Oxford Undergraduate Law & Policy Review

Oxford Law Society

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Contents

Editors' Introduction

It brings us great pleasure to introduce the inaugural edition of the Oxford Undergraduate Law & Policy Review. The Review replaces the Verdict blog as the Oxford Law Society's platform for academic legal writing, and we are delighted to publish so many strong submissions to mark the Review's very first edition.

The impetus for a fresh undergraduate law journal at Oxford formed in Trinity Term 2025. Freed from the Law Moderations - humbled but not daunted - we set out in search of a platform where we might explore legal ideas that had germinated in our minds over the past two terms, but could not be properly ventilated within the confines of the syllabus. We quickly learnt, however, that the landscape for undergraduate legal writing had fractured into two poles. On the one hand were blogs that were largely casual, or geared towards 'bite-sized' analysis. On the other hand were journals with inscrutable standards that even an intrepid law student might find discouraging. We thus decided to plant our flag somewhere between the two. The result was a journal for law students that would be credible and rigorous, but also accessible to the gutsy undergraduate willing to take a punt on a promising idea.

The quality of the submissions that we received far exceeded our expectations. Some articles probed gaps in the law's reasoning and evaluated whether the law could be placed on a more principled footing. Philip Kimber, for instance, lucidly analyses the element of unreasonable risk-taking in criminal recklessness. He brilliantly proposes that we might subsume the defence of consent into a richer conception of reasonableness. Emily Yu meticulously compares self-defence under English and Chinese criminal law, and outlines a fascinating middle ground.

Other contributions were more oriented to policy issues. To this end, Zara Cherry brings the Review into the territory of labour law and protections for professional athletes. Her analysis is careful, creative, and sensitive. She charts a viable path forward to more effectively protect professional athletes. Justin Wu and Giulia Cancellaro examine intellectual property issues. Justin asks whether reverse settlement payments to ward off challenges to patent validity might be anti-competitive, and offers a rigorous analysis of the US Supreme Court's decision in Actavis. Giulia considers how an effective balance might be struck between the protection of intellectual property rights and public health objectives in the context of the TRIPS Agreement. It makes for a fascinating read.

Collectively, this set of articles reflects the essential ambition of the Review: to enliven doctrinal legal analysis with policy questions, as the boundaries between the two grow increasingly porous.

This inaugural edition concludes with a feature article on military law by Mark Hull. Mark was a professor of international criminal law and military law at the US Army Command and General Staff College and is now studying for DPhil in History at St. Antony's College. Mark focuses on recent events in the US and considers the erosion of legal norms in military combat.

Finally, we would like to express our appreciation to those without whom the Review would not have been possible. In particular, we are profoundly grateful to Lord Justice Dingemans, Senior President of Tribunals, who so generously agreed to review the student articles and contributed a very thoughtful foreword for this inaugural edition. Second, Geng Heqin, the outgoing editor of the Verdict blog who worked closely with us to transform Verdict. Third, Agastya Rao, the Hilary Term 2026 President of the Oxford Law Society, who has been unstinting in his support for the Review.

Next, 3 Hare Court, who very generously sponsored the 3 Hare Court Oxford Undergraduate Law & Policy Review Prize for the best submission. Lastly, we would like to thank all the authors, whose dedication and willingness to collaborate with us made the Oxford Undergraduate Law & Policy Review a reality. Thank you very much.

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Founding Editors & Editors-in-Chief

Foreword

The Rt Hon Lord Justice Dingemans

It is a privilege to have been asked to write the foreword to the first edition of the "Oxford Undergraduate Law & Policy Review". I spent an enjoyable day over the Christmas vacation reading the five varied and interesting articles that form this edition. It is fantastic to see careful academic analysis combined with principled proposals for the reform and improvement of the law addressed in the articles. The articles range across many fields of law: criminal, employment, human rights, and international Intellectual Property law.

There are two articles which address the criminal law. The first article is by Philip Kimber of St John's College and considers unreasonable risks, and what is said to be the overlooked element of recklessness in English criminal law, with particular emphasis on the reasonability of taking risks. The reasonability of taking risks in ending a relationship makes for compelling reading.

The second article on criminal law is by Emily Yu of Exeter College who undertakes a comparative analysis of the approach to self-defence in the laws of England and Wales and China. The article proposed a middle ground between the two systems of law, namely of allowing self-defence only where it is reasonable to use force. This would be a change from the current position in the laws of England and Wales, where reasonableness is judged in the circumstances as the defendant believed them to be.

