140.

when the charges relate to conduct 'off-the-ball', since the requisite intention on the part of the defendant is more easily demonstrated.⁸⁵

However, it is possible to agree with Anderson's characterisation of the sport of boxing, while also remaining equivocal about the intentions of those who participate. For instance, his description of the ball as 'the single item that distinguishes rugby from boxing' does not help when considering the intentions of the participants in some other contact sports. In judo, for example, there is direct and forceful physical contact between the competitors, but no mediating element such as a ball, and yet the aim of the sport cannot be described as the causing of injury.

No boxing prosecution has been undertaken in over a century, since the court held in *Roberts* that boxing under the Queensberry Rules 'was not prizefighting but was merely an amicable demonstration of the skill of sparring and was accordingly legal'.⁸⁶ A century later, this description clearly does not accord with the often brutal sport of boxing, but to judge the intentions of the participants according to this is to ignore the radical changes that have taken place in sports generally, and it is possible to frame the intentions of the boxers as being to take part in a sporting activity that is condoned; that is, the intention to take part in a boxing match, and to win.

Whilst it is difficult to disagree with Anderson's characterisation of the inherently violent nature of boxing, and the importance of the ball in shaping the essential nature of the football codes, it is not so clear that such factors preclude alternative views on the intent of the participants. Conforming this to a legal account

⁸⁵ In *R v Lloyd* (1989) 11 Cr App R (S) 36 (CA) and *R v Johnson* (1986) 8 Cr App R (S) 343 (CA), the convictions were for offences that took place on the rugby field, but away from the ball.

⁸⁶ David Gendall, 'The Sport of Boxing: Freedom versus Social Constraint' (1997) 5 Waikato Law Review 71, 76.

of intention, in particular, is not clear-cut, and some of Anderson's assertions of the intentionality of GBH in boxing are redolent of discussions of the place of motive in the criminal law.⁸⁷

4.3.3 Sports violence and legal intention

On its primary construction, the legal definition of (direct) intention is broadly synonymous with purpose; an agent can be said to act intentionally if he acts with the purpose of bringing about a particular consequence. According to a test propounded by Duff, this means that a defendant who intends harm would regard himself as having 'failed' if this harm does not eventuate; conversely, the defendant for whom intention is not a feature of their conduct would consider resultant harm itself to be a 'failure'.⁸⁸

This definition of intention suffices in most situations, since there is usually no digression between the outcome a person desires and their intentional conduct.⁸⁹ However, where these do digress, the account of intention is supplemented and broadened by including an 'indirect' or 'oblique' form. This concept derives from the writings of Bentham, and may be used in situations where the defendant's purpose

⁸⁷ For discussions of the relationship between motive and intention, see: Doug Husak, 'Motive and Criminal Liability' (1989) 8 *Criminal Justice Ethics* 3; Alan Norrie, 'Oblique Intention and Legal Politics' [1989] *Criminal Law Review* 793; RA Duff, 'Principle and Contradiction' in RA Duff (ed), *Philosophy and the Criminal Law* (Cambridge University Press 1998) 173; Alan Norrie, 'After Woollin' [1999] *Criminal Law Review* 532; Guyora Binder, 'The Rhetoric of Motive and Intent' (2002) 6 *Buffalo Criminal Law Review* 1; Carissa Hessick, 'Motive's Role in Criminal Punishment' (2006) 80 *Southern California Law Review* 89; Alan Norrie, 'Between Orthodox Subjectivism and Moral Contextualism: Intention and the Consultation Paper' [2006] *Criminal Law Review* 486; Alan Norrie, *Crime, Reason and History* (3rd edn, Oxford University Press 2014) ch 3.

⁸⁸ RA Duff, *Intention, Agency and Criminal Liability* (Oxford University Press 1990) 61-63. Simester's conception of intention is broadly compatible with this, insofar as he differentiates between 'means', 'ends' and 'side effects'. For Simester, only an actus that is a means or an end qualifies as an intended actus, since only these can explain why the actor behaved in the way that they did (AP Simester, 'Why Distinguish Intention from Foresight?' in AP Simester and ATH Smith, *Harm and Culpability* (Clarendon 1996)).

⁸⁹ As Sullivan observes, '[a] *Woollin* direction is an exceptional event' (GR Sullivan, 'Is Criminal Law Possible?' (2002) 22 *Oxford Journal of Legal Studies* 747, 756).

was not necessarily to bring about the consequences that have eventuated, but where these were nevertheless seen as inevitable in achieving the defendant's primary aim.⁹⁰ The moral equivalence is stated by Williams: 'To the eye of common sense, a result that is foreseen as certain, as a consequence of what is done, is in exactly the same position as a result that is intended'.⁹¹

The indirect form of intention received considerable judicial attention over the course of the latter half of the twentieth-century, principally in a line of cases directed to the subject of murder, in which the appellate courts considered the degree of foresight required in order to establish indirect intention.⁹² The current authority derives from the House of Lords' judgment in *Woollin*,⁹³ wherein it was held that intention may be inferred where the defendant viewed the outcome as a 'virtual certainty'.⁹⁴ Asserting indirect intention on the part of a boxer who punches somebody in the hope of knocking them out, or indeed in the case of the rugby or soccer player who makes a tackle or commits a foul that seemingly necessitates injuring the opponent, demands the satisfaction of 'virtual certainty' of the outcome

⁹⁰ On Bentham's original definition, a result is within the scope of an agent's oblique intentions if, at the time of his action, 'the consequence was in contemplation, and appeared likely to ensue in case of the act's being performed' (Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Elibron Classics 2005) (first published: Clarendon Press 1879) 84). Bentham's original construction has since been reworked and refined; the most in-depth and influential account is found in: RA Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford University Press 1990). See also: Glanville Williams, 'Oblique Intention' (1987) 46 Cambridge Law Journal 417; Alan Norrie, 'Oblique Intention and Legal Politics' [1989] Criminal Law Review 793; Nicola Lacey, 'A Clear Concept of Intention: Elusive or Illusory?' (1993) 56 Modern Law Review 621.

⁹¹ Glanville Williams, *The Sanctity of Life and the Criminal Law* (Faber and Faber 1958) 186.

⁹² These built upon the foundations laid in s 8 of the Criminal Justice Act 1967.

⁹³ *R v Woollin* [1999] 1 AC 82 (HL).

⁹⁴ Lord Steyn stated that, in relation to the intention required for murder, 'the jury should be directed that they are not entitled to find the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's action and that the defendant appreciated that such was the case' (*R v Woollin* [1999] 1 AC 82 (HL)). See: M Cathleen Kaveny, 'Inferring Intention from Foresight' (2004) 120 Law Quarterly Review 81.

demanded by the offence; a risk, even a risk with a high probability of occurrence, will not suffice.⁹⁵

In its direct form, the manifestation of intention is largely indistinguishable from the broader motives of the actor, but the indirect form is likely to be preferred where culpable proximate intentions can be distinguished from less immediate benign motives. Norrie refers to this 'opening of the door from factual intention to motive' as 'an occasional phenomenon', citing cases such as *Gillick v West Norfolk and Wisbech AHA*⁹⁶ and *Steane*⁹⁷ as examples where the courts held to the direct form of intention, and refused to apply the broader indirect form.⁹⁸ In *Gillick*, the question was whether a doctor giving contraceptive advice or treatment to a girl under the age of 16 aids and abets unlawful sexual intercourse. Lord Scarman argued that the '*bona fide* exercise of a doctor of his clinical judgement must be a complete negation of the guilty mind'.⁹⁹ This reasoning could be extended to boxing, with a court similarly declaring that the participants who act *bona fide* in pursuit of the sport would elicit a corresponding 'complete negation of the guilty mind'.

Following the example of Lord Scarman, therefore, a court may choose to employ the 'purpose'-based measure of direct intention, by reference to which it is arguable that injuries caused by the participants are 'side effects' of an intention to play the sport, not desired *per se*, but simply an inevitable result of the way in which the sport is played and a by-product of attempting to win the contest. Thus, it may be

⁹⁵ Simester and others suggest that a rugby tackle carried out in accordance with the rules might satisfy the requirements of indirect intention (AP Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th edn, Hart Publishing 2010) 760).

⁹⁶ *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112 (HL).

⁹⁷ *R v Steane* [1947] KB 997 (CA).

⁹⁸ Alan Norrie, *Crime, Reason and History* (3rd edn, Oxford University Press 2014) 48.

⁹⁹ *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112 (HL), 190.

difficult to satisfy intention under the sorts of measures suggested by Duff and Simester. Under Duff's formulation, a boxer who has won a bout may not consider causing injury to the opponent a measure of success, nor a lack of injury a measure of failure.

The question of what will amount to intention when it comes to sports violence is perhaps not as straightforward as it might first appear. Since a boxing prosecution has not been undertaken in well over a century, and offences held to have been intentionally committed in soccer and rugby have derived from 'off-the-ball' conduct, there has been little discussion of the sort of issues raised above. These judgements are also muddied by the question of consent on the part of the injured participant, and I shall return to the issue of the intentions of sports participants in relation to violence and attendant injury in Chapter 7, after considering the role of consent.

4.4 *Mens Rea* – Recklessness and Sports Violence

4.4.1 Recklessness and the subjective/objective debate

Finding intention is necessary for s 18, but recklessness will suffice for ss 20 and 47 of the OAPA 1861 (and for common assault). As is the case with intention, a protracted debate has taken place over recent decades as to the meaning of recklessness. This debate has revolved primarily around two, alternative constructions of the concept. The first, which became known as *Cunningham* recklessness,¹⁰⁰ takes a subjective, foresight-based approach to culpability; a standard based upon *advertent* risk-taking.

¹⁰⁰ *R v Cunningham* [1957] 2 QB 596 (CA).

The second, which became known as *Caldwell* recklessness,¹⁰¹ adopts an objective, foreseeability-based approach; a standard based upon *inadvertent* risk-taking. The subjective/objective debate is well-rehearsed, is a staple of criminal law textbooks, and has dominated thinking about recklessness in recent years. Tadros summarises the conflicting subjective/objective conceptions of recklessness as follows:

[Under the subjectivist view] a defendant ought to be considered reckless for the purposes of imposing criminal sanction if and only if (a) her action was sufficiently risky to warrant a criminal sanction; and (b) she was aware that her action was that risky. By contrast, objectivist writers argue that it is appropriate to find a defendant criminally liable where (a) her action was sufficiently risky to warrant a criminal sanction; and either (bi) she was aware of that risk or (bii) although she was not aware of that risk, she *ought* in some sense to have been aware that there was such a risk.¹⁰²

Horder points out that a preoccupation with subjective fault is a relatively recent development,¹⁰³ but *Cunningham* recklessness has dominated recent history, and is consistent with the approach to *mens rea* articulated by Kenny.¹⁰⁴ In a move that caused a great deal of controversy, the House of Lords revisited this position in *Caldwell* and *Lawrence*, and held that an objective test could sometimes amount to

¹⁰¹ *R v Caldwell* [1982] AC 341 (HL).

¹⁰² Victor Tadros, 'Recklessness and the Duty to Take Care' in Stephen Shute and AP Simester, *Criminal Law Theory: Doctrines of the General Part* (Oxford University Press 2002) 227.

¹⁰³ Jeremy Horder, 'Gross Negligence and Criminal Culpability' (1997) 47 *University of Toronto Law Journal* 495.

¹⁰⁴ Courtney Stanhope Kenny, *Kenny's Outlines of Criminal Law* (1902) 186.

an appropriate *mens rea* standard; that is, recklessness could be viewed in terms of inadvertent, rather than advertent, risk-taking.¹⁰⁵ The resultant, objectively-assessed measure of recklessness was heavily criticised;¹⁰⁶ Norrie describes it as ‘prompt[ing] apoplexy in criminal law scholars’.¹⁰⁷

Amirthalingam describes the operation of an objective standard as ‘indefensible in cases where the accused simply did not have the capacity to foresee risk through no personal fault’, such as in cases involving young or mentally deficient offenders.¹⁰⁸ Tadros also sees good reason to reject pure objectivist positions, asserting that they ‘detach criminal responsibility from a reflection on the judgment of defendants’ and pointing out that there may be numerous reasons why a person’s conduct might fall below that to be expected, deserving criticism, but not ‘the quality of criticism that a criminal conviction expresses’.¹⁰⁹

The decision had potentially far-reaching consequences, and Ormerod suggests that ‘[a]t one stage in the mid-1980s it looked as if the *Caldwell* test was destined to be the principal form of recklessness in English criminal law’,¹¹⁰ but its application was limited in its scope, with the courts quickly declaring that it applied only to instances of criminal damage.¹¹¹ Even this limited use of the *Caldwell* standard duly disappeared with the advent of the judgment two decades later in *G*, with the

¹⁰⁵ *R v Caldwell* [1982] AC 341; *R v Lawrence* [1982] AC 510 (HL).

¹⁰⁶ See, for example: Glanville Williams, ‘Intention and Recklessness Again’ (1982) 2 *Legal Studies* 189. Although *cf* Jenny McEwan and St John Robilliard, ‘Recklessness: The House of Lords and the Criminal Law’ (1981) 1 *Legal Studies* 267.

¹⁰⁷ Alan Norrie, *Law and the Beautiful Soul* (Glasshouse 2005) 82.

¹⁰⁸ Kumaralingam Amirthalingam, ‘Caldwell Recklessness is Dead, Long Live Mens Rea’s Fecklessness’ (2004) 67 *Modern Law Review* 491.

¹⁰⁹ Victor Tadros, ‘The Scope and the Grounds of Responsibility’ (2008) 11 *New Criminal Law Review* 91.

¹¹⁰ David Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, Oxford University Press 2011) 124.

¹¹¹ As Amirthalingam states: ‘Uncomfortable with *Caldwell*, courts restricted its impact by refusing to apply it to cases other than criminal damage’ (Kumaralingam Amirthalingam, ‘Caldwell Recklessness is Dead, Long Live Mens Rea’s Fecklessness’ (2004) 67 *Modern Law Review* 491).

House of Lords declaring: 'Considered as a matter of principle, the honest belief approach must be preferable. By definition the mental element in a crime is concerned with a subjective state of mind, such as intent or belief'.¹¹² It is widely thought that recklessness is now firmly established as a subjective concept,¹¹³ with only marginal outliers representing the objective approach.¹¹⁴

The apparent victory of the subjective standard, and the effective marginalisation of the objective measure of recklessness, has been welcomed by the majority of legal commentators.¹¹⁵ However, the protracted nature of the subjective/objective debate points to an inevitable dissatisfaction with the way in which the concept of recklessness operates. Writing before *G* effectively banished the objective conception of recklessness, Norrie outlined some of the problems that inhere within the alternative conceptions:

Here is the dilemma for the present law of recklessness. It consists of two incompatible approaches where neither by itself seems right. If the orthodox

¹¹² *R v G and Another* [2003] UKHL 50, [2004] AC 1034, 1062 (Lord Steyn), quoting Lord Nicholls of Birkenhead in *B (A Minor) v DPP* [2000] 2 AC 428, 462.

¹¹³ As Ormerod writes, '[t]he decision in *G* is important in reasserting the primacy of subjectivism' (David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, Oxford University Press 2011) 125). Ormerod gives further examples of recent appellate decisions that have done the same: *DPP v B* [2000] AC 428 (HL); *R v K* [2002] 1 AC 462 (HL); *R v (Morgan) Smith* [2001] 1 AC 146 (HL).

¹¹⁴ The reform brought in through the Sexual Offences Act 2003 and the Road Traffic Act 1991 has meant the adoption of alternative terminology to denote objective fault requirements; Cunningham suggests that only 'conduct crimes' are suited to the imposition of the objective standard (Sally Cunningham, 'Recklessness: Being Reckless and Acting Recklessly' (2010) 21 *King's Law Journal* 445).

¹¹⁵ Although Ormerod suggests that objective recklessness has gone completely, he acknowledges that there is some doubt as to this (David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, Oxford University Press 2011) 125). Norrie suggests that the case has not 'resolved the underlying dilemmas with which the law is faced', writing: 'The judgment is indeed a disappointing one in that it reflects none of the academic discussion of the weaknesses of a subjective approach, preferring to focus only on its strengths ... The pre-*R v G* law accordingly remains instructive as to the underlying problems, which, it may be anticipated, will surface in some form or other in the years ahead' (Alan Norrie, *Law and the Beautiful Soul* (Glasshouse 2005) 82).

subjectivist approach is too narrow, ignoring the 'capacity' form of inadvertent subjectivity, the objectivist approach is too broad and indeterminate. It leaves the boundaries of the criminal law to be established in individual cases on the basis of value judgements about right and wrong.¹¹⁶

In an attempt to ameliorate such deficiencies, alternative *mens rea* standards, such as 'practical indifference'¹¹⁷ and 'wilful blindness',¹¹⁸ have been suggested, though these have also been criticised.¹¹⁹

Although the subjective/objective question has provoked much debate, some have perceived it as involving a false dichotomy, and lament both the amount of space dedicated to it and the reductive conclusions it encourages, noting that its prominence has been at the expense of a wider consideration of recklessness as a measure of culpability. On this point, Nourse sees the debate as arising from an ill-founded and distracting 'anthropomorphisation' of the legal standard of the 'reasonable man' and she is despairing of what she views as an over-concentration on the subjective/objective debate.¹²⁰ She writes: 'Long ago, the criminal law academy appears to have decided that the single most important question about the reasonable man was whether we should require a standard that is "objective or subjective"', and concludes that 'it is time to get over the "subjectivity/objectivity" question'.¹²¹

¹¹⁶ Alan Norrie, *Crime, Reason and History* (2nd edn, Cambridge University Press 2001) 70.

¹¹⁷ RA Duff, *Intention, Agency and Criminal Liability* (Blackwell 1990).

¹¹⁸ Victor Tadros, 'Recklessness and the Duty to Take Care' in Stephen Shute and AP Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford University Press 2002) 227.

¹¹⁹ Alan Norrie, *Crime, Reason and History* (3rd edn, Cambridge University Press 2014) ch 4.

¹²⁰ Victoria Nourse, 'After the Reasonable Man: Getting Over the Subjectivity/Objectivity Question' (2008) 11 *New Criminal Law Review* 33.

¹²¹ Victoria Nourse, 'After the Reasonable Man: Getting Over the Subjectivity/Objectivity Question'

Little of this nuanced debate has made its way into consideration of the criminal law and recklessness when it comes to sports violence. Here, the prevailing view appears to be that the issue is not problematic, and that the imposition of *prima facie* liability on the basis of recklessness is a straightforward exercise. The way in which this was elucidated in the Court of Appeal case of *Barnes* demonstrates some of the issues that sports participation poses for the concept of recklessness.¹²²

4.4.2 Recklessness in *Barnes*

As I noted in Chapter 1, it is necessary to exercise a degree of caution when drawing conclusions from *Barnes*, as a relatively short judgment that necessarily follows the higher authority of *Brown*, and in which much of what Lord Woolf said can be described as *obiter dicta*. The case does, however, provide a valuable illustration of some of the problems that contact sports can cause for the interpretation and implementation of the criminal law. For instance, an analysis of *Barnes* exposes some of the limitations of recklessness as a *mens rea* standard when applied to those who cause injury in contact sports, a context in which forceful physical contact between the participants is inevitable, and the potential consequences of this presumably known by most, if not all, of those who participate.

In *Barnes*, the Court of Appeal provided a straightforward characterisation of recklessness in the context of an instance of sports violence, with Lord Woolf stating: “Recklessly” in this context means no more than that the defendant foresaw the risk that some bodily harm (however slight) might result from what he was going to do

(2008) 11 New Criminal Law Review 33, 34.

¹²² *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910.

and yet, ignoring that risk, the defendant went on to commit the offending act'.¹²³

According to this, the recklessness of the defendant is measured wholly subjectively.

Lord Woolf went on to assert:

In a sport like football, *anyone going to tackle another player in possession of the ball can be expected to have the necessary malicious intent* according to this approach, and in the great majority of criminal cases, the existence of a malicious intent is not likely to be in issue. This being so ... it will only confuse the jury to make unnecessary reference to the word 'maliciously' and invite them to consider the improbability that the defendant did not foresee the risk.¹²⁴

It is important to note that Lord Woolf's sweeping statement that 'anyone going to tackle another player in possession of the ball can be expected to have the necessary malicious intent' applies only where this matter has not been raised by the defence; where it is in issue, the criminal law is governed by s 8 of the Criminal Justice Act 1967, which provides:

A court or jury, in determining whether a person has committed an offence,—

¹²³ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 915). Had the prosecution been for an offence under s 47 of the OAPA 1861, the demands would have been even less onerous; as noted above, the offence demands recklessness simply as to contact, rather than harm.

¹²⁴ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 915.

(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but

(b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

Notwithstanding this caveat, the way in which Lord Woolf frames the issue of foresight in recklessness is seemingly indicative of a willingness to ascribe *prima facie* liability for incidents of sports violence.

Further observations can be made about the characterisation of recklessness in *Barnes*, and what it reveals about the difficulty encountered in attributing fault for sports violence. Firstly, it is worth asking what it means to say that a defendant has 'foreseen the risk'. Clarkson and Keating broach precisely this question in relation to recklessness: 'Must the defendant be consciously aware of the risk ... at the moment of acting or is it enough that he is generally aware of the risks?' Clarkson and Keating use the example of a car driver, who might 'very seldom consciously think: "I may kill someone today"', and yet be 'generally aware that a motor car is sufficiently dangerous that there is always a chance that I "may kill"'.¹²⁵ This is not an issue that is raised explicitly in *Barnes*, but the approach taken suggests that the broader conception of 'general awareness' is to be preferred.

¹²⁵ CMV Clarkson and HM Keating, 'Codification: Offences Against the Person under the Draft Criminal Code' (1986) 50 *Journal of Criminal Law* 405, 421.

A further observation might be made in relation to the brevity of Lord Woolf's characterisation of recklessness, and this concerns his failure to mention the 'reasonableness' of the defendant's conduct. It is to this aspect that I now turn.

4.4.3 Reasonableness - an important aspect of recklessness

In *Barnes*,¹²⁶ the Court of Appeal provided an ostensibly straightforward assessment of recklessness in the context of an instance of sports violence, asserting that the test for recklessness amounted to 'no more than that the defendant foresaw the risk that some bodily harm (however slight) might result from what he was going to do and yet, ignoring that risk, the defendant went on to commit the offending act'.¹²⁷ This allowed the Court of Appeal to assert that 'anyone going to tackle another player in possession of the ball can be expected to have the necessary malicious intent'.¹²⁸

Under this approach, recklessness is a disembodied concept, existing largely outside of the social context in which conduct occurs. If this is all that is meant by recklessness, it is unavoidably the case that many sports events take place with the players in a potentially permanent state of *prima facie* liability. As noted above, it would be difficult to argue that a boxer, for example, or even a rugby or soccer player, did not foresee the risk of contact (required for s 47), or even the risk of some injury (s 20), when punching or tackling an opponent. It is thus difficult to imagine any boxing, rugby or soccer match in which the players would not satisfy the threshold *mens rea* requirement for s 47 and s 20 many times throughout a fixture.

¹²⁶ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910.

¹²⁷ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 915 (Lord Woolf CJ). Had the prosecution been for an offence under s 47 of the OAPA 1861, the demands would have been even less onerous; as noted above, the offence demands recklessness simply as to contact, rather than harm.

¹²⁸ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 915 (Lord Woolf CJ).

However, in presenting the formulation as it has, it is arguable that the Court of Appeal has omitted an important qualifying clause that is central to what many would view to be the accepted test of recklessness. As Ormerod concisely states, '[n]ot all risk-taking constitutes recklessness';¹²⁹ the risk taken must also be deemed 'unreasonable' in the circumstances.

In overruling the objective *Caldwell* test of recklessness, the House of Lords gave what may be considered to be the definitive and authoritative statement of recklessness as a *mens rea* standard in *G*: 'A person acts recklessly ... with respect to (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk'.¹³⁰ This test, which derives from the Law Commission's Draft Criminal Code,¹³¹ supplements the subjective test of foresight with a contextualised test of reasonableness. As will be seen, this latter element of recklessness is particularly key in cases of sports violence, but it is relatively under-examined.¹³²

Thus, even under the subjective conception of recklessness, foresight of a risk alone is not sufficient to render the defendant culpable; there is also a requirement that the risk be 'unreasonable'. Duff uses the example of driving to illustrate this additional aspect to recklessness:

¹²⁹ David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, Oxford University Press 2011) 118.

¹³⁰ *R v G* [2003] UKHL 50; [2004] 1 AC 1034, 1057 (Lord Bingham).

¹³¹ Law Commission, *A Criminal Code for England and Wales* (Law Com No 177, 1989) cl 81(c).

¹³² In the majority of criminal law textbooks, this part of the recklessness standard is accorded little space; in some (for example: Michael Jefferson, *Criminal Law* (7th edn, Pearson 2006)), it is not mentioned at all.

[R]ecklessness involves risk-taking which is 'unreasonable' by an 'objective' standard. Not every risk-creating act is reckless: driving a car always creates a risk of causing harm, but the mere act of driving does not make me reckless. To call an agent reckless is to condemn her for taking an unreasonable (unjustified) risk. Now we must judge the reasonableness of the risk which she was aware of taking; this is the 'subjective' core of recklessness. Whether she acted reasonably in taking the risk, however, depends not on whether she thought it reasonable to take, but on a standard of reasonableness which is independent of her beliefs: she was reckless if she took a risk which, whatever she thought, *it was in the eyes of reasonable people unreasonable for her to take*.¹³³

The majority of scholars appear to agree with Duff that this is the correct approach to the subjective form of recklessness;¹³⁴ Smith, for instance, characterises the subjective form of recklessness as 'the conscious taking of an unjustified risk'.¹³⁵

Whether or not the reasonableness qualification applies to all instances where recklessness is the requisite *mens rea* is a question that has recently emerged as a matter of some dispute. In its 2014 *Reform of Offences against the Person: A Scoping Consultation Paper*, the Law Commission concedes that it is 'not certain as a matter of authority whether this qualification also applies where the mental element is

¹³³ RA Duff, *Intention, Agency and Criminal Liability* (Blackstone 1990) 143 (emphasis added).

¹³⁴ See also, as examples: Alan Norrie, 'Subjectivism, Objectivism and the Limits of Criminal Recklessness' (1992) 12 *Oxford Journal of Legal Studies* 45; Roger Leng, 'Consent and Offences Against the Person: Law Commission Consultation Paper No 134' [1994] *Criminal Law Review* 480; Cath Crosby, 'Recklessness: The Continuing Search for a Definition' (2008) 72 *Journal of Criminal Law* 313; Sally Cunningham, 'Recklessness: Being Reckless and Acting Recklessly' (2010) 21 *King's Law Journal* 445.

¹³⁵ ATH Smith, 'On Actus Reus and Mens Rea' in PR Glazebrook (ed), *Reshaping the Criminal Law* (Stevens & Sons 1978) 101.

described as “maliciously”, as in ... section 20 [of the OAPA 1861]’,¹³⁶ pointing to cases where the test appears in its more restricted form.¹³⁷ However, the Commission cites the post-G Court of Appeal case of *Brady*¹³⁸ and the *Crown Court Bench Book*¹³⁹ as supporting the inclusion of the reasonableness qualification, and considers it ‘the better view’ that it should apply wherever recklessness is the requisite *mens rea*.¹⁴⁰

Writing about *Barnes*, Ormerod suggests that Lord Woolf’s characterisation of recklessness ‘may be overbroad and should be treated with caution’, precisely because of its omission of the reasonableness aspect:

The court's statement that every footballer going to tackle another in possession of the ball will have the requisite malice for s 20 may sound astonishing to the non-lawyer ... it is submitted with respect that the statement may be overbroad and should be treated with caution. The court appears to have treated the player's foresight of some, albeit not necessarily serious, harm as a sufficient proof of the *mens rea* of s 20. Surely D must have not only

¹³⁶ Law Commission, *Reform of Offences against the Person: A Scoping Consultation Paper* (Law Com CP No 217, 2014) para 2.96.

¹³⁷ *R v Mowatt* [1968] 1 QB 421 (CA); *R v Savage; Parmenter* [1992] 1 AC 699, (HL) 750.

¹³⁸ *R v Brady* [2006] EWCA Crim 2413, [2007] Crim LR 564.

¹³⁹ Judicial Studies Board, *Crown Court Bench Book* (2010) 53. Here, the directions to be given to a jury are stated as follows: ‘When deciding whether the defendant was reckless, the first stage is a judgement whether the defendant was aware of the risk (subjective). The second stage is a judgment whether the risk taken was reasonable in the circumstances of which the defendant was aware (objective)’.

¹⁴⁰ Law Commission, *Reform of Offences against the Person: A Scoping Consultation Paper* (Law Com CP No 217, 2014) para 3.33.

foreseen the risk, but have gone on to take it *unjustifiably*? That imports an objective threshold which will not be crossed in every tackle.¹⁴¹

4.4.4 Assessing reasonableness – probability of harm or social utility?

Assuming that the majority view is correct, and when confronted with a definition holding that a reckless acceptance of risk is one that is not reasonable, the obvious question to ask is: reasonable according to what? Here, there are at least two possibilities, which amount, respectively, to a quantitative and a qualitative measure. The first of these I shall refer to as ‘probabilistic reasonableness’, as it relates to the reasonableness of the defendant’s behaviour relative to the likelihood of the resultant harm occurring. All activities carry with them risks, sometimes serious, and this conception of reasonableness amounts to an exercise in quantifying that risk relative to the conduct chosen by the defendant; relative, therefore, to inaction or the choice of an alternative course of action. Applying this to Duff’s example, by the probabilistic measure, it may be said that driving a car is almost always an unreasonable choice to make, since it carries with it a greater level of risk than most other transport options. Likewise, punching a person during a boxing bout, or forcibly tackling a person during a game of soccer or rugby is also reckless, since it carries a greater risk than not doing so.

The second possibility I shall refer to as ‘social utility reasonableness’, as the focus is on the social utility of the activity in question; it is primarily a qualitative

¹⁴¹ Stephen Leake and DC Ormerod, ‘Contact Sports: Application of Defence of Consent’ [2005] Criminal Law Review 381, 384.

judgement, and is particularly important when it comes to the appraisal of conduct that is inherently dangerous, but socially beneficial. By the social utility measure, in the example of driving a car, it might be argued that it is reasonable in the context of having a driving licence to drive a car according to the accepted way of driving. In the context of contact sports, it is reasonable to behave in a way that is consistent with the rules and accepted practice of the particular sport. The underlying rationale for the reasonableness of both driving and participating in sport in the accepted way is the social utility of these activities.

The recognition of these two strands distinction is of vital importance when it comes to sport: under a probabilistic account of reasonableness, even the most cautious and rule-abiding sportsperson necessarily often behaves unreasonably; whereas according to the social utility test, any judgement as to reasonableness depends upon the social utility value given to the sport and the manner in which it is played.

Nelkin and Rickless compare the situation where a person 'fires bullets from a great distance into a sparsely populated square; the odds of hitting a person are small ... [b]ut one does it simply for fun', with that of a person who 'drives well over the speed limit in order to defuse a ticking bomb in a crowded market'.¹⁴² In the first example, the conduct cannot be considered reasonable, even though it creates a small risk of injury; in the second, it can be considered reasonable, even though it creates a high risk of injury. Thus, they conclude that '[e]valuating culpability depends on an

¹⁴² Dana Kay Nelkin and Samuel C Rickless, 'The Relevance of Intention to Criminal Wrongdoing' *Criminal Law and Philosophy* DOI 10.1007/s11572-014-9343-0 <<http://download.springer.com/static/pdf/638/>> accessed 15 June 2015.

assessment of both ... factors of perceived risk and the agent's reasons'.¹⁴³ The weighing of this is described in similar terms by Duff:

It might be reckless to create even a small risk of minor injury, if my action is not justified by some greater or more certain good which it brings; or it might be reasonable (and thus not reckless) to create a major risk of serious injury – a very dangerous operation might give the patient his best chance of survival.¹⁴⁴

Since it amounts to a judgement about the social utility of the conduct in question, recklessness falls to be considered as a value judgement; as Norrie writes,

Recklessness, it transpires, is ultimately *in its very essence* a matter of socio-political construction and judgement, not an abstract, apolitical, juridical concept of individual responsibility as maintained by both the law and the liberal political philosophy which underpins it'.¹⁴⁵

It is apparent that, under the widely accepted formulation used in *G*, there is far more to recklessness than a simple investigation of whether the defendant

¹⁴³ Dana Kay Nelkin and Samuel C Rickless, 'The Relevance of Intention to Criminal Wrongdoing' *Criminal Law and Philosophy* DOI 10.1007/s11572-014-9343-0 <<http://download.springer.com/static/pdf/638/>> accessed 15 June 2015.

¹⁴⁴ RA Duff, *Intention, Agency and Criminal Liability* (Blackstone 1990) 143. See also: David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, Oxford University Press 2011) 118. Ormerod writes: 'Whether it is reasonable to take a risk depends on the social value of the activity involved relative to the probability and the gravity of the harm which might be caused'.

¹⁴⁵ Alan Norrie, 'Subjectivism, Objectivism and the Limits of Criminal Recklessness' (1992) 12 *Oxford Journal of Legal Studies* 45, 46.

foresaw the risk of some harm, and that harm eventuated. Where it is in issue in relation to a prosecution for sports violence, there is broad scope for appraisal of the defendant's conduct, but it is also clear that any consideration of the reasonableness of the defendant's actions cannot be divorced either from the consent of fellow participants or the prevailing conditions of the contest. The possibilities this analysis presents in relation to sports violence will be pursued further in Chapter 7.

4.5 Conclusion

I started this chapter by introducing the concept of input wrongs and output wrongs that can be associated with any instance of criminal proscription, an analytical tool that is useful in appraising the application of criminal offences to sports violence. The conduct of those involved in sports such as boxing, rugby and soccer problematises the interpretation of offences that were not designed, and are not generally interpreted in order, to apply to a context in which readily foreseeable physical contact and injury occurs as a result of deliberate acts. Ordinarily (that is, outside of the context of sport), the input wrong when it comes to the statutory assaults is somewhat straightforward: culpable and injurious interference with another's person. When these same offences are applied in the case of sports violence, the input wrong is narrower, since the legitimate practice of some sports allows for a relatively high degree of physical contact and attendant risk of injury. The input wrong in such sports would comprise the type of illegitimate, injury-causing conduct that should be deemed unlawful, within the more permissive context of sport.

The Court of Appeal case of *Barnes* provides a demonstration of the difficulties this causes. In the model described in *Barnes*, controversial aspects such as the role of

consent and the meaning of 'unlawful' in ss 18 and 20 are marginalised by construing the *actus reus* as a straightforward question of injury and causation. *Prima facie* liability is therefore reduced to a simple matter of establishing the causation of a relevant injury in conjunction with a foresight-based approach to *mens rea*, and I suggested that the output wrong associated with sports violence has been constructed in a way so as to be over-inclusive relative to the input wrong the offence is designed to capture.

The majority of this chapter has concentrated on an analysis of the *mens rea* standards of intention and recklessness in the context of sports violence, the discussion of which has revealed the potential for accommodating judgements of the lawfulness of sports violence within the confines of the offence definitions, according to thickened conceptions of the statutory assaults, and particularly in relation to the *mens rea* requirements. The approach that has been adopted has the effect of placing the emphasis on the consent of the participants in order to vitiate *prima facie* liability, and it is the normative and legal importance of the concept of consent that is the focus of the following chapters.

Chapter 5

Sports Violence – Consent as a Normative Justification

5.1 Introduction

In the previous chapter, I demonstrated that the offences provided for under ss 20 and 47 (and potentially s 18) of the OAPA 1861 have been interpreted in such a way that the constituent elements of this hierarchy of statutory assaults are likely to capture incidents of sports violence, whatever their status under the rules and usual practice of the sport. This is achieved without reference to the internal standards of sport, since the offences are ostensibly interpreted as they would be outwith that context. The first limb of the orthodox view of sports violence is thus that *prima facie* offences are routinely found where injury occurs in contact sports such as soccer, rugby and boxing. In order to understand the full picture of liability, however, it is necessary also to factor in the criminal law's treatment of the consent of the participants.

In *Brown*, Lord Templeman stated that 'the courts have accepted that consent is a defence to the infliction of bodily harm in the course of some lawful activities',¹ and this is the essence of the second limb of the orthodox view; that, in the face of over-inclusive offence categories, the presence of consent distinguishes those forms of sports violence that satisfy the description of 'legitimate sport' from those which warrant the imposition of criminal liability. Implicit in the orthodox view are two claims: firstly, that consent is the predominant normative justification for the

¹ *R v Brown* 1 AC 212 (HL), 234 (Lord Templeman).

lawfulness of sports violence; and secondly, that capturing the participants' consent can be used as a doctrinal mechanism by which to assess the lawfulness of a particular incidence of sports violence.

This chapter evaluates the first of these claims: the philosophico-legal claim that consent provides sufficient normative justification for the lawfulness of sports violence. In so doing, I suggest that the consent of the participants is important, but that there are wide-ranging qualifications when it comes to its power in this respect. This is because consent to injury, or the risk thereof, represents the private authorisation of the infliction of such injury, but the criminal law is concerned with public wrongs, and there are circumstances in which this private authorisation will not translate into the criminal law.

The chapter begins by setting out the significance of consent as an expression of private authorisation, before assessing this in light of the public censoring role of the criminal law. People routinely expose themselves to the risk of interpersonal contact and injury, whether this is walking along a crowded street, electing to undergo invasive surgery, or taking part in contact sports. Calibrating the availability of consent to harm necessarily depends upon public policy judgements, which seek to balance autonomy and the social utility of some risky activities against countervailing priorities in relation to protecting individuals and society.

Attempts to develop clear legal rules have raised a fundamental question about consent and the criminal law: whether its function is inculpatory (nonconsent as a constituent element of the offence) or exculpatory (consent as a defence, to be applied once the formal requirements of the *prima facie* offence have been made

out).² At first sight, this may appear a distinction of little significance, beyond procedural demands in relation to allocating evidential burdens at trial,³ but the majority judgments in *Brown*, and commentators such as Bergelson and Gardner,⁴ posit this distinction as one that can be of assistance when it comes to understanding and imposing the proper limits to consensual violence and injury.

