

2

Criminal Law

Graham Virgo

We hear about crimes all the time and many of us probably feel that we have a pretty good idea of what conduct is criminal, whether it is murder or rape or theft. It may also be pretty obvious why we want to punish people for committing such crimes. But when you study criminal law you cannot rely on gut reaction: you need to think carefully about how crimes are defined, how they should be defined and why it is appropriate for the state to punish somebody. For example, should people who smoke cigarettes in pubs be punished for doing so? Should we punish people who sell drugs? But why don't we punish people who break a contract, or prostitutes for selling sexual services?

THE ELEMENTS OF A CRIME

When lawyers consider whether a crime has been committed, such as the crimes which may have been committed at Laura's party in chapter 1, they usually break a criminal offence down into three separate elements. First, they consider whether the prohibited conduct and result have occurred. This is known as the external elements of the crime, which are often described by using the Latin term *actus reus*. So, for the crime of murder, the *actus reus* is that the victim is dead and that his or her death was caused by the defendant. Secondly, most crimes also involve a fault element, which is often known as the *mens rea*. Not every crime needs a *mens rea*, but many do, especially serious crimes, because it is the

fact that the defendant was at fault which makes him or her particularly blameworthy and justifies the state in punishing the defendant. Relevant fault elements include intention, recklessness and negligence. For the crime of murder the relevant fault element is that the defendant intended either to kill or to cause serious injury. If this cannot be established, the defendant cannot be convicted of murder, although he or she might still be guilty of a less serious offence, such as manslaughter. Once the external and fault elements have been established, the third and final element is whether the defendant has any defences to the crime. For the crime of murder there are a number of full or partial defences which might be available. For example, if the defendant was attacked by the victim, the defendant could plead self-defence. If this defence is successful the defendant would be acquitted of the crime completely, so this is a full defence. Alternatively, the defendant might plead defences such as loss of self-control or diminished responsibility. If one of these partial defences is successful the defendant would be convicted of the less serious offence of manslaughter rather than murder.

THE REASONS FOR PUNISHMENT

Assuming that the defendant has been convicted of a crime, he or she can expect to be punished. The criminal law recognises a variety of forms of punishment including imprisonment, fines and community orders. Different reasons for punishment can be identified depending on the nature of the punishment, but there are four main reasons why the state wishes to punish a defendant who has been convicted of an offence. First, there is the need to protect the public from dangerous criminals, which can be satisfied by locking the defendant up in prison for a substantial period of time. Secondly, there is the need to deter the defendant and other potential defendants from committing crimes. Thirdly, there is the need to rehabilitate defendants to seek to ensure that they do not commit crimes in future. Finally, there is the need for retribution: society wishes to mark certain types of conduct as wrongful and reassert the accepted social order by punishing the wrongdoer.

REASONS FOR CHARACTERISING CONDUCT AS CRIMINAL

In addition to considering the definition of offences and the reasons for punishment, criminal lawyers also consider another crucial question, namely, why certain conduct is criminal and other conduct, which we might dislike, is not treated as criminal. In considering this question there are two separate principles which are involved and which contradict each other. The first is the principle of autonomy. According to this principle, individuals should be free to do whatever they like. But if we allowed this principle to operate without any check we would end up with a society which is lawless and where anarchy prevails. Society needs rules to operate by and so the autonomy of individuals needs to be restrained in some way. We can do this by means of a second principle, which is called the welfare principle. According to this principle, the needs of society must prevail over the interests of individuals. Of course, if we allowed this principle to operate without check we would end up with a totalitarian state where the interests and rights of individuals would always be subordinated to the interests of the state. Whenever we consider whether or not certain conduct should be criminalised we are really considering to what extent, if at all, the autonomy of individuals should be restricted for the benefit of the state and the protection of other individuals. We sometimes describe this restriction on autonomy in other ways. One way is by reference to the doctrine of utilitarianism, where the interests of the majority are more important than the interests of the individual. Also, there is the doctrine of paternalism, where the state intervenes to restrict the autonomy of the individual because the state is acting in what it considers to be the best interests of the individual.