There are two articles dealing with Intellectual Property. In the first article Giulia Cancellaro of Green Templeton College examines whether a manufacturing for export exception is permissible under international intellectual property law. This is an article which confronts the tension between safeguarding patentees' exclusive rights and addressing developmental and public-health needs. The article also offers an analysis of the TRIPS Agreement, identifying the scope for calibrated exceptions that prioritise public health and development while remaining consistent with international legal obligations.

In the second article on Intellectual Property, Justin Wu of Somerville College considers the tension between patent protection and competition law, and examines the antitrust treatment of reverse payment settlements in pharmaceutical patent litigation and beyond. The article considers how such settlements can reflect legitimate risk-sharing, but might mask anti-competitive collusion that preserves patent-based monopolies. The evolution of judicial approaches in the United States and the ECJ are traced, and there is an assessment of the jurisprudence before and after the decision of the US Supreme Court in FTC v Actavis. The article suggests an approach of how courts might reconcile patent rights with the demands of effective competition.

Finally, Zara Cherry of St Catherine's College addresses the employment status, or lack of employment status, of professional athletes competing outside the most commercially prominent sports. The article highlights the difficulties athletes face in securing protection under existing frameworks and categorisations of labour. The article contends that the fragmented and non-traditional income structures characteristic of less commercialised sports should strengthen, rather than undermine, the case for legal protection. The article advances a case for a more expansive interpretation of employment and worker status, one which is capable of extending meaningful protections to athletes.

I have been told that I have to select one of the articles as the winner of the 3 Hare Court Oxford Undergraduate Law & Policy Review Prize. As is apparent from my brief description of the articles above, all would be worthy winners. As it is I have selected the article by Zara Cherry "An unlevel playing field: Why employment law is failing the modern athlete". I have chosen it because the article identified a problem under the current law, as it is interpreted, and made principled suggestions for an improvement in the law which I can see being employed by an advocate in a hearing. I have always thought that legal academics and practitioners of the law should work closely together.

I wish all the authors well in their studies, and I hope that the Review grows successfully from this most promising start.

Sir James Dingemans
26 January 2026
Senior President of Tribunals
Lord Justice of Appeal

An Unlevel Playing Field: Why Employment Law is Failing the Modern Athlete

Zara Cherry, St Catherine's College, BA Jurisprudence

Winner of the 3 Hare Court Undergraduate Law & Policy Review Prize

INTRODUCTION

To the layperson, athletes are highly successful individuals. One may assume that competing at the Olympics and winning an Olympic medal is the pinnacle of success and will guarantee a comfortable life. In reality, alongside training, athletes are working full-time jobs, from engineers to food delivery drivers to influencers.[1] 58% of a sample of elite athletes surveyed in 2020 reported themselves as not being financially stable,[2] resulting in many being forced to give up entirely on their Olympic dream.

This problem pervades the sports industry and continues to exist due to a fundamental mischaracterisation of athletes. Apart from certain major commercial team sports such as football, rugby or basketball, most elite athletes fall outside of the scope of employment law and are generally not employees or workers for legal purposes. Consequently, this article will aim to combat this narrative, examining athletes from an employment law perspective. This process will involve an outline of the statutory protection and benefits granted to employees and workers, then an examination of the legislative and common law framework, and finally an application of this framework to athletes.

English employment law typically distinguishes between three types of people;[3] employees, the self-employed who are in business on their own account and undertake work for their clients or customers, and thirdly, workers (most often

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[1] Mary Whitfill Roeloffs, 'These Olympic Athletes Work Double Time to Make Ends Meet (As A Birthday Party Clown To OnlyFans Creators' (*Forbes*, 5 August 2024) <https://www.forbes.com/sites/maryroeloffs/2024/08/05/olympic-athletes-work-second-jobs-onlyfans-birthday-party-clown-influencer-ilona-maher/> accessed 14 November 2025; Dale Fox, 'Olympic rower Robbie Manson: 'I'm making more from OnlyFans than I am from rowing'' (*Attitude*, 7 August 2024) <https://www.attitude.co.uk/news/olympic-rower-robbie-manson-onlyfans-471258/> accessed 14 November 2025; Selina Wang, 'Olympic silver medalist Ryo Miyake delivers food for Uber Eats to fund Tokyo 2020 dream' (*CNN Sports,* 24 March 2021) https://edition.cnn.com/2021/03/23/sport/ryo-miyake-olympics-fencing-tokyo-2020-cmd-spt-intl accessed 14 November 2025