The particular features of consent to sports violence mean that its availability and operation are inextricably tied to the rules and practice of the relevant sports; to the concept of 'legitimate sport'. This arguably has the dual effect of making it reasonable to assume (informed) consent on the part of the participants to the usual practice (or playing culture) of a sport, whilst at the same time rendering an enquiry into the nature of the actual consent of the individual participant somewhat redundant. The implications of this for the doctrinal function of the criminal law are addressed in the following chapter, which asks whether, and if so how, the consent of the participants can usefully distinguish between instances of lawful and unlawful sports violence. In other words, whether an enquiry into the existence and effectiveness, or otherwise, of consent provides a functional mechanism by which to decide whether or not criminal liability should be imposed in a particular case.

² In its reflections on the role of consent in relation to interpersonal violence, the Law Commission clearly felt this to be an unresolved issue and, in approaching the question, used what it termed 'neutral expressions' (Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) 1).

³ As Kell notes, this is not itself insignificant (David Kell, 'Social Disutility and the Law of Consent' (1994) 14 *Oxford Journal of Legal Studies* 121, 132-33).

⁴ Vera Bergelson, 'Consent to Harm' in Franklin Miller and Alan Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010); John Gardner, *Offences and Defences* (Oxford University Press 2007).

5.2 Consent as Private Authorisation

In order to understand the role and function of consent in relation to the lawfulness of sports violence, it is necessary first to locate its meaning and significance more broadly within the criminal law.

Some of the difficulties associated with devising a comprehensive rule system in relation to consent stem from the breadth of its meaning. To say that a person 'consents' may signify any of a range of mental states, such as desire, permission, or acquiescence; or it may denote the communication or expression of these. For instance, the consent of a patient may be said to exist where they accede to the treatment offered by a doctor following diagnosis, or where they actively pursue a course of treatment; in *Bree*, the Court of Appeal described consent to sexual intercourse as extending from 'passionate enthusiasm to reluctant or bored acquiescence'.⁵ Whilst the similarities may be sufficient for the overarching term to cover such expansive territory, it is clear that, from an ontological or semiotic perspective, 'there is no single "essence of consent"'.⁶ Westen writes of 'a single concept with a multiplicity of competing conceptions',⁷ while, for Cowling, consent is best understood as comprising 'an overlapping series of meanings'.⁸

Howsoever its 'overlapping meanings' are construed and accommodated by the criminal law, the effect of consent is roughly synonymous with authorisation, and this renders it an intuitively significant concept. Consent has the potential to affect the quality of relationships in a profound way, and the private authorisation it

⁵ *R v Bree* [2007] EWCA Crim 804, [2008] QB 131, 139 (Lord Judge LJ).

⁶ Mark Cowling, *Date Rape and Consent* (Ashgate 1998) 82.

⁷ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004) 309.

⁸ Mark Cowling, *Date Rape and Consent* (Ashgate 1998).

represents means that its presence can be morally relevant and legally transformative when it comes to interpersonal conduct. Hurd offers a powerful and widely cited characterisation of the ‘moral magic’ of consent in legitimising otherwise wrongful conduct:

[C]onsent can function to transform the morality of another's conduct – to make an action right when it would otherwise be wrong. For example, consent turns a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment; a commercial appropriation of name and likeness into a biography.⁹

The transformative power with which Hurd imbues consent is closely related to, and derives from, the important liberal value of autonomy, which has been described as ‘the unifying principle that underpins the concept of consent’.¹⁰ Feinberg asserts that ‘the kernel of the idea of autonomy is the right to make choices and decisions’,¹¹ and consent is an important and useful concept because it can facilitate the exercise of ‘personal sovereignty’.¹²

In making his claims about the significance of the role of consent, Feinberg draws on the ‘harm principle’, a foundational concept when it comes to the political basis of the criminal law, and to demarcating its legitimate scope according to liberal principles. In his original iteration of the harm principle, Mill wrote that ‘the only

⁹ Heidi Hurd, ‘The Moral Magic of Consent’ (1996) 2 *Legal Theory* 121, 121.

¹⁰ Catherine Elliot and Claire de Than, ‘A Case for Rational Reconstruction of Consent in Criminal Law’ (2007) 70 *Modern Law Review* 225, 231.

¹¹ Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self* (Oxford University Press 1986) 54.

¹² Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self* (Oxford University Press 1986) 54.

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'.¹³ In the centuries since this statement, the harm principle has been appraised and criticised on many occasions,¹⁴ and more sophisticated articulations have been developed.¹⁵ Nevertheless, the base proposition remains influential in liberal conceptions of the limits of the criminal law.

Adherence to the harm principle offers strong *prima facie* support for the significance of consent, as its anti-paternalistic invocations favour autonomy,¹⁶ and this naturally includes control over 'what contacts with my body to permit'.¹⁷ If a person wishes to engage in an activity that entails injury, or the risk thereof, this can be construed as the exercise of personal sovereignty. The authorising effect of consent might even be held to extend to a person's right to consent to conduct on the part of another that will lead to their own death; Roberts asserts: 'It is entirely in keeping with respect for autonomy that a person should be able to consent to his or her own death; indeed, autonomy demands that such a choice should be respected'.¹⁸ A strict interpretation of the concept of personal sovereignty can serve to authorise some

¹³ John Stuart Mill, *On Liberty* (Longman, Green & Co 1865) 6.

¹⁴ John Stanton-Ife points out: 'it is a little misleading to speak of the "Harm Principle" as one principle shared by all the leading thinkers associated with the principle' (John Stanton-Ife, 'The Limits of Law', *The Stanford Encyclopedia of Philosophy* (Winter edn, 2014) <<http://plato.stanford.edu/archives/win2014/entries/law-limits/>> accessed 12 January 2015).

¹⁵ See, for example: Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press 1984); Joel Feinberg, *The Moral Limits of the Criminal Law: Offense to Others* (Oxford University Press 1985); Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self* (Oxford University Press 1986); Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (Oxford University Press 1988). For contrasting perspectives on the harm principle, see: John Gardner, *Offences and Defences* (Oxford University Press 2007); Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2008).

¹⁶ Roberts writes of it as 'underpinned by the liberal value of autonomy' (Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para C.54).

¹⁷ Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self* (Oxford University Press 1986).

¹⁸ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para C.54.

extreme conduct: German Armin Meiwes was tried and convicted in 2004, following his apparently consensual killing and eating of Bernd Juergen Brandes.¹⁹ A libertarian adherent to the harm principle may argue that, even where it leads to such drastic consequences, Brandes's autonomy, and thus his consent, should be respected. Under this view, Meiwes's conduct should be judged in light of the quality of the consent offered by Brandes; if it is given freely, the exercise of personal sovereignty his consent represents renders inappropriate the imposition of criminal liability.

5.3 Balancing Consent and Public Wrongs

Consent is a powerful force when it comes to the pursuit of liberal goals, but there are evident tensions between the private function of consent and the public role of the criminal law when it comes to censuring conduct. Whatever the moral force of consent in denoting acquiescence or desire, and creating private authorisations between individuals, the criminal law is ostensibly concerned with public wrongs and harms. Since a crime is nominally committed against the State,²⁰ the consent of the person who suffers injury is of questionable importance; conduct that is privately authorised may nevertheless legitimately invite public censure. In making this point, Dempsey marks the distinction between the private relationships that lie at the heart of tortious disputes, and the relationship to the State that is invoked by the criminal law:

In criminal law, as distinct from tort, the party with standing to complain

¹⁹ <http://news.bbc.co.uk/1/hi/world/europe/4752797.stm>.

²⁰ See: Grant Lamond, 'What is a Crime?' (2007) *Oxford Journal of Legal Studies* 609.

against wrongful conduct is the State—not the injured party. Thus, if B consents to A’s punching him, the fact that B’s consent strips B of standing to complain against A is of no consequence to criminal law— for, in criminal law, B has no standing to complain against A in any event.²¹

Dempsey provides a sceptical account of the significance of consent in the criminal law, and its ability to affect the quality of the defendant’s conduct, since the private authorisation it represents does not affect the State’s ‘standing’ when it comes to the imposition of criminal liability; it is ‘of no consequence to criminal law’.

The potential otiosity of consent to the question of criminal liability is regularly noted by the criminal courts, and was addressed in the following terms by the Court of Appeal in *Donovan*: ‘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’.²² In *Donovan*, where a man had caned a woman for his own sexual fulfilment, this meant that where an act was ‘likely or intended to do bodily harm’,²³ there was no need to prove consent, since the fact that it was consensual could not alter the criminal nature of the conduct.

Cases such as *Donovan* illustrate a limitation on the power of consent: the State may retain an interest in criminalising behaviour even where it is consensual and therefore privately authorised by the injured party. The dichotomy between the

²¹ Michelle Madden Dempsey, ‘Victimless Conduct and the Volenti Maxim: How Consent Works’ (2013) 7 *Criminal Law and Philosophy* 11, 13.

²² *R v Donovan* [1934] 2 KB 498 (CA), 507 (Swift J).

²³ *R v Donovan* [1934] 2 KB 498 (CCA).

private ‘licensing’ of behaviour and the public nature of the concept of crime means that the application of the harm principle to the criminal law is commonly held to be subject to qualifications and compromise, and even Feinberg’s avowedly liberal interpretation allows for a number of ‘mediating maxims’ and ‘liberty-limiting principles’.²⁴ The application of such restraints on the availability and operation of consent seeks to acknowledge and accommodate within the criminal law the deeper personal and social harms that can result from consensual violence and injury.²⁵

There are many forms of conduct that are criminalised by virtue of an absolute bar on consensual activity. For instance, if a surgeon (or indeed any other person) is performing an act of female genital mutilation, the consent of the parties will not serve to vitiate the criminality of the conduct.²⁶ Further examples include illegal abortion,²⁷ and the continuing criminality of voluntary euthanasia and assisting suicide.²⁸ Other conduct is not criminalised *per se*, but certain classes of persons may be prohibited from engaging in it; for example, the absolute ineffectiveness of consent to sexual intercourse where the person is under the age of 13,²⁹ or the prohibition on the tattooing of minors.³⁰

As these examples illustrate, the criminal law ‘takes the position that there are

²⁴ Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self* (Oxford University Press 1986) xvi.

²⁵ Anderson points out that in considering the question of when and to what a person should be able to consent, Feinberg’s sophisticated account of the harm principle is infused with a core of ‘soft paternalism’ that cannot but look to the social utility of the activity in question when making the judgement as to how it is to be treated by the criminal law (Jack Anderson, *The Legality of Boxing: A Punch-Drunk Love?* (Birkbeck Law Press 2007) 144).

²⁶ Female Genital Mutilation Act 2003.

²⁷ Abortion Act 1967. See: <http://www.chroniclive.co.uk/news/north-east-news/county-durham-mum-jailed-diy-10618161>.

²⁸ Suicide Act 1961, s 2. See: <http://www.itv.com/news/westcountry/2015-12-17/assisted-suicide-man-charged-with-helping-a-person-die-in-exeter/>. There have been repeated attempts to change the law in this respect, the most recent of which is the Assisted Dying Bill, introduced by Lord Falconer, and which received its first reading in the House of Lords in June 2015.

²⁹ Sexual Offences Act 2003, s 5.

³⁰ Tattooing of Minors Act 1969.

numerous harms that all persons are incompetent to inflict or allow to be inflicted upon themselves, regardless of how much they consciously desire them'.³¹ The concerns outlined above suffuse the House of Lords' judgment in *Brown*, the leading statement of the current limits of consensual harm under the criminal law, and are reflected in Lord Templeman's objection to the appellants' argument that 'every person has a right to deal with his person as he pleases':

I do not consider that this slogan provides a sufficient guide to the policy decision which must now be made. It is an offence for a person to abuse his own body and mind by taking drugs. Although the law is often broken, the criminal law restrains a practice which is regarded as dangerous and injurious to individuals and which if allowed and extended is harmful to society generally.³²

The rationale of this passage reflects the earlier view of Stephen J in *Coney*, who noted that consent to an injury would not be effective where the nature or circumstances of that injury mean that 'its infliction is injurious to the public as well as to the person injured'.³³

The moral values and principles underpinning policy moves which proscribe consensual behaviour are often unclear; as Westen points out, '[i]t is difficult to determine whether Anglo-American law bases the prohibitions upon the view that the

³¹ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004) 129.

³² *R v Brown* [1994] 1 AC 212 (HL), 235.

³³ *R v Coney* (1882) 8 QBD 534, 549 (Stephen J).

underlying conduct is not good for [the victim] ... , or upon the view that the conduct violates shared morality'.³⁴ Constraints on the freedom of individuals to engage in consensual harm may therefore be characterised as examples of paternalism or of legal moralism,³⁵ and the State may view such limitations as necessary, notwithstanding the potential impact upon a person's autonomy. These limitations depend upon the quality of the conduct to which the consent is being offered and its effect on the victim, and are informed by a moral view of the consensual harm, and concomitant public policy concerns. The extent to which consensual harm will be considered lawful is therefore inevitably shaped by contingent factors, and will vary according to prevailing social mores.³⁶ When it comes to consent and its potential application to sports violence, the social and personal harms are weighed against interests in autonomy and the perceived social beneficence of sport.

5.4 Negotiating the Limits of Consensual Harm

Consent is a potentially powerful force, but the private authority it represents is limited insofar as it can vitiate or otherwise affect criminal liability. The dichotomy at the heart of consent means that it must draw its authority from a broader source than simply that which might be gleaned from the views and perspectives of the individuals involved. The question of how to decide upon the nature and degree of limitations to the availability of consent is of fundamental importance to the coherence and

³⁴ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004) 129.

³⁵ See, for example: Paul Roberts, 'Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform' (2001-02) 5 *Buffalo Criminal Law Review* 173.

³⁶ The Court of Appeal has held that 'the categories of activity [involving consensual harm] regarded as lawful are not closed, and equally, they are not immutable', and their expansion and contraction is inevitable (*R v Dica* [2004] EWCA Crim 1103; [2004] QB 1257, 1269 (Judge LJ)).

operation of the criminal law, and there have been attempts to formulate clear criteria that can be used in order to establish definitive legal rules. In *Brown*, a case which is central to current understanding of the orthodox view of consent and sports violence,³⁷ Lord Slynn enunciated this requirement in straightforward terms: '[a] line has to be drawn as to what can and as to what cannot be the subject of consent'.³⁸ In addressing this task, the Law Lords set out organising principles by which to assess the operation of consent in different contexts.

Before examining these organising principles, it is worth noting that such concerns are not unique to consent; the availability of other 'defences' – such as duress, necessity and self-defence³⁹ – is also subject to public policy limitations. Where a defendant has committed a violent act against another, and is relying upon one of these defences in order to vitiate liability, it is necessary but not sufficient for the defendant to argue that he was in a position where he felt under duress, or that he considered a course of action necessary, or that a course of action was undertaken in self-defence. In addition to the requisite subjective belief, it must also be established that the 'reasonable man' placed in the defendant's position would, or might, also behave in this way, in order for any of these defences to succeed.⁴⁰ Thus, the availability of duress, necessity and self-defence is restricted by reference to an objective normative standard. This requirement reflects the status of (in this case violent) crime as constituting a public wrong, and is designed to calibrate the

³⁷ *R v Brown* [1994] 1 AC 212 (HL).

³⁸ *R v Brown* [1994] 1 AC 212 (HL), 279.

³⁹ Whether consent is properly described as a 'defence' is often unclear. Likewise, it can be argued that duress, necessity and self-defence are not 'true' defences, since the onus on establishing that they do not pertain remains on the prosecution.

⁴⁰ This, of course, is a simplification of the operation of duress, necessity and self-defence. On self-defence, see: *R v Wilson* [2005] Crim LR 108.

respective defences according to social standards, in order to preclude their use where it would be against the public interest.

When it comes to consent to injury, or risk thereof, it might be argued that the need for calibration of its availability and operation against social standards is no less important, and attempts have been made to realise this. One means by which the court in *Brown* seeks to achieve harmonisation between social standards and the criminal response to consensual violence is by reference to the quantum of harm suffered; by allowing consent to injury which is less serious, but denying it where more serious injury has been caused. Adopting this approach allowed the Law Lords to differentiate along the lines of the offences, which are also stratified *inter alia* according to the severity of injury caused.⁴¹ Lord Templeman stated: ‘When no actual bodily harm is caused, the consent of the person affected precludes him from complaining. There can be no conviction for the summary offence of common assault if the victim has consented to the assault’.⁴² Lord Lowry deemed this uncontroversial, asserting: ‘Everyone agrees that consent remains a complete defence to a charge of common assault’.⁴³ Under this general rule, therefore, a threshold is set whereby violence towards another will not bring criminal liability where it is consensual, and where it causes injury that is no more than ‘merely transient and trifling’.⁴⁴

⁴¹ As Lord Templeman noted: ‘There are now three types of assault in ascending order of gravity, first common assault, secondly assault which occasions actual bodily harm and thirdly assault which inflicts grievous bodily harm’ (*R v Brown* [1994] 1 AC 212 (HL), 230).

⁴² *R v Brown* [1994] 1 AC 212 (HL), 231.

⁴³ *R v Brown* [1994] 1 AC 212 (HL), 248.

⁴⁴ Lord Templeman invoked the judgment of Swift J in *R v Donovan*: “‘bodily harm’ has its ordinary meaning and includes 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’ ([1934] 2 KB 498, 509, cited in *R v Brown* [1994] 1 AC 212 (HL), 230).

The House of Lords held that injury below the threshold of ‘actual bodily harm’ could be the subject of consent without qualification, and suggested that, in such sub-threshold cases, nonconsent on the part of the victim is inculpatory; that is, the absence of consent is necessary in order to fulfil the offence requirements. This approach can be traced through the case law relating to consensual physical harm. In the middle of the nineteenth century, Lord Denman CJ considered it ‘a manifest contradiction in terms to say that the defendant assaulted the plaintiff by his permission’,⁴⁵ and this was taken up in the prizefighting case of *Coney*, in which Hawkins J was of the view that an assault could only be described as such if there was no consent on the part of the victim:

As a general proposition it is undoubtedly true that there can be no assault unless the act charged as such be done without the consent of the person alleged to be assaulted, for want of consent is an essential element in every assault, and that which is done by consent is no assault at all.⁴⁶

Later, Williams wrote that it is ‘inherent in the conception of assault and battery that the victim does not consent’⁴⁷ and, in *Attorney-General’s Reference (No 6 of 1980)*, the Court of Appeal considered the ‘absence of consent’ to be ‘part of the definition of assault’,⁴⁸ so that ‘ordinarily an act consented to will not constitute an assault’.⁴⁹

⁴⁵ *Christopherson v Bare* (1848) 11 QB 473, 477.

⁴⁶ *R v Coney* (1882) 8 QBD 534, 549.

⁴⁷ Glanville Williams, ‘Consent and Public Policy’ [1962] Criminal Law Review 74, 75.

⁴⁸ *A-G’s Reference (No 6 of 1980)* (1981) 1 QB 715 (CA), 717 (Lord Lane CJ).

⁴⁹ *A-G’s Reference (No 6 of 1980)* (1981) 1 QB 715 (CA), 719 (Lord Lane CJ).

In *Brown*, the House of Lords considered the availability of consent to minor harm to be uncontroversial, and universally applicable. Where this is so, it is arguably unproblematic to consider nonconsent to be a constituent part of the offence, since the universal availability of consent does not impinge unduly upon the offences by introducing complexity, nor does it overly moralise or politicise them. Its inclusion within the offence definition can be used to promote coherence and predictability of application when it comes to the offence requirements. This Norrie refers to as the aspiration for a ‘technical offence core’, whereby *offences* are constituted by reasonably robust and consistent legal principles, and moral considerations that might pertain in exceptional situations can be categorised as separate *defences*, contained in what Norrie terms the ‘moral defence periphery’.⁵⁰

5.5 Qualifying Harm and Exceptional Categories

Although the quantitative distinction outlined above is approved in *Brown*, its use when deciding upon the availability of consent has been criticised. As Roberts notes, ‘criminal wrongs cannot be reduced to the *degree*, or severity, of bodily injury inflicted or suffered’.⁵¹ Instead, it is necessary to look at the circumstances in which that injury has been inflicted.

If for no other reason than to relieve your boredom you come up to me in the street and deliberately kick me in the shins, that is a (relatively minor) criminal

⁵⁰ Alan Norrie, *Crime, Reason and History* (3rd edn, Cambridge University Press 2014); Alan Norrie, *Punishment, Responsibility and Justice* (Oxford University Press 2000).

⁵¹ Paul Roberts, ‘Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform’ (2001-02) 5 *Buffalo Criminal Law Review* 173.

offense even though it causes me little if any discomfort. Yet the surgeon who with my consent cuts open my gums, gouges out my wisdom teeth and stitches up the wound, causing me ... considerable pain, commits no offense. As Lord Mustill wisely observed in his dissenting judgment in *Brown*: 'Circumstances must alter cases'.⁵²

A distinction founded in quantity of injury does not capture satisfactorily the normative difference between these two examples, since it takes no account of the broader context in which the consent was given.

The sado-masochistic practices under discussion in *Brown* involved the infliction of injuries that exceeded the quantitative threshold of the general rule outlined above, and the House of Lords was faced with the question of whether they should be considered as lawful notwithstanding this.⁵³ By analogy, the Law Lords considered the lawfulness of a variety of activities in which there is an inevitability or likelihood of injury amounting to or exceeding the threshold of actual bodily harm. Lord Templeman spoke for the majority in 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

⁵² Paul Roberts, 'Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform' (2001-02) 5 Buffalo Criminal Law Review 173, 219.

⁵³ *R v Brown* [1994] 1 AC 212 (HL).

injured was participating. Surgery ..., ritual circumcision, tattooing, ear-piercing and violent sports including boxing are lawful activities.⁵⁴

Lord Templeman therefore marks out particular activities as deserving of an exceptional status; a status that allows those activities that qualify to involve lawful consensual violence that causes injury at or above the level of actual bodily harm.⁵⁵ This demarcation of a category of lawful activities operates to exclude those practices that cannot be brought within its confines, and precludes all other forms of consensual violence that involve causing injury at or above the threshold level of actual bodily harm.

Whereas the implementation of the quantitative test works by reference to the offence definitions, and therefore allows for a *legal* distinction to be made, the demarcation of a category of 'lawful activities' is an overtly *moral* and *political* calculation, and the value judgements that lie at the heart of this are open to criticism on a number of grounds. Kell describes the approach as constituting a 'social utility' test, the basis of which is fundamentally opposed to what he perceives as the properly liberal basis of the criminal law, under which there is a presumption of legality.⁵⁶ Roberts takes a similar view, and argues that the exceptional approach 'reverses the traditional common law presumption, that everything is lawful unless expressly proscribed, by extending criminal sanctions to conduct simply because the legislature

⁵⁴ *R v Brown* [1994] 1 AC 212 (HL), 231.

⁵⁵ To this list can be added 'general horseplay' (see *R v Aitken and Others* (1992) 1 WLR 1006 (C-MAC)), an unwieldy category that Lord Mustill justified as follows: 'The law recognises that community life ... such as exists in the school playground, in the barrack-room and on the factory floor, may involve a mutual risk of deliberate physical contact in which a particular recipient ... may come off worst, and that the criminal law cannot be too tender about the susceptibilities of those involved'.

⁵⁶ David Kell, 'Social Disutility and the Law of Consent' (1994) 14 Oxford Journal of Legal Studies 121.

has not (yet) had occasion to consider the case for exemption'.⁵⁷ For Roberts, this constitutes 'a disturbingly expansionist tendency in the criminal law'.⁵⁸ To ameliorate this particular flaw, he suggests 'the formulation of particularistic rules to proscribe only those *specific forms* of consensual injury deemed worthy of criminal prohibition'.⁵⁹ As Kell explains, this means reversing the presumption; he advocates a 'social disutility' model whereby consent to harm would be effective, 'unless the prosecution is able to provide persuasive reasons for prohibiting particular conduct'.⁶⁰ Kell points out that the adoption of a social disutility test presents a lower explanatory hurdle for practices that should not be criminalised; he offers tattooing and ear-piercing as examples of activities that are difficult to justify as 'needed in the public interest', but notes that it is 'equally difficult to state why the public interest would require their prohibition'.⁶¹

Kell's and Roberts's shared preference for presumptive lawfulness is a matter of liberal principle, but the exceptional approach elucidated by Lord Templeman is also susceptible to criticism on the ground of imprecision, as the example of contact sport demonstrates: it is to be presumed that formal iterations of mainstream sports

⁵⁷ Paul Roberts, 'Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform' (2001-02) 5 Buffalo Criminal Law Review 173, 239.

⁵⁸ Paul Roberts, 'Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform' (2001-02) 5 Buffalo Criminal Law Review 173, 239.

⁵⁹ Paul Roberts, 'Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform' (2001-02) 5 Buffalo Criminal Law Review 173, 239. On this, see also: Marianne Giles, '*R v Brown*: Consensual Harm and the Public Interest' (1994) 57 Modern Law Review 101; S Streets, 'S & M in the House of Lords' (1993) 18 Alternative Law Journal 233; Brian Bix, 'Assault, Sado-Masochism and Consent' (1993) 109 Law Quarterly Review 540; David Kell, 'Social Disutility and the Law of Consent' (1994) 14 Oxford Journal of Legal Studies 121

⁶⁰ David Kell, 'Social Disutility and the Law of Consent' (1994) 14 Oxford Journal of Legal Studies 121, 127.

⁶¹ David Kell, 'Social Disutility and the Law of Consent' (1994) 14 Oxford Journal of Legal Studies 121, 128. This is not to say that these are uncontested moral issues, particularly when it comes to minors. Although the tattooing of minors is unlawful, the criminal law is largely silent when it comes to piercing, aside from the application of indecent assault in the event of genital- or (for females) nipple-piercing.

are included as 'lawful activities', but there is little guidance when it comes to the less formal manifestations that might occur during training sessions, or in *ad hoc*, informal games between friends in a park or schoolyard. As Roberts observes, 'one can always envisage forms of nontraditional medicine or new leisure pursuits which might end up criminalized, simply through oversight'.⁶² Under this analysis, the lawfulness of benign and even socially beneficent activities is potentially unclear, and they may be under threat from discriminatory or capricious prosecution.

5.6 Offence-Types and Non/Violation of Prohibitory Norms

There are evident difficulties in the application of the organising principles propounded by the House of Lords in *Brown*, and it is worthwhile looking to the attempts of others who have tried to make sense of the limits on consent in this context. Bergelson and Gardner are amongst commentators who have also attempted to rationalise and enunciate the relationship between consent and harm under the criminal law.⁶³ Their respective arguments are framed differently to those advanced in the majority judgments in *Brown*; instead of constructing rules based upon the quantum of injury caused, supplemented by categories of 'lawful activity', Bergelson and Gardner look to 'offence types', and distinguish those which constitute the violation of a 'prohibitory norm' from those which do not. Bergelson writes:

⁶² Paul Roberts, 'Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform' (2001-02) 5 *Buffalo Criminal Law Review* 173, 239.

⁶³ Vera Bergelson, 'Consent to Harm' in Franklin Miller and Alan Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010); John Gardner, *Offences and Defences* (Oxford University Press 2007).

Compare cases of rape, kidnapping, or theft on the one hand, and cases of killing or maiming on the other. In the first group of cases, the *act itself* does not violate a prohibitory norm. Having sex, transporting someone to a different location, or taking other people's property is not bad *in itself*. It becomes bad *only* due to the absence of consent.⁶⁴

Depending on the type of offence, Bergelson suggests that whether nonconsent is inculpatory or consent exculpatory depends upon whether or not the conduct in question is construed as violating a prohibitory norm. Where the conduct does not violate a prohibitory norm, Bergelson proposes that nonconsent is inculpatory: 'no matter how we draft the statute, in cases of theft, rape, or kidnapping, the absence of consent is *inculpatory*—nonconsent is a part of the definition of the offense'.⁶⁵ In contrast, for offences where the act violates a prohibitory norm, such as violent offences, consent acts as an exculpatory defence.

Gardner uses a similar distinction when he writes that 'there is no general reason not to have sexual intercourse', and contrasts this with offences where physical injury is an inherent element: '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'.⁶⁶ Gardner draws the same conclusion as Bergelson, and argues that the distinction 'is captured in the law's treatment of consent under the "defence" heading in assault occasioning actual bodily

⁶⁴ Vera Bergelson, 'Consent to Harm' in Franklin Miller and Alan Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010), 171.

⁶⁵ Vera Bergelson, 'Consent to Harm' in Franklin Miller and Alan Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010), 171.

⁶⁶ John Gardner, *Offences and Defences* (Oxford University Press 2007) 144.

harm, but under the “offence” heading in rape’.⁶⁷ According to both Bergelson and Gardner, therefore, the type of offence dictates whether its commission violates a prohibitory norm. This, in turn, indicates whether consent functions as an exculpatory defence, or whether its absence is a constituent element of the offence.

The analytical frameworks that Bergelson and Gardner present offer an appealingly straightforward means by which to structure the role of consent, and from here to work out rules relating to its availability and operation. The application of such a distinction can be seen in *Dica*,⁶⁸ which concerned the appeal of a man who had been convicted as a result of recklessly transmitting HIV to multiple partners through sexual intercourse. In the facts of *Dica*, there lay the potential issue of consent in two respects: that of consent to sexual intercourse, and that of consent to (the risk of) being infected with HIV. There is no suggestion in *Dica* that the consent to sexual intercourse was invalid (which would raise the possibility of rape), but there was considerable discussion by the Court of Appeal as to whether consent would be available to counter a charge under s 20 of the Offences Against the Person Act 1861, where the defendant had recklessly infected the victim with HIV. The separability of the consent involved here is notable, as is the fact that it is referred to as a ‘defence’ in the context of the s 20 offence.

Dica lends support to the usefulness of prohibitory norm violation as an aid to structuring consideration of consent and, in that particular case, this involved the appraisal of consent against different types of offence. However, tying the boundaries of prohibitory norms to ‘offence-types’ will often rely upon drawing arbitrary

⁶⁷ John Gardner, *Offences and Defences* (Oxford University Press 2007) 144.

⁶⁸ *R v Dica* [2004] EWCA Crim 1103; [2004] QB 1257.

distinctions in much the same way as the demarcation based on quantum of injury. This can be demonstrated by reference to rape, an offence-type that both Bergelson and Gardner suggest derives from behaviour that does not violate a prohibitory norm. However, sexual intercourse with a person under the age of 13 is a form of rape that amounts to an absolute liability offence for which consent, or indeed a mistake as to consent or age, will not avail the defendant.⁶⁹ Here, to say that ‘having sex ... is not bad *in itself*’,⁷⁰ or that ‘there is no general reason not to have sexual intercourse’,⁷¹ is surely not true. Whilst the offence of ‘rape of a child under 13’ could be categorised as in itself violating a prohibitory norm, and therefore as a different offence-type from other instances of rape, to do so undermines the clear categorisation and demarcation that Gardner and Bergelson present. Similarly, it seems strange to characterise ‘actual bodily harm’ as ‘*per se* an unwelcome turn of events’ where it takes the form of necessary and beneficent surgical interference, such as the removal of a tumorous growth, or a wart.

5.7 Conclusion

Given the nature of sports participation, it is not unreasonable to infer consent to behaviour that is consonant with such participation. In 1962, Williams wrote of ‘games like football’: ‘In these games, the consent by the players to the use of moderate force is clearly valid and the players are even deemed to consent to an application of force that is in breach of the rules of the game, if it is the sort of thing that may be expected

⁶⁹ Sexual Offences Act 2003, s 5.

⁷⁰ John Gardner, *Offences and Defences* (Oxford University Press 2007).

⁷¹ Vera Bergelson, ‘Consent to Harm’ in Franklin Miller and Alan Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010), 171.

to happen during the game'.⁷² Here, Williams presents the underlying rationale for the second limb of the orthodox view of sports violence, whereby the participants' consent is used to counter the application of the offences considered in Chapter 4, and thus to explain and facilitate the lawfulness of sports violence where it is 'the sort of thing that may be expected to happen during the game'. This characterisation is intuitive and straightforward, and can be extended by analogy to other sports. In the context of boxing, for example, it means that a punch that causes an injury will not bring criminal liability where consent can be found on the part of the injured opponent.

When looked at more closely, the explanation exposes its shortcomings, since the consent of the injured party alone does not tell us everything we need to know about the quality of the perpetrator's conduct, especially insofar as this might be necessary for decisions about the operation of the criminal law. As Brownsword and Beyleveld have stated, 'having a defence against a claim of private wrong is one thing, having an answer to a charge of public wrong is another'.⁷³ Setting the boundaries of consensual harm is a difficult task, complicated by the dichotomy between private authorisation and public censure that underlies consent and its application to the criminal law. The formulation of legal rules depends upon policy judgements that seek to balance 'personal sovereignty' and the broader public interest, including the social utility of the activity in question.

Although they acknowledge that it is not a straightforward task, dependent upon policy judgements that are difficult to articulate precisely, the majority

⁷² Glanville Williams, 'Consent and Public Policy' [1962] *Criminal Law Review* 74, 80.

⁷³ Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Hart Publishing 2007) 16.

judgments in *Brown* purport to set out technical legal rules as to the availability and operation of consent to physical violence and injury. Under the quantitative approach laid out in *Brown*, valid consent is generally permissible where it is to injury that falls short of actual bodily harm, even when caused recklessly or intentionally. This offence-based and pragmatic distinction cannot tell the whole story, and the Law Lords held that this threshold did not apply to exceptional 'lawful activities'. The demarcation of this category, which includes contact sports, involves a degree of uncertainty, predicated as it is on moral and political judgements of social utility. For example, although formal iterations of boxing, rugby and soccer are incontrovertibly included as 'lawful activities', there is little guidance when it comes to the less formal manifestations that might occur during training sessions, or in *ad hoc*, informal games between friends in a park or the schoolyard. Here, little progress has been made since the nineteenth-century case law, which, as noted in Chapter 2, was primarily concerned with proscribing sports that were unlawful due to their potential for social disruption and low moral worth (such as prizefighting and the traditional, mass participation forms of football), as against those which should be allowed in the public interest and were therefore lawful (such as boxing according to the Queensberry Rules and the reconstituted and controlled forms of football).

Bergelson and Gardner also attempt to discern definitive legal rules that can regulate the availability and operation of consent as a means to vitiate criminal liability, and thus bring clarity to the scope of its operation. In their respective analytic schemes, they point to normative differences in how consent operates, according to whether or not the conduct violates a 'prohibitory norm', and attempt to tie this to legal standards by correlating these prohibitory norms with 'offence-types'. They

suggest that this standard can be construed so as to correlate to 'offence-types', thereby also implying a legal basis for the availability of consent. The analysis of the relationship between prohibitory norms and the operation of consent is promising, but categorising this simply in terms of offence-types will often rely upon making arbitrary distinctions. The contours of prohibitory norms are contingent upon those of social norms, and classifying something as 'not bad *in itself*' or an 'unwelcome turn of events' is a moral calculation that does not always fall to be judged according to legal categories. As Norrie points out, 'all moral judgments are "all things considered" judgments'.⁷⁴

⁷⁴ Alan Norrie, *Punishment, Responsibility and Justice* (Oxford University Press 2000) 154.

Chapter 6

Consent as a Doctrinal Mechanism

6.1 Introduction

In the preceding chapter, I sought to establish the normative role of consent in the criminal law when it comes to consensual harm, and thereby address the first of the claims implicit in the orthodox view: that consent is the normative justification for the lawfulness of sports violence. I concluded that consent is important, but that its availability and force are heavily qualified due to its ambiguous relationship with the public nature of the criminal law. Consent can have a profound legal and moral effect, but if it is to be effective as a doctrinal mechanism that can vitiate *prima facie* offences, consent must do more than provide a philosophical basis for distinction; it must be able to attain a granularity that allows it to be of assistance in discerning between the lawful and the unlawful. For this, it is necessary to look deeper at the realities of consent; at its ontological and empirical foundations. As Wertheimer suggests, when considering the moral and legal place of consent: 'The content of the morally impermissible and the legally impermissible can be captured by the concept of consent. The hard work will be to say what that means'.⁷⁵ In this chapter, I therefore address the second claim implicit in the orthodox view: that consent serves a doctrinal function as the means by which to measure the lawfulness of a particular incidence of sports violence.

⁷⁵ Alan Wertheimer, *Consent to Sexual Relations* (Cambridge University Press 2003) 7.

In the first part of this chapter, I examine the ontology of consent, which entails an irresolvable tension that results from the competing claims of what Westen terms ‘attitudinal’ and ‘expressive’ consent.⁷⁶ In order to assess the usefulness of consent as a doctrinal mechanism in discerning the lawfulness of instances of sports violence, I then compare the operation of consent in sports to its operation in two other contexts: sexual offences of nonconsent; and consent as it operates in relation to medical treatment. Considerations of consent in these latter contexts typically include vital questions such as what will amount to consent, who has capacity to consent, and the degree of freedom and information a person must possess in order to give effective consent. These are issues on which the law in relation to sports violence is largely silent, since individual participants’ consent cannot usefully be extricated from the lawfulness of that which accords with ‘legitimate sport’.

6.2 The Ontology of Consent

In this section, I shall examine competing conceptions of the ontology of consent, concentrating on Westen’s division into what he terms ‘attitudinal’ and ‘expressive’ consent, where the former looks to the subjective mindstate of the person whose consent is relevant, and the latter to outward appearance and how this may or may not convey consent in a way that is relevant to a defendant’s potential liability.⁷⁷

⁷⁶ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004).

⁷⁷ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004). This is a simplification of Westen’s conceptual apparatus, in that he further breaks these categories down into ‘factual’ and ‘prescriptive’, and also introduces varieties of ‘imputed consent’. I return to the latter category at the end of this chapter, and it is an important concept in subsequent chapters, but the other sub-categorisations introduce a degree of complexity that is unnecessary for the present purposes.

