

# THE RIGHT TO A FAIR FIGHT: SPORTING LESSONS ON CONSENSUAL HARM

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*This article critically assesses the criminal law on consensual harm through an examination of the legality of fighting sports. The article begins by considering fighting sports such as bare-fisted prize fighting (dominant in the nineteenth century). It then, in historical chronology, examines the legality of professional boxing with gloves (dominant in the twentieth century). Doctrinally, the article reviews why and how, in a position adopted by the leading common law jurisdictions, fighting sports benefit from an application of the “well-established” category-based exceptions to the usual bodily harm threshold of consent in the criminal law. Centrally, fighting sports and doctrinal law on offenses against the person are juxtaposed against the theoretical boundaries of consent in the criminal law to examine whether and where the limit of the “right to be hurt” might lie. In sum, this article uses fighting sports as a case study to assess whether the criminal law generally can or should accommodate the notion of a fair fight, sporting or otherwise, predicated on the consent of the participants to the point that the individuals involved might be said, pithily, to have extended an open invite to harm.*

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## INTRODUCTION

The manner in which the criminal law seeks to accommodate the consent of the victim in a defense to an assault has been criticized for its historically

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defined rather than contemporarily aligned rationale, its ambiguous even arbitrary scope, and its moralistic brittleness.<sup>1</sup> This article reviews these criticisms by using fighting sports, and in particular the sport of professional boxing, as a case study to assess how the criminal law (primarily the criminal law of England and Wales) accommodates the legality of fighting sports as apparently predicated on the mutual consent of the parties, to the extent that either party might be said to have invited the ensuing hurt or even serious harm. In addition, this article goes on to discuss whether the stated case study might also assist in identifying a boundary for the role of consent in instances of bodily harm such that a workable balance might be struck in criminal trials of this nature between certainty of legal principle and proper contextualization of the particular factual matrix.

As a starting point, previous research by this author has highlighted that in the English jurisdiction, and since the 1890s, an implied understanding developed between the criminal justice and sporting authorities, such that the sport of boxing seldom *directly* attracted the attention of the courts.<sup>2</sup> That understanding was based on the following “legitimising equation”: boxing with gloves, as codified in the Queensberry Rules of 1865,<sup>3</sup> was placed in stark contrast to the “sport” of bare-fisted prize fighting; boxing did not incite social disturbance nor act as a threat to general public morality; it did not require, as prize fighting had demanded of its participants, a fight to a standstill.<sup>4</sup> In sum, professional boxing in the post-Queensberry Rules era was not considered unacceptably dangerous and thus could discard the label of criminality that attached to, and remains with, bare-fisted prize fighting. More relevantly from the perspective of this article, in the limited number of instances in which the sport has been *indirectly* acknowledged since then, *dicta* from the criminal courts suggest

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1. See, for example, Vera Bergelson, *The Right to be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 235 (2007).

2. See, for example, JACK ANDERSON, *THE LEGALITY OF BOXING: A PUNCH DRUNK LOVE?*, Ch. 2 and 4 (2007).

3. The Marquis of Queensberry Rules of 1865 prescribed gloves and three-minute rounds, as well as barring wrestling and hugging. The codification of the rules of gloved boxing within of the Queensberry Rules did not immediately result in the extinction of bare-fisted fighting. Indeed, the final, credible world bare-knuckle bout would take place in the 1890s. Nevertheless, the Queensberry Rules must be seen as “constitutional” in their importance to the sport of modern boxing.

4. Jack Anderson, *The Legal Response to Prize Fighting in Nineteenth Century England and America*, 57 N. IRELAND LEGAL Q. 265, 265–66 (2006).

that boxing—largely as a reward for its late nineteenth century transformation, but also located in policy concerns surrounding the promotion of sport and in the availability of consent—appears to have been granted a *sui generis* immunity from the ordinary law of violence. That immunity, which one writer elegantly described as merely explaining and not justifying the legality of the sport, goes to the very heart of this debate on the legality of fighting sports.<sup>5</sup>

Further, this article investigates the origins of the immunity, analyzes its scope, particularly whether it might properly be classified as an immunity, and finally assesses the future sustainability of this immunity and, by definition, the future legality of boxing and indeed many other combat sports. Theoretically, the discussion of this immunity will be premised largely on the issue of the consent—apparent, implied, or even coerced—of the participants in a boxing bout: how the right to be, or licence another to, hurt operates in fighting sports (and indeed in all contact sports); where the threshold of consent to harmful sporting assaults lies; and how in answering these questions in the context of sport, the reply may lead to a rational reconstruction of the place of consent in the criminal law such that in English law, as epitomized by the majority in the House of Lords in *R v. Brown*, there is a move away from the category-based approach to exceptions to the general rule on consent above actual bodily harm.<sup>6</sup> The objective of this article is to find some coherency in theorizing the right to be hurt consensually, but it is first necessary to give a brief legal history on the case law surrounding consent in the criminal law.

## I. THE LEGALITY OF BARE-FISTED PRIZE FIGHTING: A BRIEF LEGAL HISTORY

The Royal Ascot race meeting held every year in mid-June is one of the most prestigious horse race meetings in the world. Held at Ascot racecourse to the southwest of London, the venue traces its history to 1711 when

5. Brian Foley, *Boxing, the Common Law and Non-Fatal Offences Against the Person Act 1997*, 12 IRISH CRIM. L.J. 15, 16 (2002).

6. In this, the article is informed by Catherine Elliot & Claire de Than, *The Case for the Rational Reconstruction of Consent in the Criminal Law*, 70 MOD. L. REV. 225 (2007), and Julia Tolmie, *Consent to Harmful Assaults: The Case for Moving Away from Category Based Decision Making*, CRIM. L. REV. 656 (2012).