[2] Associated Press, 'Global Athletes survey finds Olympic, elite athletes struggling financially' (*ESPN*, 24 February 2020) <https://www.espn.co.uk/olympics/story/_/id/28771036/global-athlete-survey-finds-olympic-elite-athletes-struggling-financially> accessed 14 November 2025

[3] Nicola Newson, 'Status of Workers Bill [HL]' (*House of Lords Library,* 25 August 2021) <https://lordslibrary.parliament.uk/status-of-workers-bill-hl/> accessed 14 November 2025

referred to under the colloquial classification of 'limb b' workers under s230(3)(b) Employment Rights Act 1996.[4] This discussion will focus on two categories: employees and 'limb b workers', noting that whilst all employees are workers, not all workers are employees.

I - THE LEGAL PROTECTION AFFORDED TO EMPLOYEES/WORKERS

Employment law offers tiers of protection, with the highest protection offered to employees. Such rights and benefits include, but are not limited to, wage protection, protection against discrimination and whistleblowing, maternity and paternity leave, and the right to receive paid annual leave.[5] Additional safety requirements necessitate employers, so far as is reasonably practicable, to ensure the health, safety and welfare of their employees at work, including safe premises, equipment and adequate welfare facilities.[6]

To fully understand such protection, one must consider employment law's rationale and underlying principles. It aims to regulate working relationships, safeguarding vulnerable individuals who would potentially be at risk of exploitation, such as being paid too little, required to work excessive hours or be subjected to other forms of unfair treatment.[7] The modern world of work is rapidly evolving, and employment law aims to develop alongside cultural shifts, particularly seen with recent expansions to the breadth of 'limb b workers', moving beyond the paradigm case of employment. Such inclusions were intended "to extend the benefits of protection to workers who are in the same need of that type of protection as employees *stricto sensu*".[8] Therefore, the core underlying principle is a protection of what is inherently an imbalance of power between employers and their subordinates. As explained in *Uber,* "the modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way

[4] Hereby ERA
[5] Predominantly arising under the ERA, with further developments including National Minimum Wage Act 1998; Neonatal Care (Leave and Pay) Act 2023; Working Time Regulations 1998
[6] Health and Safety at Work Act 1974
[7] *Uber BV v Aslam* [2021] UKSC 5 [71]
[8] *Byrne Brothers (Formwork) Ltd v Baird* [2002] ICR 667 [17(4)]

which best gives effect to that purpose."[9] In doing so, Lord Leggatt affirmed earlier dicta that "the ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."[10]

II - THE APPLICATION OF EMPLOYMENT STATUS TESTS TO ELITE ATHLETES

We will now assess whether elite athletes fit within employee status.

EMPLOYEE

1. STATUTE

A few statutes tackle employees, but with minor distinctions, with the generally cited definition lying in s230(1) ERA as an "individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." "A "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."[11]

2. APPLICATION

To ascertain whether the contract is a contract of employment, there is no universally accepted singular test but rather many different possible considerations, whereby all the relevant facts must be assessed holistically to determine the nature of the parties' relationship. Within this, many tools can be used to help elucidate the statutory test, such as "mutuality of obligation", "irreducible minimum", "umbrella contracts", "substitution", "predominant purpose", "subordination", "control", and "integration".[12] The most frequently

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[9] *Uber* [70]
[10] Ibid, referencing Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454 [35]
[11] s230(2) ERA
[12] *Sejpal v Rodericks Dental* [2022] EAT 91[7]

adopted "starting point"[13] is that of *Ready Mixed Concrete* (*RMC*).[14] *RMC* sets out three criteria for a contract of employment. Firstly, the servant agreed in consideration of a wage or other remuneration to provide his own work and skill in the performance of some service for his master. Secondly, the servant agreed expressly or impliedly that, in performance of the service, he would be subject to the control of the other party sufficiently to make him the master and finally, the other provisions of the contract were consistent with its being a contract of service.[15] Whilst this language appears anachronistic, it can be summarised as a mutuality of obligation, control and an exploration of the rest of the contract.

