

Legal Perspectives on State Power

Legal Perspectives on State Power:

Consent and Control

Edited by

Chris Ashford, Alan Reed
and Nicola Wake

Cambridge
Scholars
Publishing



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This book first published 2016

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

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ISBN (10): 1-4438-9944-5

ISBN (13): 978-1-4438-9944-4

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PREFACE

The contributing authors bring to bear a range of interdisciplinary perspectives on the various topics and views herein presented. The matters with which this edited collection monograph concerns itself are important and timely, with the law relating to Consent and State Control in a state of flux, and the work sets out to address some of the problematic aspects in this arena, and to provide a platform for further research and policy reform.

The contributions range from the academic and theoretical to the more practice and policy focused, and one of the aims of the collection is to achieve a balance in this respect. So far as practicable, the chapters are arranged thematically, in order to assist the reader in navigating the different topics addressed. The volume is intended to form a coherent whole, connected by an overarching theme, and it can be read as such, or more selectively by those interested by particular themes or chapters. To this end, there are cross-references between the chapters where appropriate, but these are kept to a minimum.

As editors, we would like to take this opportunity to thank the contributors to this volume, both for their excellent chapters and for the professional and timely manner in which they completed. These factors have made the editing process a relatively straightforward one. It has been a pleasure to receive, and to have the opportunity to edit, such a fine collection of work. We hope the readers will find the chapters, and the monograph as a whole, a useful and interesting addition to the expanding literature in this area. In addition, we would like to thank Beth Stuart-Cole, a Doctoral Candidate of Northumbria, for her invaluable assistance in formatting the chapters, and the University of Northumbria's Centre for Evidence and Criminal Justice Studies and Signature Area in Law and Society for their support. It has also been a pleasure to work with the superb editorial team at Cambridge Scholars Publishing towards final publication.

CHAPTER ONE

INTRODUCTION

CONSENT AND CONTROL: LEGAL PERSPECTIVES ON STATE POWER

CHRIS ASHFORD, ALAN REED
AND NICOLA WAKE

The Consent Crucible

Power, Lukes tells us, is essentially a contested concept with three dimensions: influencing the making of decisions, shaping the political agenda to prevent decisions being made, and controlling people's thoughts.¹ Social control, organised through the ways in which society regulates and responds to behaviour that might be considered deviant or troubling,² is one way through which power is exercised by the state and this control is often as legal as it is social. This legal control of the deviant or troubling typically manifests itself as criminal law. This body of law defines those actions or activities that the state seeks to prohibit, and enables the punishment of those offenders who transgress these legal rules. At the core of this is the issue of consent and control: those actions and behaviours that one can consent to and those that are controlled.

Debates about consent can act as a crucible in which the citizen and state powers are thrown together, and the new truth(s) constructed by this process are read, understood, and debated through the criminal law.

¹ Steven Lukes, *Power: A Radical View* (Palgrave 1974) *passim*.

² See more generally: Stanley Cohen, *Visions of Social Control* (Polity 2005).

Since the start of the twenty-first century, Western socio-legal discourse has arguably focused upon ‘rights-based’ narratives and cultures. These narratives have sought to re-cast the power of the state, re-framing liberal democracy and the power of the citizen. This shift was codified through the Human Rights Act 1998. The then British Prime Minister Tony Blair was to later remark that the Act and the accompanying policy changes ‘were not just changes in policy; they were radical departures in the way Britain was governed, in the constitution and in attitude.’³

Concomitant to this re-casting of the citizen, the criminal law has faced new interventions from technology, science and culture, all of which have served, at least in part, to re-cast and re-form doctrinal and theoretical debates about consent. Consent, on the one hand, a right-derived discourse, comes into growing conflict with state sanctioned or mandated control and in doing so, tells us much about contemporary society and the state that seeks to govern that society.

Legal Perspectives

In this edited collection, twenty-one authors over the course of the following fifteen chapters seek to offer legal perspectives on consent, recognising and interrogating the often complex relationship that consent has with state control and the expression of state power. This relationship, present pre-, during and post-trial, is analysed in this collection from a range of perspectives including, for example, doctrinal, socio-legal, medico-legal and queer, and draws upon authors from a range of practice and disciplinary backgrounds to offer multi- and inter-disciplinary perspectives on consent and control. The book commences with chapters that seek to understand the broader theoretical and doctrinal landscape of consent.

