

Exorcism, Religious Freedom and Consent: The Devil in the Detail

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Abstract

The ruling in *R v Brown* that consent could not be a defence to actual bodily harm or more serious injury unless a recognised exemption applied has been much criticised. When considered exclusively in light of adult sexual activity, such criticisms may appear extremely persuasive. However, the issue of assault within exorcism reveals that there are other contexts in which the arguments appear more complex. This article examines the criminal law relating to consent and exorcism and asks how we should deal with the interplay between the general and the specific when it comes to formulating legal policy.

Keywords

Assault, consent, religion and exorcism

Introduction¹

What are the limits of consent where bodily harm and religious rituals are concerned? This issue has received little academic attention, despite a number of cases in the England and Wales² and elsewhere,³ in which adult individuals have died following spiritually motivated assaults.

Although now more than 20 years old, the leading criminal case on consent to physical assault causing harm remains *R v Brown*.⁴ The facts of this decision famously involved sadomasochistic liaisons, and the lion's share of subsequent authority has also concerned sexual practices.⁵

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1. I am indebted to Javier García Oliva (Manchester University), Tom Lewis (Nottingham Trent University), Catarina Sjolín Knight (Nottingham Trent University), Neil Cobb (Manchester University), Diana Ginn (Dalhousie University) and The Rt Reverend Dominic Walker OGS for their invaluable help and insightful comments on this article. Needless to say any infelicities are mine alone.
 2. *R v Rabiya Patel and Others* [1995] 16 Cr App R (5) 827; *R v Nicholas Narideen Sogunro* [1997] 2 Cr App R(S) 89.
 3. *R v Lee* [2006] 5 LRC 716 (New Zealand); *R v Mejia-Lopez* [2003] OJ No 4846 (Canada).
 4. *R v Brown and other appeals* [1993] 2 All ER 75.
 5. See for example: *R v Slingsby* [1995] Crim LR 570; *R v Wilson* [1997] QB 47 CA and *Emmett* [1999] EWCA Crim 1710 CA.

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Nevertheless, sexual activity is by no means the only arena in which the boundaries of consent as a defence remain unclear. There are other situations in which the applicable principles are not yet firmly demarcated. Sport and religiously motivated assault are arguably the two most complex areas within this ambiguous territory. Yet unlike sport, which has been extensively considered,⁶ religious practices have hitherto attracted little academic examination.⁷

The complexity in this setting springs from the unavoidable tensions between the twin imperatives placed on the state: to respect the autonomy of citizens on the one hand and to shield the vulnerable from exploitation or abuse on the other. This collision of necessities arises whenever the limits of decision making in relation to corporeal integrity are explored. Yet because of the way in which reported case law has developed, much of the published work in the criminal sphere has considered the issue largely through the prism of sexual encounters.⁸

But many of the practical and policy considerations at stake will vary according to the factual paradigm. The issues involved in sexual activity and religious rituals are not identical. This article therefore considers the religious context, focusing particularly on the practice of exorcism.

In doing so, it explores three primary questions: First, what is the state of the law in England and Wales in relation to exorcism in light of *Brown*? Secondly, does the present law strike an appropriate balance between advancing individual liberty and protecting the vulnerable? And thirdly, are there insights from the particular issue of violence within exorcism rituals which have relevance for the broader context in relation to consent and assault?

The subject of exorcism has been chosen primarily because it has produced a small but significant number of tragic cases, in which very vulnerable people have lost their lives. For reasons which we will explore below, it is a context fraught with inherent risks of manipulation and miscommunication. Furthermore, it was at the centre of a leading New Zealand case,⁹ in which an appellate court critically examined the authority from this jurisdiction and decided to pursue a very different pathway from that taken by domestic case law. It is important therefore to explore whether the New Zealand judicial line is valid, or even preferable to the one pursued in the England and Wales.

Question I: What is the State of the Law in England and Wales in Relation to Exorcism in Light of *Brown*?

Meaning and Practice of Exorcism in Contemporary Society

In order to address this question, it is first necessary to briefly state what is meant by ‘exorcism’ in this setting. Although to some the word ‘exorcism’ might conjure up images of arcane or exotic worlds, for others it is part of their lived experience in 21st-century Britain.¹⁰

A deeply rooted belief in the capacity of evil entities to possess human beings, animals and even inanimate objects, coupled with the need to perform rituals or undertake certain practices in order to

6. M. Beloff and T. Kerr, *Sports Law* (Hart: Oxford, 1999).

7. For example, in the extremely thorough and detailed work D. Ormerod and K. Laird, *Smith and Hogan's Criminal Law*, 14th edn (OUP: Oxford, 2015) 733, the religious context is given a mere two sentences.

8. See for example J. Tolmie, ‘Consent to Harmful Assaults: The Case for Moving Away from Category Based Decision Making’ (2012) 9 Crim LR 656 and B. Bix, ‘Assault, Sado-Masochism and Consent’ (1993) 109 LQR 540.

9. *R v Lee* [2006] 5 LRC 716.