The first two factors are a major focus, as necessary, but not necessarily sufficient, conditions of a contract of employment, whereby a consideration of the cumulative effect of the full factual matrix is required.[16] Further, even once decided that these factors are present, they remain to be considered as relevant factors in the overall assessment, particularly with regards to the extent of control.[17] In reference to athletes, it appears that the major hurdle to overcome is mutuality of obligation, stemming from a mischaracterisation of the nature of sports work. This will be seen in an analysis of *Varnish v British Cycling*,[18] and the ensuing appeal heard by the Employment Appeal Tribunal (EAT),[19] concerning the non-renewal of a podium performance agreement, claiming unfair dismissal and sex discrimination.

(a) Mutuality of obligation

In *RMC*, MacKenna J emphasises that mutuality of obligation includes "wage or other remuneration" as "otherwise there will be no consideration, and without

[13] *HMRC v PGMOL* [2024] UKSC 29 [28]
[14] *Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance* [1968] 2 QB 497
[15] Ibid 515o-d
[16] *PGMOL* [30]
[17] Ibid [32]
[18] *Varnish v British Cycling and UK Sport* [2018] 12 WLUK 591 (hereby *Varnish* (ET))
[19] *Varnish v British Cycling* [2020] EAT 23 (hereby *Varnish* (EAT))

consideration no contract of any kind."[20] This includes a need for the employee to provide *personal* service.

Wage or other remuneration

Athlete income arises from various sources, including sponsorships, government support and prize winnings. Often this income will be indirect, as benefits in kind. In the UK this is estimated to be ~£36-60k per athlete at podium level.[21] Additionally, athletes may receive a conditional and means-tested grant (an Athlete Performance Award (APA)) through an agreement with UK sport. This is framed as a direct payment to athletes as a contribution to their ordinary living and personal sporting costs, with the highest band offered being £28k per annum.[22] When dissecting an athlete's salary, the language of payment (variously described as a stipend, scholarship, award or grant)[23] appears to contribute to a culture of viewing sport separately to work.

The unique and pluralist nature of income sources creates difficulties for courts applying a traditional analysis. This can be seen in *Varnish*, where the Employment Tribunal (ET) stated that there was no wage/work bargain as Varnish did not work in exchange for a wage and neither UK Sport nor British Cycling provided work or paid her.[24] This analysis reveals three distinct but interconnected points; the difficulty of benefits in kind, the mutual nature of work and the variation of payments.

Benefits in kind

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[20] *RMC* 515E
[21] Andrew Smith and others, 'The funding and employment status of elite athletes – A comparison of the UK, USA and Germany' (*LawInSport,* 6 May 2016) <https://www.lawinsport.com/topics/item/the-funding-and-employment-status-of-elite-athletes-a-comparison-of-the-uk-usa-and-germany> accessed 14 November 2025
[22] Smith and others
[23] Leanne O'Leary, Maximilian Seltmann and Vanja Smokvina, 'Elite Athletes and Worker Status,' (2024) 54(2) Industrial law Journal 248, 250
[24] *Varnish* (ET) [139-140]

The ET fundamentally misapprehended the nature of an athlete's bargain and the work provided. The focus was that Varnish did not receive *money,*[25] viewing the APA as a bonus contribution rather than payment. Only much later were benefits in kind discussed, yet they were labelled insufficient and as services rather than remuneration.[26] Whilst the EAT appreciated their existence,[27] they remained firm that they were provided in order for Varnish to train and compete at the highest levels, but were not remuneration for doing so. Their logic was that to conclude otherwise would be akin to saying that the tools given to a person to enable them to do their job were that person's pay for doing it, with an exception for certain tools, such as those that have "an intrinsic value and the parties agree that the employee can earn the right to keep the tools once the job is done."[28]

However, such binary distinction fails to recognise that there is a blurred line between a 'tool' and 'payment', which is only more present in the unique situation of sport, whereby the benefits improve an athlete's body and thus their performance, meaning there is intrinsic value even if lacking tangibility. Furthermore, benefits such as physiotherapy appointments, access to equipment, nutrition etc., are all offered through streamlined services which reduce the cost for institutions overall, instead of requiring them to pay athletes additional income to seek these benefits individually. Furthermore, weight was placed on there being no obligation to reap certain benefits, such as psychological support, with the voluntary nature revealing how these were not awarded in exchange for work or skill.[29] However, to achieve optimal performance and team selection, an athlete would, in practice, be required to utilise all available services. Moreover, the EAT's agreement that it would be highly unusual for payment to be composed entirely of discretionary benefits fails to appreciate that this unique payment method and structure of athletes should in itself be indicative of an employment relationship.[30]