Ben Livings, in his chapter *Private Authorisation and Public Censure: Negotiating the Limits of Consensual Harm* explores non-sexual violence

³ Tony Blair, *A Journey* (Hutchinson 2010) 26. It is worth noting, as the then Home Secretary Jack Straw subsequently noted, that just eleven months after the Human Rights Act came into force, the terrorist attacks of 11 September took place, ensuring fear became the dominant emotion and national security took priority over individual rights. New criminal sanctions would be rapidly introduced to temper the rights agenda. See, Jack Straw, *Last Man Standing: Memoirs of a Political Survivor* (Macmillan 2012) 282. See more generally, Shami Chakrabarti, *On Liberty* (Allen Lane 2014).

and consent in order to consider what Livings describes as the dichotomy that underlines consent's relation to the criminal law; that 'the significance of consent depends upon the private authorisation of the victim to excuse or justify what would otherwise amount to a public wrong.' His chapter provides a useful framework for engagement with the chapters that follow, considering the theoretical limits of consensual harm that are (re)negotiated. Livings provides us with a foundation, reflecting the inherent challenges in understanding consent within the confines of the symbiotic expression of state power.

Tanya Palmer considers *State Control of Consensual Behaviour through the Sexual Offences Act 2003* and in doing so covers an important overview of the statutory landscape of sexual offences law in England and Wales. The debates contained here, about the limits of sexual autonomy constructed by the State and the constructions of vulnerability, give practical meaning to the dichotomy outlined by Livings in the preceding chapter. Moreover, these debates are cross-jurisdictional in their applicability.

Palmer advocates a radical re-thinking of sexual offences against vulnerable people and in doing so, reimagines the relationship between the state and the individual.

Jess Elvin and Claire de Than consider *Consent to Death*, perhaps an area where the limits on individual freedom and consent and the application of state power is particularly stark and emotive. The authors note that academics along with legal and medical practitioners have long debated this, but in this chapter, the authors seek to move beyond the narrow analysis that has dominated so much of this debate, and offer a comprehensive and thought-provoking appraisal of consensual killing issues from a doctrinal perspective. They compellingly argue that the criminal law is in need of significant reform.

Jonathan Herring explores, in *The Age of Consent in an Age of Consent*, how the law seeks to balance protecting children from abuse, on the one hand, with a desire to 'avoid criminalising "everyday" consensual sexual behaviour between teenagers,' on the other. Herring offers a thoughtful and thought-provoking intervention in this debate, providing a measured discussion of what age any age of consent might be along with a discussion of capacity to consent and capacity as constructed within a broader social and values-based framework. Ultimately, Herring questions

the ultimate practical value of an age of consent but if one does exist, that it should be ‘high’, such as sixteen.

Chris Ashford, in the first of two chapters that seek to draw upon a queer theory perspective to consent, continues the discussion of the age of consent. In *Queering Consent: (Re)evolving Constructions of the Age of Consent and the Law*, Ashford notes the recent re-interest in the origins of the UK socio-legal paedophile activist movement and its connections with the gay rights movement. Set against a background of the ongoing Goddard Inquiry, Ashford explores our shifting understandings and constructions of consent in recent decades and suggests that the conflation of these two political movements for legal change is itself misleading, but that the insights this conflation offers for our (re)evolving constructions of consent remain valid and pertinent for queer radicals in broader agendas of resistance to the contemporary expressions of state power and limits on individual consent.

In *Queering Fear: Pro-LGBTI Refugee Cases*, Senthoran Raj continues this queer political re-appraisal of law, noting the increasing number of jurisdictions that have apparently recognised asylum claims based on sexual orientation and gender identity. Raj notes the dominance of heteronormative frameworks in how LGBTI refugees must demonstrate intimacy, identity and injury, and considers the limitations that such a dominance has for progressive assumptions in this area. Moreover, Raj considers how the concept of fear has been mobilised both in the granting of asylum but also in the responses to the adjudication of it.