Queen Anne, whilst out riding, apparently, came upon an area of open heath, not far from Windsor Castle, that looked an ideal place for “horses to gallop at full stretch.”<sup>7</sup> The venue has been associated with the so-called sport of kings ever since. In mid-June 1881, it was, however, the venue for a rather more debasing event, a bare-fisted prize fight. The fight took place between two men, a Mr. Burke and a Mr. Mitchell, inside a ring marked out roughly by rope and stakes. Each man was assisted in his corner by three seconds. A 150-strong crowd surrounded the ring. Bets were made and the fight commenced, lasting just under an hour. Although not as prevalent as it would have been a half century previously, organized fighting of this nature was not an unusual activity in the England of the 1880s.<sup>8</sup> What was unusual was the subsequent prosecution and conviction of many of those involved, including the combatants, two of their ring seconds a Mr. Parker and a Mr. Symonds, and a number of those, including a Mr. Coney, who were present solely as spectators. The principal charge on all was that of assault.

The subsequent proceedings, known as *R v. Coney*,<sup>9</sup> remain seminal as a point of reference for the legal history (and demise) of prize fighting in the courts of nineteenth-century Britain. Concomitantly, the *Coney* proceedings, for reasons that will be explained, remain fundamental to the legal status of the modern sport of boxing. Further, it must be remembered that *Coney* is still regarded in English law as authority on the issue of consent within the ordinary law of assault. Indeed, together with decisions such as *R v. Bradshaw*<sup>10</sup> and *R v. Moore*,<sup>11</sup> *Coney* is generally deemed to be a source of modern (English) criminal law’s approach to the issue of sporting violence and, in particular, to identifying the legal limits to which sports participants can consent to bodily harm during the course of a contact sport. The examination of *Coney*, as a key legal catalyst in the evolution of the above principles of criminal law, will be referred to shortly. For now, the intricacies of the *Coney* trial need to be revisited.

On first determining whether what had occurred was in fact a prize fight (and there was little evidence that the fight was for money or other reward),

7. See further Ascot Racecourse, [http://www.ascot.co.uk/?page=About\\_Ascot](http://www.ascot.co.uk/?page=About_Ascot).

8. See generally Jack Anderson, *The Business of Hurting People: A Historical, Social and Legal Analysis of Professional Boxing*, 7 OXFORD U. COMMONWEALTH L.J. 35 (2007).

9. *R v. Coney*, 8 Q.B.D. 534 (1882).

10. *R v. Bradshaw*, (1878) 14 Cox’s Crim. Cas. 83.

11. *R v. Moore*, [1898] Times Law Reports 229.

the trial judge directed the jury on the applicable law, noting: “There is no doubt that prize fights are illegal, indeed, just as much so as that persons should go out to fight with deadly weapons, and it is not at all material which party strikes the first blow; and all persons who go to a prize fight to see the combatants strike each other, and who are present when they do so, are, in point of law, guilty of assault.”<sup>12</sup> The jury found Burke and Mitchell guilty of assault upon each other, and that Parker and Symonds were guilty of assault for aiding and abetting in an active manner the management of the fight. Coney and a number of others were found also guilty even though witnesses agreed that Coney and the others were not involved in any way in the organization of the fight, nor did they appear to bet on or even say anything about the fight as it took place.

Coney and the other “passive” spectators appealed, as did Burke and Mitchell. In general criminal law terms, *Coney*’s enduring precedence relates to the part of the appeal on “aiding and abetting” a public order offense.<sup>13</sup> The article will focus on the argument by Burke and Mitchell that their mutual consent to “an interchange of blows” afforded them an answer to the criminal charge of assault.

### A. Consent to “Mutual Blows”

The contention that the participants’ mutual consent to the “interchange of blows” afforded an answer to the criminal charge of assault was rejected unanimously on appeal. In this, Cave J., giving the lead judgment, relied on case law from the seventeenth, eighteenth, and nineteenth centuries.

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12. *R v. Coney*, 8 Q.B.D. 534, 536 (1882).

13. Based on case law such as *R v. Murphy*, 6 Car. & P. 103, 172 E.R. 1164 (1833), the Court in *Coney* (see especially Hawkins J., *R v. Coney*, 8 Q.B.D. 534, 557–58 (1882)) held that mere secondary presence at the principal criminal event would not be sufficient to sustain a charge of aiding and abetting by way of encouragement. It must be proved that the accused intended to give encouragement and willfully did encourage the crime committed. See subsequently the approval of the *Coney* approach by the Courts Marital Appeal Court in *R v. Clarkson*, 3 All E.R. 344, 347 [1971], and by the Court of Criminal Appeal in *R v. Allan*, 1 Q.B. 130, 138 [1965]. A most unusual application of the *Coney* approach to aiding and abetting can be seen in the recent U.K. Supreme Court case of *R v. Gnango*, 1 A.C. 827 [2012] (joint enterprise liability for murder where D1 and D2 voluntarily engaged and intended to shoot at and kill each other, and D1 mistakenly killed V such that D2 was also held guilty of the offense of aiding and abetting V’s murder).