Alternative terminology could be used: Wertheimer refers to 'mental' and 'performative' consent to convey similar ideas,⁷⁸ and it is common, particularly in relation to sexual offences, to refer to 'factual' consent on the part of the complainant, and the defendant's *mens rea* in relation to the existence of consent.⁷⁹

For Hurd, the transformative power of consent emanates from a respect for autonomy, and the corollary of this is that the moral core of consent must be located in the subjective mindstate of the person who gives it.⁸⁰ Under this approach, effective consent to surgery, for example, would be measured by reference to the attitude of the patient. In this way, the attitudinal consent of the patient *authorises* the conduct of the surgeon in carrying out the operation, and thus renders lawful an otherwise unlawful interference with the body of the patient. Establishing the existence of attitudinal consent amounts to a question like, 'did this particular individual (expressly or otherwise) desire, permit or acquiesce (consent) to this particular conduct on the part of the defendant?'⁸¹

An alternative, expressive construction would see the effectiveness of consent measured by reference to its outward manifestation, and thus ostensibly from the point of view of the person to whom the consent is offered, or perhaps through the eyes of a 'reasonable observer'.⁸² Here, the surgeon is judged not according to the attitudinal consent of the patient, but rather expressions of consent on the part of the

⁷⁸ ideas (Alan Wertheimer, 'What is Consent? And is it Important?' (1999) 3 Buffalo Criminal Law Review 557).

⁷⁹ See, for example: David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, Oxford University Press 2011) 743-47.

⁸⁰ Heidi Hurd, 'The Moral Magic of Consent' (1996) 2 Legal Theory 121.

⁸¹ This accords with Gerwing JA's characterisation of how consent is 'ordinarily' construed (*R v Cey* (1989) 48 CCC (3d) 480, 490).

⁸² For instance, under the regime brought in by the Sexual Offences Act 2003, the offences of nonconsent catered for under ss 1-4 require that the alleged victim 'does not consent to engaging in the activity', and nor does the defendant 'reasonably believe that [the alleged victim] consents'.

patient. These might include attendance at the hospital on the day scheduled for the operation, the signing of a consent form, and voluntary submission to anaesthesia. In effect, establishing expressive consent turns on a question such as: 'Did the defendant believe (or would a reasonable person have believed) that this particular individual was (attitudinally) consenting to this conduct?' According to this question, there are different standards that can be applied to expressive consent: that of the subjective defendant's view of the quasi-victim's conduct, or that of the reasonable person placed in the defendant's circumstances; either of these can be, and both have been, used in the criminal law.⁸³

There is an intuitive logical and normative appeal to the attitudinal construction. If consent is an authorisation that finds in desire, permission or acquiescence, it may seem appropriate to measure the character and extent of this by reference to the person who has given it. Hurd argues that the morally transformative power of consent is achieved by reference to its subjective existence alone; thus: 'a person does all she needs to do in order to alter the *moral* rights or obligations of another simply by entertaining ... [attitudinal] ... consent'.⁸⁴

However, this is problematic insofar as consent is used to absolve the surgeon of wrongdoing; as Dempsey notes, an examination of attitudinal consent 'tells us only about the moral situation of the harmed person ... and not the moral situation of the person who inflicted the harm'.⁸⁵ In other words, if we are interested in the moral position of the surgeon alluded to above, we need to know more than simply the

⁸³ See, for instance, the position elucidated in *DPP v Morgan* [1976] AC 182, and *cf* the position that now pertains under the Sexual Offences Act 2003.

⁸⁴ Heidi Hurd, 'The Moral Magic of Consent' (1996) 2 *Legal Theory* 121, 122.

⁸⁵ Michelle Madden Dempsey, 'Victimless Conduct and the Volenti Maxim: How Consent Works' (2013) 7 *Criminal Law and Philosophy* 11, 13.

mindstate of the patient: in order to know how consent has removed the moral wrong of the surgeon in performing the operation, it is necessary to look to the *surgeon's appreciation* of the situation, and how the purported or perceived consent of the patient can be interpreted as affecting this.

In a given case, it may be that either construction of consent will suffice; Bergelson writes of consent in rape:

[T]he charge of rape would be unwarranted if a legally competent person voluntarily expressed his willingness to engage in a sexual act, regardless of how closely that willingness reflected his true feelings. That charge would be equally unwarranted if a legally competent person wholeheartedly welcomed the sexual intimacy, yet never outwardly expressed his feelings.⁸⁶

Here, either attitudinal or expressive consent will suffice to render the charge of rape 'unwarranted'.

In a given situation, it may also be that there is no tension between the two constructions, since attitudinal and expressive consent will exist concurrently. Where a person willingly consents to sexual intercourse, and this is conveyed to a partner in unequivocal terms that he understands as denoting consent, both attitudinal and expressive consent can be said to exist. Similarly, the patient considered above may consent both attitudinally and expressively; actively wishing to undergo the surgery as well as presenting for the operation, signing the consent form and submitting to

⁸⁶ Vera Bergelson, 'Consent to Harm' in Franklin Miller and Alan Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010) 175.

anaesthesia. However, the existence of expressive consent is not dependent upon such a correlation and it may exist independently of attitudinal consent. On the expressive view, therefore, where a person nods or says 'yes' when asked whether they consent to their ears being pierced, it is that *expression of consent* that would be operative, rather than the subjective mental state that constitutes attitudinal consent. The fact that the person concerned felt coerced by peer pressure into having his ears pierced would do nothing to erode the effectiveness of the consent if this additional factor had not come to the attention of (been expressed to) the person carrying out the piercing.

The two conceptions of consent demonstrate different priorities: attitudinal consent engenders a respect for the autonomy of a person who is the willing object of conduct that would otherwise amount to an offence, whereas expressive consent points to the lack of culpability of a defendant who honestly and/or reasonably believed that the person was consenting. In accordance with the prevailing preference for subjective constructions of liability, expressive consent may be the best reflection of culpability, but the umbilical connection of consent and autonomy means that the criminal law cannot ignore the attitudinal conception, which is woven through discussions of consent and its legal accommodation.

6.2.1 Beyond the attitudinal/expressive dichotomy - consent and moral context

The criminal law is properly concerned with culpability in relation to transgressive conduct, and Dempsey draws attention to the implications of this for the accommodation of consent: 'If our ultimate inquiry is whether the State may justifiably criminalize A's conduct, then we should focus our attention on the

normative force of B's consent insofar as it affects the moral quality of A's conduct'.⁸⁷ Whilst her view is here anchored in its expressive form, Dempsey advocates a more nuanced conceptualisation of consent. She dismisses Hurd's description of the 'moral magic' of consent as an 'overstatement', suggesting that the 'alliterative attraction of the phrase'⁸⁸ has brought it more attention than it warrants, and writes of Hurd's characterisation of the transformative power of consent: 'surely, a good deal more than consent is required in order to effect the sort of transformations Hurd has in mind. Turning a trespass into a dinner party requires, at least, dinner—while turning rape into lovemaking requires, at least, love'.⁸⁹

This is too literal a reading of Hurd's metaphorical statement, but Dempsey's observation that consent should not amount to a straightforward choice between the attitudinal and expressive form, and that it exists within a wider moral context, is important nonetheless. Wertheimer is similarly concerned when he offers what he calls an 'anti-essentialist view' of the operation of consent in the context of sexual relations:

the important question is not whether consent *is*—ontologically speaking—a performative or a mental state. Rather, we begin by reminding ourselves that we are interested in consent because it renders it permissible for A to engage in sexual relations with B, and we ask "what could do that?" From that

⁸⁷ Michelle Madden Dempsey, 'Victimless Conduct and the Volenti Maxim: How Consent Works' (2013) 7 *Criminal Law and Philosophy* 11, 13.

⁸⁸ Michelle Madden Dempsey, 'Victimless Conduct and the Volenti Maxim: How Consent Works' (2013) 7 *Criminal Law and Philosophy* 11, 12.

⁸⁹ Michelle Madden Dempsey, 'Victimless Conduct and the Volenti Maxim: How Consent Works' (2013) 7 *Criminal Law and Philosophy* 11, 12.

perspective, a suitably qualified—that is, moralized—performative view is, I think, closest to the truth.⁹⁰

Wertheimer's conception of consent transcends its existence as either purely attitudinal or expressive, and prompts an examination of the wider moral and factual context in which it can be said to exist. So considered, it follows that surgeons, those engaged in sexual activity and sports participants are acting within a moral context, and that any view of the consent that could be said to exist in these relationships must be viewed in this light.

6.2.2 An added complication – implied consent

The ontological basis of consent is marked by disputes as to the priority to be accorded to its attitudinal and expressive form, and ideas as to how these inform the moral context in which consent operates, and this is further complicated when implied consent is considered.

It is unlikely that the participants in a boxing, rugby or soccer match will explicitly articulate consent before or during the contest to which it might be held to pertain. In a more organised, and particularly professional, setting, it might be possible to infer explicit consent from the various contractual arrangements made between players, clubs, leagues and other bodies. However, this is unlikely to prove conclusive, and it will not pertain where sports are played more casually. It is therefore more productive to consider the voluntary engagement of the participants as conveying

⁹⁰ Alan Wertheimer, 'What is Consent? And is it Important?' (1999) 3 Buffalo Criminal Law Review 557, 568.

consent implicitly. An understanding of the particular characteristics of implied consent is therefore crucial to mapping the operation of consent when it comes to sports violence.

In some respects, implied consent sits very easily within the analysis of attitudinal and expressive consent undertaken above. Depending upon the particular circumstances, implied consent may be construed as fulfilling the requirements of either attitudinal or expressive consent. As in the often-invoked example deriving from the US case of *O'Brien v Cunard SS*,⁹¹ implied consent may be found where a person holds up an arm in a line of people waiting for a vaccination. Here, when looking to the subjective question of attitudinal consent, the intention behind the raising of the arm is in issue. If it was intended as such on the part of the individual, the act of raising the arm is equivalent to giving explicit consent, whether in writing or orally. Alternatively, it could be said that the action amounts to expressive consent, irrespective of the subjective intentions of the individual, and the person giving the injection can be said to rely on this.

In the example of the patient and the surgeon offered above, attendance at the hospital on the designated day and voluntary submission to anaesthesia could be taken to amount to implied consent (alongside the express consent found in the signing of a consent form). This might be held to derive from the attitudinal consent of the patient, or from its expression. Where the presence or absence of consent is being used to differentiate between sex and rape, for example, implied consent might be found in a multiplicity of behavioural cues, which can be interpreted from the

⁹¹ *O'Brien v Cunard SS Co* 28 NE 266 (Mass 1891).

perspective of the person giving consent, or in terms of the expressive value of the implied consent.

Just as in the examples above, the existence and scope of consent in a sporting context could be held to derive from the attitudinal or from the expressive aspect of implied consent. Presence on the field and voluntary participation provide evidence of a player's attitudinal consent, and also serve as an outward expression of consent to those competing with and against them. In this respect, consent in sports bears a resemblance to that which exists in relation to sexual relations.

6.3 Generating Legal Rules

Whether understood as attitudinal or expressive, or construed more broadly within its particular moral context, the place of consent within the criminal law amounts to more than just a philosophical, normative justification; it also translates into legal doctrine. In order to fulfil this function, there is a need to generate legal rules that will accommodate the general and particularised limitations on availability, and the competing ontological claims, in order to determine whether consent will be effective in individual cases.

6.3.1 Individualised consent in sexual offences and to medical treatment

The majority of the literature on consent in the criminal law relates to sexual offences (particularly rape), and to medical treatment, and these are also the areas in which the rules relating to the application of consent are the most juridically developed. The treatment of these subjects here is not intended to amount to an exhaustive account of the criminal law in relation to either sexual offences or to medical treatment. Nor

do I intend to assert that they are unproblematic in themselves; each has struggled to strike a balance when it comes to the conflict between the ontological problems of consent set out above, and with the theoretical and practical problems posed by implied consent. Despite these caveats, an examination of some of the salient features of consent in sexual offences and to medical treatment is useful in terms of what this chapter aims to achieve. What they have in common I will refer to as an 'individualised' conception of consent.

The basic requirements of consent in sexual offences are set out in s 74 of the SOA 2003, which states: 'A person consents if he agrees by choice, and has the freedom and capacity to make that choice'. This is a description of consent that is clearly rooted in a concern for autonomy, and ostensibly suggests a focus on attitudinal consent, but it provides little guidance as to the circumstances in which such consent will or should be established; as Elliott and De Than assert: 'the use of ambiguous concepts of freedom and choice leaves the definition extremely vague'.⁹²

In order to address the particular demands of sexual offences, the requirements of s 74 are augmented by ss 75 and 76, which respectively provide rebuttable and conclusive evidential presumptions. Section 75 creates a rebuttable presumption of nonconsent where the complainant suffers violence or the fear of violence, unlawful detention, is unconscious, unable to communicate consent due to a physical disability, or has been drugged;⁹³ these have been characterised by the Court of Appeal as 'situations in which the complainant is involuntarily at a

⁹² Catherine Elliott and Claire de Than, 'A Case for Rational Reconstruction of Consent in Criminal Law' (2007) 70 *Modern Law Review* 225, 238.

⁹³ S 75(2)(a)-(f).

disadvantage'.⁹⁴ Section 76 imposes a conclusive presumption of nonconsent where the defendant has 'intentionally deceived the complainant as to the nature or purpose of the relevant act',⁹⁵ or has induced consent 'by impersonating a person known personally to the complainant'.⁹⁶ Before the advent of the SOA 2003, it had been held that an honest mistake on the part of the defendant as to the existence of attitudinal consent would be sufficient to vitiate liability,⁹⁷ but this is no longer true. The law now effectively demands that such mistakes be objectively reasonable.⁹⁸

It is easy to understand why the regime governing sexual offences of nonconsent has been seen to necessitate such requirements. As Baroness Hale said in *Cooper*, 'it is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place'.⁹⁹ In the recent case of *R (on the application of F) v DPP*, which was concerned with the potential conditionality of consent to sexual intercourse, the court made reference to,

the many fluctuating ways in which sexual relationships may develop, as couples discover and renew their own levels of understanding and tolerance,

⁹⁴ *R v Bree* [2007] EWCA Crim 804, [2008] QB 131, 137 (Lord Judge LJ).

⁹⁵ S 76(2)(a).

⁹⁶ S 76(2)(b).

⁹⁷ As in the notorious case of *DPP v Morgan* [1976] AC 182 (HL).

⁹⁸ Sexual Offences Act 2003, ss 1-4.

⁹⁹ *R v Cooper* [2009] UKHL 42, [2009] 4 All ER 1033, 1041.

their codes of communication, express or understood, and mutual give and take, experimentation and excitement.¹⁰⁰

The shaping of the consent provisions in the SOA 2003 is designed to address some of the problematic realities of consent in sexual offences, which has been referred to as ‘a visceral, rather than a cerebral, process of decision-making’,¹⁰¹ frequently given implicitly, and through half-articulated desires and preferences. The absence of consent may present in a number of ways; as the Court of Appeal noted in *Bree*, nonconsent may manifest as ‘quiet submission or surrender as well as determined physical resistance against an attacker which might expose the victim to injury, and sometimes death’.¹⁰² Since the ultimate burden of proof remains on the prosecution to prove the absence of consent beyond reasonable doubt, the rebuttable presumptions provide for situations in which the ability of the complainant to assert autonomy and to communicate the presence or absence of consent has been impaired.

Other factors that may problematise the operation of consent in the sexual context, and thus influence the construction of the legal requirements, include the fact that sexual conduct, whether consensual or otherwise, is likely to take place in private, frequently meaning that the complainant and the defendant are the only

¹⁰⁰ [2013] EWHC 945 (Admin); [2014] QB 581 (DC), 591. For commentary on this case, see: Gavin A Doig and Natalie Wortley, ‘Conditional Consent? An Emerging Concept in the Law of Rape’ (2013) 77 *Journal of Criminal Law* 286.

¹⁰¹ Law Commission, ‘Appendix C: Consent in Sex Offences’ in Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (Home Office, 2000) para 4.59.

¹⁰² *R v Bree* [2007] EWCA Crim 804, [2008] QB 131, 137 (Lord Judge LJ).

immediate witnesses. Historically, this had meant the use of the complainant's past sexual conduct stood as a valuable piece of evidence in determining the plausibility of the parties' cases, though successive legislation has diminished the extent to which this is permissible.¹⁰³ Beyond this, Elliott and De Than point to '[t]he extremely low conviction rate for rape, the trauma suffered by vulnerable complainants, the evidential difficulties in prosecuting non-stranger rapes and those involving drugs or alcohol', and assert that sexual offences therefore warrant 'special rules justified by the more private and sensitive nature of sexual autonomy'.¹⁰⁴ Thus, the law relating to consent in sexual offences reflects the interest to be protected: the protection of sexual autonomy. The provisions suggest that a person who wishes to engage in sexual conduct with another bears some responsibility when it comes to ensuring that effective consent is present.

The operation of consent in medical treatment also reflects the particular interests involved. As in the sexual offences discussed above, issues of capacity are central, but there are differences in the focus. For instance, whereas there are absolute bars on allowing children to give effective consent to sex,¹⁰⁵ the test of *Gillick* competence allows for a graduated, fact-specific approach to consent to medical treatment, depending upon the understanding of the particular child in light of the seriousness of the treatment.¹⁰⁶ Whereas it is more usual for consent in a sexual context to be given impliedly, in the medical context there is an expectation that

¹⁰³ The current law is contained in s 41 of the Youth Justice and Criminal Evidence Act 1999.

¹⁰⁴ Catherine Elliot and Claire de Than, 'A Case for Rational Reconstruction of Consent in Criminal Law' (2007) 70 *Modern Law Review* 225, 245.

¹⁰⁵ Sexual Offences Act 2003.

¹⁰⁶ *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112 (HL).

consent to treatment will be given in a written form.¹⁰⁷

It should be noted that there are inevitably situations where a patient is not able to give consent, through temporary or permanent incapacitation, and, in administering treatment, the medical practitioner may have to rely on necessity, the 'best interests' of the patient, or authorisation from a proxy; each of these have developed rules and protocols that are beyond the scope of the discussion here. However, where the patient is in a position to be able to give or withhold consent, there is an effective obligation on the medical practitioner to ensure that effective consent has been given.

Each of sexual consent and medical consent are, to an extent, *sui generis*, but they have in common a focus on individualised conceptions of consent; they look at the particular defendant and complainant, and at what has passed between them. When it comes to consent in such situations, Feinberg highlights three principal factors that will undermine the effectiveness of apparent consent, and which point to the connection between consent and autonomy and a domain in which 'the self is sovereign':¹⁰⁸ that there was force or another form of coercion used in order to procure consent; that deception was used in order to procure consent; or that the person giving consent did not have capacity.¹⁰⁹ Insofar as consent looks both to autonomy and culpability, these amount to logical qualifications. It would not serve

¹⁰⁷ In *Chatterton v Gerson* [1981] 1 All ER 257 (CA), it was stated: 'It is not enough to get a patient to sign a pro forma expressing consent to a procedure with no explanation. The doctor must explain the implications of the procedure'. The General Medical Council (GMC) provides guidance which emphasizes the importance of consent. See: *Consent: Patients and Doctors Making Decisions Together* (General Medical Council 2008). It is a reflection of the increased importance of autonomy in medical ethics that the current edition (published in 2008) replaces a document called *Seeking Patients' Consent* (General Medical Council 1998).

¹⁰⁸ Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self* (Oxford University Press 1986) 52.

¹⁰⁹ *The Moral Limits of the Criminal Law: Harm to Self* (Oxford University Press 1986).

the interests involved if consent was effective where, for example, a person was forced to give explicit consent to sexual intercourse whilst held at knifepoint, nor if a surgeon sought to amputate both of a patient's legs after getting written consent to 'minor surgery'. When it comes to capacity, there are also understandable concerns around allowing children to consent, or those who are, for whatever reason, mentally unfit to do so.

6.3.2 Sports violence, the mediating effect of the playing culture, and a different conception of consent

Wherever consent is used in the criminal law, it is at root concerned with policy issues around the limits of permissible behaviour, balancing the demands of autonomy and culpability, and the relative weight to be afforded to attitudinal and expressive consent. In theory at least, the articulation of a doctrinal regime based upon consent to sports violence must therefore accommodate the same issues as those raised by consent in sexual offences or to medical treatment, and the conditions of consent outlined by Feinberg. Indeed, before the coming into force of the Sexual Offences Act 2003, it had been held that consent had the same meaning for sexual and for non-sexual offences against the person.¹¹⁰ In reality, however, these questions rarely arise in the context of sports, and the consent upon which the courts rely when it comes to sports violence is therefore notably different in terms of the way in which it is framed, and the concerns it manifests. The function of consent to sports violence is inevitably tied to the rules and practice of the particular sport – to the playing culture examined in Chapter 3 – and this has profound implications for the way it is understood and

¹¹⁰ *R v Richardson* [1999] QB 444 (CA).

interpreted. For instance, questions of capacity, freedom and choice are rarely in the foreground in the way that they would be if the context were consent to sex or medical treatment.

In its 1995 Consultation Paper *Consent in the Criminal Law*, the Law Commission dedicated a short but instructive section to ‘School Games and Compulsory Sports Activities’. The Commission highlighted the fact that ‘voluntary or freely given’ consent is not necessarily present in this context and pointed to the “‘persuasive element” involved in school sports and the possibility that a teacher, or responsible adult, may encourage a timid child to take part in an activity in which there is an element of risk “but which is done by other children in the normal course of events””.¹¹¹

In a similar vein, it has long been recognised that boxing can lead to brain injury,¹¹² and the Commission suggested that the sort of neurological damage suffered by boxers may diminish their capacity to consent.¹¹³ Gendall points to the practical realities of the consent given by boxers, stating that ‘[i]ssues such as the age, competence and mental capacity of the consenting participants become relevant to the question of whether consent was freely given’. He notes that ‘[w]ith boxers who suffer from diminished capacity induced by “punch-drunk” syndrome, issues of consent become problematic’, and points to the unequal and exploitative relationship that exists between boxers, their agents and fight promoters, noting that the pressure

¹¹¹ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para 12.62.

¹¹² HAS Martland, ‘Punch Drunk’ (1928) 19 *Journal of the American Medical Association* 1103. Recent neuropsychiatric research indicates that the repeated head trauma suffered by boxers decreases the volume of certain brain structures, and leads to an increase in impulsive behaviours (Sarah J Banks and others, ‘Impulsiveness in Professional Fighters’ (2014) 26 *The Journal of Neuropsychiatry and Clinical Neurosciences* 44).

¹¹³ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para 12.32.

that comes to bear on boxers 'to accept fights is such that a boxer's agreement is on occasions achieved through something approaching undue influence'.¹¹⁴

This is a point picked up by Anderson, who alludes to the deprived socio-economic background and lack of education of the overwhelming majority of boxers.¹¹⁵ Anderson draws an analogy with the disadvantaged citizenry of Ancient Rome who voluntarily became gladiators. This involved relinquishing their free, legal status in the hope of 'fame and glory', effectively coerced by socio-economic pressures in a way that was not entirely consonant with free choice.¹¹⁶ A similar point is made by Ritchie and Ritchie, when they describe '[y]oung men, usually from minority and disadvantaged backgrounds', who 'become lured into a gradual process of physical self-sacrifice, the motive being the lure of celebrity-status, the big purse, and the adulation of a small but vocal public'.¹¹⁷ Williams writes of an analogous phenomenon encountered historically in relation to duelling, noting that 'the consent of the victim was often given with great secret unwillingness, solely because of the fear of being branded a coward; indeed, the fear of public opinion might motivate the challenge to fight as well as the acceptance of it'.¹¹⁸

Gendall also looks to the practical reality of consent in the context of individuals taking part in a particular contest, noting the effective irrevocability of consent once it is underway: 'Once consent is given and a fight commences, the question arises as to whether there is ever any real possibility of a participant

¹¹⁴ David Gendall, 'The Sport of Boxing: Freedom versus Social Constraint' (1997) 5 Waikato Law Review 71, 79.

¹¹⁵ Jack Anderson, *The Legality of Boxing: A Punch-Drunk Love?* (Birkbeck Law Press 2007) 140

¹¹⁶ Jack Anderson, *The Legality of Boxing: A Punch-Drunk Love?* (Birkbeck Law Press 2007) 7-8.

¹¹⁷ Jane Ritchie and James Ritchie, *Violence in New Zealand* (Huia Publishers 1993) 101.

¹¹⁸ JW Cecil Turner, *Russell on Crimes* (Stevens & Sons Ltd 1958).

withdrawing the agreement to fight’, noting that, ‘[a]lthough a boxer could technically “take a dive” to end the fight, this is regarded as cowardice and is simply not an option for most fighters’.¹¹⁹ Gendall continues:

In an inherently dangerous sport like boxing, *for consent to be truly free and effective, there may be a need for consent to be renewed by each participant at the end of each round, or after each major blow.* The supporters of boxing would, no doubt, scoff at the impracticality of such a requirement. Also, the pressure on the participants to renew their consent from their paying audience, media, promoters and organisers would be immense. This simply points to the illusory nature of consent in the boxing context once the participants step into the ring. The health, safety and even the life of a fighter depend often on the decisions of others – the referee, trainer, promoter and even to some extent the paying public.¹²⁰

These are problematic areas for a fully articulated law of consent when it comes to sports violence, but they are concerns that are conspicuously absent in the appellate court judgments, and have not garnered widespread attention.

This is not to say that the majority of those who participate in sports do not do so through free choice, and fully aware of the nature of the activity and the potential risks that come with taking part, but such enquiries are marginal concerns when it

¹¹⁹ David Gendall, ‘The Sport of Boxing: Freedom versus Social Constraint’ (1997) 5 Waikato Law Review 71, 80.

¹²⁰ David Gendall, ‘The Sport of Boxing: Freedom versus Social Constraint’ (1997) 5 Waikato Law Review 71, 80 (emphasis added).

comes to consent to sports violence. They are not alluded to in *Brown*,¹²¹ nor in *Barnes*,¹²² and this is explained largely by the existence and general awareness of the rules and practices of sport; the playing culture explored in Chapter 3, and described in *Barnes* as 'legitimate sport'. The existence of this objective, external (to the players) standard means that an individualised conception of consent is unnecessary.

6.4 Imputed Consent as a Legal Fiction

The preceding passages have pointed to some of the differences between the priorities when it comes to the operation of consent across different contexts in which it might be pertinent to criminal liability. A key differentiator in the case of sports violence is the existence of the rules and playing culture of sport as distinguishing the quality of the consent that might be said to exist from that which is important in the case of consent as it operates in relation to sexual offences or medical treatment.

It is, of course, possible to argue that the existence of the rules and the expected standard of behaviour that is generated by them and the broader accepted practices, do not really differentiate sport from other contexts in any meaningful way. As was noted above, implied consent in sexual relations can subsist in any number of behavioural cues, which, when they are in issue, must be interpreted by a court. In this respect, jurors will make recourse to their experience and understanding of the facts and contentions with which they are faced, and the evidence that exists to support them. Thus, judgement of the behaviour of those involved in sexual conduct or the provision of medical treatment could be said to be tied to societal expectations

¹²¹ *R v Brown* [1994] 1 AC 212 (HL),

¹²² *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910.

in a way that resembles the judgement as to what amounts to 'legitimate sport'. For their part, surgeons and other medical practitioners are subject to the expectations of their role, and protocols exist in respect of the giving of consent, to which they are expected to conform.¹²³ Informed by these, a jury would come to a judgement born of their collective understanding of the world, and again parallels can be drawn with the de-individualised conception of 'legitimate sport'.

There is undoubtedly some practical truth to this view, but it amounts to a simple charge of the impossibility of objective and detached judgement, and it can be claimed of any offence; of the gap between the theoretical offence requirements and the means by which conclusions are reached by way of a complex interplay between the available evidence, the inferences it permits, and the jurors' individual and collective life experience in relation to it.

The qualitative difference between the individualised conceptions of consent that pertain when considering sexual offences or medical treatment and consent as it applies to sports violence lies in the normative role of the 'legitimate sport' standard, and the way in which it represents and defines the multilateral consent of the participants in sports. In the context of sexual relations and medicine, the rule frameworks around consent aim to establish attitudinal and/or expressive consent by reference to an individualised conception of consent, and the criminal law therefore emphasises factors such as coercion or deception which would undermine its effectiveness. The jury's recourse to its own collective experience of the world as applied to the conflicting and imperfect accounts of events is inevitable, but stands as

¹²³ *Consent: Patients and Doctors Making Decisions Together* (General Medical Council, 2008). The British Medical Association (BMA) provides a 'consent tool-kit', available at: <http://bma.org.uk/practical-support-at-work/ethics/consent-tool-kit>.

an obstacle to a more empathic understanding of events as they were experienced by those involved. In sports, however, the consent of the participants is determined according to whether it comprised 'legitimate sport', which renders a subjective view of attitudinal or expressive consent redundant. The following excerpt from *Cey* illustrates this:

[C]onduct which is impliedly consented to can vary, for example, from setting to setting, league to league, age to age, and so on... 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.¹²⁴

The court in *Cey* therefore advocates an approach that yields an objective and multilateral measure of the participants' consent, and which is arrived at by considering all of the relevant circumstances in a given case. Although it ostensibly sets out to describe the participants' consent, and is framed accordingly, what is striking about this characterisation is that there is no reference to the individual

¹²⁴ *R v Cey* (1989) 48 CCC (3d) 480, 490 (Gerwing JA).

beliefs or attitudes of the parties, which are subordinated to the circumstances of the sport; to the de-individualised standard of 'legitimate sport'.

While *Cey* was a case concerning ice hockey, it is clear that the pertinent points raised above apply equally to other sports. Gerwing JA went on to say:

It is clear that in agreeing to play the game, a hockey player consents to some forms of intentional bodily contact and to the risk of injury therefrom. Those forms sanctioned by the rules are the clearest example. Other forms, denounced by the rules but falling within the accepted standards by which the game is played, may also come within the scope of consent.¹²⁵

In this excerpt, Gerwing JA frames consent by way of a depersonalised reference to 'a hockey player', and the significance of consent is reduced to a question of voluntary participation, extrapolated from his 'agreeing to play the game'.

As such, the consent that is attributed to a hockey player, or to those who participate in soccer, rugby or boxing, can be described as a fiction. It does not need to rely upon a construction of consent that amounts to anything more than participation, since consent is imputed to a player on the basis of this participation. In other words, those taking part will be treated 'as if' they had consented to that which is deemed legitimate. This effective 'de-individualisation' sets imputed consent apart from most other instances of consent. For Westen, it is evident that the operation of imputed consent can be seen as a legal fiction: 'To be sure, to impute ... consent is to

¹²⁵ *R v Cey* (1989) 48 CCC (3d) 480, 490 (Gerwing JA).

create a legal fiction – a fiction that S actually acquiesced to x in mind or expression under appropriate conditions of competence, knowledge, freedom, and motivation'.¹²⁶

6.5 Conclusion

In addressing the application of consent, the Court of Appeal of Saskatchewan has made an important point in relation to sports violence; in *Cey*,¹²⁷ Gerwing JA observed: 'ordinarily consent, being a state of mind, is a wholly subjective matter to be determined accordingly'. However, in light of the particular problems caused by implied consent in sports (the case related to ice hockey), this could not apply, since 'there cannot be as many different consents as there are players on the ice, and so the scope of the implied consent, having to be uniform, must be determined by reference to objective criteria'.¹²⁸

Gerwing JA's suggestion that it is ordinarily determined wholly subjectively is an over-simplification of the complexities of consent in the criminal law. However, her adroit observation that the construction of consent in sports involves a uniform application of implied consent that 'must be determined according to objective criteria' points to something unique about sports violence. Whereas it may be true that 'there cannot be as many different consents as there are players' on the field or in the ring, it must be the case that there are as many different consents as there are sexual encounters, and as many different consents as there are medical procedures,

¹²⁶ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004) 271.

¹²⁷ *R v Cey* (1989) 48 CCC (3d) 480.

¹²⁸ *R v Cey* (1989) 48 CCC (3d) 480, 490 (Gerwing JA).

and the criminal law recognises this in its treatment of consent in these contexts. The utility of consent as a doctrinal mechanism depends upon the possibility of its individualisation, and this is the focus of the enquiry when it comes to the operation of consent in sex and in medical treatment. That is not to say that the issues raised by sex and medical treatment are in themselves straightforward; it is arguable that, in each, the operation of consent is *sui generis*.

The relatively sophisticated and context-sensitive frameworks that have developed in relation to sexual consent and consent to medical treatment demonstrate that there is no unified approach to consent, due to the very different interests involved in different contexts,¹²⁹ but their commonalities also serve at once to highlight the absence of such thinking in relation to consent in a sporting context. Here, the implied consent that is taken to exist on the part of the participants is different from that which exists when holding out an arm for an injection. It is submission not to a single act, but to a rule system, which stands to be judged according to the legal standard of 'legitimate sport'. In effect, the existence of this standard precludes the necessity and relevance of questions of individual (attitudinal or expressive) consent, beyond establishing that the player was 'agreeing to play the game', which is unlikely to be in issue. In sport, the consent of the participants is examined through the prism of the rules and practice of a sport, from which are derived the sporting standard of legitimacy that comprises the playing culture, and

¹²⁹ Cf Catherine Elliot and Claire de Than, 'A Case for Rational Reconstruction of Consent in Criminal Law' (2007) 70 *Modern Law Review* 225. See: Ben Livings, 'A Different Ball Game - Why the Nature of Consent in Contact Sports Undermines a Unitary Approach' (2007) 71 *Journal of Criminal Law* 534. Although many of my views on consent have developed somewhat since the publication of this piece, I maintain the central thesis, which is that consent cannot be unified into one universal doctrine for application across the whole of the criminal law.

the legal standard of 'legitimate sport'.

To assert that imputed consent to sports violence is a fiction is not to say that the participants in a sport such as boxing, rugby or soccer are not cognisant, and accepting, of the risks involved. As noted in Chapters 2 and 3 of this thesis, these sports have a long history. Their rules are publicly disseminated and well known, and medical and scientific research has been carried out into the risks they pose, which has informed both developments within the sport and public understanding of the risks they entail. It is reasonable to infer that the participants are well-informed as to the potential repercussions of participation, and in the majority of cases to take voluntary participation as amounting to an acceptance of these risks. However, since this involves submission to the usual practices of the game, and thus to any conduct and attendant injury that falls within the ambit of this, it is perhaps more appropriate to think of the lawfulness of the sport as shaping directly the lawfulness of the violence it permits. This raises the question of why, in light of the paramount considerations of the rules and practice of sport, and of an objectively defined standard of 'legitimate sport', consent continues to exert such a centripetal force on the jurisprudence. The reasons for maintaining sports violence within the paradigm of consent, and the extent to which the implied consent of the participants can be disaggregated from the question of lawfulness, are considered in the following chapter.

Chapter 7

Why the Fiction? Rationalising the Law

7.1 Introduction

Over the course of the preceding two chapters, I have presented a critical analysis of the orthodox view of the criminal law of sports violence. This view, I have argued, is based upon a fiction in two respects. Firstly, following Norrie, it amounts to a ‘practical fiction’ structured around the offence/defence distinction,¹ which maintains that those who cause injury during the course of sports participation are (somewhat paradoxically) committing *prima facie* offences, which are rendered lawful by the application of the injured party’s consent, and that this consent is considered as a separate defence element. Secondly, the finding of consent itself also amounts to a more particular fiction, in that it is imputed to the participants irrespective of empirical considerations of attitudinal or expressive consent, based upon their (usually voluntary) participation. A salient feature of this doctrinal arrangement is the overly broad applicability of the pertinent offences, when applied to sports and to sports violence. To return to the analytical device that was used in Chapter 4, the output wrong captured by the offences in this context is far broader than the input wrong it is intended to capture; consent is used to ameliorate this, and provides a mechanism by which liability is only ascribed to those who warrant it.

In this chapter, I seek to account for the existence of these fictions in relation to sports violence in the criminal law; to ask why they are used, and whether there

¹ Alan Norrie, *Crime, Reason and History* (3rd edn, Cambridge University Press 2014).

might be better doctrinal means by which to determine liability. In order to facilitate this, I shall present three alternative means by which liability could be attributed.

The first of these draws on the work of the Law Commission, which looked at the role of consent across two consultations carried out in the mid-1990s.² Central to the Commission's work in relation to sports violence was the idea that liability should best be considered in terms of the characteristics of the defendant's conduct, rather than by reference to the purported victim's consent; consent, the Commission suggests, is simply one of the conditions to take into account when considering this. The Commission proposed two means by which this could be achieved: by accessing the reasonableness aspect of recklessness explored in Chapter 4; or, alternatively, by implementing a category of 'recognised sport', the usual conduct of which would not attract criminal liability.

Secondly, I look to alternative constructions of intention, viewed either according to the doctrine of double effect, or more straightforwardly and intuitively as a thickened, morally substantive appraisal of intention. If sport comprises a 'lawful activity', the participants' intentions can be seen as lawful, in a manner analogous to the House of Lords' treatment of the '*bona fide* exercise of a doctor of his clinical judgement' in *Gillick*.³ As McCutcheon writes: 'If a sport is of such intrinsic worth as to merit legal recognition as being "properly constituted" it must follow that its normal

² Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994); Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995).

³ *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112, 190. It should be noted that, in *Gillick*, the court did not refer to double effect.

attributes, incidents and inherent spirit attract equal legal recognition',⁴ and so too presumably the legitimate (in a sporting sense) conduct of its participants.

The third alternative to which I turn is based upon Goff LJ's judgment in *Collins v Wilcock*,⁵ in which he proposed that what has traditionally been seen as a question of implied consent should, in some circumstances, be reframed as a straightforward question of the acceptability of the conduct that is the subject of the purported consent, assessed according to the particular circumstances in which it arises. This was considered by Goff LJ to be a 'more realistic' and 'more accurate' approach than the somewhat contrived use of implied consent.⁶

In presenting these alternatives, I do not mean to suggest an exhaustive account of the alternative routes to the orthodox view that the criminal law could take; the three I have chosen to explore have a number of salient advantages in terms of the aims I set out to achieve. Firstly, each has a basis in existing jurisprudence; secondly, and most importantly, the logic by which they proceed is tacitly acknowledged by the Court of Appeal in *Barnes*,⁷ and thus might be said to underpin the substance, if not the form, of judgements made in relation to the appropriateness of the imposition of criminal liability for sports violence.

After consideration of these alternative rationales by which to describe the lawfulness of sports violence, I return to the fictional representation that characterises the orthodox view, and ask what purpose it serves. I suggest that, as a fiction, its use requires justification, and that this might lie in its dispositive value; that is, its ability

⁴ J Paul McCutcheon, 'Sports Violence, Consent and the Criminal Law' (1994) 45 Northern Ireland Legal Quarterly 267, 274.