In *Rethinking Rape-By-Fraud*, Vera Bergelson offers the first chapter of a number in this collection that seek to examine fraud and deception issues in the context of consent and state power. Starting with the Gayle Newland trial in which Newland was convicted for lying to her female partner about her biological sex, Bergelson explores the question of ‘in what circumstances should deception turn the apparently consensual sex into rape?’ Bergelson revisits the traditional doctrine of rape-by-fraud and rejects its historical rationales, arguing instead for a different framework which recognises contemporary society and values. The author suggests that the right to sexual autonomy is absolute and yet a violation of this autonomy may not be punishable. Whether it ought to be punishable should, Bergelson suggests, be determined by the interplay of harm and culpability.

Natalia Hanley and Philip Rumney challenge another area sexual consent and rape. In *Perceptions of Consent in Adult Male Rape: Evidence-based and Inclusive Policy Making*, Hanley and Rumney argue that criminal justice policy continues to fail to incorporate research evidence. They argue that policy responses to sexual violence have failed ‘to counter rape myths, heteronormative sexual scripts and sexist attitudes.’ Hanley and Rumney draw on a series of focus groups which they conducted to explore these attitudes, concluding that there are specific rape scripts that are attached to adult male sexual victimisation and that these scripts are often gendered.

Ben Fitzpatrick contemplates recent controversies surrounding undercover policing in which gender has also been a dynamic factor. In *#Spycops: Undercover Policing, Intimate Relationships and the Manufacture of Consent by the State*, Fitzpatrick explores how key state actors – namely the Police – might raise additional issues of consent through the relationships, particularly intimate relationships, that they might engage in during undercover operations.

Fitzpatrick highlights recent controversies surrounding the practice which has arguably led to what he describes as ‘a spectacular unravelling of the fabric of undercover policing.’ Fitzpatrick suggests that our collective tolerance of cultivating intimate relationships – such as those in the Mark Kennedy case – should be restricted to exceptional circumstances, if at all.

David Hughes and Alan Reed turn to the issue of criminalisation of *HIV transmission: Anglo-North-American Comparative Perspectives and Optimal Reforms to Failure of Proof Defences*. They note the 2015 review by Law Commission (England and Wales) of the Offences Against the Person Act 1861 and associated offences. Whilst that report held back from offering radical reform of the law pertaining to HIV transmission, the authors put forward an argument for a fresh and urgent legislative intervention in this area. Their analysis focuses upon failure of proof defences and draw upon Anglo-North-American comparative perspectives to advance their analysis. They conclude with legislative proposals that would enable the law to recognise greater management of risk, specifically in relation to condom usage and viral load management.

Rajan Nathan and Keith JB Rix ask if the distinctions between personality disorder and mental illness in clinical and legal practice are justified. In the first of our final section of chapters, each addressing broad themes of treatment or diversion and consent, Nathan and Rix ask: *A Special Case*

for Personality Disorder: Are the Distinctions between Personality Disorder and Mental Illness in Clinical and Legal Practice Justified? The authors question the distinction between personality disorders and mental illness, and conclude by pondering the continued advantageous case that is made for legal and clinical approaches to personality disorder in contrast to mental illness. They also note that continuing to make this distinction ‘goes against the tide of the theoretical and empirical evidence.’

Linda Steele considers *Diversion of Individuals with Disability from the Criminal Justice System: Control Inside or Outside Criminal Law?* Steele offers an analysis of a specific diversion scheme and ultimately concludes that there does seem to be a relationship ‘between law, disability and coercion (and *consent* and *incapacity*) which is central to the way in which the state intervenes in the lives of individuals with disability.’

Ann Creaby-Attwood and Chris Ince consider *Sex Offenders with Autistic Spectrum Conditions*, providing an important intervention in the debate surrounding sex offenders with high functioning autism and offender treatment programmes. They conclude that medical diagnosis is ‘now sitting as an uncomfortable bed-fellow with criminal law and sentencing’ in cases involving individuals on the autistic spectrum. They highlight the complexities that sex offenders in this category present for law, medicine and ultimately policy making, suggesting that at the very least, greater understanding of these complexities is needed.