In *Matthew v. Ollerton*,<sup>14</sup> it appears that the defendant owed the plaintiff a certain sum of money. By way of an informal arbitration agreement, the defendant consented to the plaintiff determining the amount owed. The plaintiff so awarded but the defendant subsequently objected to its enforcement on the ground that “it is against right and law, that the plaintiff should be a judge in his own cause” and used by analogy the maxim: “if I licence a man to beat me, such licence is void.” The court held that entering into “rule by consent” in a matter of debt was permissible, but licensing another to beat would be void “because ’tis against the peace.”<sup>15</sup> In *Boulter v. Clarke*,<sup>16</sup> Parker C.B. held that it was no defense to allege that the plaintiff and defendant had fought together by consent, given that the (prize) fighting itself was unlawful.<sup>17</sup> Finally, Cave J. in *Coney* used the authority Coleridge in *R v. Lewis*<sup>18</sup> to reaffirm, straightforwardly, that whenever two persons go out to strike each other, and do so, each is guilty of assault.

In sum, whether the fight was “fair” (in arrangement, performance, or outcome) was irrelevant; fighting of this nature was illegal and the parties thus guilty on whatever public order, assault, or homicide-related charge that followed. That aside, there was a view in the nineteenth-century English courts in instances of homicide that the “fairness” of a fight might reduce the charge from murder to manslaughter.<sup>19</sup> In *Whiteley’s Case*, where what appeared initially to be a fist fight between the parties eventually led to the stabbing of one of the participants, Bayley J. directed the jury as follows:

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14. *Matthew v. Ollerton*, Comb. 218; 90 E.R. 438 (1693).

15. See similarly the courts’ negative attitude to the consent of the party in duels on matters of “honor” such that the survivor of a duel could, on the death of his opponent, be found guilty of culpable homicide: *R v. Oneby* 17 State Tr. 29 (1727); *R v. Rice* 3 East 581 (1803); and *R v. Cuddy* (1843) 1 Car. & Kir. 210.

16. *Boulter v. Clarke*, Bull. N.P. 16 (1747).

17. The logic of the stated case suggests that, although the victim in a fight is not barred for taking action notwithstanding their consent to participate in the fight, the unlawful nature of the fight would mean that a civil claim by the victim would likely be defeated by principle of illegality (*ex turpi causa non oritur actio*). See Lord Asquith in *National Coal Board v. England*, 1 AC 403, 428 [1954].

18. *R v. Lewis*, 1 Car. & Kir. 419 (1844).

19. For a broader criminological perspective on the concept of, and rituals associated with, a “fair fight,” see CAROLYN CONLEY, *THE UNWRITTEN LAW: CRIMINAL JUSTICE IN VICTORIAN KENT*, Ch. 2 (1991).

When persons fight on fair terms, and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to occasion death, if death ensues—it is manslaughter; and if persons meet originally on fair terms, and, after an interval, blows have been given, a party draws in the heat of blood a deadly instrument, and inflicts a deadly injury, it is manslaughter only. But if a party enters a contest, dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter but murder.<sup>20</sup>

That attempt to distinguish between fairly arranged fights where “mutual blows pass” and those that could be categorized simply as public disorder also feature in Cave J.’s judgment in *Coney* when he expounded on his “true view” that “a blow struck in anger, or which is likely or intended to do corporal hurt is an assault . . . and, that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial.”<sup>21</sup> In this, however, Cave J. distinguished between the above and a blow struck “in sport” (the examples he used were the leading sports of the time: playing with single sticks, wrestling, and boxing with gloves in the “ordinary way,” i.e., under the Queensberry Rules) and not likely to intend to cause bodily harm, which did not involve assault.

In the narrow jurisprudential terms, Cave J.’s judgment in this regard follows earlier precedent such as *R v. Canniff* where that court held, “All struggles in anger, whether by fighting or wrestling, or any other mode . . . are unlawful . . . if it had been an amicable contest . . . to see who was the best man, that would be quite a different matter.”<sup>22</sup> In short, struggles in anger or fights taking place spontaneously had to be contrasted against those of a prearranged nature conducted under sporting rules. The broader and more interesting point, however, is how, through the course of the nineteenth century, one version of a fair, sporting fight, bare-fisted prize fighting, fell foul of the law, while another, boxing or sparring with gloves, was in effect promoted by the criminal courts to an extent that a defacto immunity was granted to that sport, which lasts to this day. Why were the criminal courts anxious to promote the glove over the fist, and how, within the technicalities of the ordinary law of assault, was this objective achieved?

20. *Whitley’s Case*, 1 Lewin 173, 168 ER 1002, 1003 (1829).

21. *R v. Coney*, 8 Q.B.D. 534, 539 (1882).

22. *R v. Canniff*, 9 Car. & P. 359, 360–61 (1840).

## B. Promoting “Sporting” Consent

In an anonymous contribution to *The Law Times* in 1860, the contributor grumbled:

Where is the written or unwritten code which permits boxing with gloves, and prohibits boxing without gloves; which allows of fencing and the single-stick, but not of a permitted blow with the bare knuckles? If prize fighting be illegal, let it be declared to be so by the Legislature. Otherwise let us fear the judge-made law, which seeks, perhaps to substitute only the dainty squeamishness of the present age for the coarse but masculine brutality of former times.<sup>23</sup>

The courts addressed the charge of “dainty squeamishness” by directing juries as per *Canniff* that a bout was lawful if it were an amicable contest or mere exhibition of skill in sparring, but if the combatants intended to struggle in anger and fight until one was exhausted, it was a criminal offense. Accordingly, it was for the jury to decide, on the basis of the presented evidence, whether the encounter was a sparring match (a legal and acceptable fighting contest) or a prize fight (viewed as an illegal and intolerable struggle contrary to public order). Given that the essentials of both versions of the sport remained very similar, this was an extremely difficult distinction to make.<sup>24</sup> As the Queensberry Rules (written in 1865) took some time to become accepted—it must be remembered that in contrast to the other major sports of the period (and notably soccer), a credible governing authority did not exist in boxing to ensure that the code was uniformly applied—juries in the meantime took a sympathetic view of any activity that could ostensibly be deemed a “fair fight” as per *Whiteley*. Indeed, Wiener has suggested that until relatively late in the nineteenth century, acquittals in prize fight–related deaths remained more likely than in manslaughter charges taken as a whole: of the thirty men charged at the Old Bailey (the Central Criminal Court in London) with manslaughter resulting from a prize fight in the period 1856–1875, thirteen were acquitted, and sentences for the convicted never exceeded six months.<sup>25</sup>

23. “Is prize fighting legal?” *THE LAW TIMES*, Apr. 28, 1860, at 75.