This tension between autonomy and welfare is illustrated by a number of long-running debates in the criminal law. One of the best examples concerns the use of certain types of drug. If we wished to adopt an approach which is simply based on the autonomy of the individual, we would allow all drug-taking to be legal since it would be up to the individual to decide if they wanted to take drugs. However, the state has determined that there are certain types of drug the possession of which should be criminalised because of the dangers posed by drug addicts to

other people (the utilitarian argument) and to themselves (the paternalism argument).

The implications of these three distinct issues of the definitions of offences, the reasons for punishment and the reasons for criminalising certain conduct were raised by the very important decision of the House of Lords in a case called *Regina v Brown*.

FACTS OF *BROWN*

Brown concerned a group of more than 40 sadomasochistic homosexuals. Some of these men were sadists who obtained sexual satisfaction from causing pain. Others were masochists who enjoyed having pain inflicted on them. The activities were wide-ranging, but essentially involved branding, piercing and beating sensitive parts of the body. Certain features of the men's activities need to be emphasised. They occurred in private; injuries were inflicted but they did not result in any permanent disability; no infection was caused; the participants had safety words to use to ensure that the activities did not get out of hand; no medical attention was required; and no complaint was made to the police. Crucially, all of the participants consented to the activities.

The police discovered the activities of this group in the course of a separate investigation, called Operation Spanner, into the sale of obscene videos. In the course of this investigation the police discovered private videos of the sadomasochistic activities carried out by Brown and his friends and consequently the participants were charged with various criminal offences.

THE KEY OFFENCES

The defendants were charged with two specific offences contrary to sections 47 and 20 of the Offences Against the Person Act 1861. To be convicted of the section 47 offence it must be shown that the defendant assaulted the victim so as to cause him or her actual bodily harm. This

offence can be broken up into four distinct elements, all of which need to be satisfied to convict the defendant of the crime:

- 1 Assault: this means either causing the victim to apprehend immediate and unlawful harm to the person (known as common assault) or unlawfully touching the victim (known as battery).
- 2 Actual bodily harm (otherwise known as ABH): this means that the victim suffered an injury which interfered with his or her health or comfort but was more than transient or trifling. So, for example, this would include a broken finger and bruising which was painful to the touch.
- 3 Causation: that the actual bodily harm was caused by the defendant's conduct.
- 4 The fault element: the defendant must have intended to assault or batter the victim or foresaw that this might happen as a possibility.

If the defendant is convicted of this offence he or she can be sentenced to imprisonment for a period up to five years.

The other relevant offence in *Brown* was maliciously wounding or inflicting grievous bodily harm contrary to section 20. This offence can also be broken up into a number of distinct elements:

- 1 Either wounding, which means doing something which penetrates all the layers of the victim's skin, so a pin-prick could count as a wound; or
- 2 Inflicting grievous bodily harm, known as GBH. This injury is defined simply as serious injury. It is clearly worse than ABH and includes broken limbs as well as serious internal injuries. This harm needs to be inflicted. The meaning of this word 'inflicts' has proved to be controversial but it now seems that it simply means that the defendant caused the victim GBH.
- 3 The fault element for this offence is malice, regardless of whether the defendant has wounded or inflicted GBH. Malice here means that the defendant foresaw the possibility of some harm occurring, but that harm need not be as serious as the harm which did actually occur. So, for example, if the defendant punched the victim in the face thinking that the victim would only suffer bruising, but her nose was

badly broken, the defendant could be guilty of the section 20 offence because he has inflicted GBH and foresaw the possibility of some harm being caused.

The maximum sentence for this offence is five years' imprisonment, just as for the section 47 offence, even though that offence involves less serious harm. However, in practice, if the defendant is convicted of a section 20 offence he or she is likely to get a longer sentence than if he or she was convicted of the less serious section 47 offence.