⁵ [1984] 3 All ER 374.

⁶ *Collins v Wilcock* [1984] 1 WLR 1172 (DC), 1172 (Goff LJ).

⁷ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910.

better to enunciate the applicable principles, and thus facilitate decisions in individual cases. Alternatively, it serves as a means by which to structure the criminal law so as to cast sports violence as exceptional, for reasons that I explain.

As I noted in Chapter 1, the importance of *Barnes* can be overstated; the judgment necessarily followed the precedent set by the House of Lords in *Brown*, and much of what was said can be considered *obiter dicta*. Nevertheless, the importance of the case in relation to the criminal law of sports violence has been accepted by many,⁸ and it certainly serves as a demonstration of the way in which the law stated in *Brown* can be applied to sports violence. Since it is central to the arguments presented herein, I begin this chapter with an account of *Barnes*.⁹

7.2 R v Barnes

The events that gave rise to the litigation in *Barnes* occurred during a game of soccer, and were very similar to those of *Chapman*, laid out in Chapter 1 of this thesis.¹⁰ They were described as follows by the Court of Appeal:

When the ball was passed to the victim, who was a striker, he, as he admitted, went to the corner flag simply to waste time. The appellant attempted to

⁸ Andrew Ashworth, *Principles of Criminal Law* (5th edn, Oxford University Press 2006) 321; see also Mike Molan, *Cases and Materials on Criminal Law* (3rd edn, Cavendish 2005) 257; Michael Allen, *Textbook on Criminal Law* (9th edn, Oxford University Press 2007) 361-62; Russell Heaton and Claire de Than, *Criminal Law* (3rd edn, Oxford University Press 2011) 106; Catherine Elliott and Frances Quinn, *Criminal Law* (8th edn, Oxford University Press 2010) 381.

⁹ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910.

¹⁰ *R v Chapman* Crown Court (Warwick), 3 March 2010. Given the success of Mark Barnes's appeal against the backdrop of such similar facts, Pendlebury considers it 'astounding that Chapman pleaded guilty to the offence' (Adam Pendlebury, 'The Regulation of on-the-ball Offences: Challenges in Court' 10 Entertainment and Sports Law Journal <<http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume10/pendlebury/>> accessed 4 May 2015).

tackle him and in doing so committed a foul. The referee awarded a free kick to Minster. Heated words were exchanged between the appellant and the victim and the appellant was told to 'grow up' by the referee. About ten minutes later, the ball was received by the victim approximately six yards from the opposition penalty area. He ran with the ball and, when he was about seven yards from the goal mouth, kicked the ball with his left foot into the net. *After he kicked the ball, the appellant tackled him from behind, making contact with his right ankle. The victim said he heard a snapping noise and fell to the ground. The appellant was also on the ground but stood up and said words to the victim to the effect: 'Have that'. The victim suffered a serious injury to his right ankle and right fibula.*¹¹

Mark Barnes had been found guilty at first instance at Canterbury Crown Court of unlawfully and maliciously inflicting grievous bodily harm contrary to Section 20 of the OAPA 1861; the tackle described above was characterised by the prosecution as 'late, unnecessary, reckless and high up the legs'.¹² The grounds for the appeal were summarised by the Court of Appeal as amounting to 'the contention that the trial judge failed, in his summing-up and in response to a question asked by the jury after they had retired, adequately to explain to the jury the facts that needed to be established before the appellant could be convicted'.¹³

In giving judgment in the appeal, Lord Woolf CJ noted his surprise that 'there is so little authoritative guidance from appellate courts as to the legal position in this

¹¹ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 915-16.

¹² *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 912 [emphasis added].

¹³ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 912.

situation’, and reasoned that the ‘explanation for this may be the fact that, until recently, prosecutions in these circumstances were very rare’. He went on to note that the number of ‘cases of this type coming before the courts’ had been subject to an increase, and that there was a concomitant ‘need for guidance’.¹⁴

The brevity of the *Barnes* judgment precluded detailed consideration of the structure of the criminal law, but, following *Brown*, the Court of Appeal ostensibly held to the orthodox view presented over the preceding two chapters. The court therefore looked to establish a *prima facie* offence before looking to the matter of consent. That the injury sustained by the victim in *Barnes* could be considered as grievous bodily harm was not in question, nor was there any problem in establishing causation. In order to complete the offence, therefore, it was simply necessary to satisfy the *mens rea* of s 20; Lord Woolf stated that, in the course of a game of soccer, ‘anyone going to tackle another player in possession of the ball can be expected to have the necessary malicious intent according to this approach, and in the great majority of criminal cases, the existence of a malicious intent is not likely to be in issue’.¹⁵ In keeping with the orthodox view, Lord Woolf went on to cite the role of consent as holding the key to the lawfulness or unlawfulness of the conduct, ostensibly considering it in isolation from the offence elements:¹⁶

¹⁴ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 912. In a case which bears a striking resemblance to *Barnes*, Sunday League footballer Stephen Allison was sentenced in February 2000 at Cardiff Crown Court to a fine of £1,200 and 185 hours of community service (see: Jason Lamport, ‘Player in Dock for Tackle on PC; Stephen Pays a £1,200 Penalty’ *The Mirror* (London, 11 February 2000) 2).

¹⁵ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 915. As noted in chapter 4, this may differ where the *mens rea* was in dispute, where the authority is s 8 of the Criminal Justice Act 1967.

¹⁶ Although, in a nod to the constituent element theory, Lord Woolf notes that the presence of consent would preclude the ‘unlawfulness’ demanded by ss 18 and 20.

When no bodily harm is caused, the consent of the victim to what happened is always a defence to a charge. Where at least bodily harm is caused, consent is generally irrelevant because it has been long established by our courts that, exceptional situations apart, as a matter of law a person cannot consent to having bodily harm inflicted upon him. To this general rule, there are obvious exceptions ... [such as] ... physical injury in the course of contact sports such as football or boxing.¹⁷

In *Barnes*, the Court of Appeal attempted to substantiate the quality of consent as it applies to soccer; Lord Woolf CJ stated: 'in a sport in which bodily contact is a commonplace part of the game, the players consent to such contact even if, through unfortunate accident, injury, perhaps of a serious nature, may result'.¹⁸ Therefore, consent was to be found where the injury occurred through the normal and expected commission of the sport in question. Expanding on this, he continued:

The fact that the participants in contact sports had consented implicitly to take part assisted in identifying the limits of the defence; conduct which had gone beyond what a player might reasonably be regarded as having accepted by taking part was not covered by the defence, and what was accepted in one sport would not necessarily be covered by the defence in another.¹⁹

¹⁷ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 913.

¹⁸ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 914.

¹⁹ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 914.

On the surface, therefore, the Court of Appeal sustains the fiction of consent, and uses what a player might reasonably have accepted by taking part as a metric by which to determine its quality and extent. Underlying this, however, is the following: 'A criminal prosecution should be reserved for those situations where the conduct is sufficiently grave to be properly categorised as criminal'.²⁰

7.3 Recklessness and the Unexceptional Lawfulness of Sports Violence

In the decade between *Brown* and *Barnes*, the subject of consensual harm and the criminal law excited considerable comment. The *Brown* judgment has proven controversial, and the debate carried out in the wake of the House of Lords' judgment was wide-ranging and continues to reverberate.²¹ Of particular note is the work of the Law Commission, for whom the case coincided with ongoing work examining offences against the person.²² Following *Brown*, the Commission published two Consultation Papers²³ examining the role and function of consent within the criminal law, and making proposals for the development of the criminal law in the wake of the House of Lords' judgment.

7.3.1 The first round of proposals

In explaining the need for LCCP 134, the Commission asserted that, although the

²⁰ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 911-12 (Lord Woolf CJ).

²¹ The unsuccessful appellants in *Brown* subsequently brought their case before the European Court of Human Rights, again without success (*Laskey, Jaggard and Brown v UK* (1997) 24 EHRR 39).

²² Law Commission, *Legislating the Criminal Code: Offences against the Person and General Principles* (Law Com CP No 122, 1992); Law Commission, *Legislating the Criminal Code: Offences Against the Person and General Principles* (Law Com No 218, 1993).

²³ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) (hereafter referred to as 'LCCP 134'); Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) (hereafter referred to as 'LCCP 139').

majority speeches in *Brown* had 'confirmed the broad outlines of the law', there remained 'considerable disagreement about its basis, policy, detailed limits and possible future development'.²⁴ For the most part, the Commission followed the structure of the majority opinions in *Brown*,²⁵ as described in the preceding chapter, with consent forming a defence in a tripartite construction, and effectively endorsed the 'rule-plus-exceptions' approach taken by the House of Lords, going as far as to say that it was 'conceptually necessary'.²⁶

LCCP 134 was well-received in some respects; Ormerod wrote that '[t]he proposals are, generally, to be welcomed; not least the implicit overruling of *Brown*',²⁷ in proposing the extension of the general availability of consent to the degree of harm anticipated under s 47.²⁸ Beyond this, however, LCCP 134 was widely held to amount to little more than a case analysis of *Brown*, and criticism was directed at a perceived lack of rigour on the part of the Commission in formulating its recommendations.²⁹ Ormerod pointed to its 'superficiality',³⁰ stating: 'There are many issues which are not considered, and of those that are, there is often insufficient depth of discussion ... most crucially, there is no discussion of any underlying rationale in relation to

²⁴ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 1.5.

²⁵ *R v Brown* [1994] 1 AC 212 (HL).

²⁶ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 8.2. See: Stephen Shute, 'Second Law Commission Consultation Paper on Consent: (1) Something Old, Something New, Something Borrowed: Three Aspects of the Project' [1996] *Criminal Law Review* 684.

²⁷ David Ormerod, 'Consent and Offences Against the Person: Law Commission Consultation Paper No 134' (1994) 57 *Modern Law Review* 928, 928.

²⁸ See also: Roger Leng, 'Consent and Offences Against the Person: Law Commission Consultation Paper No 134' [1994] *Criminal Law Review* 480.

²⁹ For criticism of the Consultation Paper, see: David Ormerod, 'Consent and Offences Against the Person: Law Commission Consultation Paper No 134' (1994) 57 *Modern Law Review* 928; Roger Leng, 'Consent and Offences Against the Person: Law Commission Consultation Paper No 134' [1994] *Criminal Law Review* 480; Paul Roberts, 'The Philosophical Foundations of Consent in the Criminal Law' (1997) 17 *Oxford Journal of Legal Studies* 3.

³⁰ David Ormerod, 'Consent and Offences Against the Person: Law Commission Consultation Paper No 134' (1994) 57 *Modern Law Review* 928, 928.

consent'.³¹ In a similar vein, Leng criticised the lack of depth of critical thought demonstrated, and described the Commission's work as 'trapped by the concepts and categories of the past'.³²

Critics of LCCP 134 pointed out that it had failed to consider a number of matters that seemingly fell within its remit; one such exclusion was boxing.³³ When it came to sports violence, the Commission had come to the conclusion that the intentional infliction of harm involved in boxing was a 'specially protected case':³⁴

Our conclusion is that boxing, if it is to remain lawful, can only do so by the application of public policy considerations that are particular to that sport. Since that is a matter of pure policy, divorced from the more general considerations addressed in this Consultation Paper, we do not think that it would be helpful for us to add to the already formidable public debate on the issue.³⁵

The Commission therefore held that 'the intentional infliction of injury will always be criminal',³⁶ with the exception of boxing, which the Commission considered '(nearly)³⁷

³¹ David Ormerod, 'Consent and Offences Against the Person: Law Commission Consultation Paper No 134' (1994) 57 *Modern Law Review* 928, 940.

³² Roger Leng, 'Consent and Offences Against the Person: Law Commission Consultation Paper No 134' [1994] *Criminal Law Review* 480, 480.

³³ David Ormerod, 'Consent and Offences Against the Person: Law Commission Consultation Paper No 134' (1994) 57 *Modern Law Review* 928; Roger Leng, 'Consent and Offences Against the Person: Law Commission Consultation Paper No 134' [1994] *Criminal Law Review* 480.

³⁴ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 42.3.

³⁵ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 2.9. The Commission also considered this to apply to other combat sports (para 10.23).

³⁶ Law Commission, *Consent in the Criminal Law* (Law Com CP No 134, 1994) para 45.1.

³⁷ The Commission referred to 'some forms of martial arts recently introduced into this country' as analogous to boxing, and considered that the lawfulness of these was to be decided by Parliament (Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 10.23).

unique in making the intentional infliction of serious injury not only something that is permitted within the rules, but in reality the essence of the sport',³⁸ and concentrated instead on the non-intentional, reckless causing of injury during sports.³⁹ Here, the Commission proposed an approach that I suggest is radical in its simplicity, and particularly so in light of subsequent developments, such as the *Barnes* judgment. This radical aspect takes its cue from Lord Mustill, whose dissenting judgment in *Brown* evinced scepticism as to the dispositive and justificatory power of consent relied upon by the majority.⁴⁰

In LCCP 134, the Commission emphasised its agreement with the approach of Lord Mustill, which it considered to be one that:

stresses that the *actual consent of the victim is not the dispositive consideration*, but rather that the law will formulate a series of rules as to the permitted conduct of the inflicter of injury. The effect of those rules may be expressed as representing the limits of the deemed consent of the injured party, but in truth they are *objective criteria imposed by the courts to limit the field of intervention of the criminal law*.⁴¹

The Commission pointed to the fact that '[i]n most games there is *some* risk of injury; and in "contact sports", conspicuously in all codes of football, risk that is more than

³⁸ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 10.19.

³⁹ As noted in Chapter 3, this includes ss 20 and 47 of the OAPA 1861, and common assault.

⁴⁰ *R v Brown* [1994] 1 AC 212 (HL), 259.

⁴¹ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 10.9 (emphasis added).

merely negligible'.⁴² It went on to emphasise the voluntariness of participation and the 'generally beneficial' nature of 'organised sports', in which 'it is reasonable for the players to run risks of the degree normally inherent in those sports'.⁴³

The Commission advocated a straightforward and inherently flexible approach to sports violence founded in the objective, 'unreasonableness' limb of recklessness discussed in Chapter 4. The approach is apparent in this excerpt:

[A]pplying the normal approach to recklessness, based on unreasonable risk-taking, and without formulating any special exception for sports and games, it seems clear that even non-intentional aggression or dangerousness, which one would expect to be outside the rules laid down for the playing of the game, can lead to criminal liability. That is a conclusion not based in any real sense on the consent of the victim, but on a more general assessment of what, in those particular circumstances, constitutes reasonable conduct. Like all questions of reasonableness, its resolution is essentially a jury question.⁴⁴

Thus, the Commission emphasises the unexceptional nature of the criminal law's approach to sports violence, asserting that it is possible to capture it within the existing offence categories, with no need for the application of an exemption. The reasonableness of the risk taken by a participant who causes injury would be assessed by reference to the activity, which meant that '[g]ratuitously aggressive and dangerous conduct ... may well be characterised as the unreasonable taking of a risk,

⁴² Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 10.16.

⁴³ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 10.16.

⁴⁴ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 10.17

even within the extended limits of normally acceptable behaviour that apply when playing a contact sport'.⁴⁵ Thus, the 'normal general test' of recklessness in this situation would be: 'whether the defendant took a risk of injury of which he was aware, and in the circumstances it was unreasonable for him to take that risk'.⁴⁶ Holding that this was likely to proscribe injuries 'inflicted outside the course of play', the Commission went on to elucidate its principal approach:

Where injury is inflicted in the course of play, a party will be reckless if he takes an unreasonable risk, bearing in mind the requirements of the game, the general expectations of the persons playing it, and the ease with which he could have achieved his aim within the game by other means'.⁴⁷

The Commission noted that the rules would be 'persuasive',⁴⁸ and went on to consider other factors that would have a bearing on the reasonableness of the player's conduct. These included 'the experience of the player, ... his understanding of the implications of his conduct, and ... the need for him to play in a certain way'.⁴⁹

The inherent flexibility of the approach taken here militated against the strict definition of sports; the Commission stated that 'a *definition* of sport for this purpose seems difficult or, more likely, impossible to achieve; and too restrictive an approach to what will count as a sport, or as participation in sport, may unreasonably extend

⁴⁵ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 10.16

⁴⁶ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 46.1.

⁴⁷ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 46.1.

⁴⁸ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 46.1.

⁴⁹ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 46.2.

the reach of the criminal law'.⁵⁰ For the purposes of implementing its proposals, the Commission considered that 'in practice the courts will [not] have much difficulty in identifying what is and what is not a sport', going on to give some limited guidance insofar as it was 'an organised activity undertaken for purposes of recreation'.⁵¹

In emphasising the inherent flexibility of the test of reasonableness, it was recommended that 'a particular sport does not lose the benefit of this exemption just because it is being played by professionals for whom it is a business or source of reward'. Similarly, the Commission noted the necessity of allowing those without experience to gain it ('the public interest in people learning to play sport'), and observed that 'inexperienced players may be more at risk of injuring others ... and thus of the reasonableness of some risk being taken when they are learning'.⁵² Similarly, 'if the players are genuinely and recognisably engaging in a particular game, they should not lose the benefit of the exemption just because they are playing in an informal setting, or not following the rules in every detail: for instance, in a scratch game of football in a local park or, even, in the street'. The Commission was of the view that this would cater to the 'extremes of the spectrum of sporting activity', allowing the 'circumstances of play [to] affect the obligations of the players under the rule of reasonable risk-taking'.⁵³

A great advantage of these proposals therefore lies in their applicability to a wide range of sports and contexts, operating under a loose definition of sport, and accommodating the consent of the players as part of a holistic appraisal of the

⁵⁰ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 42.2.

⁵¹ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 44.2.

⁵² Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 46.2.

⁵³ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 44.4.

reasonableness of the conduct in the particular circumstances.⁵⁴ In this, Ormerod welcomed the approach taken, considering it to 'strike a good balance in protecting all players', and commending the intention to create a 'straightforward workable test, involving concepts with which the courts are already familiar'.⁵⁵ Ormerod did allude to a potential difficulty: 'that in the heat of the moment in a sports match, it might be asking too much of a player to expect rational, reasonable assessment of risk'. However, as this would be a matter for the jury, he considered that it would 'probably not give rise to much practical difficulty'.⁵⁶

Leng, on the other hand, points to the suggestions of the Commission as 'entirely misconceived':

[A]ctual bodily harm is criminal only when caused deliberately or recklessly. Recklessness is constituted by unreasonable risk-taking. A much higher level of risk would be reasonable between voluntary participants in sport than elsewhere. Since the proposed special provision for sports would not cover the deliberate infliction of harm or unreasonable risk-taking, it is not clear what function the provision would perform. Indeed, it might serve to confuse by suggesting that factors such as whether games are 'organised' or 'recognised',

⁵⁴ At two points, LCCP 134 accords consent a more central role: in relation to children, it effectively endorses an approach based on *Gillick* competence for those under the age of 16, which the Commission considered 'would not ... interfere with the solution proposed ... for the playing of games in schools' (Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 30.4-30.6); and in a slightly bizarre allusion to the dangers of fast-bowling in cricket, which appears entirely out of place alongside the rest of the proposals, and is criticised in LCCP 139 (Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para 12.29.

⁵⁵ David Ormerod, 'Consent and Offences Against the Person: Law Commission Consultation Paper No 134' (1994) 57 *Modern Law Review* 928, 934.

⁵⁶ David Ormerod, 'Consent and Offences Against the Person: Law Commission Consultation Paper No 134' (1994) 57 *Modern Law Review* 928, 934.

are in some way relevant to criminal liability.⁵⁷

Thus, Leng criticises the Commission's approach in two respects. The first criticism is an assertion of otiosity, insofar as he asserts that recklessness is already 'constituted by unreasonable risk-taking', and thus the Commission's proposals appeared to add little in this respect. This is a pertinent and well-observed criticism, notwithstanding any uncertainty over the status of the 'unreasonable' limb of recklessness, and its apparent omission by Lord Woolf in *Barnes*.⁵⁸ Leng's second criticism is more interesting, and points to a paradox: if the Commission is stating that sports violence is subject to the usual rules of recklessness, why does it occasionally refer to a 'sports exemption'? And why is the term 'recognised sport' a relevant consideration?⁵⁹ In other words, the Commission, despite recommending the *unexceptional* treatment of sport under the criminal law, frames its analysis according to *exceptional* treatment, and apparently accords sport a special standing.

In part, the approach of the Commission can be seen simply as clarification, offering illustrations of, and guidance as to, how reasonableness might be interpreted in cases of sports violence. It is likely also to have been designed to assuage the fears of those who might read into the proposals an overly permissive attitude to violence in general. This would explain the tentative definition, and deployment of the term 'recognised sport'; the Commission averted to the dangers where 'any informal group

⁵⁷ Roger Leng, 'Consent and Offences Against the Person: Law Commission Consultation Paper No 134' [1994] *Criminal Law Review* 480, 487.

⁵⁸ See discussion in Chapter 4.

⁵⁹ For instance, the Commission states: 'Any such activity that is reasonably to be regarded as ancillary to the playing of a recognised game should be included in the exemption' (Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 44.5).

of people can invent their own entertainment *ad hoc*, and then claim simply to have been playing a game', pointing to cases like *Aitken*,⁶⁰ *Attorney-General's Reference (No 6 of 1980)*⁶¹ and *Brown*⁶² as examples of behaviour that would not qualify for 'the sports and games exemption', and asserting that 'even if an activity is in form a "sport", that cannot be allowed to inhibit the criminal law from holding that the rules of that sport permit unreasonably dangerous conduct'. The Commission therefore sought to 'reinforce the attitude ... that sport is not an excuse or cloak for gratuitous violence'.⁶³

An attempt to address perceived deficiencies in the definition of 'lawful sport' would lead to significantly altered proposals when the Law Commission published LCCP 139 the following year, and a concomitant erosion of the appealing straightforwardness characteristic of LCCP 134 in relation to sports violence.

7.3.2 A second attempt – recourse to definition

From the point of view of the general criticisms outlined above, LCCP 139 was welcomed as an undoubted improvement on its predecessor, adopting a more expansive approach to the subject of consent in the criminal law, and giving more texture to the ideas discussed.⁶⁴ In an attempt to ameliorate the perceived deficiencies in LCCP 134, the Commission engaged a consultant to examine the

⁶⁰ *R v Aitken* [1992] 1 WLR 1006 (C-MAC).

⁶¹ [1981] QB 715 (CA).

⁶² *R v Brown* (1994) 1 AC 212 (HL).

⁶³ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 42.4.

⁶⁴ As Shute points out, the document stands at some 290 pages, 'four times as many as the first Consultation Paper' (Stephen Shute, 'Second Law Commission Consultation Paper on Consent: (1) Something Old, Something New, Something Borrowed: Three Aspects of the Project' [1996] Criminal Law Review 684, 684).

philosophical foundations of consent.⁶⁵ Roberts's contribution was published as an appendix to LCCP 139, and involved an examination of what he perceived to be the three most plausible philosophies from which to derive an appropriate response to consensual physical harm: liberalism, paternalism and legal moralism.⁶⁶ His work infuses much of the rest of LCCP 139, and its inclusion is symptomatic of an attempt on the part of the Commission to anchor its vision of consent within a more rounded and coherent theoretical framework.

When it came to sports violence, the central ethos of the proposals remained true to that of LCCP 134: the lawfulness of sports violence was to be construed in relation to the rules and practice of the sport in question, not by reference to the consent of the participants. The Commission acceded to demands from respondents for a more central role for consent⁶⁷ by emphasising it as a 'relevant factor',⁶⁸ but it nevertheless reaffirmed its view that '[t]hose who are playing a lawful sport in accordance with its rules are taking part in an activity which is deemed to be lawful, irrespective of consent'.⁶⁹ Far more fundamental to the difference in approach of LCCP 139 to sports violence was its accommodation of responses that had 'disclosed a need to define more precisely what is meant by the expression "lawful sport"'.⁷⁰

⁶⁵ Nottingham University-based legal academic Paul Roberts.

⁶⁶ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) Appendix C.

⁶⁷ A 'point repeatedly urged on [the Commission] by respondents' (Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para 12.22).

⁶⁸ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para 4.21. There is a note of exasperation detectable in the writing of the Commission on this point, as it understandably may have considered that the added detail was implicit in its earlier proposals.

⁶⁹ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para 12.69. This is at first sight a surprising conclusion, since it might be thought that any injury inflicted as a result of sports violence committed without the consent of the victim would inevitably be criminal, but it should perhaps be read as a statement of the lawfulness of sport, rather than a statement that the consensual nature of participation is irrelevant in this context.

⁷⁰ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para 13.1.

The problem of a satisfactory definition of sport around which to craft provisions in relation to sports violence is one to which I have alluded at several points throughout this thesis. The history of its approach to sports violence demonstrates an unwillingness on the part of the criminal law to be subject to definitions, and thus norms, that emanate from outside of itself, since, as McCutcheon notes, ‘the acceptability of violence is a matter of legal policy not of private regulation’.⁷¹ The longstanding nature of this concern is evident in the earlier discussion of *Coney*,⁷² where the court made no reference to the acceptability or authority of a particular form of boxing (as opposed to prizefighting), preferring a generic reference to ‘sport’ and ‘boxing with gloves in the ordinary way’;⁷³ concepts and standards that could be policed from within the criminal law itself.

The Commission had noted in LCCP 134 that it was probably ‘impossible to achieve’ a satisfactory definition,⁷⁴ and an acknowledgement of this had influenced and shaped its flexible approach. In LCCP 139, the Commission took a different direction, effectively accepting the exceptionality of sports, and positing *recognition* as an alternative in the place of the elusive *definition*. Recognition, and concomitant regulation, are therefore at the heart of LCCP 139’s proposals in relation to sport.⁷⁵

The Commission proposed that ‘lawful sport’ (a functional equivalent to the category of ‘lawful activities’ in *Brown*) should be synonymous with ‘recognised sport’, and suggested that recognition would come from accreditation by the UK Sports

⁷¹ J Paul McCutcheon, ‘Sports Violence, Consent and the Criminal Law’ (1994) 45 Northern Ireland Legal Quarterly 267, 273.

⁷² See discussion in Chapter 2, and the discussion of ‘private government’ in Chapter 8.

⁷³ *R v Coney* (1882) 8 QBD 534, 539 (Cave J).

⁷⁴ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 42.2.

⁷⁵ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) Part XIII.

Council,⁷⁶ which would ‘maintain 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’,⁷⁷ and in consultation with ‘such organisations as appear to it to have expert knowledge in relation to that activity’.⁷⁸

A primary driver for this approach appears to be the desire to accommodate boxing and other combat sports within the criminal law framework.⁷⁹ It meant that the governing bodies would have to satisfy the recognition body of the adequacy of their rules and disciplinary procedures, in order to ‘enjoy the benefit of a partial exemption from the ordinary rules of the criminal law’.⁸⁰ The Commission was of the view that this would have the effect of ensuring the safety of the participants and, if the governing bodies did not do what was required of them by the recognition body, ‘then in the last resort their status as a recognised “lawful sport”, with all that this involves, may be in jeopardy’.⁸¹

There are undoubtedly positive elements to the proposals contained in LCCP 139, insofar as they offer a clarity of approach in respect of those sports that are ‘recognised’. The public nature of the suggested recognition body removes the grounds for some of the concerns that have been expressed around the ‘privatisation’

⁷⁶ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) paras 12.47-12.50. This organisation was replaced in 1997 by two non-departmental governmental bodies: UK Sport (concerned with elite sport), and the national Sports Councils (concerned with ‘grassroots’ sport), the latter of which maintains a list of ‘recognised sports’ and governing bodies with which it works. This, however, is related to funding, and does not at present fulfil the function suggested by the Commission.

⁷⁷ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para 42.1.

⁷⁸ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para 42.2.

⁷⁹ These had merited extended consideration in their own right (Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) paras 12.32-12.50).

⁸⁰ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para 13.6.

⁸¹ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para 12.23.

of criminal law standards,⁸² and might be seen to open a forum for debate as to the types of sports that should qualify.⁸³ However, the instigation of a recognition body presents practical problems in terms of the requisite co-ordination of effort. It also involves drawing bright lines around those sports that were conferred with such recognition (effectively removing them to a large degree from control of the criminal law). Whilst this would bring a degree of certainty, the idea of a recognition scheme also entails a concomitant inflexibility when considered from the point of view of those more *ad hoc* variants of sport that were discussed in Chapter 3, and that were a concern for the Commission in LCCP 134. It is not clear, for example, how variants that did not conform to the official rules of a particular sport, such as sparring or informal iterations in a park or schoolyard, would be accommodated, or what status they would be accorded if they were not 'recognised'.

The Commission demonstrates some awareness of the implications of this inflexibility, but proposes little to address it. Under the heading 'Amateur Play and Practice', the Commission reiterates the broad applicability of its proposals, stating that '[b]eing paid to play, or playing in an informal setting, or practising for a sport, should not make it ineligible,⁸⁴ noting that the responses to the first consultation had indicated that 'these propositions tended to be taken for granted and there was no adverse comment on them'.⁸⁵ There is, however, no further comment from the Commission as to how such forms would interact with a system of recognition. The

⁸² J Paul McCutcheon, 'Sports Violence, Consent and the Criminal Law' (1994) 45 Northern Ireland Legal Quarterly 267.

⁸³ In *Brown*, it was not considered to be the role of the criminal courts to decide upon whether or not boxing, for example, should be legal.

⁸⁴ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para 12.51.

⁸⁵ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995), para 12.51.

Commission was also mindful of too strict an adherence to the rules of a given sport when devising the bounds of liability; as it states, ‘we do not wish a player to lose its protection, for example, merely because he or she happened to be offside on the football field’.⁸⁶

An apparent consequence of the move to a more defined and precise approach was the recommendation in LCCP 139 that the ‘horseplay’ exception be retained; a proposal that Ashworth considers ‘rather surprising’,⁸⁷ but that can easily be understood in light of the restrictive potential of a recognition scheme. The Commission only alludes obliquely to the connection, citing concerns expressed by the Crown Prosecution Service that, if it were to be abolished, ‘almost all levels of horseplay, including rough playground games, would become illegal and far too much discretion would be left in the hands of prosecutors’.⁸⁸

7.3.3 The influence of the Commission’s approach in *Barnes*

In *Barnes*, the Court of Appeal acknowledged the work of the Law Commission, although its acceptance of ‘the view of the Commission’ is limited to quoting two paragraphs, which are themselves only starting points for the Commission’s discussion, and hardly reflective of the work carried out in LCCP 134 and LCCP 139.⁸⁹ The Court of Appeal ostensibly aligns itself with the orthodox view presented in the foregoing chapters. As discussed in Chapter 4, it takes a straightforward approach to the question of recklessness, and asserts the existence of a *prima facie* offence, before

⁸⁶ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para 12.69.

⁸⁷ Andrew Ashworth, ‘The Revisiting of Consent’ [1996] *Criminal Law Review* 73, 75.

⁸⁸ Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para 14.14.

⁸⁹ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 914 (Lord Woolf CJ). Indeed, Lord Woolf makes no mention of the more detailed proposals contained in LCCP 139.

considering the vitiating role of consent. On this straightforward view, it is difficult to see what the Court of Appeal's approach might have in common with those advocated by the Commission in LCCP 134 and LCCP 139, respectively.

However, where the Court of Appeal have not adopted the *form* of either of the Consultation Papers' proposals, there is evidence in *Barnes* of an acceptance of the *substance* of their respective approaches, which can be characterised as a concentration on the quality of the conduct of the defendant as opposed to the consent of the injured party. For instance, despite Lord Woolf's omission of reasonableness from the formal construction of recklessness, he did suggest that 'the jury would need to ask themselves, among other questions, whether the contact was so obviously late and/or violent that it could not be regarded as an instinctive reaction, error or misjudgement in the heat of the game'.⁹⁰

This, of course, can be framed in terms of the orthodox view; that is, it can be argued that, if he foresaw a risk of injury, Mark Barnes was guilty of a *prima facie* offence, which could be defeated due to the consent of the injured party, and this consent would extend to running the risk of receiving an injury from a fellow participant whose conduct could be described as 'an instinctive reaction, error or misjudgment in the heat of the game'. It is far more straightforwardly, and arguably better, explained as amounting to a test of reasonableness very much along the lines of that suggested in LCCP 134, and as such arguably adopts the Commission's approach in substance, if not in form.

⁹⁰ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 911 (Lord Woolf CJ).

Similarly, when Lord Woolf approves the standard of 'legitimate sport' as 'not unhelpful' in demarcating the type of conduct to which the injured party could be said to have consented, it is difficult to avoid the conclusion that the court was imposing its own informal version of the standard of 'recognised sport', equivalent to that proposed by the Law Commission in LCCP 139.

7.4 The Doctrine of Double Effect and 'Morally Substantive Aims'

The Law Commission proposals outlined above depend upon being able to characterise the defendant's conduct as having been either during the course of a 'recognised sport' (LCCP 139), or as 'reasonable' risk-taking, that might otherwise constitute recklessness (LCCP 134). At the heart of the Commission's understanding of reasonableness in recklessness is an approach that looks more broadly at culpability than a narrow concentration on what Norrie refers to as the 'formal psychological account' often preferred in accounts of *mens rea*.⁹¹ This can also be applied to intention; as Norrie argues, 'if the law thickens the analysis of intention to include an agent's morally substantive aims ... then matters that would otherwise have been seen as defence-based become elements in the definition of the offence'.⁹² In this part, I suggest that it is possible to construe sports violence according to the defendant's intent, but to broaden out what is meant by this, and thereby to construe the lawfulness of sports violence in terms of the defendant's intention to participate in (inherently physical, risky and lawful) sport.

⁹¹ Alan Norrie, *Crime, Reason and History* (3rd edn, Cambridge University Press 2014).

⁹² Alan Norrie, *Crime, Reason and History* (3rd edn, Cambridge University Press 2014) 229.

In this section, I consider sports violence as an unlikely candidate for consideration under the doctrine of double effect. Following this, I shall argue that, even if double effect is not an appropriate mechanism to be applied to sports violence, there still remains a case for a morally substantive approach to the intention of sports participants. Hallowell and Meshbesher suggest that 'the player [who performs] in a setting in which violence is customary and approved does not act with criminal intent but merely follows the established practices of the sport',⁹³ and there is evidence to support a tacit acceptance of this in *Barnes*.

7.4.1 Double effect, the criminal law and sports violence

The doctrine of double effect is derived from the writings of St Thomas Aquinas, who stated: 'Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention ... moral acts take their species according to what is intended and not what is beside the intention'.⁹⁴ The operation of double effect therefore recognises that there are effects and outcomes that can be seen as incidental to the commission of a primary goal, even though their eventuality was perceived as likely, or even inevitable, by the person who has brought them about and who might therefore, according to the inferences permitted by *Woollin*,⁹⁵ be considered culpable.

⁹³ L Hallowell and RI Meshbesher, 'Sports Violence and the Criminal Law' (1977) 13 *Trial* 27, 28.

⁹⁴ Thomas Aquinas, *Summa Theologica* (II-II, Question 64, Article 7)

<<http://www.newadvent.org/summa/3064.htm#article7>> accessed 15 November 2014.

⁹⁵ *R v Woollin* [1999] 1 AC 82 (HL). See discussion in Chapter 4.

There is an extensive literature on double effect, and its potential application in the criminal law,⁹⁶ much of which it is unnecessary to engage with for the present purposes. The parameters of the doctrine have been set out as follows:

(1) The act itself must be morally good or at least indifferent; (2) The agent may not positively will the bad effect but may permit it. If he could attain the good effect without the bad effect he should do so. The bad effect is sometimes said to be indirectly involuntary; (3) The good effect must flow from the action at least as immediately (as in the order of causality, though not necessarily in the order of time) as the bad effect. In other words the good effect must be produced directly by the action, not by the bad effect. Otherwise the agent would be using a bad means to a good end, which is never allowed; (4) The good effect must be sufficiently desirable to compensate for the allowing of the bad effect. In forming this decision many factors must be weighed and compared, with care and prudence proportionate to the importance of the case. Thus, an effect that benefits or harms society generally has more weight than one that affects only the individual, and an effect sure to occur deserves greater consideration than one that is only probable; an

⁹⁶ See, for example: RA Duff, 'Intention, Responsibility and Double Effect' (1982) 32 *The Philosophical Quarterly* 1; TA Cavanaugh, *Double-Effect Reasoning: Doing Good and Avoiding Evil* (Clarendon Press 2006); Dana Kay Nelkin and Samuel C Rickless, 'Three Cheers for Double Effect' (2014) 89 *Philosophy and Phenomenological Research* 125; William J FitzPatrick, 'The Doctrine of Double Effect: Intention and Permissibility' (2012) 7 *Philosophy Compass* 183.

effect of a moral nature has greater importance than one that deals only with material things.⁹⁷

Bergelson explains the justification for the application of the doctrine to the criminal law as taking account of the fact that ‘people seldom have just one motive for their actions’.⁹⁸ She cites as examples ‘sadoomasochistic encounters’ that ‘presumably are motivated by altruistic as well as egotistic feelings’, and that of the ‘surgeon who has agreed to perform a risky innovative surgery’, who ‘may be driven by compassion as well as intellectual curiosity and career ambitions’, and continues:

We may not like some of the perpetrator's motives; however, as long as (i) the perpetrator intended to achieve, and in fact achieved, a positive ‘balance of evils’, and (ii) the consensual harmful act neither aimed at, nor resulted in, substantial harm to the victim's interests and dignity, the perpetrator should be justified.⁹⁹

Aligning sports violence with these descriptions depends upon construing it as a valuable activity, and one which is morally benign even allowing for the risk and reality of injury. In the case of boxing, in particular, this is a contested claim, in light of the damage that can be done to the participants,¹⁰⁰ the inherent violence,¹⁰¹ and the

⁹⁷ New Catholic Encyclopedia, vol 4 (McGraw-Hill 1967) 1020-22.

⁹⁸ Vera Bergelson, ‘The Right to be Hurt: Testing the Boundaries of Consent’ (2006-07) 75 *George Washington Law Review* 165, 233.

⁹⁹ Vera Bergelson, ‘The Right to be Hurt: Testing the Boundaries of Consent’ (2006-07) 75 *George Washington Law Review* 165, 233.

¹⁰⁰ See discussion in Chapter 1.