In *Consent, Compulsion and Sex offenders: An Ethical and Rights Based Approach to the Treatment and Management of Sex Offenders*, Karen Harrison and Bernadette Rainey consider the ‘treatment’ response landscape in relation to those who sexually offend. Harrison and Rainey consider two specific responses enabled by law: that of the use of drugs such as libido suppressants (chemical castration) in custody, and managing behaviour upon release. The authors take a rights-based approach to an often emotive and challenging area of law. They note that in considering rights, we must also contemplate risk and explore alternative approaches to the treatment and management of sex offenders such as ‘Circles of Support and Accountability.’ The authors ultimately argue that policy and legal responses to sex offending need to be more nuanced, and in seeking strategy that effectively reduces risk of offending behaviour, we should engage much more with right-based responses.

Finally, Astrid Birgden offers a practical exploration of sex offender rehabilitation, and notes that in assessing *Consent Versus Coercion: Offender Rights and Community Rights in Sexual Offender Rehabilitation* one needs a more sophisticated analysis that understands the continuum of coercion and consent. Birgden argues that community rights and offender rights need to be balanced, and the various legal and societal actors involved in the rehabilitation process have roles in ensuring this effective balancing.

Together, these chapters highlight the ways that issues of consent and control permeate through our society and criminal justice system, and through a series of theoretical and practical engagements with these themes, offer powerful interventions for our thinking on the application of state power. Collectively, we are forced to re-examine the 'consent crucible' and what that means, not just for the criminal law, but the society that (re)creates and exists within that law.

CHAPTER TWO

PRIVATE AUTHORISATION
AND PUBLIC CENSURE:
NEGOTIATING THE LIMITS
OF CONSENSUAL HARM

BEN LIVINGS

Introduction

The potential relevance of consent to the criminal law spans property offences such as theft and criminal damage, and sexual and non-sexual offences of violence,¹ in each of which the consent of the ‘victim’² may operate to vitiate the *prima facie* liability of the defendant. A considerable body of legal doctrine has developed around consent, particularly in relation to the way in which it is construed, and the conditions under which apparent consent will translate into legal force. For instance, minimum age requirements might pertain in order for a person’s consent to be considered legally relevant,³ or there may be numerous other demands relating to capacity.⁴ Where coercion or deception is used in order to procure apparent consent, this may be deemed invalid, echoing the maxim that ‘every consent involves a submission; but it by no means

¹ Elliott and De Than describe consent as ‘a concept that has general application across the spectrum of criminal law’ (Catherine Elliott and Claire de Than, ‘A Case for Rational Reconstruction of Consent in Criminal Law’ (2007) 70 *Modern Law Review* 225, 228).

² The dynamics of consent mean that ‘victim’ is arguably an inappropriate term in this context, but it is used in the absence of a better alternative.

³ See, for example, the age-related provisions of the Sexual Offences Act 2003 and the Tattooing of Minors Act 1969.

⁴ See, for example, the Mental Capacity Act 2005.

follows that a mere submission involves consent'.⁵ In the case of consensual physical harm, the availability of consent has proven problematic; that is, what level of consensual harm can be inflicted lawfully, and in what circumstances. This difficulty stems from an inherent dichotomy that underlies consent's relation to the criminal law: the significance of consent depends upon the private authorisation of the victim in order to excuse or justify what would otherwise amount to a public wrong. This chapter looks at this dichotomy in the context of offences of non-sexual violence,⁶ and appraises some of the organising principles that have been propounded as a means by which to negotiate the resultant tensions.

The chapter begins by setting out why consent is important for the criminal law, as an expression of private authorisation, before moving to questions about its proper function 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, and here consent might override the technical application of the criminal law. Calibrating the availability of consent to harms 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 the treatment of consent: 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).⁷ At first sight, this may appear a distinction of little significance, beyond procedural demands in relation to allocating evidential burdens at

⁵ May CJ in *R v Dee* (1884) 15 Cox CC 579.

⁶ That is, where the offence committed is not a sexual offence. Offences of non-sexual violence can be committed in a sexual context, without amounting to a sexual offence (see, for example: *R v Dica* [2004] EWCA Crim 1103; [2004] QB 1257).