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[25] Ibid [144]
[26] Ibid [168]
[27] *Varnish* (EAT) [54]
[28] Ibid
[29] E.g *Varnish* (ET) [170]
[30] *Varnish* (EAT) [57]

Further comparison can be made to athletes who have been labelled employees, specifically in the football case of *Walker v Crystal Palace,*[31] which reveals an arbitrary legal limit. Varnish attempted to rely on *Walker*, yet it was held that the "mere fact that training done by an athlete in one sport or case was found to comprise work…does not mean that the same must apply to any other athlete who trains hard for the common purpose of achieving success for team or country. To take that approach would be to focus on one factor (training to compete) out of the many that must be weighed and considered in forming an overall picture."[32] Specific focus was given to the fact that the game of football is a "trade".[33] Building on academic criticism, specifically in relation to a need to appreciate the broader environment in which elite athletes provide their services,[34] this appears to create an unprincipled distinction. This can be further revealed when comparing Varnish's cycling career to Tour de France cyclists, where specific club/team contracts exist. In both situations, structurally, the services provided and obligations are the same.[35] Yet one athlete receives sufficient pay and protection, whilst the other does not. The legal test should focus on the nature of the relationship and practical implications, not the commercial popularity of sport. If anything, slower commercial development reveals a greater need for employment law protection.

The nature of 'work'

Furthermore, the focus must be on *mutuality* of obligation. The ET failed to recognise the ways in which Varnish owed obligations to the relevant bodies. A particular lack of focus was placed on external elements of training, such as media or press appearances, which only received two paragraphs worth of attention,[36] and only focused on the guidelines and commercial restrictions, rather than appreciating that an athlete, in representing their respective

[31] [1910] 1 KB 87
[32] *Varnish* (EAT) [46]
[33] Ibid [45]
[34] O'Leary, Seltmann and Smokvina, 271-272
[35] Ibid, 269
[36] *Varnish* (ET) [226-227]

institution(s), is actively serving in a promoter role.[37] This requires one to understand the shifts in the sports industry, which has led to increased performance expectations and thereby, increased time spent training, competing, and fulfilling external obligations such as media.[38] This work directly benefits sporting institutions, drawing attention that results in increased opportunity for funding and income, benefitting from athletes' branding and performance. Underpinning this is the fact that the current view of sports work fails to align with professional guidance.[39]

Variation of monetary awards

Varnish's awards and methods of payment were not only varied, but varied on an assessment of future potential,[40] which is unlike conventional wages.[41] This difficulty could be reframed. The level of past efforts, such as performance in training and competitions would directly impact an assessment of future potential, albeit perhaps not in a uniform fashion. This reveals the complexity of sport assessments, compounded by natural non-linear athletic progression. Regardless, a general causal relationship between past work and benefits remains. Thus, *Varnish* appears to rely on circular reasoning. She was training in 'hope' of selection, yet the selection was contingent and directly impacted by the result of her training, thereby creating a continuous, reciprocal relationship that enforced mutual obligations. In order to continually be considered for awards and selection, Varnish was compelled to train and develop, with the provision of training support and services being directly dependent on this essential input. It is more than merely an incentive or encouragement to facilitate training and personal performance. If she did not meet these obligations, selection for a national Olympic team (being dependent on national federation selection) would not be possible. In this sense, the variation of monetary awards could directly support her employee status, as it reveals her dependency on these bodies.

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[37] O'Leary, Seltmann and Smokvina, 271-272
[38] Ibid, 267
[39] Ibid, 267-271, focusing on the International Labour Organisation and the Centre for Sport and Human Rights White Paper on Child Labour in Sport: Protecting the Rights of Child Athletes (White Paper)
[40] *Varnish* (ET) [147]
[41] Ibid [148]

Personal performance and substitution

Mutuality of obligation also requires work to be done by the individual, rather than allowing for the employee to substitute themselves for another. Returning to *RMC,* Mackenna J states that "freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service", with the key qualification being that "a limited or occasional power of delegation may not be."[42] Athletes cannot delegate their work, be it at a training, media or competition level. However, when this was applied in *Varnish*, the ET used its previous conclusion that there was no performance of work to detract from Varnish's personal performance. Rather, "she was personally performing a commitment to train in accordance with the individual rider agreement".[43] This reveals the interaction between the different stages of reasoning, whereby such personal commitment is essentially neutralised by an earlier discussion of work.