¹⁰¹ See discussion in Chapter 3.

intentionality of those who inflict it;¹⁰² factors that can also, to a lesser extent, be applied to rugby and soccer. However, if a sport can lay claim to a morally benign effect then it may be possible to recast the intentions of the participants according to the doctrine of double effect. This is an interpretation of the lawfulness of sports violence that is reminiscent of that offered in the nineteenth-century case of *Bradshaw*, in which Bramwell B said: 'If a man is playing according to the rules and practices 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'.¹⁰³

Despite its arguable satisfaction of the logic of double effect, it is unsurprising that the doctrine has not been applied to instances of sports violence, and it may appear incongruous even to suggest that it might. Aquinas originally used double effect to assess the permissibility of self-defence, and criminal law scholars continue to employ it as a potential theoretical and philosophico-legal underpinning in this context.¹⁰⁴ In recent times, however, double effect is most often invoked in relation to debates around the end-of-life issues of palliative care and the impermissibility of euthanasia, and in this context it has gained a limited and controversial legal acceptance.

Double effect was first used in relation to medical practice in the trial of Dr John Bodkin Adams, who was charged with murder after 'easing the passing' of elderly patients through the administration of drugs.¹⁰⁵ Directing the jury, Devlin J stated:

¹⁰² See discussion in Chapter 4.

¹⁰³ (1878) 14 Cox CC 83, 85 (Bramwell B).

¹⁰⁴ Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge University Press 1994).

¹⁰⁵ H Palmer, 'Dr Adams's Trial for Murder' [1957] *Criminal Law Review* 365.

If the first purpose of medicine, the restoration of health, can no longer be achieved there is still much for a doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering, even if the measures he takes may incidentally shorten life'.¹⁰⁶

In the case of bringing about a terminally ill patient's willed death, this might apply where the doctor administers a high dose of analgesic, hastening death.¹⁰⁷ In the recent case of *Nicklinson*, the Supreme Court held that: '[m]edical treatment intended to palliate pain and discomfort is not unlawful only because it has the incidental consequence, however foreseeable, of shortening the patient's life'.¹⁰⁸ Thus, 'a doctor commits no offence when treating a patient in a way which hastens death, if the purpose of the treatment is to relieve pain and suffering'.¹⁰⁹

Despite its occasional popularity with philosophers and legal theorists, there has been a reluctance to employ double effect in the criminal law,¹¹⁰ outside of what many perceive as a special standing accorded doctors when it comes to the application

¹⁰⁶ H Palmer, 'Dr Adams's Trial for Murder' [1957] *Criminal Law Review* 365, 375. For an account of the trial, written by the presiding judge, see: P Devlin, *Easing the Passing* (Bodley Head 1985).

¹⁰⁷ A similar situation can be said to occur where sedatives are used; 'terminal sedation' is often equated with, but sometimes distinguished from, the operation of double effect (see: Glenys Williams, 'The Principle of Double Effect and Terminal Sedation' (2001) 9 *Medical Law Review* 41).

¹⁰⁸ *R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) v The Director of Public Prosecutions* [2014] UKSC 38, para 255 (Lord Sumption).

¹⁰⁹ *R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) v The Director of Public Prosecutions* [2014] UKSC 38, para 18 (Lord Neuberger).

¹¹⁰ Williams supports the possibility that the doctor's conduct may not amount to legal causation (Glenys Williams, 'The Principle of Double Effect and Terminal Sedation' (2001) 9 *Medical Law Review* 41). See also: R Devetterre, 'Sedation Before Ventilation Withdrawal: Can it be Justified by Double Effect and Called "Allowing to Die"?' (1991) 2 *Journal of Clinical Ethics* 122.

of the law,¹¹¹ and even its very limited practical application has been heavily criticised. For instance, Price states that the doctrine ‘threatens analytical integrity’ and is a ‘primary catalyst for jurisprudential distortion’,¹¹² while Helme and Padfield assert that ‘allowing *mens rea* to be denied by an argument of double effect often appears sophistic if not hypocritical’.¹¹³

7.4.2 A morally substantive conception of intent in *Barnes*

Sports violence is perhaps a surprising candidate for consideration under the doctrine of double effect, but its application is a logical extension of the social value that is widely accepted and often asserted in relation to sport. Something very like double effect, or at least a morally substantive account of intention, is often tacitly referred to in the cases relating to sports violence. In the Canadian case of *TNB*,¹¹⁴ discussed in Chapter 3, the court asserted that the defendant ‘had no intention of harming anyone and particularly he had no specific intention of harming [the injured party]. The punch thrown was a random, wildly thrown punch meant to intimidate within the context of the scrum’.¹¹⁵ It was suggested that the intentions of the participants should only be discerned in the overall context of the game, and the judge held that ‘[t]he action fit within the unwritten but accepted code of conduct’.¹¹⁶

¹¹¹ Richard Huxtable, *Euthanasia, Ethics and the Law: From Conflict to Compromise* (Routledge-Cavendish 2007) ch 4; Richard Huxtable, ‘Get Out of Jail Free? The Doctrine of Double Effect in English Law’ (2004) 18 *Palliative Medicine* 62; JC Smith, ‘A Comment on Moor’s Case’ [2000] *Criminal Law Review* 41.

¹¹² David Price, ‘Euthanasia, Pain Relief and Double Effect’ (1997) 17 *Legal Studies* 323, 324.

¹¹³ Tim Helme and Nicola Padfield, ‘Setting Euthanasia on the Level’ (1993) 15 *The Liverpool Law Review* 75, 83.

¹¹⁴ *R v TNB* (2009) BCPC 0117.

¹¹⁵ *R v TNB* (2009) BCPC 0117 [88] (Honourable Judge SD Frame).

¹¹⁶ *R v TNB* (2009) BCPC 0117 [88] (Honourable Judge SD Frame).

In *Barnes*, it is pertinent to note that, at trial, both the prosecution and defence are said to have framed the conduct of the defendant in sporting terms: the prosecution had ‘contended that it was the result of a “*crushing tackle, which was late, unnecessary, reckless and high up the legs*”, while ‘[t]he appellant had admitted the tackle but claimed that it was a fair, if hard, challenge, in the form of a sliding tackle in the course of play’.¹¹⁷ These are contrasting assertions of the essence of the defendant’s conduct that go beyond any notions of foresight of harm, and seem to rest rather in a dispute as to whether causing injury was *incidental* to the sport, or whether it should be considered as outside the ambit of sporting practice, and should therefore be deemed criminal.

The Court of Appeal employed analogous reasoning in giving judgment. In relation to the inadequacies in the judge’s summing-up, Lord Woolf held that ‘[the jury] should have been told the importance of the distinction between the appellant going for the ball, albeit late, and his “going for” the victim’.¹¹⁸

As with the approaches based in the Law Commission’s proposals, and set out above, Lord Woolf’s direction can be accounted for under the orthodox view. According to this, it might be said that, notwithstanding whether the appellant was ‘going for’ ball or victim, his conduct entailed an appreciation of the risk of contact or injury to the other player. Thus, either way, his actions in causing injury amounted to a *prima facie* offence, and consent would vitiate this where he was ‘going for’ the ball, but not where he was ‘going for’ the victim. Alternatively, and arguably more straightforwardly, what the appellant was ‘going for’ might be explained as a

¹¹⁷ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 912.

¹¹⁸ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 918 (Lord Woolf CJ).

characterisation of his intent. As such, his conduct amounted to 'legitimate sport' if he was 'going for' the ball, and his intentions should be construed accordingly. This reflects the sort of reasoning that underpins the doctrine of double effect, or at least a thickened account of intention that is constructed in relation to the context in which it arises.

7.5 'Generally acceptable in the ordinary conduct of ... [sport]'

In *Collins v Wilcock*,¹¹⁹ the Court of Appeal addressed the lawfulness of the conduct of a police officer who had taken hold of a person's arm in order to detain them. Goff LJ stated of the accommodation within the criminal law of 'the physical contacts of ordinary life':

[M]ost of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact. So nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is, within reason, slapped.¹²⁰

Goff LJ went on to say that '[a]lthough such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general

¹¹⁹ [1984] 1 WLR 1172 (DC).

¹²⁰ *Collins v Wilcock* [1984] 1 WLR 1172 (DC), 1172 (Goff LJ).

exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life'.¹²¹ He considered this approach 'more realistic' and 'more accurate'.¹²²

The court expressed this in terms of 'generally acceptable conduct', and noted that this would always be dependent upon the circumstances: 'In each case, the test must be whether the physical contact so persisted in has in the circumstances gone beyond generally acceptable standards of conduct; and the answer to that question will depend on the facts of the particular case'.¹²³ A line of similar cases have relied upon this reasoning.¹²⁴ In the most recent of these, the court was asked whether a police officer was permitted to hold the arm of a drunk person, in order to move them. It was held that, although it was 'important to place the events in their context', 'common sense' dictated that a police officer was not acting unlawfully in this situation.¹²⁵

Since *Collins v Wilcock*, this potentially wide-ranging concept has been afforded varied treatment, and there have been limitations placed on it. In *T v T*, Wood J was not willing to extend it to the termination of pregnancy and sterilisation of a woman aged 19, but with a mental age of around three years and thus not able to give effective consent, stating: 'It would not seem to me that operative treatments or perhaps in some more serious cases medical treatments in hospital fall within the phrases "exigencies of everyday life" or "the ordinary conduct of daily life"'.¹²⁶

¹²¹ *Collins v Wilcock* [1984] 1 WLR 1172 (DC), 1172 (Goff LJ).

¹²² *Collins v Wilcock* [1984] 1 WLR 1172 (DC), 1172 (Goff LJ).

¹²³ *Collins v Wilcock* [1984] 1 WLR 1172 (DC), 1172 (Goff LJ).

¹²⁴ *Mepstead v DPP* (1996) 160 JP 475; *Smith v DPP* (2001) 165 JP 432; *McMillan v CPS* [2008] EWHC 1457 (Admin) [2008] LLR 513. See also: Neil Parpworth, 'Steadying a Drunken Person' (2009) 173 *Justice of the Peace* 216.

¹²⁵ *McMillan v CPS* [2008] EWHC 1457 (Admin) [2008] LLR 513, 516 (Maurice Kay LJ).

¹²⁶ *T v T* [1988] Fam 52, 66.

Returning to the subject in *Re F*,¹²⁷ where the House of Lords was also faced with the question of whether sterilisation of a severely mentally impaired, but physically mature, woman would be lawful, Lord Goff restated his original proposition, but also refused to apply it. He held that '[m]edical treatment ... does not fall within that category of events', and that in such cases the principle should not be used as a substitute for consent.¹²⁸

It is easy to understand why, in cases involving such invasive and personal treatment as the termination of a pregnancy and sterilisation, the courts were not willing to apply the principle. Notwithstanding this, the idea of 'generally acceptable conduct' has been approved in other cases. In *Wilson v Pringle*, the Court of Appeal considered the concept 'a solution to the old problem of what legal rule allows a casualty surgeon to perform an urgent operation on an unconscious patient who is brought into hospital'.¹²⁹ Croom-Johnson LJ noted that 'it has been customary to say in such cases that consent is to be implied for what would otherwise be a battery on the unconscious body', but considered it 'better simply to say that the surgeon's action is acceptable in the ordinary conduct of everyday life, and not a battery'.¹³⁰

Such an explanation might also be extended to sport, and the types of violence that are a legitimate and intrinsic part of their practice. Here, there are objectively discernible markers as to the level of violence that can be expected, and thus the types of conduct that should be deemed acceptable. The idea draws from the same kind of normative judgement that underpins the Law Commission's proposals in relation to

¹²⁷ *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.

¹²⁸ *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 73 (Lord Goff).

¹²⁹ *Wilson v Pringle* [1987] QB 237, 252 (Croom-Johnson LJ).

¹³⁰ *Wilson v Pringle* [1987] QB 237, 252 (Croom-Johnson LJ).

the reasonableness of risk-taking in sports. Indeed, in LCCP 134, the Commission used language very similar to that of Goff LJ's formula; in relation to the 'extended limits of normally acceptable behaviour that apply when playing a contact sport', the Commission wrote: 'Thus, it is not acceptable in the ordinary affairs of life to seize another person by the legs and bear him to the ground: all that changes, however, when he is holding the ball in rugby football'.¹³¹

Support for this approach can be found in the jurisprudence of the Canadian courts, which have been open to discussing the contextual factors that underpin the jurisprudence relating to on-field violence, and in addressing the inherent acceptability of conduct. In *Cey*,¹³² the Saskatchewan Court of Appeal explicitly considered the unique context of sport when assessing culpability, and in *Green* the court declared:

It is very difficult in my opinion for a player who is playing hockey with all the force, vigour and strength at his command, who is engaged in the rough and tumble of the rink, suddenly to stop and say, 'I must not do that. I must not follow up on this because maybe it is an assault; maybe I am committing an assault'. *I do not think that any of the actions that would normally be considered assaults in ordinary walks of life can possibly be, within the context that I am considering, assaults at all.*¹³³

¹³¹ Law Commission, *Consent and Offences Against the Person* (Law Com CP No 134, 1994) para 10.16.

¹³² *R v Cey* (1989) 48 CCC (3d) 480.

¹³³ *R v Green* 16 DLR 3d 137 (Ont 1971) (emphasis added).

Reasoning that is analogous to both that of the Canadian courts, and of Goff LJ can be seen in *Barnes*, suggesting again that the substance of the judgment draws from something other than just the rationale of the orthodox view:

[I]n highly competitive sports, conduct outside the rules can *be expected to occur in the heat of the moment*, and even if the conduct justifies not only being penalised but also a warning or even a sending off, it still may not reach the threshold level required for it to be criminal. *That level is an objective one and does not depend upon the views of individual players*. The type of the sport, the level at which it is played, the nature of the act, the degree of force used, the extent of the risk of injury, the state of mind of the defendant are all likely to be relevant in determining whether the defendant's actions go beyond the threshold.¹³⁴

In *Barnes*, this passage ostensibly sets out to calibrate the type of conduct to which the injured party can be considered to have consented, and thus whether the appellant can rely on the defence of consent. The approach therefore conforms with the orthodox view, but is equally readily explicable according to Goff LJ's contextualised appraisal of the 'physical contacts of ordinary life'.¹³⁵

The concept of consent suffuses each of the alternative approaches laid out above, albeit in a way that is less obvious than the position under the orthodox view. Its role here is explained by Chiesa, who argues that, rather being considered a

¹³⁴ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 914-15 (Lord Woolf CJ) (emphasis added).

¹³⁵ *Collins v Wilcock* [1984] 1 WLR 1172 (DC), 1172 (Goff LJ).

defence, consent should be viewed as a factor that changes the way in which conduct is viewed. He writes that consent 'amounts to a factor that counts in favor of modifying the definition of the offense in a way that reveals that the perpetrator's conduct does not really fall within the scope of the prohibited conduct'.¹³⁶ Chiesa gives the example of a person who wishes to get her ears pierced, and states that 'the victim's consent to having her ears pierced' amounts to an aspect of the context in which the person who has done the piercing acts. Other factors that are taken into account ('such as the fact that the procedure is carried out by a licensed professional') also contribute to the context in which the conduct takes place, and mean that an act that could conceivably amount to an offence if it took place under different circumstances, 'does not inflict the kind of harm sought to be prevented by the offense'. Chiesa concludes:

So conceived, consent does not count as a defense to conduct that inflicted the kind of evil represented by the offense, but rather as a factor that contributes to modifying the definition of the offense in way that reveals that the defendant's conduct did not inflict a legally relevant evil in the first place.¹³⁷

The concept of a 'legally relevant evil' forces greater focus on the offence itself, rather than loading this onto a 'defence' of consent. This context-sensitive

¹³⁶ Luis E Chiesa, 'Consent is Not a Defense to Battery: A Reply to Professor Bergelson' (2011-12) 9 Ohio State Journal of Criminal Law 195, 196.

¹³⁷ Luis E Chiesa, 'Consent is Not a Defense to Battery: A Reply to Professor Bergelson' (2011-12) 9 Ohio State Journal of Criminal Law 195, 196.

consideration of the function of consent is redolent of the argument engaged in Chapter 6, where the moral force of consent was seen to reside not simply in its attitudinal or expressive factual existence, but rather in a morally qualified appraisal of the effect of consent, so that it is seen as affecting the moral quality of a defendant's conduct.

Each of the alternative approaches laid out above provides a way of thinking about the criminal law's approach to sports violence in which consent features as one of a number of contextualising factors to be considered when appraising the lawfulness of an incidence of sports violence. They centralise the conduct of the protagonist, in a way that a concentration on consent can only do indirectly.

7.6 Why use a fiction? Trapped by the concepts and categories of the past?¹³⁸

I have laid out a number of alternatives to the fiction-based orthodox view, and demonstrated how, particularly in *Barnes*, but also in the case law dating back to the nineteenth century, reasoning analogous to that which these alternatives utilise can be found. Thus, I suggest that their *substance*, if not their *form*, has informed decisions as to the lawfulness of sports violence. I now return to the orthodox view, and assess why it is that the courts have opted to maintain the fictions that structure it. Before moving to appraise the value of such fictions, it is worth reiterating the orthodox view, and what it is that is fictitious about it.

¹³⁸ Roger Leng, 'Consent and Offences Against the Person: Law Commission Consultation Paper No 134' [1994] *Criminal Law Review* 480, 480.

The premise of the orthodox view is easily expressed: sports violence comprises a *prima facie* crime. Where this violence can be categorised as falling below the seriousness captured by s 47 of the OAPA 1861, consent effectively precludes liability. Where it amounts to at least a s 47 offence, sports violence comprises a *prima facie* offence. Since it also violates a prohibitory norm, consent amounts to a defence to be applied after satisfaction of the offence requirements. Judgements as to the lawfulness or otherwise of the conduct of the defendant therefore fall to be decided according to the quality of the consent of the victim.

The fiction of imputed consent that is used here does not necessarily misrepresent the views, attitudes and understanding of the participants. As I have stated at numerous points throughout this thesis, it is likely that the participants in a particular iteration of boxing, rugby or soccer voluntarily engage in the activity in full and mutual knowledge and acceptance of a contest's rules and playing culture, and that this also accords with the criminal law's views as to the lawfulness of the contest. This standard was characterised in *Barnes* as that of 'legitimate sport', and it would appear that this largely correlates to the way in which a hypothetical reasonable participant would expect the contest to be conducted, with criminal liability imposed for egregious breaches of this notional code.¹³⁹ It is, however, a standard maintained by the criminal law, and may depart from the individual or mutual understanding of the participants if the latter is not constitutive of the legal conception of 'legitimate sport'. It is therefore a standard that does not depend upon the subjective views of any of the participants, but is rather projected onto, or imputed to, them.

¹³⁹ See Chapter 2 for a more detailed discussion of this relationship.

Westen concedes that the ends served by the operation of imputed consent could be achieved without recourse to fiction, and could be 'replaced with functionally equivalent rules that make no reference to consent'.¹⁴⁰ Referring to Canadian provisions relating to ice hockey, Westen notes that the aims of the fiction could just as well be achieved,

simply by holding that the assault statute as a whole, including its provision on consent, does not apply to hockey players who knowingly take the risk of being punched by engaging in fistfights outside the course of play, provided that the blows are not too 'inherently dangerous' to be permitted.¹⁴¹

In this way, the fiction of imputed consent can be 'replaced with substitute rules to the effect that harms that are inherent in, and reasonably incidental, to certain *activities* ... are lawful in so far as they befall persons who voluntarily participate in those activities'.¹⁴² If this is true, and similar outcomes can be achieved without recourse to fictions, it is worthwhile asking why it is that they are used in this context, and whether their use is beneficial or detrimental to determining the lawfulness of particular instances of sports violence. The first and most obvious potential criticism derives quite simply from their status as a fictional construct.

¹⁴⁰ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004) 272.

¹⁴¹ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004) 284.

¹⁴² Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004) 272.

Numerous commentators have come to the conclusion that legal fictions are acceptable only to the extent that they are unavoidable. For Campbell, ‘the existence of fictions is necessary only in the sense that if an end is desired and there is only one means of achieving it, then resort to that means is necessary’.¹⁴³ For Fuller, the possible misuse of fictions is always possible; he points to examples that ‘stand out like ugly scars in the language of the law – the linguistic wounds of discarded make-believes’.¹⁴⁴ What is significant for the present purposes is that the sorts of fictions which he thus disapproves are precisely those that are implicated in the case of imputed consent and its operation in relation to sports violence. Fuller writes of this type of fiction as ‘carr[ying] still the badge of its shame – the apologetic “constructive” or “implied”’.¹⁴⁵

7.6.1 Criticism of the fiction as a fiction

In spite of what Knauer recently referred to as their ‘venerable pedigree,’¹⁴⁶ legal fictions have often received a hostile response. Bentham was condemnatory of their use, declaring the relationship of the fiction to justice to be ‘exactly as swindling is to trade’.¹⁴⁷ Blackstone wrote of legal fictions: ‘to such awkward shifts, such subtle refinements, and such strange reasoning, were our ancestors obliged to have recourse . . . while we applaud the end, we cannot admire the means’.¹⁴⁸ Also writing in the nineteenth century, Phelps considered them an unwelcome and outmoded facet of

¹⁴³ Kenneth Campbell, ‘Fuller on Legal Fictions’ (1983) 2 *Law and Philosophy* 339, 369.

¹⁴⁴ Lon L Fuller, ‘Legal Fictions’ (1930-31) 25 *Illinois Law Review* 363, 380.

¹⁴⁵ Lon L Fuller, ‘Legal Fictions’ (1930-31) 25 *Illinois Law Review* 363, 380. In this sense, I take ‘constructive’ and ‘implied’ to amount to synonyms for ‘imputed’.

¹⁴⁶ Nancy J Knauer, ‘Legal Fictions and Juristic Truth’ (2010-11) 23 *St Thomas Law Review* 1, 2.

¹⁴⁷ Jeremy Bentham, *Works VII* (Bowring edn 1843) 283.

¹⁴⁸ William Blackstone, *Commentaries on the Laws of England* 360 (14th ed, A Strahan 1803).

legal reasoning, describing them as ‘now recognized as the blundering devices of an unphilosophic age, which had not yet learned from science to value truth for its own sake’.¹⁴⁹

For King, to criticise a fiction simply for being a fiction makes little sense. He asserts that ‘to criticise a legal concept ... by calling it a fiction, is no criticism at all’,¹⁵⁰ and this is a view to which Westen also ascribes:

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 legal rules, legal fictions purport 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 as one would approach any other rule: one must examine it critically to discover and assess its underlying rationale.¹⁵¹

In order to substantiate his argument, Westen points to perhaps the most controversial legal fiction to have been dealt with by the criminal courts in recent

¹⁴⁹ Charles E Phelps, *Juridical Equity* (M Curlander 1894) 204.

¹⁵⁰ Stephen King, ‘Consensual Violence and the State: A Case Study in Combat Sports’ (PhD thesis, University of Limerick 2011) 99.

¹⁵¹ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004) 325.

years: that which underpinned what became known as the ‘marital rape exemption’, whereby a man could not be held guilty of raping his wife. In the context of English law, this supposition derived from Hale, who wrote in his *History of the Pleas of the Crown*: ‘[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract’.¹⁵²

In *R*, the Court of Appeal rejected the basis of the concept described above, and Westen writes of this: ‘The English Court of Appeal ... agreed that Hale’s notion of consent was a legal fiction, and it rejected Hale’s consent on that ground alone’.¹⁵³ Although the quotation Westen uses to make this point is a faithful reproduction (‘[Hale’s “consent”] can never have been other than a fiction, and fiction is a poor basis for the criminal law’¹⁵⁴), it is removed from the context and broader reasoning of the Court of Appeal, and amounts to a highly selective use of the judgment.

In *R*, it was held that this ‘common law fiction’ should no longer apply, on the grounds that it had become ‘anachronistic and offensive’,¹⁵⁵ and Lord Lane gave substantial reasons why the fiction did not reflect social views, and should not remain the position of the criminal law.¹⁵⁶ The Court of Appeal, in a judgment that was

¹⁵² Matthew Hale, *History of the Pleas of the Crown* (1736) 629.

¹⁵³ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004) 324.

¹⁵⁴ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004) 324 (quoting from *R v R (rape: marital exemption)* [1992] 2 All ER 257 (CA), 265 (Lord Lane CJ)).

¹⁵⁵ *R v R (rape: marital exemption)* [1992] 2 All ER 257 (CA), 266 (Lord Lane CJ).

¹⁵⁶ Indeed, the law has moved so far from the pre-*R* position that consent to sexual intercourse is now construed in such a way that it can be withdrawn at any point, even after penetration. For recent developments in the ‘conditionality’ of consent in this context, see: *R (on the application of F) v DPP* [2013] EWHC 945 (Admin); [2014] Q.B. 581. For commentary on this case, see: Gavin A Doig and Natalie Wortley, ‘Conditional Consent? An Emerging Concept in the Law of Rape’ (2013) 77 *Journal of Criminal Law* 286.

approved by the House of Lords,¹⁵⁷ chooses to emphasise the fictionality of the law primarily in order to permit itself the authority to disclaim it, since it had been assumed that the extant law was stated in statute, which had kept the ‘unlawful’ requirement in the definition of rape,¹⁵⁸ and which had hitherto been construed as maintaining the marital rape exemption.¹⁵⁹ Westen misses this important motivation, and presents a reductive picture of the judgment. With this in mind, if Westen was trying to illustrate the benign effect of fictions, he chose a very strange case with which to do it.

Similarly, Westen looks to Goff LJ’s conception of ‘physical contact which is generally acceptable in the ordinary conduct of daily life’ in *Collins v Wilcock*¹⁶⁰ as an example of the fact that ‘[e]very jurisdiction takes the view, for example, that by voluntarily choosing to engage in certain social activities, persons constructively consent to allow others to impose certain physical contact on them, regardless of their objections’.¹⁶¹ Unfortunately for Westen’s argument, and as seen above, this was the very judgment in which Goff LJ proclaimed that the concept of implied consent was an unhelpful one, best discarded in favour of a construction that was ‘more realistic’ and ‘more accurate’,¹⁶² and which did not rest upon a fiction.

¹⁵⁷ *R v R (rape: marital exemption)* [1992] 1 AC 599 (HL).

¹⁵⁸ S 1(1)(a) of the Sexual Offences Act 1976 stated as part of the definition of rape: ‘unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it’. The current statutory provisions relating to rape are contained in the Sexual Offences Act 2003.

¹⁵⁹ *R v Roberts* [1986] Criminal Law Review 188; *R v Kowalski* (1987) 86 Cr App R 339; *R v J (Rape: Marital Exemption)* [1991] 1 All ER 755.

¹⁶⁰ *Collins v Wilcock* [1984] 1 WLR 1172 (DC), 1172 (Goff LJ).

¹⁶¹ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004) 278.

¹⁶² *R v Brown* [1994] 1 AC 212 (HL), 260 (Lord Mustill).

Westen does not present a convincing argument that fictions should be treated like 'any other legal rule',¹⁶³ and I would suggest that the use of a fiction demands positive justification. However, to say that the use of a fiction demands justification is not to say that it is not therefore justifiable. Poorly supported though it is, Westen's argument that a fiction should not be criticised or dismissed on that ground alone is, at base, a reasonable one, and he is right to suggest that it is necessary to 'examine it critically to discover and assess its underlying rationale'.¹⁶⁴

For Fuller, understanding the use of a fiction in a particular context is rooted in an understanding of why it exists, and what 'actuated its author', and he points to two likely spurs.¹⁶⁵ Firstly, Fuller suggests that a spirit of judicial conservatism lies at the heart of many legal fictions. This may amount to 'emotional conservatism', whereby a judge 'may state new law in the guise of old, not for the purpose of deceiving others, but because this form of statement satisfies his own longing for a feeling of conservatism and certainty'.¹⁶⁶ Alternatively, or additionally, Fuller posits that the fiction may stem from 'intellectual conservatism', insofar as a judge may be *unable* to state the rule in a way that steps outside of the doctrinal mechanism that the fiction provides. Thus, he is 'forced to employ a fiction because of his inability to state his result in non-fictitious terms'. This, suggests Fuller, is inevitable given the limitations of 'human reason', which must always proceed by assimilating that which is unfamiliar to that which is already known'.¹⁶⁷ Faced with an infinite variability of

¹⁶³ Westen does not explain what he means by 'any other legal rule'.

¹⁶⁴ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004) 325.

¹⁶⁵ Lon L Fuller, 'Legal Fictions' (1930-31) 25 *Illinois Law Review* 513, 513.

¹⁶⁶ Lon L Fuller, 'Legal Fictions' (1930-31) 25 *Illinois Law Review* 513, 520.

¹⁶⁷ Lon L Fuller, 'Legal Fictions' (1930-31) 25 *Illinois Law Review* 513, 525.

possible circumstances for adjudication, the judge must rely upon an ‘intellectual equipment of rules, distinctions, concepts, and words’ that is ‘limited and finite’; ‘forced to deal with new problems in terms of an existing conceptual apparatus which in the nature of things can never be entirely adequate for the future’.¹⁶⁸

It may be that Fuller’s charges of conservatism, whether emotional, intellectual or both, lie at the root of the application of the fiction to sports violence, but there is evidence to suggest that there is more to it than that. The *Barnes* judgment came less than two years after the landmark judgment in *G*,¹⁶⁹ which had provoked widespread comment, and Lord Woolf’s peremptory treatment of recklessness and deviation from the formula utilised in *G* appears somewhat strange in light of this. In addition, the numerous examples I have offered above of the underlying rationale for the judgment suggests that considerations outside of the orthodox view formed the substance of the outcome, but that it was framed according to the fiction in order to accord with the accepted structuring of the criminal law of sports violence. The selective and somewhat misleading citation of the work of the Law Commission also points to a deliberate avoidance of the Commission’s proposals.

Knauer describes fictions as ‘enablers’, in that they can be used to ‘facilitate the application of the law to novel legal questions and circumstances’.¹⁷⁰ While this might mean that some amount to ‘bald untruths’, she asserts that the majority ‘operate more in the realm of metaphor’.¹⁷¹ Insofar as the metaphor deployed in relation to sports violence is concerned, it is worth asking what it is that it is intended

¹⁶⁸ Lon L Fuller, ‘Legal Fictions’ (1930-31) 25 Illinois Law Review 513, 525.

¹⁶⁹ *R v G and Another* [2003] UKHL 50, [2004] AC 1034.

¹⁷⁰ Nancy J Knauer, ‘Legal Fictions and Juristic Truth’ (2010-11) 23 St Thomas Law Review 1, 9.

¹⁷¹ Nancy J Knauer, ‘Legal Fictions and Juristic Truth’ (2010-11) 23 St Thomas Law Review 1, 9.

to enable. In what follows, I suggest that there are two possible reasons for the use of the fiction when it comes to sports violence: firstly, that it has dispositive value; and secondly, that it has formal, structural value.

7.6.2 The fiction as dispositive tool

The most obvious reason for the adoption of a fiction is that it has dispositive value; that, in the words of Fuller, it allows a court to come to a decision that is 'in accord with the "good sense of the case"'.¹⁷² Insofar as it is useful in this respect, Tourtoulon outlined the attractions of an effective fiction: 'If it is very good, it will outline concrete provisions of the law wonderfully well; if it is bad, it will outline them very clumsily, and it will be necessary to complement it with a great number of exceptions in order to give it its correct value'.¹⁷³ So, the question to address is whether the use of imputed consent does have dispositive value; that is, whether it is practically useful in demarcating the circumstances in which sports violence should be considered unlawful.

In this respect, a particular criticism of the imputed consent model offered by Westen has come from Hurd,¹⁷⁴ who demonstrates its distance from the paradigmatic instances of 'individualised' consent usually seen in relation to medical treatment and sexual offences. Hurd asserts that Westen's conception of imputed consent means that it is effectively synonymous with the idea of an 'assumption of risk', and that this

¹⁷² Lon L Fuller, 'Legal Fictions' (1930-31) 25 Illinois Law Review 363, 369. Fuller is here writing in relation to the utility of the fictional aspect of implied contractual terms, where a court proceeds 'as if it were determining the intent of the parties'.

¹⁷³ Pierre de Tourtoulon, *Philosophy in the Development of Law* (The MacMillan Co 1922) 391.

¹⁷⁴ Heidi M Hurd, 'Was the Frog Prince Sexually Molested?: A Review of Peter Westen's *The Logic of Consent*' (2004-05) 103 Michigan Law Review 1329.

entails little dispositive power when it comes to determining the grounds for criminal liability. Hurd's objection is compelling, and warrants exposition in full:

Consider the woman who wears a low cut tight red dress to a notoriously rough bar on a Friday night. Does she assume the risk of rape, and so give her rapist a stained permission to subject her to forced intercourse? After all ... we can imagine that her knowledge of the risk is perfect: she understands precisely the peril she courts. And nothing about her decision to spend a Friday night at that bar is in any way coerced or less than fully voluntary. So it would seem that she assumes the risk of rape. But surely we do not want to suggest that in wearing deliberately provocative clothing to a bar, a woman transfers away her right to bodily integrity.¹⁷⁵

Hurd offers further examples: the person who 'drives to the grocery store late on New Year's Eve to buy snacks' and the 'runner who heads through Central Park at dusk'.¹⁷⁶ Both, she asserts, might be said to be cognisant of the dangers associated with these activities, and thus to have freely and voluntarily assumed the risk of colliding with a drunk driver and being mugged, respectively.¹⁷⁷ Thus, Hurd asserts, 'the criteria for [imputed] consent discussed by Professor Westen do not do the work to sort between

¹⁷⁵ Heidi M Hurd, 'Was the Frog Prince Sexually Molested?: A Review of Peter Westen's *The Logic of Consent*' (2004-05) 103 Michigan Law Review 1329, 1345.

¹⁷⁶ Heidi M Hurd, 'Was the Frog Prince Sexually Molested?: A Review of Peter Westen's *The Logic of Consent*' (2004-05) 103 Michigan Law Review 1329, 1346.

¹⁷⁷ Heidi M Hurd, 'Was the Frog Prince Sexually Molested?: A Review of Peter Westen's *The Logic of Consent*' (2004-05) 103 Michigan Law Review 1329, 1346.

hockey players and skiers on one hand and provocatively dressed women and joggers in Central Park on the other'.¹⁷⁸

What this analysis reveals is that consent, in the form of a voluntary and informed assumption of risk, must be qualified in some way, if it is to be useful in determining liability, and it is in this qualification that the nub of the issue lies when it comes to imputed consent's dispositive function. In order to decide whether criminal liability should attach to the conduct of the defendant, it is necessary to supplement any assertion of consent with the answers to questions such as: was the defendant's conduct reasonable? What does it mean in the sporting context to say that the defendant intended to cause harm? Was the defendant's conduct acceptable in the circumstances? Did it comprise 'legitimate sport'? These are questions that the alternatives posited above pose directly, with the voluntary participation, or consent, of the victim an important normative underpinning, and relevant constituent part of the enquiry. Consent is an axiomatic concern when it comes to the lawfulness of sports violence, but it must be supplemented. In the words of Chiesa, the imputation of consent helps to discern whether the conduct of the defendant 'inflict[s] a legally relevant evil'.¹⁷⁹

All of this is not to suggest that the alternative approaches sketched out above lead to any easy answers when it comes to assessing potential criminal liability. Whichever way the issues are framed, it appears they converge on the same essential question of whether the defendant's conduct amounted to 'legitimate sport'.

¹⁷⁸ Heidi M Hurd, 'Was the Frog Prince Sexually Molested?: A Review of Peter Westen's *The Logic of Consent*' (2004-05) 103 Michigan Law Review 1329, 1346.

¹⁷⁹ Luis E Chiesa, 'Consent is Not a Defense to Battery: A Reply to Professor Bergelson' (2011-12) 9 Ohio State Journal of Criminal Law 195, 196.

Although it may be an intuitively understandable concept, this is a difficult standard to explain with any precision; in *Barnes*, the Court of Appeal resorted to the following by way of guidance: '[A] criminal prosecution should be reserved for those situations where the conduct is sufficiently grave to be properly categorised as criminal'.¹⁸⁰

In this respect, cases of sports violence bear comparison to the offence of gross negligence manslaughter, in which, in order to impose liability, a jury must be satisfied that, in causing death by breaching a duty, 'the conduct of the defendant was so bad in all the circumstances as to amount in [the judgement of the jury] to a criminal act or omission'.¹⁸¹ The duty that this imposes on the jury in effectively defining the crime has been the subject of an unsuccessful challenge on the basis that it is incompatible with Article 7 of the European Convention on Human Rights,¹⁸² is described by Ormerod as 'objectionable in principle',¹⁸³ and has led to calls for the abolition of the crime of gross negligence manslaughter.¹⁸⁴

The alternatives I have suggested in this chapter address the question of whether the conduct of the defendant amounted to 'legitimate sport' directly. To assert this is not to say that the question cannot be framed according to, and addressed through, the prism of a qualified form of consent, but to approach the matter in this way adds a complexity and imposes a barrier to addressing the real question. The intuitive conception of consent as 'individualised', as it is in the paradigm cases of sexual conduct and medical treatment that were discussed in

¹⁸⁰ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 911-12 (Lord Woolf CJ).

¹⁸¹ *R v Adomako* [1994] 1 AC 171 (HL), 187 (Lord Mackay).

¹⁸² *R v Misra* [2004] EWCA Crim 2375, [2005] 1 Cr App R 328.

¹⁸³ David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, Oxford University Press 2011) 559.

¹⁸⁴ Oliver Quick, 'Prosecuting "Gross" Medical Negligence: Manslaughter, Discretion, and the Crown Prosecution Service' (2006) 33 *Journal of Law and Society* 421.

Chapter 6, must be overcome, and the potential for confusion as to the conditions for liability is therefore increased.

Here, dependence on the use of a fiction is potentially problematic. Fuller writes of weighing the 'advantages of clarity over those of rhetoric',¹⁸⁵ drawing attention to the 'strangeness and boldness of the legal fiction',¹⁸⁶ and speculating that one of its harmful effects is that it may make the law "uncognoscible" to the layman'.¹⁸⁷ For his part, Westen asserts that '[c]onceptual complexity is not itself a problem. The problem is conceptual complexity dimly grasped'.¹⁸⁸ It is difficult to believe that Westen does not mark a correlation between these phenomena in constructing his own complex account of imputed consent.¹⁸⁹

Thus, I suggest that a concentration on consent adds little by way of clarity, and may in fact obfuscate, by drawing unnecessary attention to the quality of the consent. If this is the case, and consent does not assist in adjudicating individual cases, it is necessary to ask whether the approach that characterises the orthodox view of sports liability serves another useful function. In the next section, I shall suggest that it does, and that this derives from the way in which it allows the law to be structured.