10. Interestingly, academic evidence suggests that rather than declining, cultural awareness and practise of exorcism may in fact be growing, in the West as elsewhere. See for example B. Levack, ‘The Devil Within: Possession and Exorcism in the Christian West’ (Yale University Press: Yale, 2013) 242–53.

force their expulsion, is common to many cultures around the world, including Western Europe.¹¹ These beliefs take a variety of forms and are subject to a wide range of differing manifestations, the overwhelming majority of which could not be construed as legally problematic in a democratic, pluralist and inclusive society.¹²

Article 9 of the European Convention on Human Rights not only confers freedom of belief upon citizens, but also the freedom to manifest belief in practical ways.¹³ Nevertheless, the right to manifest belief is not an absolute right, but may be subject to:

such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.¹⁴

Certain interpretations and expressions of some beliefs have been linked to serious problems which the state cannot ignore; in these instances limiting the right of citizens to manifest their beliefs would not only be justified under Article 9(2), but potentially required by other Convention Articles, such as the Article 2 right to life.¹⁵

In the context of exorcism rituals, the most pressing such issues are the abuse of children¹⁶ and the killing of adults.¹⁷ The former is acknowledged by academics,¹⁸ public authorities¹⁹ and voices from the voluntary sector²⁰ to be a highly complex problem, which can only be adequately addressed by an equally sophisticated and sustained response. However, this tragic phenomenon is not the primary focus of the present discussion.

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11. A. van Eck Duymaer van Twist, 'Beliefs in Spirit Possession' in J. La Fontaine (ed.), *The Devil's Children: From Spirit Possession to Witchcraft: New Allegations That Affect Children* (Ashgate: Farnham, 2009) 13–28.
 12. For instance, it is common in many faiths to carry out ritual acts for the blessing and spiritual cleansing of a new home or sacred indoor space; this would include an idea of expelling any malign spiritual forces. These ceremonies generally take place on private property and do not involve physically dangerous practices or activities likely to cause a nuisance to neighbours. See, for a Christian example, H. Ward and J. Wild, *Human Rites: Worship Resources for an Age of Change* (Continuum International Publishing: London, 1995) and S. Cunningham, *Wicca: A Guide for the Solitary Practitioner* (Llewellyn Publications: St Paul, MN, 2004) 103 for an instance from the Pagan tradition.
 13. European Convention on Human Rights, Art. 9(1): 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.'
 14. European Convention on Human Rights, Art. 9(2).
 15. It is not sufficient for Convention States to refrain from interfering with the Article 2 right to life, there is a duty to actively protect it, at least in some circumstances. See for example *Osman v England and Wales* [1998] EHRR 101.
 16. See for example: A. Simon, H. Hauari, K. Hollingworth and J. Vorhaus, *A Rapid Literature Review of Evidence on Child Abuse Linked to Faith or Belief*. Childhood Wellbeing Research Centre Working Paper No 15. (CWRC: London, 2012); Lord Laming, *The Victoria Climbié Inquiry Report* (Crown Copyright: London, 2003). Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/273183/5730.pdf (accessed 4 August 2014); and Africans United Against Child Abuse, *What is Witchcraft Abuse?* (Africans United Against Child Abuse: London, 2008).
 17. See for example: *R v Rabiya Patel and Others* [1995] 16 Cr App R (S) 827; and *R v Nicholas Narideen Sogurno* [1997] 2 Cr App R (S) 89.
 18. E. Stobart, *Child Abuse Linked to Accusations of 'Possession' and 'Witchcraft'*. (Department for Education and Skills: London, 2006).
 19. H.M. Government, *Safeguarding Children from Abuse Linked to Spirit Possession*, Non-Statutory Guidance. Available at: http://oxfordshirescb.proceduresonline.com/pdf/sg_ch_a_belief_spirit.pdf (accessed 12 January 2016). Also, Metropolitan Police, 'Project Violet: The Metropolitan Police Service Response to Abuse Linked to Faith and Belief'. Available at: <http://content.met.police.uk/Article/Project-Violet-The-Metropolitan-Police-Service-MPS-response-to-abuse-related-to-faith-and-belief/1400010000897/1400010000897> (accessed 12 January 2016).
 20. Africans United Against Child Abuse, *What is Witchcraft Abuse?* (Africans United Against Child Abuse: London, 2008) and A. Cimpric, *Children Accused of Witchcraft: An Anthropological Study of Contemporary Practices in Africa* (UNICEF: Dakar, 2010).

Exorcism and the Legal Framework

In short, the key question is whether it is possible for a person to consent to an assault which may occasion actual bodily harm, more serious injury, or even potentially result in death, if this is done for religious motivations connection with exorcism?

It remains the case in England and Wales that a person *cannot* lawfully consent to an assault where actual bodily harm²¹ (or more serious injury) is caused, and this was either intended or foreseen as a risk,²² *unless* one of the recognised exemptions applies.²³

The House of Lords in *R v Brown*²⁴ discussed the circumstances in which an exemption to the general rule applied, and a potential defendant could rely upon the consent of his or her victim as a defence. One category of exempt situations referenced by Lord Mustill was that of ‘religious mortification’.²⁵ However, he did not attempt to explore or define this concept, much less to address whether it would be wide enough to encompass exorcism.