THE ISSUE IN *BROWN*

The key issue for the courts in *Brown* was whether it was appropriate to convict the defendant sadists of harming the masochist victims where the victims wanted to be harmed. In other words, should the consent of the victim operate as a defence? You might be surprised to learn that, even though the relevant criminal offences were defined by statute, the answer to this question turns on the interpretation of the common law rather than statute. English law accepts that, as a general rule, where the victim consents to harm, then that is a valid defence. So, for example, if the defendant tattoos the adult victim at her own request, the victim's consent means that no crime has been committed. This defence of consent even extends to cases where the victim cannot be shown to have specifically consented to the harm but that harm occurs in circumstances where the victim can be deemed to have consented to it. So, for example, if the defendant slaps the victim on the back as a greeting at a party, that is the type of touching to which everybody can be assumed to have consented. Similarly, if the defendant is playing football with the victim and trips the victim up in order to get the ball, that would usually be the sort of touching to which all football players consent, at least if the defendant has not gone beyond what a player could have reasonably been regarded as having consented to by taking part in the sport. But should any limit be imposed upon the type and circumstances of harm to which the victim can consent? That is the key issue with which the judges in *Brown* had to grapple.

The Trial

The defendants were tried in a Crown Court before a judge and jury. In such a trial the judge has to decide questions of law, such as the proper interpretation of elements of the crime, but the jury has to decide questions of fact in the light of the judge's directions and rulings about legal questions. In *Brown* the jury was asked to consider whether the elements of both the sections 47 and 20 offences had been satisfied to justify a conviction. For the most part this was simply a question of fact. But there was a key question of law, namely, that if, as the defence argued, the victims had consented to the harm, then, because of the extreme circumstances in which that harm was caused, was this consent a valid defence? The judge ruled that it was not and so, even if all the victims did consent, it followed that the defendants would be guilty. Following this ruling the defendants pleaded guilty and various sentences of imprisonment were imposed on them, ranging from one to three years.

The Court of Appeal

Following the defendants' conviction they wanted to appeal against the judge's ruling that the defence of consent was not available. This involved appealing to the Court of Appeal (Criminal Division). The argument before the Court of Appeal focused simply on a question of law rather than fact, namely whether the actual consent of the victims meant that the defendants could not be found guilty of the crimes. The judges reviewed earlier cases and concluded that they were bound by these authorities to rule that the victim's consent was not a valid defence. Consequently, the defendants' appeal was rejected. However, their sentence was reduced to between three and six months because they did not know that their conduct was criminal.

The House of Lords

The defendants then appealed to the House of Lords. Three of the five judges decided that the appeal should be rejected and the other two dis-

sented, concluding that the appeal should be allowed. The decision of the majority prevails and so the appeal was rejected, which meant that the defendants' convictions were affirmed.

Since, however, there were three speeches given by the majority, it is not immediately obvious what counts as the 'official' reason for rejecting the appeal. It is, therefore, necessary to analyse these speeches very carefully, and by doing so it is possible to identify a central principle which justifies the decision of the majority. As we saw in chapter 1, this is called identifying the *ratio decidendi*, otherwise known as the *ratio*. The *ratio* of *Brown* is as follows:

- Where the victim has suffered harm which is actual bodily harm or worse, then the victim's consent to that harm is no defence.
- But this principle is subject to an exception, namely that the consent can operate as a defence if the circumstances of the harm can be justified by a good reason.

Since, on the facts of *Brown*, the harm was at least actual bodily harm and because satisfaction of the sadomasochistic libido was not considered by the majority to be a good reason for causing such harm, it followed that the victims' consent was not relevant and the defendants were properly convicted.

The majority identified four key reasons in support of this decision.

Earlier Authorities

Although this was a decision of the House of Lords, which was not bound by earlier decisions of lower courts such as the Court of Appeal, the judges in the House of Lords considered it important that their decision was consistent with such earlier authorities. These earlier cases were interpreted as recognising that the consent of the victim to actual bodily harm or worse could be justified only if the conduct was consistent with public policy. So, an earlier decision of the Court of Appeal had held that causing harm in the course of a fight in public was not an acceptable reason even if the victims had consented. This case had recognised that acceptable reasons for consenting to harm would include medical

interventions and properly conducted sports. However, the judges in the House of Lords could have decided to overrule these earlier cases if they thought that the principles involved were not acceptable. Indeed, it is even possible for the House of Lords to overrule its own earlier decisions if it is felt that those decisions were incorrect or no longer appropriate.