⁷ 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).

trial,⁸ but the majority judgments in *Brown*, and commentators such as Bergelson and Gardner, 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.

Consent as Private Authorisation

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’.⁹ 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”’.¹⁰ Westen writes of ‘a single concept with a multiplicity of competing conceptions’,¹¹ while, for Cowling, consent is best understood as comprising ‘an overlapping series of meanings’.¹²

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 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:

⁸ 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).

⁹ *R v Bree* [2007] EWCA Crim 804, [2008] QB 131, 139 (Lord Judge LJ).

¹⁰ Mark Cowling, *Date Rape and Consent* (Ashgate 1998) 82.

¹¹ Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate 2004) 309.

¹² Cowling (n 10).

[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.¹³

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’.¹⁴ Feinberg asserts that ‘the kernel of the idea of autonomy is the right to make choices and decisions’,¹⁵ and consent is an important and useful concept because it can facilitate the exercise of ‘personal sovereignty’.¹⁶

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 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’.¹⁷ In the centuries since this statement, the harm principle has been appraised and criticised on many occasions,¹⁸ and more sophisticated articulations have been developed.¹⁹ Nevertheless,

¹³ Heidi Hurd, ‘The Moral Magic of Consent’ (1996) 2 *Legal Theory* 121, 121.

¹⁴ Elliot and de Than (n 1) 231.

¹⁵ Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self* (Oxford University Press 1986) 54.

¹⁶ *ibid.*

¹⁷ John Stuart Mill, *On Liberty* (Longman, Green & Co 1865) 6.

¹⁸ 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).

¹⁹ 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); Feinberg (n 15); Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (Oxford University Press 1988). For contrasting perspectives on the harm

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,²⁰ and this naturally includes control over ‘what contacts with my body to permit’.²¹ 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’.²² A strict interpretation of the concept of personal sovereignty can serve to authorise some extreme conduct: German Armin Meiwes was tried and convicted in 2004, following his apparently consensual killing and eating of Bernd Juergen Brandes.²³ 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.

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 censoring conduct. Whatever the moral force of consent in denoting acquiescence or desire,

principle, see: John Gardner, *Offences and Defences* (Oxford University Press 2007); Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2008).

²⁰ Paul 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).

²¹ Feinberg (n 15).

²² Law Commission, *Consent in the Criminal Law* (Law Com CP No 139, 1995) para C.54.

²³ <http://news.bbc.co.uk/1/hi/world/europe/4752797.stm>.

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,²⁴ 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 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.²⁵

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 for the 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’.²⁶ 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’,²⁷ 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

²⁴ See Grant Lamond, ‘What is a Crime?’ (2007) *Oxford Journal of Legal Studies* 609.

²⁵ Michelle Madden Dempsey, ‘Victimless Conduct and the Volenti Maxim: How Consent Works’ (2013) 7 *Criminal Law and Philosophy* 11, 13.

²⁶ *R v Donovan* [1934] 2 KB 498 (CA), 507 (Swift J).

²⁷ *ibid.*

consensual and therefore privately authorised by the injured party. The dichotomy between the 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’.²⁸ 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.²⁹

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.³⁰ Further examples include illegal abortion,³¹ and the continuing criminality of voluntary euthanasia and assisting suicide.³² 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 13,³³ or the prohibition on the tattooing of minors.³⁴

As these examples illustrate, the criminal law ‘takes the position that there are numerous harms that all persons are incompetent to inflict or allow to

²⁸ Feinberg (n 15) xvi.

²⁹ 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).

³⁰ Female Genital Mutilation Act 2003.

³¹ Abortion Act 1967. See: <http://www.chroniclive.co.uk/news/north-east-news/county-durham-mum-jailed-diy-10618161>.

³² 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.

³³ Sexual Offences Act 2003, s 5.

³⁴ Tattooing of Minors Act 1969.

be inflicted upon themselves, regardless of how much they consciously desire them'.³⁵ The concerns outlined above suffuse the House of Lords' judgment in *R v 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.³⁶

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'.³⁷

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 underlying conduct is not good for [the victim] (...), or upon the view that the conduct violates shared morality'.³⁸ Constraints on the freedom of individuals to engage in consensual harm may be characterised as examples of paternalism or of legal moralism,³⁹ 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

³⁵ Westen (n 11) 129.