Furthermore, there has been no consideration to this particular point in subsequent England and Wales case law. However, it was an issue which confronted an appellate court in New Zealand. The court in question referred very extensively, but also extremely critically, to the reasoning set out in *Brown*. It is therefore appropriate at this point to consider the New Zealand case in detail.

The New Zealand Case: *R v Lee*

It is worth setting the facts in greater detail than would ordinarily be required, as the factual paradigm has crucial bearing on our subsequent enquiry into whether cases like these raise different issues from ones taking place in the context of sexual interactions.

The defendant Lee was a Korean national living in New Zealand who founded the ‘Lord of All’ church. At the time of the exorcism there were 15–20 members of this group, most of whom were also Korean. Seven of the church members lived in Lee’s home,²⁶ a significant point, as this arrangement could easily have generated a dynamic of dependency and control.

The victim Joanna Lee (no relation to the pastor defendant, and hereinafter referred to as Joanna to distinguish the two) was a member of Lee’s congregation. She suffered from the skin disease vitiligo, which according to Lee’s evidence made her feel depressed. Witnesses painted a picture of a meek, compliant and self-sacrificing woman.²⁷ She was also highly likely to have been emotionally vulnerable, given her medical issues and the fact that she had only arrived in New Zealand from Korea a few weeks before the exorcism. Nevertheless, there was no suggestion that she might have lacked legal capacity to make decisions.

When Joanna experienced low mood and persistent negative feelings, both the victim and Lee attributed this to demonic possession, and it was decided that she should undergo an exorcism in order to seek a cure. The exorcism process took place over a number of hours, with a break for sleep and food.

21. Actual bodily harm has been defined by the courts to mean harm which is more than transient or trifling, but need not be permanent: *R v Donovan* [1934] 2 KB 498, 25 Cr App Rep 1, CCA; *R v Miller* [1954] 2 QB 282; *R v Chan Fook* [1994] 2 All ER 552. Psychological harm is included, but only where identifiable psychiatric injury can be demonstrated: *R v Dhalial* [2006] EWCA Crim 1139.

22. There is some complexity in cases where the victim may have consented to the *risk* of harm, rather than actual harm. See further D. Ormerod and K. Laird, *Smith and Hogan’s Criminal Law*, 14th edn (Oxford: OUP, 2015) 727–9. However, given that the reported cases on exorcism all involve sustained and violent beating, it would be very difficult to argue that the issue was one of risk of harm rather than actual harm.

23. *R v Brown* [1994] 1 AC 212.

24. *Ibid.*

25. *Ibid.* at 267 per Lord Mustill.

26. *R v Lee* [2006] 5 LRC 716 para 8.

27. *Ibid.* at paras 10–12.

The exorcism involved Lee and other church members applying pressure to Joanna's neck, chest, stomach and face, sitting, lying and bouncing on her. When towards then she shouted at them to stop, they assumed that it was the devil rather than Joanna talking.

At the end of the process Lee told his followers that Joanna was resting, as though asleep; however, in reality she was dead. The church members tended her body for the next six days, in the apparently quite genuine expectation that she would wake up, washing her with alcohol to try to deal with the smell. Eventually, a visitor came to the house and alerted the police. When the police arrived Lee tried to convince them that Joanna was 'regenerating' and would come back to life. However, he also instructed his followers to say that Joanna had not been physically touched during the prayers.²⁸

In any event, Lee was charged with manslaughter. The applicable statutory provision²⁹ required the victim's death to have been caused by an unlawful act. He was convicted at his trial, but argued on appeal that the issue of consent should have been left to the jury. If Joanna had given legally recognised consent to the assault, then the assault which led to her death would not have been an unlawful act. In consequence the conviction was quashed and a retrial was ordered.

After a lengthy survey of the authorities in England and Wales, as well as other Common Law systems, the court decided not to follow the approach in *Brown*. They rejected the principle of only allowing consent to operate as a defence in one of the special exempt categories of activity, where actual bodily harm or more serious injury was involved:

In our view, the rule (for all levels of intentional infliction of harm) is rather that there is an ability to consent to the intentional infliction of harm short of death unless there are good public policy reasons to forbid it and those policy reasons outweigh the social utility of the activity and the value placed by our legal system on personal autonomy.³⁰

Therefore, the default position in New Zealand is now that consent *is* available as a defence, *unless* there are public policy reasons which necessitate the judge withdrawing the defence. Whether such public policy considerations exist is to be decided on a case-by-case basis and judges should take the following into account:

the right to personal autonomy, the social utility (or otherwise) of the activity, the level of seriousness of the injury intended or risked, the level of risk of such injury, the rationality of any consent or belief in consent, and any other relevant factors in the particular case.³¹

In light of this, the court found that the defence of consent should have been available in this case, subject to a possible public policy exclusion if Lee was reckless or intended to cause grievous bodily harm.³²

Brown and Religious Activities

Before moving on to address the validity of the policy based critique of *Brown* put forward by the New Zealand court, it is prudent to pause and ask whether the analysis on which it was founded was legally correct. Did the court accurately set out the position in relation to consent to assault in a religious context?

28. *Ibid.* at 13.43.

29. Crimes Act 1961, s. 160(2)(a).

30. *Ibid.* at para. 300.

31. *Ibid.* at para. 316.

32. *Ibid.* at para. 344.