24. See Neil Parpworth, *Boxing and Prize Fighting: The Indistinguishable Distinguished*, 2 *SPORT & THE LAW J.* 5 (1994).

25. MARTIN WIENER, *MEN OF BLOOD: VIOLENCE, MANLINESS AND CRIMINAL JUSTICE IN VICTORIAN ENGLAND* (2004).

Nevertheless, as the authority of the Queensberry Rules began to expand and become more generally accepted in the sport nationwide, the distinction between that which was legitimate with the fist and that which was unacceptable also become more readily identifiable in the court room for judges and juries to direct and deliberate upon. In *Coney*, the example used was that of *R v. Orton*.<sup>26</sup> In that case, the defendants had been convicted at trial for unlawfully assembling for the purpose of a prize fight. The Court of Criminal Appeal dismissed the appeal, affirming the trial judge's direction to the jury:

If it were a mere exhibition of skill in sparring [it was not unlawful]; but that if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of the law and a prize fight, whether the combatants fought with gloves or not.<sup>27</sup>

After an exhaustive review of the facts, including an examination of the bloodied gloves used by the combatants, the *Orton* jury had held that, although the appearance was of an organized boxing match, such was the severity and intensity of the blows that the nature of the fight clearly went beyond that which would normally be expected of a gloved sparring exhibition of fixed duration.<sup>28</sup> This view of what might be expected to occur “normally” or “in the ordinary way” during a bout is one that can, simply, be benchmarked against the consent of the parties. In *Coney*, this is best seen in Hawkins J.'s judgment where, applying the standard that a man might compromise his personal civil rights and including those of his bodily integrity save those in the public interest, he went on to hold that every fight in which the object and intent of each of the combatants was to subdue the other by violent blows, was, or had a direct tendency to be, a breach of the peace because “it is not in the power of any man to give an effectual consent to that which amounts to, or has direct tendency to create, a breach of the peace; so as to bar criminal prosecution.”<sup>29</sup>

Boxing under the Queensberry Rules, the socially acceptable version of this fighting sport, did not (apparently) arouse angry passions and was

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26. *R v. Orton*, 14 Cox's Crim. Cas. 226 (1878).

27. *Id.* at 227.

28. See similarly *R v. Young* 10 Cox's Crim. Cas. 371 (1866), and *R v. Ward* (1872) 12 Cox's Crim. Cas. 123 (1872).

29. *R v. Coney*, 8 Q.B.D. 534, 553 (1882), and citing *R v. Billingham*, 2 Car. & P. 234 (1825), and *R v. Guthrie*, 11 Cox's Crim. Cas. 522(1870).

legally acceptable. In contrast, bare-fisted prize fighting was designed inherently to produce riot, tumult, and mischief and therefore was socially and legally unacceptable. This development was consistent with development in sport and leisure more generally in the middle to late Victorian era, with its promotion of the Corinthian ideal of rule-bound sport played mainly by gentleman amateurs (encapsulated in the very phrase “under Queensberry Rules”), to the detriment of traditional sports, many of which (prize fighting included) were associated with excess alcohol and gambling. Indeed Sir Edward East was moved to make the argument in his treatise *Pleas of the Crown* that the consent of the participants to a prize fight should be vitiated by the fact that on promise of monetary award the participants might “each be careless of what hurt may be given.”<sup>30</sup>

Finally though, and in a caveat that echoes today to the sport of boxing and to other combat sports, and particularly those of a mixed martial art variety, Hawkins J. concluded his judgment in *Coney* with a stern warning to the emerging boxing fraternity that even “under the colour of a friendly encounter,” if the parties had as their object the intent to beat each other until one of them was exhausted or subjugated by that force, and so engage in conflict likely to end in a breach of the peace, the parties remained exposed to a prosecution in assault. It was at all times, according to Hawkins J., a matter for the jury to decide whether the factual characteristics of the fight in question had breached the accepted “colour” and intent of a socially acceptable fighting contest.<sup>31</sup> In sum, it was clear to the *Coney* court that, in the above instance, no consent, even that given freely by a “trained pugilist,” could render innocent that which is in fact dangerous.<sup>32</sup>

## II. CONSENT AND CRIMINAL ASSAULT: A SPORTING EXCEPTION?

The view of the court in *Coney* on consent was neatly summarized by Stephen J:

The principle as to consent seems to me to be this: When one person is indicted for inflicting personal injury upon another, the consent of the

30. EDWARD EAST, *PLEAS OF THE CROWN* 1:268–70 (2 vols. 1803).

31. *R v. Coney*, 8 Q.B.D. 534, 554 (1882).