³⁶ *R v Brown* [1994] 1 AC 212 (HL), 235 (Lord Templeman).

³⁷ *R v Coney* (1882) 8 QBD 534, 549 (Stephen J).

³⁸ Westen (n 11) 129.

³⁹ 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.

according to prevailing social mores.⁴⁰

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 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*, 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'.⁴¹ In addressing this task, the Law Lords set out to organise 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-defence⁴² – 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

⁴⁰ 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 (*Dica* (n 6) 1269 (Judge LJ)).

⁴¹ *Brown* (n 36) 279.

⁴² 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.

defences to succeed.⁴³ 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 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.⁴⁴ 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’.⁴⁵ Lord Lowry deemed this uncontroversial, asserting: ‘Everyone agrees that consent remains a complete defence to a charge of common assault’.⁴⁶ 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’.⁴⁷

⁴³ 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.

⁴⁴ 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’ (*Brown* (n 36) 230).

⁴⁵ *ibid* 231.

⁴⁶ *ibid* 248.

⁴⁷ 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 *Brown* (n 36) 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’,⁴⁸ 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.⁴⁹

Later, Williams wrote that it is ‘inherent in the conception of assault and battery that the victim does not consent’,⁵⁰ 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’,⁵¹ so that ‘ordinarily an act consented to will not constitute an assault’.⁵²

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 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

⁴⁸ *Christopherson v Bare* (1848) 11 QB 473, 477.

⁴⁹ *Coney* (n 37) 549.

⁵⁰ Glanville Williams, ‘Consent and Public Policy’ [1962] Criminal Law Review 74, 75.

⁵¹ *A-G’s Reference (No 6 of 1980)* (1981) 1 QB 715 (CA), 717 (Lord Lane CJ).

⁵² *ibid* 719 (Lord Lane CJ).

categorised as separate *defences*, contained in what Norrie terms the ‘moral defence periphery’.⁵³

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’.⁵⁴ 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 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’.⁵⁵

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.⁵⁶ 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

⁵³ Alan Norrie, *Crime, Reason and History* (3rd edn, Cambridge University Press 2014); Alan Norrie, *Punishment, Responsibility and Justice* (Oxford University Press 2000).

⁵⁴ Roberts (n 39).

⁵⁵ *ibid* 219.

⁵⁶ *Brown* (n 36).

which the person injured was participating. Surgery, (...) ritual circumcision, tattooing, ear-piercing and violent sports including boxing are lawful activities.⁵⁷

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.⁵⁸ 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.⁵⁹ 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 has not (yet) had occasion to consider the case for exemption'.⁶⁰ For Roberts, this constitutes 'a disturbingly expansionist tendency in the criminal law'.⁶¹ 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'.⁶² As Kell explains, this means reversing the

⁵⁷ *Brown* (n 36) 231.

⁵⁸ 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'.

⁵⁹ Kell (n 8).

⁶⁰ Roberts (n 39) 239.

⁶¹ *ibid* 239.

⁶² *ibid*. On this, see also: Marianne Giles, 'R v Brown: Consensual Harm and 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’.⁶³ 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’.⁶⁴

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 grounds of imprecision, as the example of contact sports demonstrates: it is to be presumed that formal iterations of mainstream sports 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’.⁶⁵ 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.

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

Public Interest’ (1994) 57 *Modern Law Review* 101; Sue 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; Kell (n 8).

⁶³ Kell (n 8) 127.

⁶⁴ Kell (n 8) 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.

⁶⁵ Roberts (n 39) 239.

between consent and harm under the criminal law.⁶⁶ 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:

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.⁶⁷

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’.⁶⁸ 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’.⁶⁹ 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 harm, but under the “offence” heading in rape’.⁷⁰ According

⁶⁶ Vera Bergelson, ‘Consent to Harm’ in Franklin Miller and Alan Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010); Gardner (n 19).

⁶⁷ Bergelson (n 66) 171.

⁶⁸ *ibid.*

⁶⁹ Gardner (n 19) 144.

⁷⁰ *ibid.*