Exempt Activities

In his speech, Lord Mustill listed the situations in which a person might consent to actual bodily harm. This included this miscellaneous category of ‘dangerous pastimes, bravado and mortification’.³³

It is interesting that the New Zealand Court of Appeal slightly but significantly misquoted this passage from Lord Mustill’s speech, referring to ‘religious flagellation’.³⁴ The concept of ‘mortification’ is clearly broader than flagellation. The *Oxford English Dictionary* defines mortification as:

In religious use: the action of mortifying the body, its appetites, etc.; the subjection or bringing under control of one’s appetites and passions by the practice of austere living, esp. by the self-infliction or voluntary toleration of bodily pain or discomfort.³⁵

This could therefore include practices other than flagellation, for example immersing an individual in cold water with the intention of punishing or subduing the flesh. The confusion of the New Zealand Court may have come from reference to Feldman’s enlightening submission to the 1995 Law Commission.³⁶ Feldman argued that removing the capacity to consent to religious flagellation would be likely to be an interference with the Article 9(1) right to manifest a belief pursuant to the European Convention on Human Rights and that it would be extremely difficult to justify this under Article 9(2).³⁷

Whilst the concept of mortification undoubtedly includes flagellation, it is clearly broader than this. However, it is less apparent that it encompasses exorcism. The purpose of exorcism is not to subdue or control one’s own body and bodily desires. Rather, the *Oxford English Dictionary* defines this as:

The action of exorcizing or expelling an evil spirit by adjuration or the performance of certain rites; an instance of this.³⁸

This definition echoes the more detailed explanation of exorcism set out above. Seeking to remove an evil spirit is a different endeavour from trying to subjugate the body to mental and spiritual powers.

However, is this distinction a purely semantic one and a dangerous distraction? In short, if it is legally permissible for a person to consent to a beating for religious reasons, why should the nature of the underlying religious belief make any difference? This question undoubtedly deserves some attention, especially since, as commentators like Jivraj and Herman³⁹ and Shelley⁴⁰ highlight, there is the risk of inherent of inadvertent discrimination when judges are faced with religious issues from outside their own cultural paradigm. Whilst exorcism is practised by many faiths and cultures, rituals involving physical violence in this jurisdiction predominantly take place within ethnic and or religious minority communities.⁴¹

33. *R v Brown* [1994] 1 AC 212 at 267.

34. *R v Lee* [2006] 5 LRC 716 at para. 323.

35. Oxford English Dictionary Online. Available at: www.oed.com/view/Entry/122481?redirectedFrom=mortification#eid (accessed 20 February 2016).

36. Law Commission, *Criminal Law: Consent in the Criminal Law*, Law Com. Consultation Paper 139 (1995). See the court’s discussion of this *R v Lee* [2006] 5 LRC 716 para. 324.

37. European Convention on Human Rights, Art. 9.2: ‘Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’

38. Oxford English Dictionary Online. Available at: www.oed.com/view/Entry/66357?redirectedFrom=exorcism#eid (accessed 5 August 2014).

39. S. Jivraj and D. Herman ‘“It is difficult for a white judge to understand”: Orientalisation, Racialisation and Christianity in English Child Welfare Cases’ (2009) 21(3) *Child and Family Law Quarterly* 283.

40. C. Shelley, ‘Beating Children is Wrong, Isn’t It? Resolving Conflicts in the Encounter between Religious Worldviews and Child Protection’ (2013) 15 *Ecclesiastical Law Journal* 130.

41. See for example ‘Bishop Warns on Exorcism’, *The Church Times*, 2 November 2006.

But having acknowledged this concern, it would still be difficult to support the contention that allowing people to consent to assault for *some* religious purposes should allow individuals to give valid consent in *all* circumstances where there was a religious element involved. If this were the case, then the ‘religious mortification’ exemption would have to operate very differently from the other categories of activities where the general prohibition of consent to actual bodily harm is suspended.

For example, ‘boxing’ which is regulated by the Queensberry Rules was acknowledged as an exemption in *Brown*.⁴² This does not mean that all forms of boxing are lawful in all circumstances. Prize fighting is not shielded by the exemption.⁴³

This principle is also supported by drawing an analogy with the statutory position in relation to genital modification for religious and cultural purposes. Female genital mutilation is criminalised by legislation.⁴⁴ However, Parliament has chosen not to modify the common law position of permitting ritual male circumcision,⁴⁵ which remains lawful. For public policy reasons, the legal system treats two forms of genital modification for religious and cultural purposes differently.

There are strong grounds to argue that, in a similar way, the law should regard exorcism as a different type of activity from religious mortification. Declining to allow exorcism the shelter of the ‘religious mortification’ exemption is not a decision which is in and of its nature discriminatory, given that it can be supported by objective differences in the activity and its context. It is further submitted that it would stand up to rigours of the European Convention on Human Rights, properly applied.