32. *Id.* at 546–47, Mathew J.

person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured . . . in all cases the question whether consent does or does not take from the application of force to another its illegal character, is a question of degree depending upon circumstances.<sup>33</sup>

Accordingly as prize fighting was unlawful—primarily because of its inherent danger with blows struck intending and likely to cause injury, but also because it was an activity *inter alia* injurious to society as a whole, when compared to gloved boxing or sparring—the consent of the participants was irrelevant. Fifty or so years later, the English Court of Criminal Appeal in *Donovan* viewed consent in this context in a similar manner:

If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer . . . As a general rule, although it is a rule to which there are well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial.<sup>34</sup>

In that case, the accused, during the course of a sexual act, caned a young woman with her consent. The accused's appeal was ultimately permitted on the technical ground that the jury had been misdirected, though the court's view (entirely *obiter*) that the presence of consent is vitiated in the beating of another to the point of infliction of bodily harm clearly betrayed its attitude to the accused's actions. In the course of the judgment, Swift J. referred to the "well established" exceptions to the general rule on consent to bodily harm, noting in particular the exemption extended to "manly diversions," cases of rough and undisciplined sport or organized play, so described by the great institutional writers of the common law, such as Coke, Hale, and Foster.

A century subsequent to *Coney*, the *Donovan* view on the limitations on consent was affirmed in the English Courts in *Attorney General's Reference*

33. *Id.* at 549.

34. *R v. Donovan*, 2 K.B. 498, 507 [1934].

(*No. 6 of 1980*).<sup>35</sup> In that case, two young men had met in a public street; they had argued and decided to settle the argument there and then by a fight. Avoiding the somewhat tautological reasoning inherent in *Donovan*, the Court of Appeal held that, although the presence of consent absolves the accused of liability on a charge of common assault:

... it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason. Minor struggles are another matter. So in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent.<sup>36</sup>

Delivering judgment Lord Lane C.J. went on to observe:

Nothing which we have said is intended to cast doubt on the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in other cases.<sup>37</sup>

The frustration with, but ultimate acceptance of, the fact that a fighting sport such as boxing, with its promotion of direct, intentional harm by and against both participants, is legal on the rather nebulous ground of public “sporting” interest was clearly evident from the judgments in the celebrated House of Lords decision of *R v. Brown*. In that case, the appellants, a group of sadomasochists, participated enthusiastically in consensual sadomasochistic homosexual encounters. As a result of those incidents, the appellants were convicted on various assault-based charges, contrary to provisions in the (U.K.) Offences Against the Person Act 1861. The Court of Appeal (Criminal Division) upheld the convictions but permitted an appeal to the House of Lords (now the U.K. Supreme Court) on the ground that a point of law of general public importance was involved in the decision, namely:

35. Attorney General’s Reference (No. 6 of 1980), Q.B. 715 [1981].

36. *Id.* at 719.

37. *Id.* The approach that consent does not generally absolve liability for aggravated assaults save in exceptional circumstances, of which contact sport is one, appears to have been adopted in all the major common law jurisdictions. See the thorough review in *The Queen v. Lee*, 3 NZLR 42, NZCA 60 (2006).

Where A wounds or assaults B occasioning him actual bodily harm in the course of a sadomasochistic encounter, does the prosecution have to prove lack of consent on the part of B before they can establish A's guilt under [§ 20 or 47 of] the Offences Against the Person Act 1861?<sup>38</sup>

A 3-2 majority in the House of Lords answered this question in the negative. In this, Lord Jauncey confirmed the view:

... the line [of consent] properly falls to be drawn between assault at common law and the offence of assault occasioning actual bodily harm ... with the result that the consent of the victim is no answer to anyone charged with [this] offence or with [the more serious aggravated assault offences under the 1861 Act] unless the circumstances fall within one of the well known exceptions such as organised sporting contest and games, parental chastisement or reasonable surgery.<sup>39</sup>

The central question then became whether there was a “good reason” to view sadomasochistic acts as being within the public interest exception to the general rule on the limitations of consent. The majority view was that such activities could not be regarded as an exception to the general rule as the practice was perverted, depraved, consisted of physical cruelty and danger, including infection, and could not in any way be seen as enhancing the enjoyment of family life or conducive to the welfare of society as a whole!<sup>40</sup>

The decision in *Brown* attracted considerable criticism on two grounds. First, that the decision promoted “moralism at the expense of individual autonomy and, in particular, the freedom of sexual expression.”<sup>41</sup> Second, and of more relevance to the debate on boxing, that although the House of Lords endorsed the existence of well-established exceptions to the general rule on the threshold of consent, the parameters of these exceptions were defined poorly, if at all.

38. *R v. Brown*, 2 W.L.R. 556 [1993].

39. *Id.* at 573. See also Lord Templeman at 560.

40. See, for example, Lord Lowry in *R v. Brown*, 2 W.L.R. 556, 583 [1993].

41. F. MCAULEY & P. MCCUTCHEON, *CRIMINAL LIABILITY*, 531 (2000). Equally, this was the view of the minority. See Lord Mustill, *R v. Brown*, 2 W.L.R. 556, 586–88 [1993] and at 607 *per* Lord Slynn. The privacy rights-based approach was the basis of a further (unsuccessful) appeal to the European Court of Human Rights in *Laskey et al. v. United Kingdom*, 24 E.H.R.R. 39 (1997).

### III. CROSSING THE THRESHOLD OF CONSENT: THE WELL-ESTABLISHED EXCEPTIONS

It has been suggested that neither theoretical coherency nor practical elaboration underpins the accepted legality of these category-based exceptions to the general rule on consent, and further the continuing use of these categories of consent is, it has been claimed, aggravating a jurisprudential approach that is “piecemeal and arbitrary.”<sup>42</sup> In *Brown*, the English Court of Appeal, affirmed by the House of Lords, dismissed the appeal primarily on the grounds that “the satisfying of the sado-masochistic libido does not come within the category of good reason.”<sup>43</sup> Yet, what is a good reason, or more precisely, what are the criteria, if any, that must be satisfied by the activity in question to “come within the category of good reason”? Is it, as one commentator at the time suggested, that there may be no “reasoned basis for preferring one characterisation over another, and it may be that people [judges] simply choose whichever characterisation supports the conclusion they wish to reach”?<sup>44</sup> It would appear that the accommodation of the determinedly and intentionally violent sport of boxing under the category of “properly conducted games and sports” epitomizes the arbitrary nature of this approach.