Technical Reasons

The majority accepted that it was easier to differentiate between no injury and some injury than it was to distinguish between degrees of injury. Consequently, it was accepted that the appropriate line to be drawn between when the victim's consent should always be a defence and when it should only be a defence if the conduct was consistent with public policy is the line between battery and actual bodily harm, rather than between actual bodily harm and grievous bodily harm. This is, however, highly dubious reasoning, because the criminal law distinguishes between injuries constituting actual bodily harm and grievous bodily harm all the time, since it is the difference between these degrees of injury which underlies the separate offences of section 47 and section 20.

Policy Reasons

A number of policy reasons were identified by the majority for their decision. These included:

- the dangers of more serious injury being caused if the defendant's activities became too exuberant;
- the dangers of infection being transmitted, particularly of the HIV virus; and
- the danger that young men would be corrupted by involvement in sadomasochistic activities.

But all of these factors involve potential harm, none of which was found to have occurred on the facts. It is difficult to justify the decision in *Brown* on the basis of what might have happened, rather than what did actually happen, particularly because the defendants had introduced

various safeguards to ensure that very serious injuries were not caused and that any diseases were not transmitted. Further, if there had been any evidence that young men had been corrupted into performing sado-masochistic activities, this would suggest that they were not consenting, which would unquestionably constitute an offence against the person, and may also involve a sex offence in its own right.

Morality

None of these reasons is therefore altogether convincing. However, careful reading of the majority speeches reveals a fourth reason for the decision, namely that the majority perceived the case as involving conduct which was so immoral that it could not be tolerated by society and had to be punished. For example, Lord Templeman said that '[p]leasure derived from the infliction of pain is an evil thing' and Lord Lowry spoke in emotive terms of activities resulting from 'perverted and depraved sexual desires'. Whether reliance on gut reactions to perceived immorality is a sufficient reason to criminalise conduct is a difficult question. The danger of such an argument is that the notion of what is immoral is virtually impossible to define and depends very much on personal perceptions and beliefs rather than legal principle. It is difficult to see, therefore, that this is a sufficient reason in its own right to justify conviction.

APPLICATION OF THE DECISION

Despite concerns about the reasons behind the decision of the majority, we are left with *Brown* representing the law in England as to when the victim's consent can operate as a defence. When you are considering whether an important decision is correct, it is always useful to test the implications of that decision by applying it to hypothetical situations in an attempt to determine whether the results are acceptable or absurd. In considering the application of *Brown* it is important to consider those circumstances where harm might be considered to be justified by public policy and those where it might not.

Good Reasons for Consenting to Harm

In a case decided before *Brown*, the Court of Appeal recognised that a victim could validly consent to harm involving actual bodily harm or worse where the harm occurred in the course of properly conducted games and sports, lawful chastisement and correction, reasonable surgical interference, and dangerous exhibitions, which would presumably cover the case of an incompetent knife-thrower at a circus who misjudges the throw and wounds his assistant.

The test of properly conducted sports encompasses boxing, because such a sport must be conducted within the Queensbury Rules, which provide that there must be no hitting below the waist, gloves must be used and there must be a referee. This is distinct from the old practice of prize-fighting, where the fight occurred without rules and where, as a matter of public policy, the consent of the participants was not sufficient to negate criminal liability. That boxing is a legitimate activity was confirmed in *Brown*. It appears therefore that there is a distinction between fighting without rules, where the participants' consent is no defence, and boxing, where the consent of the parties means that no crime has been committed.

The boundary between unacceptable and acceptable fighting is difficult to draw, particularly because it has been held that conduct characterised as 'horseplay' is acceptable. This was recognised in a case called *Jones*, which involved a fight in a playground during which one boy was thrown into the air and suffered a ruptured spleen when he fell to the ground. It was held that the victim's consent was a defence because 'boys would be boys and would always engage in rough and undisciplined horseplay'. This was applied in a later case called *Aitken*, which was decided not long before the House of Lords handed down judgment in *Brown*. This was a decision of the Courts Martial Appeal Court, which is the equivalent of the Court of Appeal (Criminal Division) but which hears appeals from disciplinary decisions involving the armed forces. The case concerned a group of drunken RAF officers who celebrated the end of their exams by pouring white spirit over their fire-resistant suits and setting light to them. One officer was doused with white spirit which, once set fire, caused 35 per cent burns to his body. *Aitken* was found to be not

guilty of inflicting grievous bodily harm, because he assumed that the victim consented to the activity and, crucially, the victim's consent could be considered legitimate because the participants were engaged in rough and undisciplined horseplay. Bearing in mind that this case was decided not long before *Brown* there appears to be an inconsistency developing, especially given that the activities in *Brown* were carefully controlled whereas those in *Aitken* were not and so were much more dangerous. It is difficult to avoid the conclusion that the context of the activities in each case played some influence in determining whether or not the conduct was considered acceptable.