(b): Control

MacKenna J in *RMC* expanded on control, stating that it "includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant."[44]

The level of required control for employment status has been considered afresh by the Supreme Court in *PGMOL*,[45] concerning football referees. It was held that sufficient control consistent with an employment relationship may take many forms and is not confined to the right to give direct instructions to the individuals

[42] *RMC* 515
[43] *Varnish* (ET) [157]
[44] *RMC* 515
[45] *HMRC v PMGOL* [2024] UKSC 29

concerned,[46] or the right to intervene in every aspect of performance.[47] Notably, this case has been remitted to the First Tier Tribunal to decide whether the referees were under a contract of employment, leaving the state of the law in a position of "unacceptable" uncertainty.[48]

This may signal a promising development in the law, considering how athlete contracts incorporate strict terms addressing their location, schedule, training, conduct-requirements, essentially spreading into all areas of their life. This can be contrasted with the approach of the ET in *Varnish*, which likened the athlete-coach relationship to that of a parent and their child in youth.[49] It is likely that, with the development in *PGMOL*, it would be easier to point out the presence of control in athlete-coach relationships by making reference to the practical reality and long-term relationship of trust and dependence. In particular, whilst a parent indeed asserts control over, for example, their child's bedtime, they provide a level of safety and security which is lacking for athletes, evidenced by the immediate effects of non-renewal. It fails to appreciate the convoluted athlete-coach relationship, whereby the coach benefits from the athlete's performance as it appears to be a direct reflection of their skill. Furthermore, there is the political aspect to coaching, whereby the athlete is dependent on the coach's input and attention to continue to be selected, with this likely being connected to the high frequency of coaches abusing their power. With this consideration, the ET focused on Varnish's ability to have her own coach,[50] failing to appreciate the potential distrust or relational impact that this decision could have.

(c) Terms of contract generally

[46] Ibid [76]
[47] Ibid [69]
[48] Hugh Collins and Judith Freedman, 'Employment Status: The Death Throes of the Tests of Mutuality of Obligation and Control,' (2025) 54(1) ILJ 161, 170
[49] *Varnish* (ET) [86]
[50] *Varnish* (ET) [100]

The third condition in *RMC* is broad and unspecific, yet in practice simply requires one to take a step back to look at the whole contract, alongside any other relevant circumstances,[51] to ascertain the true agreement, going beyond standard contract principles.[52] In *HMRC v S & L Barnes Limited*,[53] considering whether a rugby pundit was employed under disguised employment, it was held that no single factor is decisive and no exhaustive list can be compiled.[54] Nonetheless, specific factors were listed as consistent with a relationship of employment, with those most comparable to *Varnish* relating to contractual obligation to perform services individually without a right of substitution and the need for written consent to engage in new commercial activities.[55]

This section offers the argument that the tribunals and courts currently may be adopting a hyper-focused approach on monetary payment and too narrow an appreciation of the true scope of an athlete's job.

Although Varnish did not succeed in her claim as an employee, the EAT did provide a statement that brings a glimmer of hope, especially in light of any errors of the ET being only errors of fact, rather than law. The EAT stated that this "does not mean that in another case, where perhaps the contractual provisions, and the balance between services provided to and performed by the athlete, are different, the training done by a cyclist [and presumably any athlete] could not be found to amount to work."[56] Perhaps a better understanding of the law may allow athletes to ensure that the agreements they enter into with their sporting bodies confer employee status in order to enjoy the protections that come along with it. Alternatively, this may be accelerated by promoting and focusing instead on social change, encouraging greater athlete protection within existing contracts, such as guaranteed pay.