Somewhat ironically, of all the category-based exceptions to the general rule or threshold on consent to assault (surgery, rough horseplay, reasonable chastisement of a child, etc.), sport seems to be the most clearly drawn. Its origins can in fact be traced to Foster’s “manly diversions” of the eighteenth century, where it was acknowledged that, although friendly sporting exertions and displays of strength were capable of causing bodily harm, they were not unlawful because they “intend to give strength, skill and activity, and may fit people for defence, public as well as personal, in time of need.”<sup>45</sup> The public interest in contact sports is now slightly more refined than national, military preparedness and is based largely on the health benefits of participation in sport.

42. See Tolmie, *supra* note 6 at 657.

43. R v. Brown, 94 Cr. App. R. 302, 309 (1992).

44. Brian Bix, *Assault, Sado-Masochism and Consent*, 109 LAW Q. REV. 540, 542 [1993].

45. Cited in *Donovan*, *supra* note 34 at 508.

Indeed, drawing from the seminal, late nineteenth-century cases of *R v. Bradshaw*<sup>46</sup> and *R v. Moore*<sup>47</sup>—two cases involving manslaughter charges consequent to a killing during a soccer game—the implication seems to have been that the criminal law’s intrusion into the sporting sphere should be founded on the basis that deliberate and/or reckless tackling causing injury, particularly in breach of the playing laws of the particular game in question, *prima facie* creates an offense. This means that the threshold of “sporting consent” in assault is breached only where intention or knowledge that the unlawful act was likely to cause serious injury is proven. The principle remains largely true of English law today, as seen in the Court of Appeal (Criminal Division) decision in *R v. Barnes*<sup>48</sup>: contact sports remain exempted from the usual scope of consent to assault not only on the public policy ground that they are good for the health of society but also because their methods of self-regulation are, for the main part, satisfactorily drawn. That exemption is not however a license for thuggery, and where the inflicted injury is clearly intentional and reckless, to the extent that it is beyond the rules and norms of the game in question, the criminal law’s threshold of toleration will be breached.

In specific application to boxing, where a boxer inflicts an injury on an opponent in a clearly intentional and reckless manner, to the extent that it is beyond the rules and norms of the boxing, the culprit could face prosecution. A boxer who injures another by means, for example, of a head butt, a low blow, a blow, or even a bite before or after the bell has sounded, or a blow upon a vulnerable opponent after the referee has stepped in, might be exposed to prosecution. In short and consistent with what has occurred in other contact sports, reckless disregard by a boxer for the safety of an opponent should expose that boxer to the possibility of prosecution<sup>49</sup> and the probability of further civil litigation.<sup>50</sup>

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46. *R v. Bradshaw*, 14 Cox’s Crim. Cas. 83 (1878), especially Bramwell L.J.’s direction to the jury at 85. Given the evidence, the jury acquitted the soccer player on the manslaughter charge after representation had been given by an umpire that no unfair play had occurred.

47. *R v. Moore*, 14 TIMES LAW REPORTS 229 (1898). In that case, with Hawkins J. presiding, the player was convicted of manslaughter.

48. *R v. Barnes* [2005] 1 W.L.R. 910.

49. Note the comment by Dyson J. in *Blake v. Galloway*, E.W.C.A. (Civ) 814, [20] (2004).

50. See *Collins v. Resto*, 746 F. Supp. 360 (1990); *Collins v. State*, 617 N.Y.S.2d.1010 (1994); and *People v. Lewis* 560 N.Y.S.2d. 630 (1990).

In the more general (and theoretical) sense, the parameters of the “sporting exception” to the ordinary rule of consent in assault are, at least in comparison to that which exists in the area of sexual offenses, for example, rationally constructed. As Hanna has noted:

While the sports exception to assault and battery is embedded with its own set of cultural norms and values about the benefit and inevitability of male aggression, at the very least the law has sought to confine the detour from the doctrine of violent consent. We can accept some intentional infliction of harm so long as the path of the law is marked with rules and regulations and referees, and where the power among the participants is relatively balanced.<sup>51</sup>

However, the context-specific nature of the sporting exception means that it is limited in the manner in which it might inform the more general debate on consent in the criminal law. The context-specific nature of the exception and, more generally, the inconsistency of the criminal law on consent is highlighted succinctly by Foley’s synopsis of *Brown*: “Suppose the people there decided to find their sadomasochistic thrills within the boxing ring and gained sexual gratification for the punishment they received. Would this have been found acceptable?”<sup>52</sup>

In sum, there is not enough to be learned from sport for “it to be stated with confidence how much harm people are able to permit against themselves or even to solicit before the criminal law steps in.”<sup>53</sup> Given therefore that there is little guidance to the criteria underpinning the public interest in the existing list of category-based exceptions to the general rule on consent, it may be time to consider an alternative approach. It is suggested that Kell’s “social disutility model” is worthy of review, and again the sport of boxing provides a good test of the strength and sustainability of that model.<sup>54</sup>

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51. C. Hanna, *Sex is not a Sport: Consent and Violence in the Criminal Law*, 42 BOSTON COLL. L. REV. 239 (2001).