¹⁸⁵ Lon L Fuller, 'Legal Fictions' (1930-31) 25 Illinois Law Review 363, 382.

¹⁸⁶ Lon L Fuller, 'Legal Fictions' (1930-31) 25 Illinois Law Review 363, 363.

¹⁸⁷ Lon L Fuller, 'Legal Fictions' (1930-31) 25 Illinois Law Review 363, 363.

¹⁸⁸ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004) 307.

¹⁸⁹ Westen's conceptual analysis is complex and, worse, sometimes apparently arbitrary. For instance, Westen sub-divides imputed consent into 'constructive', 'informed' and 'hypothetical'; the grounds for distinguishing the first two are not at all clear (the latter category, which applies to those who are unable to communicate consent, such as those who are unconscious, is not relevant to sports violence).

7.6.3 The fiction as a formal device

It is clear that the existence and use of the fiction is not ascribable to its ability to distinguish those cases of sports violence deserving of criminal liability from those which are not. It does not, in other words, have dispositive value within the criminal law. However intuitively plausible its conceptual framework, the question of the lawfulness of sports violence necessarily relies upon morally and politically derived judgements of behaviour that are more directly, and better, accessed through the devices explored above, which converge on the straightforward question: 'was it 'legitimate sport'? Since the fiction serves to obscure this question, it is worth asking whether it has value. In what follows, I shall argue that the fiction has value as a formal device. The formal coherence and certainty it provides shades substantive moral-political judgements concerning whether sports violence should be deemed to amount to 'legitimate sport'.

Although he does not refer to the term 'fiction', Norrie perceives an analogous phenomenon when he writes of the idea of 'outcome responsibility' as an alternative, or adjunct, to character- and capacity-based conceptions of responsibility when it comes to end-of-life issues:

In our society, there is a serious conflict between those who think that it is crucial to uphold the sanctity of life at all costs (for a variety of reasons—religious, 'slippery slope'), and those who think that sometimes quality of life issues override. *Those who take the latter view, however, may think it important not to be entirely transparent about what is happening: permitting quality of life to win in certain cases should not become generalised to a norm*

in too many others. One should, relatively speaking, ‘keep it dark’, or operate by way of euphemism, and the criminal law is able to assist in this process by avoiding open statements that euthanasia is permitted by virtue of formal accounts of the law of intention and the nature of defences.¹⁹⁰

In the context in which Norrie is writing, the approach he describes allows the ‘live political argument’ to be ‘resolved quietly, within the doctrines of the criminal law’s general part;’ a way of ‘shading socio-political controversy’.¹⁹¹ By “‘keep[ing] it dark”, or operat[ing] by way of euphemism’,¹⁹² the law is able to operate in a way in which ‘[o]utcome based conclusions in fact determine responsibility, but appear not to’. In the case of end-of-life issues, this is dealt with by reference to technical, doctrinal distinctions surrounding the construction of intention, the difference between acts and omissions, and the availability of the defence of necessity. Thus, the ‘formal, neutral appearing categories of criminal responsibility ... do real moral and political work of a particular as well as a general kind, but obliquely’. The judicious use of these categories is ‘able to “resolve”, or rather mediate, social and political issues with a measure of indirectness’, producing ‘an outcome-oriented justice for the here-and-now through the manipulation of categories concerning individual fault’.¹⁹³ In the context of sports violence, the structure of the orthodox view allows for the same thing to happen.

¹⁹⁰ Alan Norrie, ‘Historical Differentiation, Moral Judgment and the Modern Criminal Law’ (2007) 1 *Criminal Law and Philosophy* 251, 256 (emphasis added).

¹⁹¹ Alan Norrie, ‘Historical Differentiation, Moral Judgment and the Modern Criminal Law’ (2007) 1 *Criminal Law and Philosophy* 251, 256.

¹⁹² Alan Norrie, ‘Historical Differentiation, Moral Judgment and the Modern Criminal Law’ (2007) 1 *Criminal Law and Philosophy* 251, 256.

¹⁹³ Alan Norrie, ‘Historical Differentiation, Moral Judgment and the Modern Criminal Law’ (2007) 1 *Criminal Law and Philosophy* 251, 256-57.

Whereas the alternatives I have proposed demand answers to openly moral questions (Is this reasonable in the context? If it is double effect, what is the 'good' that is furthered? Is this generally acceptable behaviour?), locating the question at one step removed, sequestered in the consent of the victim-participant, allows these to be hidden to an extent. The fiction permits the suppression of open confrontation of the moral and social questions. Thus, the fiction can be used in order to avoid a declaration that the violence and injuries that occur in soccer, rugby and boxing are inherently lawful, which might be unwelcome for a number of reasons.

Firstly, addressing the conduct of the participant directly may involve an acknowledgement that the law in relation to sports violence is as uncertain as that which governs gross negligence manslaughter, as it would rely upon contingent issues such as how reasonableness was to be construed in a particular situation, whether the violence that is inherent to sports participation can be considered a moral good, which of the manifold intentions a sports participant manifests should be legally relevant, and the general acceptability of conduct in a given context.

Secondly, acknowledging the primacy of the 'legitimate sport' standard might effectively devolve criminal lawmaking, since, in positing the standard, it might reasonably be asked whether the criminal courts are the best authority on this question. In other words, it may have the effect of devolving criminal law policy to the internal standards (playing culture) of sport itself, in much the same way as the Law Commission advocated, but without necessarily instigating the attendant recognition body. By accommodating sports violence within the bounds of the existing structure of consent, and therefore clearly within its own jurisdictional bounds, the criminal law is able to maintain its direct relationship with the citizenry, rather than mediated by

the rules of particular sports and their governing bodies. Consent is a useful device, employed in order that those charged with making decisions about liability can conceal the complex ethical and moral considerations that this entails behind a veil of formalism.

Thirdly, there are also potential implications for the wider operation of the statutory offences, since it introduces morally and politically contested questions into the constituent *mens rea* elements. Despite the criticism of ss 18, 20 and 47 referred to in Chapter 4, they are used with a great deal of flexibility. They have been described as protecting ‘fundamental interests’,¹⁹⁴ and amounting to ‘the food and drink of criminal law’.¹⁹⁵ As Dennis observes of their centrality to the work of the criminal law, ‘[i]nsofar as an aspect of the content of the criminal law is uncontroversial, there is virtually universal acceptance of the necessity for these offences’.¹⁹⁶ Acknowledgement of the existence of morally and politically contestable elements at the heart of them may destabilise these ‘technical core offences’ beyond their application to cases of sports violence. Evidence for this concern is seen in Lord Woolf’s interpretation of recklessness, which, by ignoring the reasonableness qualification that many would consider to be a constituent element of subjective recklessness, operates to remove moral and political judgement from this *mens rea* standard.

¹⁹⁴ Ian Dennis, ‘The Critical Condition of Criminal Law’ (1997) 50 *Current Legal Problems* 213, 215.

¹⁹⁵ Victor Tadros, ‘The Distinctiveness of Domestic Abuse: A Freedom-Based Account’ in RA Duff and Stuart Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford University Press 2005) 119.

¹⁹⁶ Ian Dennis, ‘The Critical Condition of Criminal Law’ (1997) 50 *Current Legal Problems* 213, 215. Dennis is referring to ‘the general principles of criminal liability together with specific offences of violence, stealing, and vandalism’ (214).

7.7 Conclusion

This chapter set out to evaluate the use of the orthodox view, and its dependence upon the consent of the participants as the means by which to adjudge the lawfulness of sports violence. As the preceding chapters have demonstrated, consent is a valuable normative justification for the lawfulness of sports violence, useful insofar as allowing a person voluntarily to participate in sports that entail a degree of risk of injury can be said to further that person's autonomy. The consent of those participating is therefore an important moral consideration when considering the appropriateness of criminal liability for instances of sports violence, but translating this into a dispositive doctrinal function is more challenging, attributable in large part to the fiction of imputed consent upon which the orthodox view is based.

The chapter began with an account of the Court of Appeal's judgment in *Barnes*, an important contribution to the law in this area which this thesis has posited as symptomatic of the difficulties sports violence poses for the criminal law. While it makes little reference to the structuring of the criminal law, the *Barnes* judgment adopts the formal structure of the orthodox view, but draws its substance from a broader, contextual understanding of the defendant's conduct. This is evident at numerous points throughout the judgment, and particularly in the imprecision of the following key passage: '[A] criminal prosecution should be reserved for those situations where the conduct is sufficiently grave to be properly categorised as criminal'.¹⁹⁷

¹⁹⁷ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 911-12.

In order to assess the value of the orthodox view, I posited a number of alternative ways of framing the criminal law of sports violence. The first of these comprised two distinct proposals from the Law Commission, grouped together because of their shared provenance and inherent similarities. The respective Commission proposals were united in their assertion that, as Lord Mustill had suggested in *Brown*, consent is not the dispositive consideration when it comes to the lawfulness of sports violence.¹⁹⁸ In its first consultation, the Commission focused only on reckless sports violence, and proposed that the reasonableness limb of recklessness was potentially flexible enough that it could extend to that which was reasonable in the course of a particular sporting contest, taking into account all prevailing circumstances, including the consensual nature of sport. In its next consultation document, the Commission replaced this approach with the suggestion of a 'recognition body' that would determine the status of sports, and thus provide an authoritative guide to what was to be considered lawful. Beyond the Commission proposals, I also suggested that the doctrine of double effect may be applied to sports violence, or that Goff LJ's standard of 'generally acceptable' behaviour might also be used. Each of the alternatives posited draws from the same normative concerns as the orthodox view, though they may be said to address the 'quality' of the defendant's conduct more directly, with consent one of a number of contextual factors to take into account in considering the lawfulness of instances of sports violence.

There is a clear and understandable distaste for legal fictions because of their innately artificial and potentially duplicitous nature and this may engender an

¹⁹⁸ *R v Brown* [1994] 1 AC 212 (HL), 259.

instinctive reluctance to accept imputed consent purely because it is a fiction.¹⁹⁹ I suggested that there is no inherent problem with the use of legal fictions, but that their use requires justification. Beyond this, I set out to explain the use of the fiction of imputed consent in relation to sports violence, and explored two options. The first of these was to ascertain whether the fiction had dispositive value; that is to say, whether it could better determine cases than the alternatives presented above. I concluded that it cannot; that it accesses the same values as a more direct assessment of the defendant's behaviour, but obliquely, and thus engenders further complication, and introduces possible confusion. However, I also suggested that the certainty of the current law would not necessarily be improved by approaching the question in a different way, since it is based upon the inherently contingent concept of 'legitimate sport', and tied to heuristic measures of whether conduct during sport has reached the level of gravity for it to be considered criminal.

In the final part, I suggested that the use of the fiction enables the law to be structured in a way that can instill a degree of formal clarity and coherence into adjudications of the lawfulness of sports violence, and thus shade some of the potentially contentious moral and political questions that it raises, enabling these to be subsumed within a formal consideration of the quality of the consent that is imputed to the victim-participant. Sequestering the substantive moral and political considerations in the defence of consent prevents the more permissive attitude to violence that prevails in sports such as boxing, rugby and soccer from becoming

¹⁹⁹ On this, Hurd is forthright: 'Given that fictions are just that, I am not a fan of their use' (Heidi Hurd, 'Was the Frog Prince Sexually Molested?: A Review of Peter Westen's *The Logic of Consent*' (2004-05) 103 Michigan Law Review 1329, 1344).

'generalisable', in a way that might more readily occur were the substantive concerns addressed more directly through the offence definitions.

Chapter 8

Is Discretion the Answer?

8.1 Introduction

The preceding chapters have sought to locate sports violence within, and according to, the substantive criminal law, and have demonstrated the indeterminacy within the doctrines that purport to demarcate between lawful and unlawful sports violence. The most recent attempt to navigate this problem on the part of the appellate courts is the case of *Barnes*. In a key part of what is a relatively short Court of Appeal judgment, Lord Woolf states:

The issue which this appeal raises, is an important one. It goes to the heart of the question of when it is appropriate for criminal proceedings to be instituted after an injury is caused to one player by another player in the course of a sporting event, such as a football match. It is surprising that there is so little authoritative guidance from appellate courts as to the legal position in this situation. The explanation for this may be the fact that, until recently, prosecutions in these circumstances were very rare. However, there is now a steady but, fortunately, still modest flow of cases of this type coming before the courts, and thus *the need for guidance*.¹

As noted in the previous chapter, the ‘guidance’ that Lord Woolf considered

¹ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 911 (emphasis added).

necessary was not forthcoming, at least insofar as the substantive criminal law is concerned. Here, the Court of Appeal ostensibly concerned itself with the question of whether the conduct was criminal, and whether the trial judge had correctly directed the jury, but there is a tacit acknowledgement of the difficulty of creating a sufficiently dispositive doctrinal framework. Lord Woolf speaks of the circumstances in which it will be 'appropriate for criminal proceedings to be instituted', and suggests that it is 'fortunate' that the 'flow of cases' is 'still modest'. It is not immediately clear whether this connotes satisfaction that there is a lack of injuries being sustained during the course of contact sports; that the low level of cases illustrates a low level of criminality, however construed; or simply that it is fortunate that the level of prosecutions, for whatever reason, remains low.

Clarification of Lord Woolf's meaning is found in subsequent passages of the judgment; after pointing out that there exist other avenues by which violence can be discouraged and punished, and by which an injured party can obtain redress, Lord Woolf makes an assertion that will be familiar from preceding chapters: '[A] criminal prosecution should be reserved for those situations where the conduct is sufficiently grave to be properly categorised as criminal'.² Lord Woolf's meaning is intuitively discernible, even if its expression is somewhat imprecise, and at base tautological: in light of the uncertainty of the criminal law in relation to sports violence, Lord Woolf does not want the Court of Appeal's judgment to lead to a slew of prosecutions. It amounts to a tacit acknowledgement that the criminal law is not well-equipped to adjudicate such matters, and that prosecution is generally to be avoided.³

² *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 911-12.

³ Lord Lane had made a similar point two decades earlier when giving judgment in another Court of Appeal case concerned with the 'particular uncertainty' in relation to the limits of consensual harm; he

In this chapter, I suggest that Lord Woolf's judgment is to be understood primarily as comprising a message to those charged with bringing cases before the criminal courts. I examine the decision-making structure to which he is therefore effectively delegating responsibility, and ask whether this is a reasonable and justifiable response to sports violence in light of the indeterminacy of the substantive criminal law.

8.2 Procedural Developments post-*Barnes*

In June 2005, six months after the Court of Appeal's judgment in *Barnes*, the Crown Prosecution Service (CPS) convened a conference on the subject of 'Crime in Sport'. Although the timing suggests that the conference and draft prosecutorial guidance that followed might have been precipitated by the *Barnes* judgment, the message that emanated from the former, in particular, was in stark contrast to the approach that had been recommended by the Court of Appeal.

The conference took place in the shadow of a well-publicised on-field fight between Lee Bowyer and teammate Kieron Dyer in an English Premier League soccer game in April of that year, which had created what Gardiner terms a 'media-generated "moral panic"' around the violent behaviour of high-profile sportspersons.⁴ Presenting at the conference, Sector Director for the CPS in London West, Nazir Afzal, argued that 'the growing feeling among the public is that players are getting away with crime – that footballers in particular escape punishment by criminal justice – and that is

stated 'We would not wish our judgment on the point to be the signal for unnecessary prosecutions' (*A-G's Reference (No 6 of 1980)* [1981] 1 QB 715, 719).

⁴ Simon Gardiner, 'Sports Participation and Criminal Liability' (2007) 15 *Sport and the Law Journal* 19, 27.

wrong'.⁵ Reports of the outcome of the conference suggested that the CPS was a 'crackdown on player violence';⁶ a very different policy response to the restraint in prosecutorial practices urged by Lord Woolf.

After the conference, and speaking about the prosecutorial guidance that had been proposed, 'CPS spokesman' Paul Hayward is reported to have said: 'The guidelines ... are not about prosecuting people who simply behave badly, because that should rightly remain within the jurisdiction of governing bodies'. Rather, he continued, they were intended to target 'people who behave criminally, and who, as things stand, get away with it because they do it on the field of play'. He intimated that the threshold for prosecution might be quite low, stating: 'We don't want a situation where sportsmen are getting away with something on the pitch that they would be prosecuted for if it happened in the high street. Our aim, and I believe the public are behind us, is to bring an end to that anomaly'.⁷ Although this seemed to signal a policy direction that would lead to an increase in prosecutions, the approach was not overtly reflected in the draft guidance, which was duly published in the autumn of 2005, and this may be because the drafting took place after consultation with sports governing bodies.⁸

The draft guidance was jointly issued by the Association of Chief Police Officers

⁵ Nazir Afzal, 'Crime and Sport' (CPS Conference, London, June 2005), cited in John Carnochan and Karyn McCluskey, 'Violence, Culture and Policing in Scotland' in Daniel Donnelly and Kenneth Scott (eds), *Policing in Scotland* (2nd edn, Routledge 2011) 413.

⁶ Nick Harris, 'CPS plans crackdown on player violence' *The Independent* (London, 4 June 2005) <<http://www.independent.co.uk/sport/football/news-and-comment/cps-plans-crackdown-on-player-violence-6144901.html>> accessed 19 May 2015.

⁷ Nick Harris, 'CPS plans crackdown on player violence' *The Independent* (London, 4 June 2005) <<http://www.independent.co.uk/sport/football/news-and-comment/cps-plans-crackdown-on-player-violence-6144901.html>> accessed 19 May 2015.

⁸ CPS and ACPO, *Draft Guidance to Prosecutors and Police Officers – Crime in Sport* (2005). The draft guidance is no longer publicly available, but it is detailed in: Simon Gardiner, 'Sports Participation and Criminal Liability' (2007) 15 *Sport and the Law Journal* 19, 25-26.

(ACPO) and the CPS, and demanded that account be taken of a number of factors when deciding whether to pursue a prosecution against a person for a crime believed to have taken place during the course of sport. These included: 'the context of the sport under consideration'; whether there was evidence of 'pre-meditation'; the status of the victim (whether they were a fellow participant, match official or spectator); the impact of the conduct upon the victim and whether it led to further 'violence or disorder'; and whether the perpetrator had a history of similar conduct. In addition, the draft guidance demanded consideration of '[a]ny action taken by the match officials or the governing bodies in relation to the incident'.⁹

These factors point to a similar approach to that advocated in *Barnes*, insofar as there is a requirement to look to context, and decide upon the seriousness of the offence, based upon the identity of the victim, the effect upon the victim, and whether it was pre-meditated. It also urges that the pluralistic nature of sports regulation be considered. However, it is not clear what effect the draft guidance had on prosecutorial practice; it is seemingly now obsolete and no longer publicly available.¹⁰

8.2.1 The 'Agreement'

On 23 December 2013, the CPS, ACPO, the Football Association (FA) and the Football Association of Wales (FAW) jointly issued the *Protocol on the Appropriate Handling of Incidents Falling Under Both Criminal and Football Regulatory Jurisdiction* (the 'Joint Protocol').¹¹ This was superseded in October 2015 by the *Agreement on the Handling*

⁹ Simon Gardiner, 'Sports Participation and Criminal Liability' (2007) 15 *Sport and the Law Journal* 19, 26.

¹⁰ Letter from Miss H Hardaker (Information Management Unit, CPS) to author (11 April 2014).

¹¹ Crown Prosecution Service, *Protocol on the Appropriate Handling of Incidents Falling Under Both Criminal and Football Regulatory Jurisdiction* (2013)

of Incidents Falling Under Both Criminal and Football Regulatory Jurisdiction (the 'Agreement'), agreed by the CPS, FA, FAW and the National Police Lead for football on behalf of the National Police Chiefs' Council (the NPCC is the successor organisation to ACPO).¹² Although there have been some refinements in the language employed, the effect of the Agreement is functionally identical to that of the Joint Protocol, in that it exists in order to facilitate collaboration between the respective organisations when it comes to deciding upon whether criminal proceedings should be brought in relation to 'incidents falling under concurrent jurisdiction'.¹³ Whilst it is not made explicit in the Agreement, it is clear that its primary target is on-field violence.¹⁴

The ambit of the Agreement is both narrower and wider than that of the draft guidance. Since it has been agreed between the CPS, NPCC and domestic soccer's governing bodies, it has no official application outside of this, whereas the previous CPS and ACPO draft guidance was generally applicable to all sports in which there was a prospect of prosecution for a criminal offence. Where the Agreement is wider is in the active involvement of the sports governing bodies (the FA and the FAW); the draft guidance had been compiled after consultation with sports governing bodies, but it did not make explicit provision for them to be involved in particular decisions around prosecution.

Although it was promulgated almost a decade after the Court of Appeal judgment, the lineage to *Barnes* is more evident in the approach adopted in the

<http://www.cps.gov.uk/publications/agencies/football_protocol.pdf> accessed 15 June 2015.

¹² *Agreement on the Handling of Incidents Falling under both Criminal and Football Regulatory Jurisdiction* (2015) <http://cps.gov.uk/publications/agencies/football_agreement_02_09_2015.pdf> accessed 20 July 2016.

¹³ The Agreement 1.

¹⁴ The Agreement offers two 'illustrative examples', both of which involve on-field violence (4).

Agreement than in the previous draft guidance. This is true both of its tone, insofar as it urges restraint in prosecution and more clearly points to the benefits of alternatives to criminal prosecution, and in the fact that it draws some of its terminology directly from the words of Lord Woolf.¹⁵

There is a pragmatic foundation for the implementation of the Agreement, which states that its purpose is to:

clarify the roles and responsibilities of the relevant parties in respect of dealing with incidents falling under concurrent jurisdiction;

ensure consistent early liaison between the parties where appropriate;

establish a streamlined and consistent approach to all cases.¹⁶

The Agreement therefore promotes the sharing of information and pooling of expertise across the organisations represented by the signatories. Like *Barnes* (and, to a more limited extent, the earlier draft guidance), the Agreement draws on the logic of a pluralistic approach to sports violence, and allows for this to feed into the response of the criminal law.

It may be that the approach advocated by the Agreement reflects current practice across the agencies of criminal justice, but this is likely only to be partially true, and its invocations to collaboration may have a profound effect on the treatment of sports violence at the hands of criminal justice practitioners. The nature of the

¹⁵ For instance, the Agreement directly quotes Lord Woolf when it states as a guiding principle: 'In respect of incidents on the field of play which cause injury, prosecutions should be reserved for situations where the conduct is sufficiently grave to be properly categorised as criminal' (4).

¹⁶ The Agreement 1.

signatories to the Agreement mean that its official remit extends only to soccer, but there are reasons to suppose that its influence could be much wider. As noted above, the Agreement draws heavily on the reasoning in *Barnes*, which is a case that, although also immediately concerned with events arising from a soccer match, has application across all sports where such issues arise. The coincidence in terminology and approach may persuade police and prosecutors that the underlying rationale of the Agreement should be adopted when deciding to prosecute, for example, a rugby player.

Whether or not the Agreement reflects current practice, it is likely to act as a reference point, and may enact a cautionary approach to prosecution, and induce collaboration between police, prosecutors and sports governing bodies. Additionally, it appears likely that, if it is perceived to be successful, attempts will be made on the part of the criminal justice agencies to establish similar protocols in conjunction with other sports bodies.¹⁷

8.3 A Pluralistic Approach to Sports Violence

A prominent feature of what Lord Woolf had to say in relation to the appropriateness or otherwise of criminal prosecution in cases of sports violence was attributed to the availability of alternative regulatory mechanisms; he stated in *Barnes*:

In determining what the approach of the courts should be, the starting point is the fact that *most organised sports have their own disciplinary procedures for*

¹⁷ The CPS has stated that equivalent arrangements 'might be rolled out to encompass other sports' (Letter from Mr D Martindale (Information Management Unit, CPS) to author (29 January 2015)).

enforcing their particular rules and standards of conduct. As a result, in the majority of situations there is not only no need for criminal proceedings, it is undesirable that there should be any criminal proceedings. Further, in addition to a criminal prosecution, *there is the possibility of an injured player obtaining damages in a civil action from another player,* if that other player caused him injuries through negligence or an assault.¹⁸

8.3.1 Presumptions against the use of the criminal law

The view that, where there are alternatives, it is ‘undesirable that there should be any criminal proceedings’ is a relatively uncontroversial starting-point for many; limitations on the use of criminal law as a regulatory tool have been a popular trope for liberal commentators. For example, Husak writes that the criminal law ‘cannot be necessary to accomplish a purpose if other means could do so more easily’,¹⁹ and Feinberg considers the use of the criminal law to be a ‘more drastic and serious thing than its main alternatives’, and thus also considers it should be something of a ‘last resort’.²⁰ Feinberg points to the frequent availability of, and preference for, alternatives, stating: ‘For every criminal sanction designed to prevent some social evil, there is a range of alternative techniques for achieving, at somewhat less drastic cost, the same purpose’.²¹

¹⁸ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 911.

¹⁹ Doug Husak, ‘The Criminal Law as Last Resort’ (2004) 24 *Oxford Journal of Legal Studies* 207, 212.

²⁰ Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press 1984) 23.

²¹ Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press 1984) 22. On this, see Roberts’s contribution to LCCP 139: ‘If some other state action short of criminalisation - such as advertising, licensing, taxation, civil law remedies and so on - might be effective in controlling or eradicating the conduct in question, liberalism, paternalism and moralism are united in advocating that those alternative means be pursued first’ (Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para C.94).

In the case of sport, it is often pointed out that, not only are there alternatives available that might make the use of the criminal law unnecessary, but these alternatives may be more effective than the criminal law in achieving the aims of the latter. As Cohen emphasises, '[t]he decision not to prosecute does not mean that a professional athlete acting violently during a game goes without punishment'.²² He points to '[v]arious alternative dispute resolution methods, including civil mechanisms, game officiating, league fines and suspensions', and suggests that these might 'control violent behavior in sports more effectively than the imposition of criminal liability'.²³

8.3.2 'Private government' and the Agreement

As the discussion in Chapter 3 demonstrated, sports engender behavioural expectations of their participants, and these are guided by relatively sophisticated rule structures, which, along with manifold other influences, such as the level of play, seriousness of competition and commercial pressures, generate a playing culture associated with its practice. This is policed from within by a combination of in-game adjudication and tribunals that, to a greater or lesser extent, resemble the criminal justice system.

Gardiner and others note that 'the regulatory processes of the sports governing bodies have themselves become increasingly legalistic and legalised, as

²² Wayne R Cohen, 'The Relationship Between Criminal Liability and Sports: A Jurisprudential Investigation' (1989-90) 7 *University of Miami Entertainment and Sports Law Review* 311, 322. Cohen is writing primarily of the situation in the US, but the point can successfully be extended to England and Wales, amongst other jurisdictions.

²³ Wayne R Cohen, 'The Relationship Between Criminal Liability and Sports: A Jurisprudential Investigation' (1989-90) 7 *University of Miami Entertainment and Sports Law Review* 311, 322.

legal professionals play an increasing role, on behalf of both regulated parties and the governing bodies themselves'.²⁴ This 'legalism' is also evident in the use of the term 'laws' to describe the rules in some sports,²⁵ and is used partly, no doubt, to assert the legitimacy of the governing bodies, their practices and procedures, and to insulate the various parties themselves from the interference of the law and retain control over what they might perceive as internal disciplinary matters.

This type of arrangement has been referred to by Macaulay as comprising a system of 'private government'.²⁶ The legitimacy of the sports bodies and their disciplinary tribunals are acknowledged in the Agreement, which refers to 'concurrent jurisdiction' and compares aspects of criminal and sports disciplinary procedure, and the 'sentencing' options open to the respective mechanisms. In so doing, there is a recognition that the disciplinary arms of sports governing bodies have broad powers to impose sanctions where a sportsperson is found to have transgressed their rules, including fines, playing suspensions, bans on attending stadia, orders to pay compensation, or 'any order appropriate to the misconduct in question'.²⁷ The Agreement goes on to say that, in some circumstances, the punishments available to the disciplinary tribunals might serve as 'a more effective punishment', and thus a 'strong deterrent against misbehaviour', insofar as they can impose larger financial penalties than can the criminal courts, and can impose punishments that are not

²⁴ Simon Gardiner and others, *Sports Law* (4th edn, Routledge 2012) 89.

²⁵ For example: FIFA, *The Laws of the Game 2015/2016* (FIFA 2015); World Rugby, *Laws of the Game* (World Rugby 2015).

²⁶ Stewart Macaulay, 'Private Government' in Leon S Lipson and Stanton Wheeler (eds), *Law and the Social Sciences* (New York 1986).

²⁷ The Agreement 2.

available to the criminal courts, such as deducting points from a player's club, or imposing a ban from competition.²⁸

An example of the relative 'sentencing powers' available to the respective mechanisms of a sport's internal disciplinary mechanisms and the criminal process can be found in the case of Lee Bowyer, who was banned for seven matches and fined £30,000 by the Football Association, in addition to a fine from his club (Newcastle United) of around £200,000, for his part in an on-field fight with teammate Kieron Dyer during a Premier League soccer game in 2005. The incident also led to Bowyer being charged with a public order offence contrary to s 5 of the Public Order Act 1986, and he pleaded guilty to the lesser offence provided for under s 4 of the same Act. The fine imposed by the court was £600 (plus £1,000 costs). Justifying the decision to prosecute, Nicola Reasbeck, Chief Crown Prosecutor for CPS Northumbria, said: 'The criminal law doesn't cease to operate once you cross the touchline of a sports field'.²⁹ The disparity between the penalties imposed by the sports bodies and that imposed by the criminal court is striking.

Anderson also suggests that the sports bodies might be more effective than the criminal law when it comes to deterring 'unnecessarily violent play':

There is little doubt that a *speedy, consistent and fair internal disciplinary regime within a sport is the most effective deterrent* against unnecessarily violent play, as opposed to the *more distant and unpredictable applicability of*

²⁸ The Agreement 2.

²⁹ Crown Prosecution Service, 'Lee Bowyer Pleads Guilty to Public Order Offence' (5 July 2007) <http://www.cps.gov.uk/news/latest_news/143_06/> accessed 15 June 2015; Andrew Norfolk, 'Fair Play under Scrutiny as Bowyer Pleads Guilty over Punch-up on Pitch' *The Times* (London, 6 July 2006) 3).

the criminal law. Such matters are clearly better dealt within ‘in-house’ because that is where the expertise lies and it is where long-term preventive measures, such as rule changes, can be implemented in a coherent way in order to ensure that such ill discipline will not occur again in the future.³⁰

It should be noted that Anderson here places an implicit caveat on his preference for an ‘internal disciplinary regime’, insofar as it is only to be preferred where it satisfies the requirements of being ‘speedy, consistent and fair,’ and others have suggested that this is an unrealistic expectation.

Although he concedes that, ‘[i]n theory the best way to deal with sports violence and deter athletes from injuring other athletes is through internal controls in the sport’, Jahn points out that, in many cases, commercial concerns and the attendant internal politics and pressures of sport mitigate against harsh penalties, which means that the sanctions imposed by the sports authorities are often ‘largely ineffective in deterring athletes from violence’.³¹ Meanwhile, Flakne and Caplan go even further in outlining their principled objection to delegating responsibility for ‘quasi-criminal acts’ to sports governing bodies:

[T]o suggest that the governing body of a particular sport determine appropriate sanctions for a quasi-criminal or a criminal act would be tantamount to granting the board of directors of General Motors jurisdiction

³⁰ Jack Anderson, ‘Sanctioned Aggression or Criminal Sanction? Violence, Contact Sports and the Law’ in David Hassan and Jim Lusted (eds), *Managing Sport: Social and Cultural Perspectives* (Routledge 2012) 57 (emphasis added).

³¹ Gary Norman Jahn, ‘Civil Liability: An Alternative to Violence in Sporting Events’ (1988) 15 Ohio Northern University Law Review 243, 250.

over the determination of guilt or innocence and the appropriate punishment for one of their employees who, while on the job, killed his foreman.³²

8.3.3 Redress and deterrence through the civil law

In addition to the 'private government' of a sport's internal disciplinary procedures, the Court of Appeal also makes reference to 'the possibility of an injured player obtaining damages in a civil action from another player, if that other player caused him injuries'.³³ It is not necessary for the present purposes to explore the civil law in detail; it is sufficient to establish its place in the pluralistic regulatory response to sports violence, and thus the potential effect its availability and function might have on the decision to prosecute.

When it comes to those who have been injured by a fellow participant, the tort of negligence is the most likely avenue of civil recourse. Lord Woolf noted that '[t]he circumstances in which criminal and civil remedies are available can and do overlap'³⁴ and, since the possibility for legal action will frequently derive from the same circumstances, it is unsurprising that establishing negligence has encountered similar problems to those faced by the criminal law. Fafinski notes the closeness of the criminal and civil doctrines when it comes to assessing liability for sports violence,³⁵ and these similarities extend to the difficulties they have faced in deciding in what circumstances liability requirements will be satisfied.

The first English civil case to address the issue of negligence following an injury

³² Gary W Flakne and Allan H Caplan, 'Sports Violence and the Prosecution' (1977) 13 *Trial* 33, 33-34.

³³ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 911.

³⁴ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, 911.

³⁵ Stefan Fafinski, 'Consent and the Rules of the Game: The Interplay of Civil and Criminal Liability for Sporting Injuries' (2005) 69 *Journal of Criminal Law* 414.

caused by one sports participant to another, and thus the mutual duties of care owed to each other by those who take part in sport, was *Condon v Basi*.³⁶ Here, the Court of Appeal looked to the Australian case of *Rootes v Shelton* for guidance, and quoted Barwick CJ: 'By engaging in a sport...the participants may be held to have accepted risks which are inherent in that sport...but this does not eliminate all duty of care of the one participant to the other'.³⁷ As in the criminal law, liability is not tied to the rules; contravention of the rules will not in itself bring liability, and liability may be imposed for dangerous acts that are within the rules.³⁸ However, also in common with the criminal law, it has been held that liability will not derive from 'the great majority of errors of judgement, mistakes and even intentional fouls'.³⁹

In *Caldwell v Maguire*,⁴⁰ Lord Tuckey noted that in the 'prevailing circumstances' of the sporting context, 'the threshold for liability is in practice inevitably high',⁴¹ and the proof of a breach of duty necessary in order to impose liability for negligence 'will not flow from proof of no more than an error of judgement or from mere proof of a momentary lapse in skill', since '[s]uch are no more than incidents inherent in the nature of the sport'.⁴² Lord Tuckey therefore noted that '[i]n practice it may therefore be difficult to prove any such breach of duty absent proof of conduct that in point of fact amounts to reckless disregard for the fellow contestant's safety'.⁴³

³⁶ [1985] 1 WLR 866. See: Connor Gearty, 'Liability for Injuries Incurred During Sport and Pastimes' [1985] Cambridge Law Journal 371.

³⁷ *Rootes v Shelton* [1968] ALR 33, 34 (Barwick CJ).

³⁸ *Affutu-Nartey v Clarke* (1984) The Times, 9 February.

³⁹ *McCord v Swansea City AFC Ltd* (1997) The Times, 11 February (Ian Kennedy J).

⁴⁰ *Caldwell v Maguire and another* [2002] PIQR P6 (CA).

⁴¹ *Caldwell v Maguire and another* [2002] PIQR P6 (CA), 48 (Lord Tuckey).

⁴² *Caldwell v Maguire and another* [2002] PIQR P6 (CA), 48 (Lord Tuckey).

⁴³ *Caldwell v Maguire and another* [2002] PIQR P6 (CA), 48 (Lord Tuckey). Whilst asserting that he did not mean to alter the established meaning of negligence, Lord Tuckey was at pains to 'emphasise the

Just as the criminal courts have been reluctant to allow for a precedent to be created whereby the existence of sports, and their inherent characteristics, would be unduly impinged upon, so have the civil courts. In *Tomlinson v Congleton Borough Council*, the House of Lords emphasised that '[t]he pursuit of an unrestrained culture of blame and compensation has many evil consequences', including 'interference with the liberty of the citizen';⁴⁴ to this end, a 'dull and grey safety regime' should never be imposed.⁴⁵ This approach has now been given statutory force in the Compensation Act 2006, which directs a court to consider whether a claim might 'prevent a desirable activity from being undertaken at all ... or discourage persons from undertaking functions in connection with a desirable activity'.⁴⁶

Cohen states the advantage of the civil law as being more attractive than the criminal process to the injured sportsperson, in that it can operate to 'compensate the injured sports victim who brings an action'.⁴⁷ However, it should be noted that some of the traditionally accepted distinctions between the role and functions of the criminal and civil law are increasingly blurred.⁴⁸ For example, upon conviction, the

distinction between the expression of legal principle and the practicalities of the evidential burden'.

⁴⁴ *Tomlinson v Congleton Borough Council* [2003] UKHL 47, [2004] 1 AC 46, 97 (Lord Hobhouse).

⁴⁵ *Tomlinson v Congleton Borough Council* [2003] UKHL 47, [2004] 1 AC 46, 100 (Lord Scott).

⁴⁶ S 1. This provision applies to claims arising from negligence or breach of a statutory duty. In addition, there is a possibility that such a claim would come within the ambit of the Social Action, Responsibility and Heroism Act 2015, which specifies that the court 'must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting for the benefit of society or any of its members' (s 2), and 'must have regard to whether the person, in carrying out the activity in the course of which the alleged negligence or breach of statutory duty occurred, demonstrated a predominantly responsible approach towards protecting the safety or other interests of others' (s 3).

⁴⁷ Wayne R Cohen, 'The Relationship Between Criminal Liability and Sports: A Jurisprudential Investigation' (1989-90) 7 *University of Miami Entertainment and Sports Law Review* 311, 322. In some cases, the damages awarded can be substantial; see: *Collett v Smith and Middlesbrough Football and Athletics Co (1986) Ltd* [2008] EWHC 1962 (QB); Mark Hughes, 'The £4.3million Football Career That Never Was' *The Independent* (London, 12 August 2008)

<<http://www.independent.co.uk/news/uk/home-news/the-16343million-football-career-that-never-was-891508.html>> accessed 21 February 2015.