The law relating to one of the other recognised situations where consent can be considered valid has in fact changed. It has been recognised that parents can use force to chastise their children. Since this exception was recognised in *Brown* it appears that parents could use force to cause actual bodily harm and the child could still be deemed to have consented to the harm, so no crime would have been committed. The law has since changed. By section 58(1) of the Children Act 2004 the defendant has no defence of chastisement if the injury caused is at least actual bodily harm. It follows that chastisement of children now falls within the principle recognised in *Brown* and so chastisement is only a defence to a battery, where no significant injury is caused, and not to assault occasioning actual bodily harm, where the injury is more than merely transient or trifling.

Bad Reasons for Consenting to Harm

Following *Brown* it is clear that the consent of the victim to actual bodily harm or worse will be relevant only if the conduct can be justified by reference to public policy. We have seen that fighting without rules and satisfaction of the sadomasochistic libido by homosexuals do not satisfy this test. What else will not satisfy it? What if the sadomasochistic activity occurs within a heterosexual relationship, eg between husband and wife? Although the facts of *Brown* did not involve heterosexual people, does the *ratio* extend to them? It appears that the *ratio* in *Brown* is not confined to sadomasochistic activity amongst homosexuals and so all

such activity would appear to be criminal, regardless of the sexuality of the participants. This is consistent with an earlier case called *Donovan* where a man caned a woman to give him sexual pleasure. It was unclear whether she had consented to this, but it was accepted that, if she had been consenting, this would have been no defence because he had caused her actual bodily harm.

A useful hypothetical example against which the application of the principle in *Brown* can be tested concerns a boyfriend and a girlfriend who are in love and the girlfriend asks her boyfriend to give her a love-bite, which he does. Assuming that the love-bite results in a bruise to the girl's neck which is painful to the touch, and so constitutes actual bodily harm, can her consent be regarded as legitimate within the *Brown* principle? It cannot be assumed that this is acceptable conduct; a positive reason needs to be identified for such conduct. If no such reason can be identified, then giving a loved one a love-bite would be a criminal offence. This is, presumably, absurd, and we will see later that the motive of the biter may be enough to make the conduct acceptable. Similarly, what about a defendant who pierces the victim's ear to enable her to wear an ear-ring. Is that a crime? It does constitute actual bodily harm, but can a good reason for the conduct be identified? What if other parts of the body are pierced? What if the defendant is a schoolfriend who uses a needle to pierce the victim's ear without first sterilising it? When, if ever, should such conduct be treated as criminal within the principle recognised in *Brown*? We are forced to engage with such issues following *Brown*.

THE DISSENTING JUDGES

When you are seeking to analyse and criticise the law it is always useful to consider the judgments of dissenting judges, even though their views do not represent the law, because they can provide important arguments for criticising the decision of the majority. Both of the dissenting Law Lords in *Brown*, Lords Mustill and Slynn, shared the revulsion of the majority as to the nature of the defendants' conduct and characterised it as immoral, but they considered that this was not a sufficient reason to

convict the defendants. Lord Mustill in particular sought to identify the rationale for determining when the victim's consent cannot be considered to be legitimate by reference to earlier decisions, and he concluded that no rationale existed. Rather, he considered that these cases turned on the application of vague principles of public policy and value judgments. He, with Lord Slynn, sought to identify a workable principle for such cases. Both judges accepted that there reaches a point where the nature of the injuries caused are such that public policy should treat the victim's consent as invalid, but this should only occur where the harm involves serious injury. Where lesser harm is involved the consent of the victim should be sufficient to operate as a defence. Although the approach of the minority does not represent the state of English law, it is an approach which is arguably more principled and therefore easier to apply than that of the majority.