52. Foley, *supra* note 5 at 17. See also Judge J. in *R v. Dica*, E.W.C.A. (Crim.) 1103 [41] [2004]: “However, the categories of activity regarded as lawful are not closed, and equally, they are not immutable. Thus, prize fighting and street fights by consenting participants are unlawful: although some would have it banned, boxing for sport is not.”

53. Elliot & de Than, *supra* note 6 at 248–49.

54. David Kell, *Social Disutility and the Law of Consent*, 14 OXFORD J. LEGAL STUD. 121 (1994).

#### IV. SOCIAL DISUTILITY: IN THEORY AND IN THE RING

To be categorized as an exception to the general rule on consent, an activity must be deemed to be in the public interest. In other words, the activity must have such significant social value or utility that an exception is justified and the threshold of consent adjusted accordingly. Yet, as noted above, what the legal criteria underpinning “social utility” are, and when they are to be invoked, remain unclear and, worse, unprincipled. Kell on the other hand proposes an attractive social disutility model, which holds that “unless the prosecution is able to provide persuasive reasons for prohibiting certain conduct, consent will be effective generally up to the level of grievous bodily harm.”<sup>55</sup> The principal attraction of the social disutility test is that, although deceptively transparent at first glance, the model requires deeper and cogent reasons as to why, through criminalization, individual autonomy should be overridden in the public interest, and it avoids unconvincing attempts to justify category exceptions in terms of a socially valuable product.<sup>56</sup> The attraction of Kell’s model is also supported by its theoretical robustness, illustrated by the fact that it appears to have the capacity to accommodate both liberalism’s reverence of individual autonomy, located, for example, in the writings of H.L.A. Hart, and the more conservative, paternalistic perspective of Patrick Devlin—that nothing should be punished by the law that does not lie beyond the limits of toleration.<sup>57</sup>

Notwithstanding the general attractiveness of Kell’s model of social disutility, the question remains as to the specific application the model may have to the sport of boxing. Applying the social utility argument to boxing, the sport is deemed in the public interest and an exception to the general rule on consent on the ground that it is not, per *Coney*, prize fighting. Problematically, even in the late nineteenth century, it was difficult to invoke a clear

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55. *Id.* at 127.

56. See Richard Binder, *The Consent Defence in Criminal Law, Sports, Violence and the Criminal Law*, 14 AM. CRIM. L. REV. 235, 242 (1975), who dismissed the notion of an exceptional category of “sporting” consent as “a blunt instrument incapable of separating the abusive from the desirable aspects of the sport.”

57. It is also suggested that the ill-fated reports of the Law Commission of England and Wales on consent in the criminal law in the mid-1990s would have benefitted hugely from Kell’s approach. See Law Commission of England and Wales Consultation Paper, *Consent and Offences Against the Person*, No. 134 (1994), and Law Commission of England and Wales Consultation Paper, *Consent in the Criminal Law*, No. 139 (1995).

distinction between prize fighting (with the fist and for money) and boxing (with the glove and for sparring purposes only). Moreover, just as the brutality of bare-knuckle fighting led the courts of the nineteenth century to declare such fights unlawful even if the protagonists consented, should the brutality and corruption of modern professional boxing lead today's courts to declare that sport unlawful?

In this specific regard the judgments of the majority in *Brown* are unhelpful in that they do little more than note, without question or analysis of its origins or extent, the purported legality of the sport of boxing. For example, on reviewing *Coney*, Lord Templeman in *Brown* was satisfied to do no more than conclude, "Rightly or wrongly the courts accepted that boxing is a lawful activity."<sup>58</sup> It is submitted that that representation of the legality of boxing, which is little more than an unquestioned assumption as opposed to a precise legal principle or authority, is not only inadequate in itself but also clearly demonstrates the inherent weakness of the public interest/social utility rationale regarding exceptions to the general rule on consent. In short, there is neither explanation nor elaboration of the reasoning or criteria utilized in reaching the ultimate decision about the nature of the conduct or activity in question.

The social disutility model posited by Kell states that unless the prosecution is able to provide persuasive reasons for prohibiting certain conduct, in so far as that conduct is an expression of individual autonomy, consent will be effective generally up to the level of grievous bodily harm. However, even under this sympathetic model, boxing fails to find solace for two reasons. First, there are persuasive, cogent reasons, related to the health and safety record of the professional code in particular, about why the sport might be prohibited. Second, it is submitted that the nature of the sport (which uniquely rewards direct, intentional violence with scoring points) is such that serious harm *must and does occur* in all competitive boxing matches.

Where does this leave the legality of the sport of boxing in England, and *per force* what does this say about the legality of other combat sports such as mixed martial arts?

Various suggestions have been made, and many writers take the view that any attempt to rationalize or accommodate the legality of boxing in the context of the exceptions to the general threshold of consent in assault, or indeed in any context, is futile, and that the sport's status should be deemed

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58. R v. Brown, 2 W.L.R. 556, 561 [1993].