⁴⁸ For accounts of the often close relationship between criminal and tort law, see: Matthew Dyson (ed), *Unravelling Tort and Crime* (Cambridge University Press 2014).

criminal court may order an offender to pay compensation to the victim.⁴⁹

Additionally, a victim of violent crime might be entitled to compensation under the Criminal Injuries Compensation Scheme.⁵⁰

For the violent sportsperson who is convicted, it has been suggested that there could be tailored punishments at the sentencing stage. In the Canadian case of *R v McSorley*,⁵¹ on conviction for assault with a weapon after hitting an opponent with an ice hockey stick, McSorley was granted a conditional discharge, bound by a condition that he would not engage in any sporting event where the victim was on the opposition team. Writing of this case, James suggest that '[a] playing ban is the ideal punishment in these circumstances', since '[t]he players are not a threat to society at large, only to other players. To stop them from playing both punishes them and protects the class of people most likely to be harmed by their actions'.⁵² Under English law, a similar punishment could be imposed by virtue of s 177 of the Criminal Justice Act 2003. This provides for 'community orders', one of which is a 'prohibited activity requirement'.⁵³

Jahn suggests that, as well as offering compensation to the injured victim of sports violence, the civil law of tort also offers 'the best way to deter violent conduct among athletes', as it 'imposes financial liability on the athlete ... and this will hit him where it hurts the most – in his pocket'.⁵⁴ The decision as to whether to bring a claim for damages will, of course, be influenced by the ability of the potential defendant to

⁴⁹ Powers of Criminal Courts (Sentencing) Act 2000, s 130.

⁵⁰ Ministry of Justice, *Criminal Injuries Compensation Scheme 2012* (The Stationery Office, 2012); Criminal Injuries Compensation Act 1995.

⁵¹ [2000] BCPC 117.

⁵² Mark James, 'The Trouble with Roy Keane' (2002) 1 Entertainment Law 72, 91.

⁵³ Criminal Justice Act 2003, s 177(d); further defined in s 203.

⁵⁴ Gary Norman Jahn, 'Civil Liability: An Alternative to Violence in Sporting Events' (1988) 15 Ohio Northern University Law Review 243, 253.

pay, and here the existence of insurance schemes might have a bearing in two, contrasting respects. Firstly, they may serve to encourage a potential claimant. However, as the cost will be borne directly by the insurer, it may also be that the deterrent effect is diluted, since the penalty will not have direct financial implications for the athlete. The possibility of vicarious liability might have a similar effect, particularly in the case of professional sports. Here, a player's club could be held liable for the tort of an employee if its commission is sufficiently linked to the player's employment.⁵⁵ Vicarious liability extends to semi-professional and part-time players, but is unlikely to apply to amateur sportspersons,⁵⁶ unless a quasi-employment relationship is held to exist.⁵⁷

Gardiner suggests that 'the reality of potential civil liability seems to have had a positive effect on the promotion of safety and good practice in sport',⁵⁸ and the possibility of civil action may influence the approach of the criminal courts, and the decision to prosecute, insofar as the Court of Appeal acknowledged it as a potential alternative avenue of redress. It is not a factor mentioned in the Agreement, presumably because the decision to take civil action on the part of an injured participant is beyond the control of either the sports governing bodies or the criminal justice agencies.

⁵⁵ *Lister v Hesley Hall Ltd* [2001] UKHL 22. See: Mark James and David McArdle, 'Player Violence, or Violent Players? Vicarious Liability for Sports Participants' (2004) 12 Tort Law Review 131.

⁵⁶ *Gravil v Carroll and Redruth Rugby Football Club* [2008] EWCA Civ 689.

⁵⁷ *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938, [2012] WLR (D) 204.

⁵⁸ Simon Gardiner, 'Sports Participation and Criminal Liability' (2007) 15 Sport and the Law Journal 19, 29. Liability for injury has been extended to both referees (*Smoldon v Whitworth* [1997] PIQR 133; *Vowles v Evans and Welsh Rugby Union* [2003] EWCA Civ 318) and governing bodies (*Watson v British Boxing Board of Control Ltd and Another* [2001] QB 1134 (CA)).

8.4 Discretion and Criminal Justice

The criminal justice system is punctuated at various points by the exercise of discretion and,⁵⁹ in the case of sports violence, the practical application of discretion starts before the mechanisms of the criminal justice system are even engaged. What small empirical studies have been carried out suggest that sports participants do not favour recourse to the criminal law, except for in the case of conduct or injury that is entirely egregious.⁶⁰ Citing player reaction in the wake of the high-profile conviction of Canadian ice-hockey player Dino Ciccarelli,⁶¹ Carroll states that 'players tend to prefer internal fine/suspension mechanisms to judicial intervention'.⁶² This is unsurprising in light of the mutual risk all sportspersons run when playing contact sports, and the pervasive influence of the culture surrounding sport alluded to in Chapter 3. It is therefore possible, indeed probable, that there are relatively few complaints, and that potentially criminal incidents do not generally come to the attention of prosecutors, or even the police.

In 2006, following an incident during a Premier League soccer game in which Portsmouth player Pedro Mendes was knocked unconscious by Manchester City player Ben Thatcher, Greater Manchester Police were reported to have begun an

⁵⁹ For the relative importance of discretionary mechanisms and the 'law on the street', see: William J Stuntz, 'Plea Bargaining and Criminal Law's Disappearing Shadow' (2003-04) 117 *Harvard Law Review* 2548.

⁶⁰ Adam Pendlebury, 'Perceptions of Playing Culture in Sport: The Problem of Diverse Opinion in the Light of Barnes' (2006) *Entertainment and Sports Law Journal*; Mark James, 'Consent to Injury and an Exemption for Contact Sports' (PhD thesis, Manchester Metropolitan University 2001).

⁶¹ Ciccarelli was convicted of assault in 1988, for an incident that occurred during an ice hockey match in the US National Hockey League. He was fined \$1000 and imprisoned for one day.

⁶² Mary Carroll, 'It's Not How You Play the Game, It's Whether You Win or Lose: The Need for Criminal Sanctions to Curb Violence in Professional Sports' (1988-89) 12 *Hamline Law Review* 71.

investigation.⁶³ Having spoken to ‘the relevant parties involved’, however, the police announced that no further action would be taken, and that this decision had been arrived at ‘[i]n consultation with the injured player, the clubs and the Football Association’.⁶⁴ The police stated that this decision had been taken because they had been informed that Mendes had decided to pursue a complaint with the FA, and had asked for the police to discontinue their investigation and not to pursue a criminal prosecution’.⁶⁵ This case illustrates the discretionary power that lies with the victim to report and encourage or discourage prosecution, and that of the police, since the cooperation of an alleged victim is not necessary in order for a prosecution to proceed.

The importance of police discretion is emphasised by McConville, Sanders and Leng, who note that the autonomy of the police in the early stages of the criminal process is ‘virtually absolute’.⁶⁶ In a similar vein, Samuels writes that the ‘police can very largely “control” the decision whether or not to continue with the prosecution’, noting that ‘the police are virtually the sole source of information for the prosecution’ and that they ‘select ... the evidence and other material passed to the prosecution’.⁶⁷ Uglow describes the role of the police as akin to a ‘preliminary filter’, insofar as they decide ‘whether to investigate, to take no further action ... whether to caution or to prosecute’,⁶⁸ and thus pursue cases or remove them from the ‘conveyor-belt of

⁶³ Mark Ogden and Christopher Davies, ‘Thatcher Faces Police Action over Mendes’ *The Telegraph* (London, 26 August 2006) <<http://www.telegraph.co.uk/sport/football/2344180/Thatcher-faces-police-action-over-Mendes-foul.html>> accessed 12 January 2015.

⁶⁴ ‘No Police Penalty for Thatcher’ *The Guardian* (London, 6 September 2006) <<http://www.theguardian.com/football/2006/sep/29/newsstory.sport7>> accessed 15 February 2015.

⁶⁵ ‘No Police Penalty for Thatcher’ *The Guardian* (London, 6 September 2006) <<http://www.theguardian.com/football/2006/sep/29/newsstory.sport7>> accessed 15 February 2015.

⁶⁶ Mike McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution* (Routledge 1991) 6.

⁶⁷ Alec Samuels, ‘Crown Prosecution Service’ (1986) 50 *Journal of Criminal Law* 432. Samuels does note that this is a slight simplification, insofar as the prosecution can call for the file if need be.

⁶⁸ Steve Uglow, *Criminal Justice* (2nd edn, Sweet & Maxwell 2002) 177-78.

justice'.⁶⁹ The attitudes and practices of the police in making such decisions are therefore significant factors in the treatment of sports violence,⁷⁰ and the importance to criminal justice of police decision-making when it comes to sports violence is reflected in the involvement of the NPCC as one of the signatories to the Agreement.

8.4.1 The exercise of prosecutorial discretion

The majority of prosecutions in England and Wales are undertaken by the CPS,⁷¹ an organisation that came into operation in 1986, by virtue of the Prosecution of Offences Act (POA) 1985,⁷² and it is likely that any prosecution for sports violence will be brought by the CPS. The organisation is led by the Director of Public Prosecutions (DPP), who issues the *Code for Crown Prosecutors* ('the Code'),⁷³ in accordance with s 10 of the POA 1985. This document sets out *inter alia* the factors to be taken into account when deciding whether to prosecute in a particular case, and has been called the CPS's 'most fundamental document'.⁷⁴

7.4.1.1 The application of the evidential test

The Code specifies a two-stage process to be undertaken when deciding whether a prosecution should be brought, the first element of which is known as the

⁶⁹ Steve Uglow, *Criminal Justice* (2nd edn, Sweet & Maxwell 2002) 196.

⁷⁰ For studies of police attitudes and practices, see: Robert Reiner, *The Politics of the Police* (4th edn, Oxford University Press 2010); David Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon Press 1997).

⁷¹ As Young and Sanders note, the decision whether to prosecute can be traced further back, to the practices of enforcement agencies such as the police (Richard Young and Andrew Sanders, 'The Ethics of Prosecution Lawyers' (2004) 7 *Legal Ethics* 190).

⁷² On its website (www.cps.gov.uk), the CPS states as its role the following: advising the police on cases for possible prosecution; reviewing cases submitted by the police; determining any charges in all but minor cases; preparing cases for court; presenting cases at court.

⁷³ Crown Prosecution Service, *The Code for Crown Prosecutors* (7th edn, 2013).

⁷⁴ Keir Starmer, 'The Rule of Law and Prosecutions: to Prosecute or not to Prosecute' <http://www.freedomunderlaw.org/wp-content/files/5_Keir_Starmer.pdf> accessed 15 June 2015.

‘evidential test’.⁷⁵ Under this, the prosecutor must consider whether there is ‘sufficient evidence to provide a realistic prospect of conviction’;⁷⁶ the test will be satisfied where it is considered that ‘an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged’.⁷⁷ Of the evidential test, former DPP Keir Starmer writes:

The evidential stage of the Full Code Test is clear: no-one has seriously suggested that the threshold for evidential sufficiency of a ‘realistic prospect of conviction’ is inappropriate, balancing as it does the need to ensure that individuals should not be prosecuted where the evidence does not support a conviction while not setting the standard so high that probably guilty people escape justice completely.⁷⁸

Although the calibration of the threshold is a potential point of contention,⁷⁹ Starmer is surely right to assert that there is little problem in principle with such a test being employed; in the context of an adversarial criminal justice system, it is difficult to envisage a prosecutorial policy without some form of evidential test in place.⁸⁰

⁷⁵ Crown Prosecution Service, *The Code for Crown Prosecutors* (7th edn, 2013) paras 4.4-4.6.

⁷⁶ Crown Prosecution Service, *The Code for Crown Prosecutors* (7th edn, 2013) para 4.4.

⁷⁷ Crown Prosecution Service, *The Code for Crown Prosecutors* (7th edn, 2013) para 4.5.

⁷⁸ Keir Starmer, ‘The Rule of Law and Prosecutions: to Prosecute or not to Prosecute’ <http://www.freedomunderlaw.org/wp-content/files/5_Keir_Starmer.pdf> accessed 15 June 2015.

⁷⁹ Prior to the inauguration of the CPS in 1986, the test, under a system of police prosecution, had been at the level of ‘a *prima facie* case’ (Oliver Quick, ‘Prosecuting “Gross” Medical Negligence: Manslaughter, Discretion, and the Crown Prosecution Service’ (2006) 33 *Journal of Law and Society* 421, 427).

⁸⁰ Ashworth states: ‘To prosecute when the evidence is insufficient inflicts unjustified anxiety on the defendant and wastes public resources’ (Andrew Ashworth, ‘Developments in the Public Prosecutor’s

The satisfaction of the evidential test may appear at first to be a routine and mechanistic quantitative exercise, but it is axiomatic to the operability of the test that the law must have a degree of certainty and predictability. If the offence is not conceptually or doctrinally clear, it is difficult for a prosecutor to come to any judgement as to the likelihood of success in a prosecution, and here the uncertainty and lack of clarity surrounding the criminal law of sports violence makes application of the evidential test problematic. Quick draws attention to a similar problem that exists in relation to the prosecution of gross negligence manslaughter, an offence characterised by an 'inherent definitional vagueness' that is analogous to the offences that might be prosecuted when it comes to sports violence.⁸¹

Thus, Young and Sanders assert that "evidential sufficiency" is not merely a technical legal matter, but involves evaluations of ... open-ended matters'.⁸² They cite 'dishonesty' and reasonable self-defence' as examples, and the uncertainty and contingency that attends the concept of 'imputed consent' in relation to sports violence, or the standard of 'legitimate sport', bears comparison with these. Thus, even where prosecutors have access to all of the relevant information and evidence, Young and Sanders suggest that 'guilt and innocence would not always be a matter of objective fact about which there could be no "reasonable doubt"'.⁸³

Office in England and Wales' (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice* 257, 275).

⁸¹ Oliver Quick, 'Prosecuting "Gross" Medical Negligence: Manslaughter, Discretion, and the Crown Prosecution Service' (2006) 33 *Journal of Law and Society* 421, 422.

⁸² Richard Young and Andrew Sanders, 'The Ethics of Prosecution Lawyers' (2004) 7 *Legal Ethics* 190, 201.

⁸³ Richard Young and Andrew Sanders, 'The Ethics of Prosecution Lawyers' (2004) 7 *Legal Ethics* 190, 201.

7.4.1.2 *The application of the public interest test*

If the evidential threshold is not reached, a prosecution should not proceed. However, although satisfaction of this test is necessary, it is not sufficient in order to commence a prosecution and, following this, the 'public interest' test should be addressed.⁸⁴ The Code lists various factors that should be considered, and a prosecution will be pursued only if it is held that these point to its being in the public interest. The words of then Attorney-General, Sir Hartley Shawcross, have often been used in support of the ethos of the test:

It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute, amongst other cases: 'wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest'. That is still the dominant consideration.⁸⁵

These sentiments were recently cited with approval by Lord Hope,⁸⁶ and have also been championed by Starmer, who differentiates between the approach described above and one where there is no consideration of matters extraneous to evidential concerns.⁸⁷ In weighing up the relative merits of a system based on

⁸⁴ Crown Prosecution Service, *The Code for Crown Prosecutors* (7th edn, 2013) paras 4.7 to 4.12.

⁸⁵ HC Deb 29 January 1951, vol 483, col 681.

⁸⁶ *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345, 391.

⁸⁷ Keir Starmer, 'The Rule of Law and Prosecutions: to Prosecute or not to Prosecute'

discretionary power (the 'expediency principle'), or one anchored in the 'legality principle' (whereby all provable crimes are prosecuted), Starmer holds that the existence of the public interest test amounts to 'a recognition that the fact a crime has been provably committed is not the be-all and end-all of the matter'; that it evinces 'an acceptance that there are other appropriate considerations around the suspect, the victim, the offence and the national interest'.⁸⁸ He characterises the approach as 'rounded and inclusive', asserting that it 'makes it more rather than less likely that proper justice will be done'.⁸⁹ Of the benign operation of the test, he writes:

The adoption of the 'expediency' principle in England and Wales has allowed the enforcement of the rigid structures of State to be flexible enough to allow firm and rigorous prosecutions when necessary but also to allow the public prosecutor not to prosecute where it is not in the public interest to do so. Properly exercised the discretion whether to prosecute or not delivers justice and is consistent with the rule of law.⁹⁰

Although it is acknowledged within the Code that '[i]t has never been the rule that a prosecution will automatically take place once the evidential stage is met',⁹¹ there is a presumption in favour of prosecution where the evidence is considered sufficient for a conviction; the Code states: 'A prosecution will usually take place

<http://www.freedomunderlaw.org/wp-content/files/5_Keir_Starmer.pdf> accessed 15 June 2015.

⁸⁸ Keir Starmer, 'The Rule of Law and Prosecutions: to Prosecute or not to Prosecute'

<http://www.freedomunderlaw.org/wp-content/files/5_Keir_Starmer.pdf> accessed 15 June 2015.

⁸⁹ Keir Starmer, 'The Rule of Law and Prosecutions: to Prosecute or not to Prosecute'

<http://www.freedomunderlaw.org/wp-content/files/5_Keir_Starmer.pdf> accessed 15 June 2015.

⁹⁰ Keir Starmer, 'The Rule of Law and Prosecutions: to Prosecute or not to Prosecute'

<http://www.freedomunderlaw.org/wp-content/files/5_Keir_Starmer.pdf> accessed 15 June 2015.

⁹¹ Crown Prosecution Service, *The Code for Crown Prosecutors* (7th edn, 2013) para 4.8.

unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour'.⁹² Where there is doubt, it seems that a prosecution is to be pursued, since the Code demands that, even where there are 'public interest factors tending against prosecution in a particular case, prosecutors should consider whether nonetheless a prosecution should go ahead and those factors put to the court for consideration when sentence is passed'.⁹³

The Code sets out the factors that are potentially relevant and that 'should enable prosecutors to form an overall assessment of the public interest'. The factors tend to revolve around the seriousness of the offence,⁹⁴ centring primarily on the existence or not of aggravating factors,⁹⁵ but also looking at the impact on the purported victim,⁹⁶ and on wider societal concerns.⁹⁷ It is acknowledged that these are neither 'exhaustive', nor necessarily 'relevant in every case'.⁹⁸ Across different situations, the weight to be attached to each factor will also change, according to 'the facts and merits of each case'.⁹⁹

Starmer makes reference to the use of 'guidance' as the best means by which to ensure that prosecutorial discretion is not 'capricious and discriminatory'.¹⁰⁰ In general, this guidance is found in the Code, but Lord Brown noted that the applicability

⁹² Crown Prosecution Service, *The Code for Crown Prosecutors* (7th edn, 2013) para 4.8.

⁹³ Crown Prosecution Service, *The Code for Crown Prosecutors* (7th edn, 2013) para 4.11.

⁹⁴ Clarkson points to the 'almost ... random relationship between seriousness ... and the reporting, investigation, prosecution and punishment of assault' (Chris Clarkson, 'Assaults: The Relationship between Seriousness, Criminalisation and Punishment' [1994] *Criminal Law Review* 4, 20).

⁹⁵ For example, whether the suspect used a weapon, whether the offence was premeditated, whether there was corruption involved.

⁹⁶ For example, the extent of the harm and the possible impact of legal proceedings on the victim.

⁹⁷ For example, whether the offence is likely to be continued or repeated.

⁹⁸ Crown Prosecution Service, *The Code for Crown Prosecutors* (7th edn, 2013) para 4.10.

⁹⁹ Crown Prosecution Service, *The Code for Crown Prosecutors* (7th edn, 2013) para 4.10.

¹⁰⁰ Keir Starmer, 'The Rule of Law and Prosecutions: to Prosecute or not to Prosecute' <http://www.freedomunderlaw.org/wp-content/files/5_Keir_Starmer.pdf> accessed 15 June 2015.

of the Code ‘across the entire spectrum of criminal conduct, to offences of every kind and description, means that the principles it states are at a very high level of generality’.¹⁰¹ For this reason, they are likely to prove deficient in unusual circumstances. For example, it is the nature of contact sports that they are more likely to cause serious injury, and this would usually be a factor tending in favour of prosecution.

8.4.2 Beyond the Code – the status and effect of the Agreement

Additional prosecutorial guidance is promulgated where it is considered that the general provisions of the Code are not sufficient in relation to a particular offence, circumstance or class of victim, and particularly when it comes to areas of the criminal law that have proven controversial, lacking in clarity, politically sensitive, or difficult to enforce. Thus, guidance supplemental to that found in the Code can be found *inter alia* in respect of crimes involving ‘domestic violence’, ‘homophobia and transphobia’, ‘racist and religious crime’, and ‘disability and hate crimes’.¹⁰² A recent addition is guidance relating to s 2 of the Suicide Act 1961, which proscribes assisting or encouraging the suicide of another.

As I have argued in the case with sports violence, the law in relation to assisting suicide is arguably over-inclusive, and it was in recognition of the potentially beneficent motives of the assistant, and the lack of socio-political will to prosecute in such cases, that the House of Lords mandated that the DPP give guidance to those

¹⁰¹ *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345, 402 (Lord Brown).

¹⁰² CPS, ‘Other Guidance’ <<http://www.cps.gov.uk/publications/prosecution/index.html>> accessed 15 June 2015.

considering assisting a person to commit suicide on the circumstances in which a prosecution would be brought.¹⁰³ Lord Brown pointed to the factors that might be applicable in the Code and gave the view that, in the situation of a person contemplating assisting somebody else to commit suicide, they provided ‘singularly little assistance’;¹⁰⁴ he outlined what was required:

A custom-built policy statement indicating the various factors for and against prosecution ..., factors designed to distinguish between those situations in which, however tempted to assist, the prospective aider and abettor should refrain from doing so, and those situations in which he or she may fairly hope to be, if not commended, at the very least forgiven, rather than condemned, for giving assistance’.¹⁰⁵

The DPP duly complied and released interim guidance in September 2009,¹⁰⁶ which was superseded by the *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* (‘the Assisted Suicide Policy’) in February 2010,¹⁰⁷ a development that has prompted considerable discussion as to the role and function of prosecutorial discretion, and the extent to which it should be used in order to shape policy.

The Assisted Suicide Policy is similar to the Agreement, in that it is a document

¹⁰³ *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345.

¹⁰⁴ *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345, 402.

¹⁰⁵ *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345, 405.

¹⁰⁶ DPP, ‘Interim Policy for Prosecutors in Respect of Cases of Assisted Suicide’ (September 2009) <http://www.cps.gov.uk/consultations/as_policy.html> accessed 15 June 2015.

¹⁰⁷ DPP, ‘Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide’ (February 2010) <http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html> accessed 15 June 2015.

promulgated in order to set out the factors that should be taken into consideration when making the decision as to whether to prosecute in a particular case,¹⁰⁸ whereas the majority of the published guidance issued to supplement the Code is primarily concerned with the way in which prosecutors should approach prosecutions, for example in relation to the sensitivities involved when dealing with vulnerable people as complainants and witnesses.¹⁰⁹ Both the Agreement and the Assisted Suicide Policy are intended to guide the decision as to whether a prosecution is in the public interest, in particular circumstances where the appellate courts have signalled that such prosecutions often should not be brought, but where the general guidance contained in the Code is considered inadequate for this purpose. Additionally, they are both intended, in part at least, for an external audience, although the composition of this audience is very different, in that the Assisted Suicide Policy aims to guide prospective defendants, whereas the Agreement is concerned with inter-institutional cooperation after the commission of a quasi-criminal offence. Comparison between them is therefore worthwhile insofar as some of the claims made in relation to, and criticisms directed at, the Assisted Suicide Policy may also be applicable to the Agreement.

Even though the substantive provisions pertaining to assisting suicide have not changed, and s 2 of the Suicide Act 1961 remains in force, it has been suggested that the Assisted Suicide Policy has effected a *de facto* change to the legal status of assisted suicide. Rogers postulates:

¹⁰⁸ As with the Agreement, it is arguably the case that the Assisted Suicide Policy is simply a restatement and continuation of the pre-existing approach to a series of suspected cases of assisted suicide; this is lent credence by the fact that there had never been a prosecution for a case that satisfied the criteria laid out in the Assisted Suicide Policy (DPP, 'Decision On Prosecution - The Death By Suicide Of Daniel James' (9 December 2008)

<http://www.cps.gov.uk/news/articles/death_by_suicide_of_daniel_james/> accessed 15 June 2015).

¹⁰⁹ For example, in relation to hate crimes or domestic violence.

It is conceivable that a court which was asked to review the application of the DPP's Policy [might consider that] ... it was intended to give effective rights to defendants ... It may even be reasoned that the Final Policy was to be treated as a *de facto* substitute for legislative change.¹¹⁰

Rogers suggests the existence of the Assisted Suicide Policy might be akin to a 'statutory defence', though he concedes that such contentions are 'highly speculative',¹¹¹ and others disagree with his assessment; for instance, Greasley asserts that any such guidance is extra-legal, stating: 'while the conferral of prosecutorial discretion forms part of the substantive law, the same is not true of the principles called upon in its exercise'.¹¹² Whatever the merits of these conflicting arguments, a challenge to the decision to prosecute might also be made 'by way of an abuse of process argument or possibly by an application for judicial review before the trial'.¹¹³ By contrast, a decision not to prosecute could until recently only be challenged by way of judicial review,¹¹⁴ and this is a rare eventuality. A move to allow a decision not to prosecute to be reconsidered through an appeal on the part of the complainant has opened a limited possibility for review, though it appears unlikely to have a significant

¹¹⁰ Jonathan Rogers, 'Prosecutorial Policies, Prosecutorial Systems, and the Purdy Litigation' [2010] Criminal Law Review 543, 557.

¹¹¹ Jonathan Rogers, 'Prosecutorial Policies, Prosecutorial Systems, and the Purdy Litigation' [2010] Criminal Law Review 543, 557.

¹¹² See, for example: Kate Greasley, 'R (Purdy) v DPP and the Case for Wilful Blindness' (2010) 30 Oxford Journal of Legal Studies 301, 309). Greasley argues that the policy is an unwelcome development, and advocates instead the 'wilful blindness' that could be said to epitomise the approach pre-policy.

¹¹³ *H v CPS* [2010] EWHC 1374 (Admin), [2012] QB 257, 264 (Cranston J). On abuse of process, see: Jonathan Rogers, 'The Boundaries of Abuse of Process in Criminal Trials' (2008) 61 Current Legal Problems 289. On judicial review of a decision not to prosecute, see: *Rowley v DPP* [2003] EWHC 693.

¹¹⁴ *R (on the application of F) v DPP* [2013] EWHC 945 (Admin); [2014] QB 581 (DC).

impact on decisions or their consequences.¹¹⁵

The potential elevation of the role of prosecutorial discretion to 'law' brings with it constitutional concerns, and the DPP has demonstrated an awareness of the potential for unintended regulatory developments as a result of the Assisted Suicide Policy. As Lewis notes,¹¹⁶ the DPP has been careful not to create the impression of a regulatory regime for assisted suicide. She points to the following excerpt from the consultation process that preceded the publication of the final policy:

[To require written evidence of the victim's request] is within the scope of processes and procedures that, in effect create a regime for encouraging or assisting suicide. Only Parliament can determine the legality of such a regime – not the DPP – and accordingly, the CPS has firmly rejected any factor against prosecution that could be said to be a stepping stone towards the creation of such a regime.¹¹⁷

Similarly, the Agreement is also framed so as not to allow the sports bodies to monopolise the regulation of sports violence. Although it is co-signed by the agencies of criminal justice and sports governing bodies, and employs the language of 'concurrent jurisdiction', it is made clear that 'the fair enforcement of the criminal law

¹¹⁵ The policy allows for an alleged victim to appeal a decision not to prosecute, and if this is successful, the decision will be revisited. The change was prompted by the Court of Appeal case of *R v Christopher Killick* [2011] EWCA Crim 1608. Guidance on the policy can be found in the CPS publication: Director of Public Prosecutions, 'Victims' Right to Review Guidance' (July 2016) <http://www.cps.gov.uk/publications/docs/vrr_guidance_2016.pdf> accessed 19 September 2016.

¹¹⁶ Penney Lewis, 'Informal Legal Change on Assisted Suicide: The Policy for Prosecutors' (2011) 31 *Legal Studies* 1.

¹¹⁷ DPP, 'Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' (February 2010) para 7.6 <http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html> accessed 15 June 2015.

is of paramount importance', and the Agreement makes provision for the suspension of the sports authorities' own disciplinary proceedings where these might be seen to interfere with those of the criminal justice agencies.¹¹⁸ Thus, the criminal process is effectively sovereign when it comes to the nominal concurrent jurisdiction. Just as the playing culture that emanates from within the practices of sport does not constitute 'legitimate sport', so those who make and enforce the rules of sport cannot dictate when a criminal prosecution will be brought. The ethos and message is pluralistic, but the core is hierarchical, with the criminal law sitting at the top of the hierarchy, and the sports disciplinary bodies playing a supplementary role.

Whilst there have been arguments made that the sort of guidance issued by the DPP to supplement the Code might have legal force, the prevailing view appears to be that they do not, and indeed it is arguable that policy statements such as the Agreement have a more ephemeral nature than the Code, which is mandated by statute, with any alterations to be specified in the DPP's annual report to Parliament.¹¹⁹

Critics have doubted the utility of the sort of prosecutorial guidance represented by the Assisted Suicide Policy and the Agreement. Sanders and Young appear unconvinced by its operative potential, and perceive a fundamental problem in the interpretation and implementation of such a 'flexible concept' as the public interest, which 'will vary according to one's experiences and political views'.¹²⁰ Rogers is also sceptical, and highlights a dichotomy at the heart of the demands of the *Purdy* litigation: 'it is very difficult for prosecutorial "public interest" guidelines to be clear

¹¹⁸ The Agreement 3.

¹¹⁹ Prosecution of Offences Act 1985, s 10(3).

¹²⁰ Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn, Oxford University Press 2007) 345.

and accessible, because clarity may tend to come at the price of concealing important nuances (thus undermining accessibility).¹²¹ Meanwhile, Ashworth recently noted that there have been no studies of the effectiveness of this type of guidance, and thus 'it remains to be discovered whether it has brought about reductions in questionable practices'.¹²²

8.5 Criticisms of (Excessive) Discretion

Despite his defence of the principle and operation of a bipartite approach to prosecutorial discretion, contingent upon both sufficiency of evidence and satisfaction of a public interest test, Starmer is not blind to its potential shortcomings, and the extent to which these have largely escaped what may amount to legitimate criticism.¹²³ Starmer considers it 'perhaps surprising' that 'the articulation of the public interest discretion has largely gone unnoticed', noting that 'the exercise of discretion is potentially the most sensitive part of the decision-making process'.¹²⁴ He concedes that '[b]road, unfettered discretion can lead to wholesale inconsistency', but suggests that guidance as to 'the factors that should properly be borne in mind' can ensure that 'capricious and discriminatory' decision-making is avoided.¹²⁵ However, Sanders and Young point to how the fragmented and largely unaccountable

¹²¹ Jonathan Rogers, 'Prosecutorial Policies, Prosecutorial Systems, and the Purdy Litigation' [2010] *Criminal Law Review* 543, 552.

¹²² Andrew Ashworth, *Sentencing and Criminal Justice* (5th edn, Cambridge University Press 2010) 20. Ashworth gives examples of the 'questionable practices' to which he refers, such as overcharging in order to induce a guilty plea, possibly to a lesser, and more appropriate, offence.

¹²³ Keir Starmer, 'The Rule of Law and Prosecutions: to Prosecute or not to Prosecute' <http://www.freedomunderlaw.org/wp-content/files/5_Keir_Starmer.pdf> accessed 15 June 2015.

¹²⁴ Keir Starmer, 'The Rule of Law and Prosecutions: to Prosecute or not to Prosecute' <http://www.freedomunderlaw.org/wp-content/files/5_Keir_Starmer.pdf> accessed 15 June 2015.

¹²⁵ Keir Starmer, 'The Rule of Law and Prosecutions: to Prosecute or not to Prosecute' <http://www.freedomunderlaw.org/wp-content/files/5_Keir_Starmer.pdf> accessed 15 June 2015.

nature of decision-making in the CPS has raised concerns: 'In England and Wales ..., [prosecutorial] discretion is not closely controlled. Neither the basis for the exercise of discretion nor the level of decision-maker is consistent throughout the system'.¹²⁶

8.5.1 The 'Lived Reality' of the Prosecutor

However much guidance is issued and published in order to determine and clarify the grounds upon which decisions should properly be made, prosecutors still inevitably enjoy a large degree of discretion in deciding whether or not to prosecute, and thereby have an enormous effect on the administration of justice on an individual level. Young and Sanders point to these decisions being made in what they refer to as the 'unethical, lived reality of the prosecutor's world',¹²⁷ and Stuntz notes the dangers inherent in vesting so much power in the hands of prosecutors, pointing out that in exercising this, 'they are responding to a variety of forces':¹²⁸

[Prosecutors are influenced by] their own views of sound enforcement policy, political rewards and penalties, the relative cost of pursuing different cases, and so forth. Those forces need not produce the kinds of criminal offenses legislators or the public would like to see. Indeed, there is no reason to believe prosecutors will behave in ways that benefit prosecutors themselves, taken as a whole. The reason for this gap between public interest, even prosecutorial interest, and

¹²⁶ Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn, Oxford University Press 2007) 324.

¹²⁷ Richard Young and Andrew Sanders, 'The Ethics of Prosecution Lawyers' (2004) 7 *Legal Ethics* 190, 190. For a consideration of the ethics of individuals working as prosecutors in the US context, see: A Smith, 'Can You Be a Good Person and a Good Prosecutor?' (2001) 14 *Georgetown Journal of Legal Ethics* 398.

¹²⁸ William J Stuntz, 'Self-Defeating Crimes' (2000) 86 *Virginia Law Review* 1871, 1892.

prosecutors' behavior is simple: Charging decisions are made by *individual* prosecutors, who internalize neither the full benefit nor the full cost of their decisions.¹²⁹

These individual prosecutors, and indeed the organisations within which they work, are vulnerable to the distorting effect of pressures that may influence decisions around whether to bring a prosecution. Quick points to the susceptibility of prosecutors to both the political climate and media pressure.¹³⁰ He suggests that, '[a]lthough prosecutors largely work alone rather than in teams, they are not sheltered from wider organisational dictates and documents, nor immune from the workings of power relationships'.¹³¹

These pressures might infuse a decision about a particular case, or about more general policy practices and priorities, and might make prosecutions more or less likely in individual cases. A high-profile example of overt political interference was seen when the Director of the Serious Fraud Office prematurely terminated investigations into alleged corruption on the part of BAE Systems plc in its dealings with Saudi Arabia.¹³²

The question of whether to prosecute for sports violence is unlikely to attract overt and blatant political interference, but more subtle interference and influences

¹²⁹ William J Stuntz, 'Self-Defeating Crimes' (2000) 86 Virginia Law Review 1871, 1892.

¹³⁰ Oliver Quick, 'Prosecuting "Gross" Medical Negligence: Manslaughter, Discretion, and the Crown Prosecution Service' (2006) 33 Journal of Law and Society 421, 429.

¹³¹ Oliver Quick, 'Prosecuting "Gross" Medical Negligence: Manslaughter, Discretion, and the Crown Prosecution Service' (2006) 33 Journal of Law and Society 421, 436.

¹³² *R (on the application of Corner House Research and others) v Director of the Serious Fraud Office* [2008] UKHL 60. For a discussion of the issues raised by this case, and others, see: Philip C Stenning, 'Prosecutions, Politics and the Public Interest: Some Recent Developments in the United Kingdom, Canada and Elsewhere' (2009-10) 55 Criminal Law Quarterly 449.

may come to bear. Feldman alludes to a number of ‘factual, legal, social and moral obstacles’ that face prosecutors when deciding whether to bring a prosecution for sports violence. Amongst these, she alludes to the lack of clarity in the law itself, and a concomitant problem in understanding the potential to win such cases. Feldman also suggests that a prosecutor working with limited time and resources and faced with the decision of whether to prosecute a sportsperson accused of injuring a fellow participant, may feel under pressure to concentrate on ‘real criminals’;¹³³ Horrow makes the same point,¹³⁴ and such internalised pressures, whether experienced by individual prosecutors or on an institutional basis, may operate to render a prosecution less likely.

Alternatively, pressure exerted in the other direction might act as a spur to prosecution. Sports can create sporadic moral panics that seem to spark the criminal justice system into action,¹³⁵ as was manifest in the views expressed in the wake of the CPS conference alluded to above.¹³⁶ Barnes suggests that the prosecution of Lee Bowyer, for what was a high-profile but relatively innocuous on-field fight,¹³⁷ was undertaken for largely political reasons, against the backdrop of a ‘media-generated “moral panic”’.¹³⁸ The relative penalties brought to bear by the sporting and criminal

¹³³ Debra L Feldman, ‘Pandora’s Box is Open: Criminal Prosecution Implemented; Violent Play in the National Hockey League Eliminated’ (2002-03) 2 Virginia Sports and Entertainment Law Journal 310, 312.

¹³⁴ Richard Horrow, *Sports Violence: The Interaction Between Private Law-Making and the Criminal Law* (Carrollton Press 1980).

¹³⁵ In Scotland, for instance, a spate of violent incidents in the 1990s prompted the Lord Advocate to issue ‘Instructions’. See: Simon Gardiner and Mark James, ‘Touchlines and Guidelines: The Lord Advocate’s Response to Sportsfield Violence’ [1997] Criminal Law Review 41.

¹³⁶ Nick Harris, ‘CPS plans crackdown on player violence’ *The Independent* (London, 4 June 2005) <<http://www.independent.co.uk/sport/football/news-and-comment/cps-plans-crackdown-on-player-violence-6144901.html>> accessed 19 May 2015.

¹³⁷ Mathew Barnes, ‘Discipline: Crime and Punishment on the Sports Field’ (2005) 3(9) World Sports Law Reports 3.