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[51] Collins and Freedman, 164
[52] *Autoclenz Ltd v Belcher* [2011] UKSC 41, specifically [35]
[53] [2024] UKUT 00262 (TCC)
[54] Ibid [108]
[55] Ibid [117]
[56] *Varnish* (EAT) [49]

WORKERS ('Limb (b) workers')

We will now consider whether athletes can be protected under the category of workers. Workers are defined by a looser need for control and mutuality of obligation, connecting to the lesser statutory protection, such as no protection against unfair dismissal, no statutory redundancy pay and no parental leave.[57] This category has seen various expansion recently as the working world has expanded to meet growing atypical labour patterns. However, "the dust is beginning to settle", with the determination of worker status not being "very difficult in the majority of cases, provided a structured approach is adopted, and robust common sense applied."[58]

1. STATUTE

Under s230(3) ERA 1996 a worker is:

"an individual who has entered into or works under (or, where the employment has ceased, worked under) —

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual".

2. APPLICATION

<u>The Development of *Uber*</u>

[57] For a brief summary, and for more information, see Gov.uk 'Employment Status' ('*Gov.uk*') <https://www.gov.uk/employment-status/worker> accessed 10 November 2025
[58] *Sejpal* [7]

Although *Varnish* was denied worker status, we consider whether the subsequent Supreme Court case of *Uber* could signal a positive development in the law for athletes.[59] In *Uber*, worker status was awarded to Uber drivers, demonstrating a "major victory" to workers within the gig economy.[60]

Firstly, the obvious differences must be noted. Gig workers generally provide services to end customers, often on a task-by-task basis and often over online applications.[61]Athletes are not working via online platforms, nor are they explicitly providing a result to end customers in the same way that Uber drivers bring clients to their destination. Uber drivers offer a standardised service which leads to drivers being perceived as substantially interchangeable from Uber, with Uber, rather than the drivers, obtaining this benefit.[62] Whilst athletes represent their national federations and sporting institutions, with restrictions on the way they must present themselves, they remain markedly unique.[63]

Dependency and subordination

Nonetheless, the dependence and subordination of an athlete to sporting bodies mirrors the control exerted in the gig economy, since both bodies rely on the performance of the individual for personal gain. Both types of individuals have limited control over their working conditions, and both are often on short-term, unstable contracts. Thus, whilst integration into a business and subordination is not a freestanding and universal characteristic of being a worker,[64] such integration and the inability to market personal services to anyone else gives rise to dependency on a particular relationship which may also render an individual vulnerable to exploitation.[65]

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[59] O'Leary, Seltmann and Smokvina, 272-273
[60] Harvard Law Review, 'Recent Case: *Uber BV v. Aslam*' (*Harvard Law Review*, 8 March 2021) <https://harvardlawreview.org/blog/2021/03/recent-case-_uber-bv-v-aslam_/> accessed 9 November 2025
[61] Patrick Brione, 'Atypical workers in the gig economy' (*House of Commons Library,* 16 July 2024) <https://commonslibrary.parliament.uk/atypical-workers-in-the-gig-economy/> accessed 14 November 2025
[62] *Uber* [101]
[63] Although one must note that sporting bodies are positionally placed to take advantage of the marketability of individual athletes
[64] *Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32 [39]
[65] *Uber* [74]

Financial skill and risk

Consequently, within *Uber*, a focus was on the fact that Uber drivers had "little or no ability to improve their economic position through professional or entrepreneurial skill," whereby their only way to improve was to work longer hours.[66] A strong indication of self-employment and factors that point away from employment status is financial risk, connected to the regular payment and payment protection offered to employees (such as sick pay). This goes back to *RMC* which considers where ownership of assets lies (i.e. does the employee or employer own the tools) and who bears the chance of profit and/or risk of loss.[67]

Whilst athletes can improve their economic position directly from their athletic performance, such as external sponsorships (with this being exactly what Varnish did, earning £35k/annually[68]), this does not defeat the dependency on national federations. Sporting bodies enjoy "extraordinary autonomy",[69] internal procedures,[70] and monopoly power under the "one-federation principle",[71] all of which acts against athlete protection.[72] In fact, I argue that the ET afforded too much weight to Varnish's relatively moderate level of external success, especially considering that this success was directly connected to her ability to perform and train as dictated by the relevant sporting bodies. Moreover, the assets and tools (such as training facilities) are all necessarily provided by such sporting institutions. Potentially the chance of profit and risk of loss lies in the athlete as only they individually compete, but one must consider the wider instability of athletes. This is demonstrated in *Varnish,* where the non-renewal effectively ended her competitive career, with this risk of loss lying outside of her control. Furthermore, such bodies incorporate strict media restrictions, which can harm