*sui generis*.<sup>59</sup> Thus far, the most celebrated attempt to rationalize the legality of the sport lies in the judgment of Lord Mustill in *Brown*. Although his Lordship started as if to confront the issue in a meaningful way, he ended tersely and somewhat disappointingly: “It is in my best judgment best to regard this as another special situation which for the time being stands outside the ordinary law of violence because society chooses to tolerate it.”<sup>60</sup> Other suggestions from legal commentators range from a reticence to intervene at all until such time as a full public debate of the medical evidence takes place<sup>61</sup>; to the granting of an *ad hoc* exemption for the anomalous sport of boxing<sup>62</sup>; to a call for the proscription of an activity that can only “perversely” be treated as a sport.<sup>63</sup> Finally, many of the above point to McInerney J.’s judgment in the Australian case of *Pallante v. Stadiums Pty. Ltd. (No.1)* (1976).<sup>64</sup>

The stated case was an action in negligence in which the claimant sought to recover damages for injuries received by him in a professional boxing contest governed by the rules of the Australian Boxing Alliance, and in the course of which he received injuries that affected his eyesight. The claimant sought to recover damages not from his opponent but from the first-named defendants who organized the fight, the fight’s matchmaker and referee, the promoter of the fight, and his trainer, arguing that the above-named parties had a duty of care to prevent the injuries sustained. The defendants sought to strike out the proceedings as an abuse of legal process on the ground that boxing contests, notwithstanding their evolution from bare-fisted fights through the Queensberry Rules and into the modern era, must be considered and declared illegal. In sum, in the course of this civil action, it was necessary for McInerney J. to consider generally whether boxing was a criminal activity or not:

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59. See, for example, Paul Roberts, *Philosophy, Feinberg, Codification and Consent: A Progress Report on English Experiences of Criminal Law Reform*, 5 BUFF. CRIM L. REV. 173, 211 (2001).

60. *R v. Brown*, 2 W.L.R. 556, 592 [1993].

61. See Law Reform Commission of Ireland, *Report on Non-Fatal Offences against the Person*, LRC 45, ¶ 9.157 (1994).

62. Suggested by the Law Reform Commission of Canada, *Working Paper No.38—Assault*, 1984.

63. See Paul Farugia, *The Consent Defence: Sports Violence, Sadoomasochism, and the Criminal Law*, 8 AUCK. U. L. REV. 472, 500: “professional boxing amounts to a publicly sponsored beating of an opponent.”

64. *Pallante v. Stadiums Pty.*, V.R. 331 [1976].

If the encounter is conducted either from its inception or if not from some point in its course by either, or both of, the contestants, in a spirit of anger or a hostile spirit and with the predominant intention of inflicting substantial bodily harm so as to disable or otherwise physically subdue the opponent it may be an assault on the part of the contestant or contestants so animated, even though each contestant may have consented to the infliction of blows on himself and whether or not that encounter is for reward, in public or in private, bare-fisted or in gloves. It may be an assault, at all events, from the time when the element of hostility becomes the predominant motive. On the other hand, boxing is not an unlawful and criminal activity so long as, whether for reward or not, it is engaged in by a contestant as a boxing sport or contest, not from motive of personal animosity, or at all events not predominately from that motive, but predominately as an exercise of boxing skill and physical condition in accordance with rules and in conditions the object of which is to ensure that the infliction of bodily injury is kept within reasonable bounds, so as to preclude or reduce, so far as is practicable, the risk of either contestant incurring serious bodily injury, and to ensure that victory shall be achieved in accordance with the rules by the person demonstrating the greater skill as a boxer.<sup>65</sup>

Reflecting on McInerney J.'s efforts to grapple with the (legality of) the sport of boxing, Lord Mustill in *Brown* damned his Australian colleague with faint praise:

I intend no disrespect to the valuable judgment of McInerney J. [in *Pallante*] when I say that the heroic efforts of that learned judge to arrive at an intellectually satisfying account of the apparent immunity of professional boxing from criminal process have convinced me that the task is impossible.<sup>66</sup>

Lord Mustill was quite right: it is a difficult task to identify to any satisfactory degree the current location of boxing within the norms of the criminal law of violence. The sport's exemption, indeed its very existence, is *sui generis*. More bluntly, it might be suggested that the continuing and unquestioning lenience to the sport of professional boxing, which also has many regulatory faults and attracts significant criticisms from the legal profession, possibly tells us more about the tolerance of the society we live in toward public displays of personal violence, than it does about the technicalities of the criminal law.

65. *Id.* at 343.

66. *R v. Brown*, 2 W.L.R. 556, 592 [1993].

## CONCLUSION

The criminal law's view of the sport is that boxing must be perceived in terms of its social utility as a properly conducted sport. Rightly or wrongly (and with great uncertainty), boxing is deemed in the public interest. This public interest in the sport of boxing is historically (and negatively) located to a specific period of time when the English criminal courts in effect promoted the sport of professional boxing with gloves under the Queensberry Rules because it was, simply, *not* prize fighting. The organized gloved sport compared well to the coarseness and disorder of bare-fisted prize fighting, with the latter being seen as merely an adjunct for gambling and all sorts of secondary criminality. Moreover, it was held that, on balance, gloved boxing between disciplined participants would not, in the medical opinion of the day, endanger life or health.

Commenting upon this promotion of professional boxing by the criminal courts, Glanville Williams observed that the anti-prize fighting case law of the nineteenth century did consistently reserve that fighting of any form might still be declared unlawful "where the circumstances make it likely that injury or (at least) some kind of serious injury will be caused."<sup>67</sup> This appears to mean that boxing's legal status remains vulnerable to a court being persuaded of its dangers and risks by clear and comprehensive medical evidence. More relevantly, it also means that the elasticity within the concept of consent can only be stretched so far by the participants in a boxing match. Finally, and arguably most tantalizing of all, at least by receiving the occasional, robust attention of the courts, proponents of the sport can defend its legality with reference to case law such as *Coney* and *Brown*, legal commentary recognizing the sport's exemption for the usual rule on consent as a properly conducted sport, and its general societal acceptance and utility as a sport. In contrast, other combat sports, such as mixed martial arts and kickboxing, have received no such dedicated attention, and if the immunity extended to boxing is seen as specific to the sport or even hopelessly *sui generis*, then the legality of mixed martial arts and kickboxing events in England and Wales, increasingly popular at the time of this writing, must be called into question.

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67. GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW, 535–36 (1978).