THEORY: AUTONOMY VERSUS WELFARE

The debate about whether the approach of the majority or the minority in *Brown* is to be preferred goes right to the heart of the criminal law since it turns on the question: what are we seeking to do when we punish? This raises some deep issues about the philosophy of law. We saw earlier that there is a tension in the criminal law between the autonomy of the individual on one side and the welfare of society on the other. This tension is illustrated best by the issues in *Brown*. An emphasis on autonomy would suggest that the defendants in *Brown* should have been acquitted, since the recognition of the autonomy principle means that the defendant should be free to do what he or she wants to do. If this involves causing harm to others then the defendant should be free to do that. This argument can be strengthened by reference to the autonomy of the victim so that, if the victim wants to be injured, then he or she should be allowed to consent to that. However, the welfare principle would appear to support the decision of the majority, on the basis that the conviction of the defendants was for the benefit of society. But where was this benefit? There was nothing to suggest that the conduct of the defendants was harmful to society since no member of the public, outside the group of

sadomasochists, was in danger from this type of conduct. The welfare principle must, consequently, be interpreted in a somewhat different way so as to justify the conviction. This interpretation of welfare would encompass the morality of the defendants' conduct. This interpretation is consistent with the approach of a former member of the House of Lords, Lord Devlin, who wrote a book entitled *The Enforcement of Morals*. Lord Devlin argued that there was a need for the criminal law to exist to ensure that certain standards of morality are maintained. This approach focuses on the paternalism of criminalising this sort of conduct, namely that it is considered to be in the best interests of the defendants and society generally that sadists are convicted for causing harm. There is no doubt that Lord Devlin would have supported the approach of the majority in *Brown*.

Against the philosophical approach of Lord Devlin is the approach of other philosophers of law, especially HLA Hart and John Stuart Mill, who advocated, to varying degrees, that the criminal law should intrude only to ensure that people's interests are not adversely affected. This emphasis on adverse effects suggests that, if the victim consents to being hurt, the hurt is not adverse and so should not be criminalised. This approach clearly focuses on autonomy rather than welfare and would result in an acquittal in *Brown*. This begs the question as to whether any limit should be imposed as to the degree of harm to which the victim should be allowed to consent. Would the answer differ if the victim suffers from a rare psychiatric condition which makes him believe that one of his limbs is repulsive and needs to be amputated? What if the victim wants to die?

Brown is thus a decision which is founded on morality and the concept of paternalism. In other words, the state seeks to protect certain types of people from themselves where their conduct does not accord with what is regarded as acceptable and normal, whatever that means.

SUBSEQUENT EVENTS: MOTIVE AND RISK

Even though *Brown* is a case which suggests that the welfare principle prevails over that of individual autonomy, events subsequent to *Brown*

indicate that there is a move away from this approach. This section will examine the judicial developments following *Brown*. This illustrates an important feature of the study of law, namely that it is not sufficient to focus on the principles derived from leading cases; it is also necessary to examine what has happened to those principles subsequently. It may be found that these subsequent developments have moved the law on dramatically.

One of the significant decisions following *Brown* was *Wilson*, in the Court of Appeal. Although this was a decision of a lower court, which could not overrule a decision of the House of Lords, it is possible for the Court of Appeal to interpret the principles derived from a decision of the House of Lords and apply them in such a way that we are better able to understand the rationale of those principles. That is exactly what happened in *Wilson*, which concerns a moving love story involving an elderly couple. Mr and Mrs Wilson wanted to show their love for each other by bodily adornment. After discussing the matter they agreed that Mr Wilson would brand his initials on his wife's buttocks: A (standing for Alan) on one and W (standing for Wilson) on the other. They agreed that Mr Wilson would use a heated knife to do this. The wife never complained about this conduct. Indeed, she wanted it. She went to her doctor for a medical examination; he saw the scarring and complained to the police. Mr Wilson was prosecuted for assault occasioning actual bodily harm and was convicted. He appealed to the Court of Appeal and his conviction was quashed. The decision of the House of Lords in *Brown* was distinguished for a number of reasons, including that the wife was a willing participant, that the branding was analogous to tattooing which is acceptable, and that this conduct was done in the privacy of the matrimonial home, in which it was not for the courts or the law to interfere, so that there was no public interest in prosecuting the husband for this conduct. However, there was one reason which appears to be the most significant, especially as a way of distinguishing the facts of *Brown* from those in *Wilson*. This was the motive behind the activity. In *Brown* the motive was to get pleasure from pain and this was not considered to be an acceptable reason. However, in *Wilson* the wife got no pleasure from the experience of branding; it was the consequence of the branding which she wanted. Consequently, the motive was a sign of their affection