The differing treatment would not be based upon a differing assessment of the validity of the underlying religious belief. All faith, secular ideologies and matters of conscience must be treated equally in relation to holding beliefs.⁴⁶ However, Article 9(2) of the European Convention on Human Rights specifically permits states to limit the freedom of citizens to *manifest* such convictions, in so far as the limitation constitutes a proportional means of achieving a legitimate goal. The text of the article refers specifically to the interests of public safety, protection of public order, health or morals and also the rights and freedoms of others.⁴⁷

As will be seen in the following section, the context of exorcism rituals means that they have very different implications from practices of true ‘religious mortification’ in relation to these Article 9(2) considerations. The differing treatment of exorcism as a phenomenon is based not upon a differing assessment of the beliefs which underpin it, but a recognition that the context surrounding it and the risks which it presents to the vulnerable are distinct from those associated with practices more properly described as ‘religious mortification’. On this basis, it is suggested that it is not and should not be included in the exemption to the prohibition of consent, for the reasons which will be discussed below.

Question 2: Does the Present Law Strike an Appropriate Balance between Advancing Individual Liberty and Protecting the Vulnerable?

It must be acknowledged that the suggestion made above is by no means uncontroversial. Although not always addressing the specific question of exorcism, there are commentators who regard the approach of the court in *R v Lee* as preferable to that of *Brown* in terms of autonomy, and regard the current England and Wales framework as unduly paternalistic and restrictive. If their reasoning were to be followed, then a more permissive regime would be adopted in relation to exorcism as well as all other matters.

42. *R v Brown* [1994] 1 AC 212, *per* Lords Templeman, Jauncey, Mustill and Slynn.

43. *R v Gnanjo* [2011] UKSC 59 *per* Lord Brown, para. 69.

44. Female Genital Mutilation Act 2003.

45. *Re J (child's religious upbringing and circumcision)* [2000] 1 FCR 307; *Re S* [2004] EWHC 1282 (Fam).

46. European Convention on Human Rights, Art. 9.

47. *Ibid.* 9(2).

For instance, Tolmie⁴⁸ has praised the reasoning of the appellate court in *Lee* and argues that it is a preferable approach to that of House of Lords in *Brown*. Her argument is that moving from a category-based approach to one which involves an examination of the particular facts, not only allows for a more rational framework than that given by a patchwork quilt of exemptions, it also permits a more nuanced and tailored judicial approach to the considerations of individual autonomy and imbalances of personal power.

She does, however, qualify her thesis with the caveat that the law would have to need to shift to treat actual and grievous bodily harm differently if her proposal were to be adopted. Tolmie notes that whilst great judicial freedom might be helpful in complex cases of serious harm, it would not be desirable to render every ear-piercing potentially unlawful.⁴⁹

Tolmie's analysis undeniably has a lot to commend it, particularly when the primary paradigm being considered is that of sexual interactions between adults. Her discomfort with the paternalistic approach of the House of Lords in *Brown*, and with the accompanying disregard for personal freedom, echoes that of previous commentators such as Giles, Streets and Bix.⁵⁰ Although it should again be noted that all three of these authors were grounding their analysis firmly in the sexual freedoms of adults, there was little in-depth consideration of the wider social paradigm.

In addition, there are also important counterarguments to the libertarian critique of *Brown*, many of which are brought into sharp focus by the specific issue of exorcism.

In Partial Defence of *Brown*

A Legitimate Need to Protect the Vulnerable

It is undeniable that the *Brown* case has attracted widespread criticism from commentators, and authors like Murphy⁵¹ have questioned whether courts are increasingly prepared to deviate from it and show greater flexibility, at least where sexual practices between consenting adults are concerned. However, the negative views have by no means been universal.

Writers like Edwards⁵² and Wilson⁵³ take a more positive stance towards the decision. Edwards makes the very valid point that the function of the law is not solely to advance the liberties of the strong, but also to protect the weak and vulnerable.⁵⁴ The fact that a judicial decision (or other legal measure) limits personal freedom of some citizens in some way does not necessarily make it wrong or repressive. The reasons for the limitation and its potential benefits for both individuals and society are key considerations in assessing its helpfulness.

It should also be noted that the European Court of Human Rights upheld the decision in *Brown*.⁵⁵ Therefore extra-national judicial scrutiny had found the limitation of personal autonomy implicit in the criminal law to be justified on the basis of wider public interest. Restricting the freedom of citizens to inflict actual bodily harm (and worse) upon one another to legally defined circumstances has therefore been accepted as an appropriate balance of liberties.

48. Tolmie, above n. 8.

49. *Ibid.* at 671.

50. M. Giles, '*R v Brown*: Consensual Harm and the Public Interest' (1994) 57 MLR 101, S. Streets, '*S & M in the House of Lords*' (1993) 18(5) *Alternative Law Journal* 233, Bix, above, n. 8.

51. P. Murphy, 'Flogging Live Complainants and Dead Horses: We May No Longer Need to be in Bondage to *Brown*' (2011) 10 Crim LR 758–65.

52. S. Edwards, 'No Defence for a Sadomasochistic Libido' (1993) 143 NLJ 406.

53. W. Wilson, 'Is Hurting People Wrong?' (1992) *Journal of Social Welfare and Family Law* 388.

54. S. Edwards, 'No Defence for a Sadomasochistic Libido' (1993) 143 NLJ 406.

55. *Laskey, Jaggard and Brown v England and Wales* (1997) 24 EHRR 39.