¹³⁸ Simon Gardiner, ‘Sports Participation and Criminal Liability’ (2007) 15 Sport and the Law Journal 19, 27.

justice organs were enumerated above and, as Gardiner notes, '[i]t is not obvious how the public interest was served' in bringing the prosecution.¹³⁹ Piwowarski is less cynical about the intentions of prosecutors, but sees them as fallible nonetheless: 'While prosecutors, like most people in public service, try to do right in each individual case, they may—without the proper incentives—cause undesired results at the system level'.¹⁴⁰

8.5.2 Differential treatment

The exercise of discretionary judgement has the obvious potential to produce inconsistent decisions.¹⁴¹ Although it is a national service, the CPS is organised into 13 regional areas, each headed by a Chief Crown Prosecutor, and studies have pointed to disparities in CPS practices and performance across different geographical areas.¹⁴² There are numerous reasons for such differences, such as the internal and external pressures that come to bear on individual prosecutors, and the inevitable differences in approach that might be found in the different branches of the service. This may be exacerbated by relationships with, and variations in the practices and priorities of, the various police forces to which they are geographically tied.

¹³⁹ Simon Gardiner, 'Sports Participation and Criminal Liability' (2007) 15 *Sport and the Law Journal* 19, 26.

¹⁴⁰ Nathan Piwowarski, 'Prosecutorial Discretion and the Rule of Law: Is it Time for a Little Formalism? (Or, Mr Prosecutor: How Formalists Learned to Stop Worrying and Love Discretion)' in *King Scholar Senior Seminar Papers 2007* Michigan State University <<http://www.law.msu.edu/king/2007/Piwowarski.pdf>> accessed 15 June 2015.

¹⁴¹ William J Stuntz, 'Self-Defeating Crimes' (2000) 86 *Virginia Law Review* 1871, 1880. Stuntz writes: 'Legislatures cannot enact statutes that forbid selling liquor to Irish or Italian customers, or that punish black drug dealers more severely than white ones. But police and prosecutors can create crimes like these by targeting their time and attention on some classes of cases rather than others'.

¹⁴² Sean O'Neill, Frances Gibb and Heather Brooke, 'Justice by Postcode: The Lottery Revealed' *The Times* (London, 23 November 2005) <<http://www.thetimes.co.uk/tto/news/uk/article1941062.ece>> accessed 5 January 2015.

When it comes to sports violence, the uncertainty of the law is a potential factor. Anderson notes the susceptibility of boxing to challenge under the criminal law, but points out that there is a general acceptance of its legality. He suggests that this acceptance will invariably impact upon the decisions of prosecutors: '[A] prosecution against a boxer would be seen as serving little purpose in that it would merely 'scapegoat' the individual boxer for the illegality of the sport as a whole; thus it is likely to have little attraction for the Crown Prosecution Service'.¹⁴³ He continues: 'Most probably, the CPS has simply not countenanced prosecutions of ... [boxers], as a prosecution for aggressive, invasive, overly physical behaviour during the course of a boxing match seems rather incongruous'.¹⁴⁴

James criticises what he perceives as inconsistency in prosecutorial practices when it comes to sports violence, and points to differences in the treatment of high-profile soccer players,¹⁴⁵ and both he and Gardiner acknowledge the widely accepted fact that a prosecution is far more likely to be brought in respect of those who participate in amateur sports than for professionals.¹⁴⁶ Gardiner attributes this to 'a greater likelihood that offences are reported to the police and that the Crown Prosecution Service will decide to prosecute',¹⁴⁷ although it should be noted that participation rates are significantly higher for amateur than for professional sport, and there are no figures available to confirm the extent to which this is true. However, it is a bias that was seemingly conceded by the CPS in the wake of their 'Crime in Sport'

¹⁴³ Jack Anderson, *The Legality of Boxing: A Punch-Drunk Love?* (Birkbeck Law Press 2007) 83.

¹⁴⁴ Jack Anderson, *The Legality of Boxing: A Punch-Drunk Love?* (Birkbeck Law Press 2007) 104.

¹⁴⁵ Mark James, 'Prosecutorial Discretion and Sportsfield Violence' (1996) 23 *Criminal Justice Matters* 21.

¹⁴⁶ Mark James, 'The Trouble with Roy Keane' (2002) 1 *Entertainment and Sports Law Journal* 72, 80; Simon Gardiner, 'Sports Participation and Criminal Liability' (2007) 15 *Sport and the Law Journal* 19.

¹⁴⁷ Simon Gardiner, 'Sports Participation and Criminal Liability' (2007) 15 *Sport and the Law Journal* 19, 21.

conference in 2005. Spokesperson Paul Hayward was reported to have said: 'As things stand, you are probably more likely to face prosecution for an incident in a Sunday league game than an identical incident in a professional match'.¹⁴⁸ Hayward went on to criticise this approach, saying: 'We'd argue that that cannot be right'.¹⁴⁹ However, the Agreement arguably promotes differential treatment.

According to the Agreement, the likelihood of criminal prosecution should be shaped by a number of criteria. The first factor to be taken into consideration is the perceived seriousness of the conduct: 'The more serious the incident or allegation, the more likely it is that a criminal investigation is required'; this is given extra force by reference to the possibility of aggravating factors that might make it a 'hate crime'. Further criteria relate to procedural concerns, such as the 'availability and willingness of potential victims and witnesses to support either or both a criminal or disciplinary prosecution', and 'the admissibility of evidence'.¹⁵⁰

Beyond this, the Agreement also refers to the 'respective sentencing powers of the criminal court and the football disciplinary tribunal'. Again, the perceived seriousness of the offence is at the heart of this: 'A criminal investigation may be appropriate in circumstances where a court is likely to impose a custodial sentence or a high level community order on conviction'.¹⁵¹ Guiding all of these, it seems, is a standard lifted straight from Lord Woolf's judgment in *Barnes*: 'In respect of incidents

¹⁴⁸ Nick Harris, 'CPS plans crackdown on player violence' *The Independent* (London, 4 June 2005) <<http://www.independent.co.uk/sport/football/news-and-comment/cps-plans-crackdown-on-player-violence-6144901.html>> accessed 19 May 2015.

¹⁴⁹ Nick Harris, 'CPS plans crackdown on player violence' *The Independent* (London, 4 June 2005) <<http://www.independent.co.uk/sport/football/news-and-comment/cps-plans-crackdown-on-player-violence-6144901.html>> accessed 19 May 2015.

¹⁵⁰ The Agreement 3-4.

¹⁵¹ The Agreement 4.

on the field of play which cause injury, prosecutions should be reserved for situations where the conduct is sufficiently grave to be properly categorised as criminal'.¹⁵²

The Agreement largely follows the Code in setting out its priorities, with the seriousness of the incident and the likelihood of a successful conviction prominent factors to be taken into account when deciding whether to prosecute. It describes as its 'overriding principle' 'the requirement of fair and efficient justice'. The Agreement points to the involvement and role of sports disciplinary bodies, and acknowledges that they may be best placed to deal with quasi-criminal behaviour. In pursuing 'the requirement of fair and efficient justice, which is carried out expeditiously, proportionately and in a transparent manner', the Agreement notes that, '[i]n this context, justice is to be given a wide meaning, covering both criminal prosecutions and disciplinary proceedings'.¹⁵³ It highlights '[t]he respective sentencing powers of the criminal court and the football disciplinary tribunal' as one of the factors that will influence the decision whether to prosecute,¹⁵⁴ and goes on to stress that prosecutors will 'take account of any relevant FA/FAW sanction which may be imposed or has already been imposed'.¹⁵⁵

The potential disparity between the powers of the court and the sports authorities was noted above in relation to Lee Bowyer, but his is an exceptional example, when viewed in the context of all of those who participate in sports, and it is clear that the extra-legal penalties imposed by the sports authorities can carry a lot more force for a person who depends upon endorsement by the governing bodies in

¹⁵² The Agreement 4.

¹⁵³ The Agreement 3.

¹⁵⁴ The Agreement 4.

¹⁵⁵ The Agreement 5.

order to make a (sometimes very lucrative) living.¹⁵⁶ As Gardiner points out, the 'internal sporting disciplinary procedures at regional level are not enforced so effectively compared to the professional game which has a national enforcement procedure',¹⁵⁷ and there are many participants involved in lower-level and unorganised sports over whom the governing bodies have no effective control, nor power to impose disciplinary sanctions.

Thus, the Agreement openly promotes differential treatment when it comes to making the decision whether to prosecute, and this is a direct result of taking into account the relative effectiveness of the alternative regulatory mechanisms open to it; that is, the role of the sports disciplinary bodies. A prosecution is therefore less likely where it is considered that the sports authorities' sanctions are an effective punishment. This arguably has the effect of creating a *de facto* regulatory body with prosecutorial powers. Young and Sanders point to the fact that 'the police and CPS usually prosecute if there is sufficient evidence', but note that, by contrast, 'regulatory agencies ... share a propensity not to prosecute, even where the offences they are dealing with are serious'.¹⁵⁸ Writing of this analogous situation, Ashworth suggests that this 'might be defended on the principle of parsimony, minimum intervention

¹⁵⁶ In the case of Lee Bowyer, for example, the criminal law penalties were insignificant in comparison to the disciplinary sanctions imposed by his employer and the sports governing bodies (Crown Prosecution Service, 'Lee Bowyer Pleads Guilty to Public Order Offence' (5 July 2007) <http://www.cps.gov.uk/news/latest_news/143_06/> accessed 15 June 2015; Andrew Norfolk, 'Fair Play under Scrutiny as Bowyer Pleads Guilty over Punch-up on Pitch' *The Times* (London, 6 July 2006) 3).

¹⁵⁷ Simon Gardiner, 'Sports Participation and Criminal Liability' (2007) 15 *Sport and the Law Journal* 19, 21.

¹⁵⁸ Richard Young and Andrew Sanders, 'The Ethics of Prosecution Lawyers' (2004) 7 *Legal Ethics* 190, 197. Young and Sanders offer the examples of the Health and Safety Executive and Inland Revenue (now HM Revenue and Customs; the prosecutorial powers were absorbed into the CPS in 2010). See also: Julia Fionda, *Public Prosecutors and Discretion* (Clarendon Press 1995) 15.

being given higher priority than equality of treatment',¹⁵⁹ but he highlights the inherent unfairness of an approach that may disadvantage certain classes of potential defendants.

8.5.3 Transparency and accountability for prosecutorial decisions

Although individual prosecutors may work independently, they are accountable to the DPP, who is in turn accountable to the Attorney General, and ultimately Parliament; under s 9 of the Prosecution of Offences Act 1985, the DPP must present annual reports to the Attorney General,¹⁶⁰ which the latter 'shall lay before Parliament', and 'shall cause ... to be published'.¹⁶¹ The Attorney General may also request that the DPP 'report to him on such matters as the Attorney General may specify'.¹⁶²

The functions of the CPS are also overseen by HM Crown Prosecution Service Inspectorate (HMCPSI), an independent body established by statute.¹⁶³ The HMCPSI is headed by a Chief Inspector who is appointed by the Attorney General,¹⁶⁴ and whose statutory obligation is to 'inspect or arrange for the inspection of the operation of the [CPS]',¹⁶⁵ 'report to the Attorney General on any matter connected with the operation of the [CPS] which the Attorney General refers to him',¹⁶⁶ and 'submit an annual report to the Attorney General on the operation of the Service'.¹⁶⁷ The Inspectorate describes

¹⁵⁹ Andrew Ashworth, 'Developments in the Public Prosecutor's Office in England and Wales' (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice* 257, 265.

¹⁶⁰ S 9(1).

¹⁶¹ S 9(2).

¹⁶² S 9(3).

¹⁶³ The HMCPSI commenced in 1996, and became an independent body in 2000, by virtue of the CPS Inspectorate Act 2000. Funding for the HMCPSI is 'provided by Parliament' (s 1(3)).

¹⁶⁴ S 1(1)

¹⁶⁵ S 2(1)(a)

¹⁶⁶ S 2(1)(b)

¹⁶⁷ S 2(1)(c). Under s 2(2), the Attorney General 'shall lay before Parliament a copy of any report which he receives under subsection (1)(c)'.

its 'purpose' as 'enhanc[ing] the quality of justice and mak[ing] an assessment of prosecution services that enables or leads to improvement in their efficiency, effectiveness and fairness',¹⁶⁸ and it publishes its findings on its website.¹⁶⁹

Despite these mechanisms, in the years since its inception, the CPS has faced criticism for an apparent lack of transparency and accountability. Fionda writes of '[t]he haphazard history of the public prosecutor in this country, and the piecemeal and *ad hoc* reform of his or her role',¹⁷⁰ while Ashworth has characterised its 'policies and practices' as being in a 'state of anarchy, with little control or accountability'.¹⁷¹ Ashworth describes the annual reports submitted by the DPP as being 'written in the language of Voltaire's Dr Pangloss, giving the impression of a public service which is achieving most of its performance targets, is at the forefront of innovation in the criminal justice system, and has no significant problems'.¹⁷² It is notable that the annual reports covering the period in which the Joint Protocol and then the Agreement were signed and brought into effect make no reference to either of them.¹⁷³ Despite the crucial role played in making prosecutorial decisions and bringing cases before the court, Uglow describes the CPS as 'far from the lynchpin around

¹⁶⁸ HM Crown Prosecution Service Inspectorate, 'Who we are and what we do' <<http://www.justiceinspectors.gov.uk/hmcpsi/about-hmcpsi/#.VYTEDPmqkqo>> accessed 9 June 2015.

¹⁶⁹ Ashworth describes these as having 'identif[ied] a number of persistent shortcomings in CPS practice' (Andrew Ashworth, 'Developments in the Public Prosecutor's Office in England and Wales' (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice* 257, 261). There is no record of any inspections or reviews having taken place in relation to the CPS's approach to sports violence.

¹⁷⁰ Julia Fionda, *Public Prosecutors and Discretion* (Clarendon Press 1995) 63.

¹⁷¹ Andrew Ashworth, 'Developments in the Public Prosecutor's Office in England and Wales' (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice* 257, 281.

¹⁷² Andrew Ashworth, 'Developments in the Public Prosecutor's Office in England and Wales' (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice* 257, 261.

¹⁷³ Crown Prosecution Service, *Annual Report and Accounts 2013-14* (CPS, 2014); Crown Prosecution Service, *Annual Report and Accounts 2014-15* (CPS, 2015); Crown Prosecution Service, *Annual Report and Accounts 2015-16* (CPS, 2016) <<https://http://www.cps.gov.uk/publications/reports/index.html>> accessed 6 August 2016.

which the system of criminal justice rotates'. He characterises its role as being '[s]andwiched virtually to vanishing point between the two symbolic reference points of the police and the judge', and describes prosecutors as 'faceless, certainly in terms of personal identity and status'.¹⁷⁴

More recently, Sosa notes improvements made to the service, but she still highlights an ongoing lack of accountability, which she describes as 'tenuous' and characterised by a 'hands-off' approach,¹⁷⁵ and individual decisions to prosecute are unlikely to come under scrutiny. Writing in the context of the decision as to whether or not to prosecute in cases of gross negligence manslaughter, Quick writes: 'There is nothing essentially contested about defining or justifying discretion: we know what it is and why it is used. However, we know relatively little about *how* it is used'.¹⁷⁶ Quick points to the increasing prevalence of material published and disseminated via the CPS website. However, whilst praising the transparency this might bring, Quick perceives a move to 'blander defensive description, presenting a picture of a more mechanical approach to making decisions which is reluctant to acknowledge the exercise of discretion'.¹⁷⁷ Quick implies that the documents deliberately understate and draw attention away from the amount of discretionary decision-making that in reality takes place.

¹⁷⁴ Steve Uglow, *Criminal Justice* (2nd edn, Sweet & Maxwell 2002) 193.

¹⁷⁵ Karen Sosa, 'It's Time for the Crown Prosecution Service to Grow Up' Policy Exchange (14 December 2012) <<http://www.policyexchange.org.uk/media-centre/blogs/category/item/it-s-time-for-the-crown-prosecution-service-to-grow-up>> accessed 15 June 2015.

¹⁷⁶ Oliver Quick, 'Prosecuting "Gross" Medical Negligence: Manslaughter, Discretion, and the Crown Prosecution Service' (2006) 33 *Journal of Law and Society* 421, 429.

¹⁷⁷ Oliver Quick, 'Prosecuting "Gross" Medical Negligence: Manslaughter, Discretion, and the Crown Prosecution Service' (2006) 33 *Journal of Law and Society* 421, 433.

In this respect, the Agreement might be considered a welcome step, since it purports to give the rationale for prosecution, and therefore ought to aid transparency when it comes to prosecutions for sports violence. Transparency and accountability might also be facilitated by the collaboration with the NPCC and the soccer authorities that the Agreement envisages. Much of this depends upon the practical effect it has on the attitudes, working practices and choices of the signatories, since it is also possible that the reality might not match the rhetoric, as Quick suggests is the case with other published guidance.¹⁷⁸

In spite of the power wielded by the prosecutor in the exercise of discretion to prosecute, this aspect of the criminal justice system has been subject to a relative paucity of academic scrutiny, when compared to that devoted to the substantive criminal law. Wright and Miller propose a number of reasons for this, amongst which are the fact that, since such matters are not adjudicated in a public forum, legal scholars are deprived of their 'traditional window on the law';¹⁷⁹ and a reluctance to carry out the empirical work that such studies would necessarily involve.¹⁸⁰ Stuntz detects in this an imbalance in academic understanding of the realities of the criminal law, asserting that 'the assumption that criminal law is defined by statutes and appellate opinions' heralds 'a problem with criminal law teaching and scholarship';¹⁸¹ he continues:

¹⁷⁸ Oliver Quick, 'Prosecuting "Gross" Medical Negligence: Manslaughter, Discretion, and the Crown Prosecution Service' (2006) 33 *Journal of Law and Society* 421.

¹⁷⁹ Ronald F Wright and Marc Miller, 'The Screening/Bargaining Tradeoff' (2002-03) 55 *Stanford Law Review* 29, 55.

¹⁸⁰ Ronald F Wright and Marc Miller, 'The Screening/Bargaining Tradeoff' (2002-03) 55 *Stanford Law Review* 29, 117.

¹⁸¹ William J Stuntz, 'Self-Defeating Crimes' (2000) 86 *Virginia Law Review* 1871, 1899.

We need to think of criminal law as having less to do with codes and court opinions than with policing strategies and press coverage and prosecutors' charging patterns. That in turn requires careful attention, of a sort scholars have not yet paid, to why enforcers make the decisions they do, and why the public pays attention when it does.¹⁸²

8.6 A Pragmatic Acceptance of Discretion

There is an inevitable role for discretion in the criminal justice system and a pragmatic acceptance of it insofar as it screens out cases that are not appropriate to progress to trial, and thereby avoids 'overwhelming' the system.¹⁸³ The place, prominence and role of discretion in criminal justice, however, elicits a wide range of views; Lome and Sossin posit the opposing 'conventional' views of 'discretion in administrative decision making' as, on the one hand, 'a crucial feature of individualized justice, as it allows for the tailored and humane application of general rules and laws to individual cases', or, on the other, 'a vehicle for arbitrariness, tyranny, caprice, and discrimination', against which 'law and law-like rules are needed to constrain and monitor the exercise of discretion'.¹⁸⁴

Articulating the latter view, Gelsthorpe and Padfield assert that it is 'the day-to-day discretionary actions of police officers, prosecutors, defence lawyers, judges, psychiatrists, prison, probation and immigration officers, amongst others, which are

¹⁸² William J Stuntz, 'Self-Defeating Crimes' (2000) 86 Virginia Law Review 1871, 1899.

¹⁸³ *H v CPS* [2010] EWHC 1374 (Admin), [2012] QB 257, 264 (Cranston J).

¹⁸⁴ Anna Pratt and Lorne Sossin, 'A Brief Introduction of the Puzzle of Discretion' (2009) 24 Canadian Journal of Law and Society 301, 307-308.

the 'stuff of justice' and which 'make for justice or injustice'.¹⁸⁵ For them, this is an unwelcome fact, as the exercise of this discretion 'provides all these professionals with the space both to engage in discriminatory activities and to subvert policies that they do not agree with'.¹⁸⁶ Similarly, Sanders and Young argue the case for increased accountability, and an implicit diminution of power, on the part of prosecutors, asserting that 'Parliament and the government should formulate prosecution policy, and the courts should ensure that enforcement and prosecution agencies stick to it'.¹⁸⁷

In contrast, Ashworth advocates greater powers and resources for the CPS, including what might be considered overstepping their constitutional role in taking a more active role in policy formation. Ashworth points to the 'quasi-judicial' function of the CPS, arguing that this necessitates that the organisation's duties should be better defined and expanded, and that a greater degree of independence in policy-making should come with greater responsibility.¹⁸⁸

For their part, Pratt and Sossin advocate moving away from polarised views in relation to discretion in the criminal justice system, and suggest that '[f]rom a different perspective, discretion has significant, progressive potential to humanize legal rules and democratize bureaucratic authority'.¹⁸⁹

¹⁸⁵ Loraine Gelsthorpe and Nicola Padfield, *Exercising Discretion* (Willan Publishing 2003) 1.

¹⁸⁶ Loraine Gelsthorpe and Nicola Padfield, *Exercising Discretion* (Willan Publishing 2003) 1-2.

¹⁸⁷ Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn, Oxford University Press 2007) 325.

¹⁸⁸ Andrew Ashworth, 'Developments in the Public Prosecutor's Office in England and Wales' (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice* 257, 281-82.

¹⁸⁹ Anna Pratt and Lorne Sossin, 'A Brief Introduction of the Puzzle of Discretion' (2009) 24 *Canadian Journal of Law and Society* 301, 307-308.

8.7 Conclusion

In *Barnes*, the Court of Appeal expressed a clear view that prosecutions for sports violence should only take place in exceptional circumstances. This appears to be the result of two, linked rationales: the deficiencies of the criminal law in setting clear instructions as to the conditions to be satisfied for criminal liability to attach; and the desire to avoid cases coming before the court which could better be resolved in another forum. Lord Woolf points to the availability of both the internal disciplinary bodies and the civil law as alternative avenues, and states that the criminal law should only be used for cases that are 'sufficiently grave'.

This approach has the potential to devolve large parts of the decision as to the criminality or otherwise of particular instances of sports violence to the police and prosecutors, but it is arguably the case that this is a reality of criminal justice in any event. Discretionary judgement is a feature of decisions taken on the part of the injured party as to whether to report an incident, and police choices as to whether to proceed and thereby pass the matter on to the CPS. From here, there are discretionary elements to all of the decisions made, from prosecution to conviction to sentencing. In this chapter, I have chosen to concentrate on the exercise of prosecutorial discretion, a space in which recent policy moves have sought to address some of the problems of indeterminate, or potentially over-inclusive, criminal law, including that which governs sports violence.

The chapter presents a mixed view of the power underlying prosecutorial discretion. It might be argued that the use of discretion at this point is a pragmatic means by which to avoid involving the criminal law in matters that are better resolved elsewhere. An alternative view might be that the susceptibility to organisational and

external pressures, and lack of accountability and transparency when it comes to making prosecutorial judgements, are factors which undermine the case for a further concentration of power.

The implementation of the Agreement brings an added dimension to the discretion to be exercised in deciding whether to prosecute for sports violence, as it points to reasons in favour of differential treatment. It may be thought that the selective application of the criminal law to cases where the sports authorities cannot impose punishments or exert influence over the quasi-criminal conduct of a sports participant is an effective and expedient option. However, this individualised approach to prosecution inevitably means treating like cases unlike. This is apparent from the approach of the Agreement, which arguably implements a system analogous to a regulatory body, and could mean that one class of potential defendants is more likely to face prosecution than another.

Chapter 9

Conclusion

In Chapter 1, I set out the aims and scope of this work, and the principal question that this thesis sought to answer, which is whether the criminal law's treatment of sports violence amounts to a 'zone of legal exemption'. In addressing this, I opted to concentrate the study on boxing, rugby and soccer, though parallels have been drawn with, and comparisons made to, other sports where appropriate. The focus on particular sports mitigated potential conceptual and definitional difficulties in relation to sports violence, but the aim was not to provide an exhaustive account of the effective legality of each of these sports. Boxing, rugby and soccer were chosen because of their long history of socio-cultural acceptance and because they are undoubtedly included within the category of 'lawful activities' referred to by the House of Lords in *Brown*.

The space that exists within the criminal law for sports violence is tied to the belief that sport comprises a socially valuable activity. It is clear that there is no desire on the part of the courts to criminalise that which can be characterised as 'legitimate sport', but there is little guidance on what is meant by this. Here, the courts implicitly defer to the expertise and competence of sports governing bodies to devise and promulgate rules and regulations that shape the practice of sport, and to Parliament as the appropriate forum for deciding upon whether specific practices or sports should be declared unlawful. In order to compensate for the lack of detail provided by recent judgments, I looked to the historical development of the socio-legal status of sports

violence (Chapter 2), and to the rules, practice and regulatory backdrop to modern sport (Chapter 3), as means by which to access an understanding of the relevant considerations for the criminal law.

Chapter 2 documented a period during which profound changes to the sports under examination took place. The pressures that were brought to bear during this time came from a number of sources, including the criminal law, and resulted in a transformation of the primitive, disorganised and brutal leisure pursuits that comprised the antecedent forms of boxing, rugby and soccer, reshaping the leisure pursuits of the working classes in order to align them with prevailing social mores. This ‘civilising process’ in sport coincided with the establishment of associations and governing bodies whose purview included the promulgation of rules and the establishment of regulatory systems designed to uphold these. The principal change in the attitudes of the criminal courts towards sports violence related to a diminishing concern around the tendency of sports to cause civil disorder, and a greater respect and tolerance for the lawfulness of sport in its more contained form. This recognition of social utility and a concomitant essential value to sport resonates through the subsequent case law, and finds its modern manifestation in the ‘legitimate sport’ standard approved in *Barnes*.

Building on the historical account of the socio-legal status of sports violence developed in Chapter 2, Chapter 3 turned to the violence that is inherent in the practice of modern sport, and located it according to the explicit and implicit rules of engagement and concomitant normative expectations of the participants. In so doing, the chapter had two principal aims: to present a picture of the violence that is either anticipated or deemed acceptable by those involved in boxing, rugby and soccer; and

to establish the source of this acceptance. In pursuit of these aims, I drew first on the rules of the respective sports in terms of their demarcation of legitimate and illegitimate violent conduct, the sanctions that are imposed in relation to contravention of these, and the safety provisions that are in place in anticipation of the potential for injury, often as a result of such violence. These demonstrated that the sports in question explicitly sanction violent practices that risk (sometimes serious) physical injury, but also highlighted disciplinary mechanisms that may be applied to those who go beyond the rules.

The formal rules of sport do not provide the whole picture when it comes to the place of violence in the sports under consideration, and I devoted a significant portion of Chapter 3 to the 'playing culture', a construct that takes into account 'unwritten conventions' in providing a more realistic portrayal than a simple reading of the rules permits. In the past two decades, the term 'playing culture' has found a particular currency amongst those keen to limit the criminal law's involvement when it comes to sports violence, but it is rarely defined or analysed by those who advocate its adoption. The analysis I undertook revealed a complex and dynamic concept that is useful to the criminal law insofar as it can provide a more realistic portrayal of the respective sports, and the normative expectations of those who participate, but one that potentially causes problems for the criminal law due to its inherent variability across different levels of sport, and the influence of factors beyond the control of the individual participants.

In the context of the overall thesis, Chapters 1 to 3 served an important purpose in giving meaning to the concept and socio-legal place of sports violence and the problems it poses for the criminal law as an inherent part of a historically accepted,

socially valuable and independently regulated activity, which derives its legitimacy from a range of sources. In so doing, they contributed to existing literature by providing insights into important aspects of the historical development of the socio-legal status of sports violence, and facilitating a deeper understanding of the nature and relevance of the normative expectations of those who participate.

Chapter 4 marked the start of my analysis of the substantive criminal law of sports violence, to which a large part of this study has been devoted. The formal approach of the criminal law to sports violence is characterised by a pronounced offence/defence demarcation, with the establishment of a *prima facie* offence being followed by a consideration of the defence of consent, and Chapter 4 examined the pertinent offences (I concentrated on the ‘statutory assaults’: ss 18, 20 and 47 of the OAPA 1861). The majority of the chapter was taken up with an analysis of the *mens rea* standards of intention and recklessness in the context of sports violence. I noted that the prevailing approach to these has been to interpret them narrowly, meaning that the statutory assaults are relatively easy to satisfy; the expansive ‘output wrong’ of the offence definitions is over-inclusive in relation to the narrower ‘input wrong’ it must capture. I suggested that there is scope within the offences to accommodate a deeper consideration of *mens rea* when it comes to sports violence, but that these are not exploited under the prevailing approach. This analysis of the relative ease of application of the statutory assaults to instances of sports violence comprises the first part of what I termed the ‘orthodox view’ of the criminal law of sports violence.

The second part of the orthodox view provides a counter to the over-inclusiveness of the offences, since the relatively straightforward ascription of *prima facie* liability may be vitiated by reference to the consent given by the victim-

participant; thus, a determination of the defendant's guilt depends upon being able to establish a lack of consent on the victim's part. When it comes to establishing this, the moral and political considerations suppressed in the construction of the offence definitions are allowed to surface. The topic of consent was addressed across two chapters, with Chapter 5 examining its normative role and Chapter 6 its doctrinal function.

In Chapter 5, I argued that the voluntary participation that is a feature of contact sports is a fundamental reason for their status as a lawful activity. As the discussion in Chapter 3 demonstrated, sports such as boxing, rugby and soccer have rule systems that are publicly disseminated and widely known. Given this, it is reasonable to hold that the risk of injury is both understood and accepted by those who take part in such sports, and that participation therefore signifies consent on the part of the participant-victim that is relevant to a judgement of the culpability of a person who inflicts injury. Notwithstanding the intuitive and persuasive logic of this, there arises an intractable tension when it comes to accommodating two principles in relation to consent: a respect for autonomy, according to which a person should be able to exercise 'personal sovereignty' and thus authorise harm to their person; and the fact that, since a crime is nominally committed against the State, the relevance of the private authorisation that consent represents is uncertain. This dichotomy between the essentially private nature of consent and the public role of the criminal law is particularly acute when considering the lawfulness of consensual harm. Although fundamentally and necessarily a relevant concern when it comes to the lawfulness of sports violence, consent is an inherently problematic concept in the criminal law. The resolution of this problem is a public policy judgement that confines

the availability of consent to activities which comprise 'legitimate sport', a normative standard that is also central to the doctrinal operation of consent in individual instances of sports violence.

In Chapter 6, I examined the doctrinal function of consent. Voluntary participation underpins the normative rationale for the lawfulness of contact sports and the violence that is intrinsic to them, but it is difficult to translate this into a functional doctrinal mechanism by which to determine which acts of sports violence should be lawful and which unlawful under the criminal law. This is because the consent that is imputed to the participants comprises a legal fiction.

To say that the imputed consent which provides the fulcrum for the lawfulness of sports violence is a fiction is not to say that the participants in a sport such as boxing, rugby or soccer are not cognisant, and accepting, of the risks involved, but rather that the operation of imputed consent is not dependent upon an examination of this in any particular case. The consent that is taken to exist on the part of sports participants is different from that which operates when it comes to sexual offences and medical treatment. It is submission not to a single act, but to a rule system, the existence of which precludes the necessity and relevance of questions of individual (attitudinal or expressive) consent, beyond establishing that the player was 'agreeing to play the game' (which is unlikely to be in issue). The interpretation of consent is inextricably bound up with whether the injury was caused during the course of 'legitimate sport'; sports participants will be treated 'as if' they had consented to that which is deemed legitimate, and the consent of the participants is therefore examined through the prism of the rules and practice of the particular sport. This effective 'de-individualisation' sets imputed consent apart from most other instances of consent.

In Chapter 7, I looked to understand the rationale for the orthodox view; to explain why the criminal law of sports violence is structured around the fiction of imputed consent. To this end, the chapter was effectively split into two parts. In the first half, I suggested three alternatives to the orthodox view, each of which drew to a large extent on the observations of Chapter 4, and to thickened conceptions of the offences examined therein. The first of these alternatives considered two distinct proposals from the Law Commission, united in their assertion that, as Lord Mustill had stated in *Brown*, consent is not the dispositive consideration when it comes to the lawfulness of sports violence. The next option I considered was the possible applicability of the doctrine of double effect, whereby conduct is not considered wrong if it is not intended to do wrong and, on balance, achieves a benign outcome. The third alternative revolved around the possibility that the courts could utilise Goff LJ's highly context-contingent substitute for implied consent, whereby conduct is judged according to whether it is 'generally acceptable' in the circumstances. Each of these alternatives draws on the inherent quality of the behaviour of the defendant sportsperson, and asks whether it should be lawful in the context of the particular sport, a consideration of which includes the consent signified by the participation of those involved.

As has been noted at numerous points throughout this thesis, judgements as to the lawfulness of sports violence are necessarily matters of public policy, and criminal law in this area is impossible to craft without resort to moral and political judgements as to the acceptability of violent conduct. This can be addressed directly by asserting that sports are lawful *per se* (as per the 'recognition body' proposed by the Law Commission), or that it is 'reasonable', 'unintentional' or 'generally acceptable' in the

broader context of the sport, and to construe the offence definitions accordingly. Alternatively, as under the orthodox view analysed in Chapters 4, 5 and 6, the public policy issues can be sequestered within a consideration of the victim-participant's consent. Whichever way the issues are framed, they converge on the same essential question of whether the defendant's conduct amounted to 'legitimate sport'.

The second half of Chapter 7 looked to the formal structure of the orthodox view detailed in Chapters 4 to 6, and asked whether, in light of the discussion of alternative approaches, it had value. I suggested that the use of a fiction required justification, and that this might be present were the fiction to possess either: dispositive value; or some other value that derived from the way in which it allowed the law to be expressed. Given the existence of (arguably superior) alternative ways of framing liability, I concluded that the fiction lacks dispositive value; a concentration on consent adds little by way of clarity and may in fact obfuscate, by drawing unnecessary attention to the quality of the consent. The use of imputed consent as the formal device by which to discern the lawfulness of sports violence may also disrupt the understanding and operation of consent in other contexts where it currently does valuable normative and doctrinal work to which it is better suited, such as in sexual offences and in relation to medical treatment. Despite its relative lack of dispositive value, I suggested that there are convincing reasons for the formal approach of the orthodox view, and argued that these stem from the way in which it allows the law to be structured.

The value of the orthodox view's approach must be understood in the context of the aims of the criminal law in this area, where it seeks to achieve a balance between deferring to the greater expertise and competence of sports governing

bodies in regulating what is a valuable social activity, whilst maintaining the broader public interest through acting as the ultimate arbiter of the limits of violence. As a doctrinal mechanism, the imputation of consent functions as a proxy for a judgement based on whether the defendant's conduct amounted to 'legitimate sport'. It is useful for the fundamental indeterminacy of the criminal law in this context, which is resolved according to moral, political and social considerations, to be hidden behind a veil of formalism. This would be less easily achieved were the law to address the conduct of the participant directly, which may involve an acknowledgement that the law in relation to sports violence is as uncertain as that which governs gross negligence manslaughter, as it would rely upon contingent issues such as how reasonableness was to be construed in a particular situation, whether the violence that is inherent to sports participation can be considered a moral good, which of the manifold intentions a sports participant manifests should be legally relevant, and the general acceptability of conduct in a given context.

The concerns which actually determine lawfulness are subsumed within the defence of consent, leaving 'technical core offences' free of morally and politically conflicted concerns. This also has potential implications for the wider operation of the statutory offences, since it introduces morally and politically contested questions into the constituent *mens rea* elements. Acknowledging the primacy of the 'legitimate sport' standard might also be seen as effectively devolving criminal law policy to the internal standards (playing culture) of sport itself, in much the way that the Law Commission advocated, but without necessarily instigating the attendant recognition body. By accommodating sports violence within the bounds of the existing structure of consent, and therefore clearly within its own jurisdictional bounds, the criminal law

is able to maintain its direct relationship with the citizenry, rather than mediated by the rules of particular sports and the 'private government' of the sports authorities.

In *Barnes*, Lord Woolf pointed to an increase in prosecutions for sports violence and a lack of 'authoritative guidance' on the subject, and a central part of the guidance he gave was the heuristic that criminal prosecutions were not to be brought unless the conduct was 'sufficiently grave'. In Chapter 8, I asserted that this should be understood primarily as a message to the prosecutorial authorities, and I looked to the Agreement signed by the CPS, the NPCC and the FAs of England and Wales as a recent and potentially influential development in this respect.

The Agreement is explicitly influenced by the Court of Appeal's judgment in *Barnes*, and is designed to facilitate collaboration in the agencies' respective functions when it comes to matters of 'concurrent jurisdiction'. As such, the Agreement comprises a means by which to effect Lord Woolf's advocacy of parsimony in the prosecution of sports violence, the principal justification for which is the existence of other mechanisms that could act to deter or punish errant violence, or quasi-criminal behaviour. Its adoption is a pragmatic step in an area in which the priorities of criminal justice are intuitively relatively well understood but difficult to reduce to absolute and clear rules, and in which parallel jurisdiction vests in arguably better-placed sports governing bodies. However, the prioritisation of the discretionary decision-making aspects of criminal justice the Agreement represents and implements potentially raises concerns in two respects. Firstly, because such decisions are made in a forum that lacks the transparency of the open court, and by bodies whose accountability is questionable; and secondly, because the approach appears to encourage differential treatment. The use of discretion is a necessary and expedient ancillary to inevitably

contingent criminal law doctrine, but it is an imperfect one.

There is no straightforward answer to this work's titular question: whether the criminal law's treatment of sports violence amounts to a 'zone of legal exemption'. The language of *Brown* suggests an exemption, in that sport comprises one of a limited set of activities afforded the status of 'lawful activities', but a distillation of the arguments presented in this thesis points to a number of observations that can be made in relation to this. Firstly, it is inappropriate and potentially misleading to use the term 'exemption', since those who perpetrate acts of sports violence are not exempt from the purview of the criminal law. A better way of thinking about the relationship is to consider the criminal law's treatment of sports violence an 'accommodation'. The contingency of the social utility arguments that underpin the criminal law and the existence of parallel regulatory systems demand a degree of flexibility, and this necessarily entails a degree of ambiguity in terms of the particular sports and sports practices that are included. The indeterminacy this creates within the substantive criminal law means that its relationship to sports violence is better managed by the discretionary mechanisms that exist within the agencies and institutions of criminal justice. These will have a great effect on the susceptibility to prosecution, and thus possible conviction, of participants who engage in acts of sports violence.

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