for each other. The motive was love rather than pain and love is consequently a perfectly acceptable motive for causing injury to another.

This emphasis on motive is significant. If we return to the example of a boyfriend giving his girlfriend a love-bite, although there may well be pleasure in the activity it is not pleasure which derives from pain, but is pleasure which derives from love. Consequently, it appears that it is not a crime to give somebody a love-bite.

A further example of the retreat from *Brown* is to be seen in a series of cases involving the transmission of HIV. In the first of these cases, *Dica*, the defendant, who had AIDS, had unprotected sex with two women in the course of which he transmitted HIV to them. The defendant was charged with maliciously inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861. It was held that the disease constituted grievous bodily harm and that the defendant had inflicted this on the victims. He was also aware that he had the disease and that he might transmit it to the victims in the course of having unprotected sex. The crucial issue, however, concerned whether the defendant's conduct was unlawful, bearing in mind that the women had consented to have sex with him. Did it follow that the victims had consented to the disease? For, if they had consented, the defendant could not be found guilty of the offence. One argument which was adopted was that, even if the victims had consented to the disease, this was not a legitimate consent within the *Brown* principle, since there was no social utility in consenting to such a disease. The Court of Appeal in *Dica* rejected this argument by distinguishing *Brown* again. The principle in *Brown* was considered to be relevant only where the harm had been deliberately inflicted and not where, as may have been the case in *Dica*, the victims had consented to the risk of the harm being inflicted. Consequently, in any case where the victim consents to the risk of harm rather than wanting the harm, the victim's consent is legitimate and the defendant would not be guilty. So, in *Dica*, if the victims had contemplated the possibility that the defendant might have a sexually transmitted disease and were prepared to take that risk by having unprotected sex, the consent to the risk would mean that the defendant would not be guilty. This raises a difficult question of policy as to whether the victim in such a case should be required to bear the burden of taking the risk of the defendant having unprotected

sex with him or her. Dica was subsequently retried and was found guilty, presumably because he had falsely told the victims that he did not have the disease and so they did not in fact consent to the risk of the disease. A subsequent case, *Konzani*, has placed the burden of risk-taking squarely on the defendant by holding that the victim's consent to the risk of the disease must be a fully informed consent. So, if the defendant knew or suspected that he had the disease but did not reveal this knowledge or suspicion to the victim, that victim's consent to the risk of the disease would not be considered to be fully informed and would not therefore be relevant.

This review of the decisions following *Brown* indicates that the law has developed dramatically. Today the victim can legitimately consent to injury where the motive for the injury is regarded as acceptable or where the victim is consenting to the *risk* of injury. It is only where the defendant wants the injury to be inflicted for no acceptable motive that the victim's consent will not be considered relevant.

HUMAN RIGHTS

There is one further dimension to the decision in *Brown*, involving the application of the European Convention on Human Rights. Following the decision of the House of Lords, the defendants appealed to the European Court of Human Rights. This was on the basis that the conviction of the defendants interfered with their fundamental human rights under the European Convention. In particular, the defendants relied on Article 8, which recognises the right to respect for private and family life. They argued that this encompassed a right to express their sexuality as they wished, even if this involved sadomasochism. Article 8 does indeed protect the right to expression of sexuality, but the European Court confirmed that the conviction of the defendants by the English courts did not infringe the European Convention. This was because states which are parties to the Convention are allowed to derogate from the right under Article 8 where it is 'necessary in a democratic society' for the protection of health and morals. So, even the European Court of Human Rights

adopted a paternalistic approach in preference to one which respected the autonomy of the individuals to express their sexuality as they wished.