Freedom to Make Case-by-case Decisions

Tolmie⁵⁶ highlighted the contrast between judicial approaches in *Lee* and *Brown*. In doing so, she emphasised the capacity afforded by the *Lee* methodology to make decisions on the facts of individual cases, without being constrained by the exemption categories set out in *Brown*. Whilst there is some validity in this analysis, the author would respectfully question whether Tolmie may have over-egged the pudding to some degree. It is true that moving towards a category-based approach would bring about a significant change at a doctrinal level; however, the practical impact of the difference between the two approaches may well not be as great as she suggests.

The really fundamental distinction between *Brown* and *Lee* concerns the nature of the presumption on the availability of consent as a defence. In *Lee*, the defence of consent is presumed to be available, unless it is rebutted by public policy considerations on the facts. Conversely in *Brown*, it is presumed *not* to be available unless the assault took place in the course of one of the exempt activities.

Admittedly, the way in which the presumption is weighted is key; and there is a very real difference between the permissive line taken by the New Zealand appellate court and the more restrictive one of the House of Lords. Nevertheless, both approaches have ample scope for the facts of individual cases to be considered in *operation* of the presumption. Whichever way the presumption faces, there is freedom for it to be rebutted and for the unique factual scenario before the court to be considered.

This inherent flexibility is demonstrated by the differing outcomes of cases which have followed *Brown*. For example in *Wilson*⁵⁷ a woman was held to be capable of consenting to her husband branding her with his initials using a hot knife, as this was done for personal adornment rather than sexual gratification, and the court deemed it analogous to tattooing. In contrast, in *Emmett*⁵⁸ consent was not accepted as a defence when a man tied a plastic bag over his partner's head and on another occasion poured lighter-fluid onto her body and ignited it. Although the *Wilson* case could be distinguished on the basis of the purpose of the activity, the degree of the violence involved is also striking.

There is considerable judicial room for manoeuvre in deciding whether or not the proposed *actus reus* comes within the scope of an exempt activity and the level of risk and violence will almost invariably be a factor in making this decision.

As Anderson⁵⁹ correctly observes, even in the realm of contact sports, certain behaviour on the pitch will take the perpetrator outside of the scope of the exempt activity. Players do not and cannot consent to any and all violence which may take place during a match. Livings⁶⁰ also notes the complex character of consent for sporting purposes and the potential exposure to criminal liability for players in certain circumstances.

Similarly, some of the exempt categories are broad in scope and have very blurred edges, for example horseplay.⁶¹ This provides another avenue for the exercise of discretion where appropriate.

Neither is it clear that the categories set out by the House of Lords in *Brown* were intended to be closed or comprehensive. For example, dancing is not mentioned explicitly. Ballet is not really a 'contact sport', nor is it usually seen as a dangerous pastime, nevertheless serious accidents can and do happen. If a dancer injures another with a sword in a fight scene from *Romeo and Juliette*, it seems implausible to suggest that he would be liable to prosecution simply because this circumstance was not contemplated by the House of Lords in *Brown*.

56. Tolmie, above n. 8.

57. *R v Wilson* [1997] QB 47 CA.

58. *R v Emmett* [1999] EWCA Crim 1710 CA.

59. J. Anderson, 'No Licence for Thuggery: Violence, Sport and the Criminal Law' (2008) Crim LR 751.

60. B. Livings, 'A Different Ball Game: Why the Nature of Consent in Contact Sports Undermines a Unitary Approach' (2007) 71 JCL 534.

61. *R v Aitken*; *R v Bennett*; *R v Barson* (1992) *The Times*, 10 June.

Considered in the round, the process for assessing whether the activity giving rise to the *actus reus* falls within one of the activities to which a person may lawfully consent affords considerable scope for the exercise of judicial discretion. Having categories of exempt activities where consent to actual bodily harm is permitted does not preclude the factual context of each case from being considered in the round. Consequently, the criticism that the *Brown* approach is inherently inflexible and unwieldy does not stand up to careful analysis.

Certainty

As Tolmie⁶² herself acknowledged, there is a serious drawback with allowing individuals to consent to actual bodily harm in all circumstances, but retaining judicial freedom to withdraw this on public policy grounds. This stance inevitably involves uncertainty as to whether *any* particular instance of physical harm is lawful. The concept of categories of activity to which consent may be given does at least provide some structure and guidance as to when and how violent or dangerous conduct may be indulged in.

But even more fundamentally, it is less problematic in terms of both individual freedom and the Rule of Law to *allow* a defence when its availability was not certain at the time when the offence was committed than to *withdraw* a defence which a defendant might reasonably have assumed to have been available. The latter could come perilously close to retroactively criminalising the defendant's conduct, a position incompatible with domestic and international standards in relation to the rule of law.⁶³ Examined closely, it is far from certain that the more permissive approach in *Lee* is necessarily more conducive towards safeguarding human rights.

Question 3: Are there Insights from the Particular Issue of Violence within Exorcism Rituals which have Relevance for the Broader Context in Relation to Consent and Assault?

When the particular scenario of assault within the context of exorcism rituals is considered, further support can be found for the general defence of the law set out above. It is often the nature of academic discourse to point out flaws in judicial reasoning,⁶⁴ rather than praise its successes; aspects of the legal framework which are functioning smoothly provide little grist for the scholastic mill. However, it appears that in this instance, the House of Lords which heard *Brown* did at least consider situations beyond the one before the court at that moment in time. This sensitivity to the impact of their decision on the wider legal framework was laudable, even if there were problematic aspects to the decision.

Some of the highly persuasive criticism of a judgment which criminalised consensual sexual activity between consenting adults does appear different in the light of the specific issue of exorcism. A dialogue about autonomy in the abstract is given the counterpoint of actual instances of vulnerability. This in turn raises the question of how the general legal framework should operate in terms of decriminalising consensual assault.

The facts of *R v Lee* were set out extensively above because they reveal eloquently and necessarily the extreme vulnerability of the victim. The debate would be utterly inadequate if this tragic reality were obscured. Joanna Lee may have had the mental capacity to consent, but there was nevertheless a gross imbalance of power. It is the role of the legal framework to protect the weak as well as to vindicate the freedoms of the strong.

62. Tolmie, above n. 8.

63. M. García-Salmónes Rovira, 'Faith, Ritual and Rebellion in 21st Century (Positivist) International Law' (2011) 26(2) *European Journal of International Law* 537.

64. Lord Roger of Earlsferry, 'Judges and Academics in the England and Wales' (2010) *University of Queensland Law Journal* 4.

A similar pattern can be revealed in other tragic cases of exorcisms which have come before the criminal courts, both in the England and Wales and other jurisdictions.

R v Rabiya Patel and Others⁶⁵

The harrowing facts of this case concerned a 21-year-old Muslim woman, Farida Patel. A local religious teacher had given talks on jinn or evil spirits at prayer meetings, and this had utterly terrified to Farida to the point that she would sweep under her bed at night to remove the jinn.⁶⁶ At the time of her death she was ill and suffering from depression. She and her family had become convinced that her symptoms were the result of possession; the religious teacher confirmed this and assured them that the only way to cure Farida was to beat the jinn out of her.

This ‘therapeutic’ beating took place under the direction and with the active participation of the religious teacher, Mouna Rai. Farida’s younger brother who was a minor at the time, was reluctantly induced to participate. He was deeply distressed, but was told that he was the only man available, and that if he did not help, his sister would remain possessed forever. When Farida’s father pleaded for the beating to stop, the religious teacher assured him that only the jinn would be harmed.⁶⁷

All of the evidence suggested that the siblings of Farida who had been persuaded to beat her to death loved her and did not believe that she would come to harm. Her older sister was suffering herself from post-natal depression at the time and severe psychological disturbance.⁶⁸ She and the other family members were deeply traumatised by Farida’s death and overcome with guilt. When interviewed by the police, they gave a full account of what happened; only the religious leader attempted to deny her participation and involvement.

Suffering from suffering from depression does not automatically mean that an individual lacks capacity to give consent for the purposes of either criminal⁶⁹ or civil law,⁷⁰ neither does pursuing a form of unscientific, alternative treatment for a diagnosable medical condition.⁷¹ Consequently, had exorcism been included within the ‘religious mortification’ exemption, Farida’s consent would in theory have been available as a defence for the religious teacher who orchestrated her painful and protracted death.

R v Nicholas Narideen Sogunro⁷²

The facts of this case concerned a man who had Messianic religious beliefs, who imprisoned his fiancée in his flat and allowed her to die from starvation and neglect, again believing that he was punishing her body in order to oust an evil spirit.

The jury made a finding of fact that the deceased had not given her consent to this treatment. Nevertheless, the point that the defendant raised the issue of consent at trial demonstrates its relevance in exorcism cases. The victims will often be, or be believed to be, consenting to the activity, at least at the outset. It is also striking that at sentencing the appellate court considered *R v Williamson*⁷³ a case involving the accidental death by asphyxiation of the victim during mutually consensual sexual activity.

65. *R v Rabiya Patel and Others* [1995] 16 Cr App R(S) 827.

66. *Ibid.* at 828.

67. *Ibid.* at 828–30.

68. *Ibid.* at 830–1.

69. J. Stannard, ‘The Emotional Dynamics of Consent’ (2015) *Journal of Criminal Law* 422.

70. Mental Capacity Act 2005.

71. *R (on the application of Jenkins) v HM Coroner for Portsmouth and South East Hampshire* [2009] EWHC.

72. *R v Nicholas Narideen Sogunro* [1997] 2 Cr App R(S) 89.

73. *R v Williamson* (1994) 15 Cr App R (S) 364.

R v Mejia-Lopez⁷⁴

This Canadian decision demonstrates that these issues are by no means confined to the England and Wales. In this case, the victim was tied up by his parents and a family friend, and kept confined until he died of dehydration. Although the fact that he was bound and had resisted made it difficult to argue that this consent had been given, the perpetrators testified that signs of resistance and struggle were to be attributed to demonic forces, rather than the true will of the victim.⁷⁵ Furthermore, he had been involved in the same Evangelical church as the rest of his family and seemed of his own volition to be refusing water.

Once again, it demonstrates the difficulties of the operation of consent in the context of exorcism, particularly in relation to the withdrawal of consent. The very beliefs which inspire the practice, and which may in many cases have been shared by the victim, may lead to the retraction or cessation of consent to be tragically misinterpreted.