LAW REFORM

Having reviewed the decision of the House of Lords in *Brown*, its application and its implications, we should now consider whether that decision itself is justifiable. This requires students of the law to engage critically with the decision and consider whether reform of the law is necessary. You might consider that the decision of the majority in *Brown* is correct and that there is no need to reform the law. However, if you conclude that the decision is unsatisfactory, you need to consider how the law should be reformed and whether this should be left to the judiciary or should be a matter for Parliament.

The question of reforming the law in this field has been considered by the Law Commission. As we saw in chapter 1, the Law Commission was established in 1965 to review the law in certain areas and, if the law is found wanting, make recommendations for reform to the Government. The Law Commission prepares reports for consultation and, having reviewed the responses, prepares a final report. The Law Commission produced a consultation paper in 1995, soon after the decision in *Brown*, on the relevance of the victim's consent where injury has been caused. Its preliminary conclusion was that the victim's consent to personal injury should be regarded as valid save where the injury is seriously disabling or involves death, and even then the victim should be allowed to consent to the risk of injury or death where it is for a legitimate reason such as medical treatment. Unfortunately, the Law Commission did not proceed with this project to a final report to be presented to Parliament.

The Law Commission's preliminary proposals would seem to be a satisfactory compromise between the need to respect the autonomy of the individual defendant and the victim and the need to protect those parties. Where the injury is seriously disabling or worse it should be appropriate for the state to intervene through the mechanism of the criminal law to protect defendants and victims from themselves, for in an extreme case, such as that of Armin Meiwes, a German national, who advertised on

the internet for a willing victim to come forward to be killed and eaten, the criminal law should make clear that such conduct is unacceptable in a civilised society. In that case a victim did come forward and allowed himself to be killed and eaten and the German court in May 2006 held that Meiwes was guilty of murder, regardless of the victim's consent. Of course, issues of consent to one's own death raise big and difficult questions concerning euthanasia, suicide and assisting and encouraging suicide. These issues essentially concern the legitimacy of consent and when engaging with them the law student needs to take account not only of legal rules but also moral and ethical considerations.

CONCLUSIONS

Although *Brown* raises some issues of quite technical law, ultimately the analysis of this case raises a very simple question, namely whether it is appropriate to convict a defendant of a serious crime involving personal injury where the victim consented to that injury. The case can be analysed on a variety of different levels. First, there is the basic analysis of what the case decided and the identification of the arguments for and against the decision. Secondly, the practical implications of the decision need to be considered by reference to hypothetical examples and subsequent decisions. Thirdly, the decision needs to be considered critically by considering whether a workable principle can be identified and whether that principle is acceptable with reference to theoretical and social policy considerations. Ultimately, you need to ask, 'If I were one of the justices sitting in the Supreme Court how would I decide the appeal in *Brown*?'

Cases

Aitken [1992] 1 WLR 1006

Attorney-General's Reference (No 6 of 1980) [1981] 2 All ER 1057

Barnes [2004] EWCA Crim 3246; [2005] 1 WLR 910

Brown [1992] QB 491 (Court of Appeal); [1994] 1 AC 212 (House of Lords)

Coney (1882) 8 QBD 534

Dica [2004] EWCA Crim 1103; [2004] QB 1257
Donovan [1934] 2 KB 498
Emmett (1999) *The Times*, 15 October
Laskey, Jaggard and Brown v UK (1997) 24 EHRR 39
Jones (1986) 83 Cr App R 375
Konzani [2005] EWCA Crim 706
Wilson [1996] 2 Cr App R 241

Further reading

Ashworth, *Principles of Criminal Law*, 6th edn (Oxford, Oxford University Press, 2009) 307–15
Devlin, *The Enforcement of Morals* (Oxford, Oxford University Press, 1965)
Hart, *Law, Liberty and Morality* (Oxford, Oxford University Press 1963)
Law Commission Consultation Paper No 139 (1995) *Consent in the Criminal Law*
Simester and Sullivan's Criminal Law: Theory and Doctrine, 4th edn (Oxford, Hart Publishing, 2010) 432–46, 747–66