To observe this is not to comment on the validity or desirability of such beliefs, but to note that as a matter of fact their existence makes violence within the context of exorcism more dangerous than violence in other contexts. Participants in boxing and other martial arts can express their desire to stop; those 'playing' sadomasochistic games will usually have a 'safe word' so that a genuine request for mercy will be heard⁷⁶ and individuals engaging in religious mortification to discipline their body and mind tell their co-religionists when they are ready to give up. However, those undergoing exorcism are often in real terms without the ability to express their withdrawal of consent in a way which will be heard and understood.

The fate of all of these victims illustrates the dangers which exorcism can involve. The perpetrators of the crime believe that their violence or ill treatment of the victim is being targeted at an evil spirit, not at a human being whom they may be genuinely trying to help.

In addition, by the very nature of the situation, individuals seeking exorcism are likely to be emotionally vulnerable in some way or another. Taking a neutral position on the objective reality of 'possession', it is clear that a person who regards themselves as needing to be delivered of an evil force is highly likely to be frightened and distressed. Furthermore, exorcism is ordinarily practised and encouraged by figures who wield spiritual authority and have considerable social standing within the community in which the victim lives.

Taken together, these factors make the potential for the perfect storm of abuse and coercion. It is for this reason that many faith groups which practise exorcism on human beings in certain circumstances tightly regulate it,⁷⁷ and most would never authorise any elements which were physically violent or had a sexual dimension.

Conclusion

Balancing all of these factors, it is difficult to conclude that the arguments in favour of individual autonomy put forward by the court in *R v Lee* really justify enabling victims to legally consent to physical injury in the context of exorcism. Autonomy and dignity are not furthered by allowing vulnerable people to be coerced, starved or beaten, possibly until the point of death.

Perhaps more persuasive than the autonomy argument is the concern that leaving violence within exorcism beyond the pale of the criminal law, we risk disadvantaging cultural minorities. Commentators

74. *R v Mejia-Lopez* [2003] OJ No. 4846.

75. *Ibid.* at para. 44.

76. As in fact was the case within *R v Brown* [1994] 1 AC 212.

77. Exorcism, or deliverance as it is now generally known within Anglican churches, is carefully regulated and would never involve violence on the part of the priest responsible. See D. Walker, *The Ministry of Deliverance* (DLT: London, 1997) 3.

Kymlicka, Lernestedt and Matravers⁷⁸ make a persuasive case for greater consideration of cultural factors within the criminal justice framework in general.

However, the tragic context of child exorcism provides a salutary counterpoint to this when dealing with assault. It is now recognised that child abuse is child abuse, whatever the motivation, and this is robustly set out in guidance for statutory services dealing with children thought by their families or communities to be possessed by evil spirits and in need of exorcism.⁷⁹ However, this point is emphasised precisely because it is now acknowledged by those working in the field that there was a problem in the past of misguided understandings of cultural difference leading to children being left to suffer abuse when public authorities should have intervened to protect them.⁸⁰

In a similar way, if the legal system regards that there are good public policy reasons to prevent adults from consenting to physical harm outside certain established contexts, the benefit of this should not be denied to those from cultural, religious and linguistic minorities. Victims from such groups may be in an especially vulnerable situation, as there may be additional barriers for them in seeking outside help and support.

All citizens should enjoy the same level of protection and the same level of freedom. It is not the validity or appropriateness of the underlying beliefs which is at issue, but the dangers inherent in the activity concerned. If it is not appropriate to include exorcism within the 'religious mortification' category of exemptions to the prohibition on consent, then the reasons for this must apply to all citizens from all backgrounds.

The specific issue of exorcism also demonstrates that there are flaws in the *general* critique of the principles in *Brown*, when this is founded on dissatisfaction with its specific application to sexual encounters. An individual's motivation for submitting to harm is a significant consideration in deciding where the balance should lie in relation to autonomy and protection.

Seeking sexual gratification is very different from seeking release from an evil spirit, especially when the person involved believes that the perpetrator of the violence is in a special position to effect this deliverance.

One response to *Brown* and the persuasive concerns raised by commentators⁸¹ might be to reassess whether sexual activity should in fact be recognised as an exemption from the general rule. This could present a more constructive way forward, as it would enable the specific issues in this context to be properly considered, and would avoid the dangers of generalising inappropriately. The balance between autonomy and protection, and the factors to be weighed up, are in fact very different in different settings.

The issue of exorcism reveals that there are some situations at least, in which permitting individuals to consent to physical assault occasioning injury could leave vulnerable people exposed to harm and even death, where their choice was in reality much less than free. It would be misguided to reform the law to solve one set of problems in relation to sexual activity, only to open the door to a host of others in different arenas. The contrast between *Brown* and *Lee* shows us the complex interplay between the specific and the general in creating policy, and the need for caution in finding a way forward.

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78. W. Kymlicka, C. Lernestedt and M. Matravers, *Criminal Law and Cultural Diversity* (Oxford: OUP, 2014).

79. The Metropolitan Police Service, above n. 19.

80. Stobart, above n. 18.

81. Giles, above n. 50, Streets, above n. 50, Bix, above, n. 8.