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[66] Ibid [101]
[67] *RMC* 520-521
[68] *Varnish* (ET) [76]
[69] Margareta Baddeley, 'The extraordinary autonomy of sports bodies under Swiss law: Lessons to be drawn' (2020) 20 ISLJ 3
[70] As specifically noted in *Varnish* (ET) [216], although caveated due to member application
[71] Jacob Kornbeck, 'What Can Sports Governing Bodies do to Comply with EU Antitrust Rules While Maintaining Territorial Exclusivity?' (2020) 20(3–4) ISLJ 203
[72] O'Leary, Seltmann and Smokvina, 251

an athlete's sponsorship potential, seen most vividly with the operation of Rule 40 in the Olympics.[73]

No irreducible minimum

Outside of *Uber*, the recent development in *Nursing and Midwifery Council,*[74] as applied in *Sejpal,*[75] has developed the concept of an irreducible minimum of obligation. Mutuality of obligation goes principally to whether there is an agreement, as fundamental to establish the existence of a contract,[76] but the Court of Appeal has clarified that "there is no need and no purpose served, in seeking to introduce the concept of an irreducible minimum of obligation" (in the sense of a minimum amount of work).[77] In *Varnish*, the ET expressed hesitancy as to whether "mutuality of obligation is required as a distinct element under limb (b)."[78] They then proceeded to state that if mutuality is required, then, using the prior reasons "in relation to whether the claimant was an employee…there is no mutuality of obligation".[79] However, the earlier analysis hinged on the idea of an irreducible minimum.[80] Moreover, the ET stated that if "there is some minimum amount of work that the claimant is obliged to perform personally", then Varnish would fail this test as well.[81] Ultimately, this demonstrates the force in the idea that if *Varnish* were decided today, in light of such developments, it would likely be decided differently.

Statutory rationale

Finally, there is a need to move to a wider consideration of statutory purpose and Parliamentary intention. Throughout this discussion, I have revealed the economic dependency of athletes and their weaker bargaining position. One

[73] Mike Morgan, 'Rule 40 - An affront to athlete rights' (*Morgan Sports Law,* 4 May 2016) <https://www.morgansl.com/en/latest/rule-40> accessed 14 November 2025
[74] *Nursing and Midwifery Council v Sommerville* [2022] EWCA Civ 229
[75] *Sejpal* [25-27]
[76] *Sejpal* [23]
[77] *Nursing and Midwifery Council* [48]
[78] *Varnish* (ET) [239]
[79] Ibid [241]
[80] E.g. ibid [136-137]
[81] Ibid [242]

must appreciate the absence of independent athlete organisations advocating for worker status, paired with general governmental reluctance to interfere with sport, all of which results in a sector organised in favour of the interests of those with greater power.[82]

Without employment law protection, athletes such as Varnish are unable to achieve any recompense for actions that adversely impact their careers. Varnish's only alternatives would be to appeal the decision, or to try and bring a claim under the Equality Act 2010, with this carrying significantly less protection.[83] Such difficulty is further seen in a lack of health and welfare protection, with rising focus on impact sports and mental health. Currently, such issues are dealt with through negligence,[84] or as direct criminal/tortious abuse.[85] However, there is a high threshold to be met, with particular lack of protection in non-fault-based injuries or illnesses (i.e. overuse injuries), which would be covered under employment law, as demonstrated through a footballer's disability discrimination claim on the basis of non-selection following a cancer diagnosis.[86]

III - CONCLUSION

With respect to employee status, we have seen that the tribunals currently may be adopting a hyper-focused approach to monetary payment and too narrow an appreciation of the true scope of an athlete's job. With respect to worker status, we have seen how the decision in *Uber* may pave the way for a *Varnish*-like case to be decided differently by the ET now. Crucially, the application of employment labelling is not a necessary prerequisite for increased protection. It remains in the power of national bodies to develop appropriate wage protection, sick pay or

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[82] O'Leary, Seltmann and Smokvina, 275
[83] Henry King, 'Case comment: Varnish v (1) British Cycling (2) UK Sport (Employment Tribunal, 16 January 2019)' (*12KBW*, 7 February 2019) <https://12kbw.co.uk/case-comment-varnish-v-1-british-cycling-2-uk-sport-employment-tribunal-16-january-2019/> accessed 14 November 2025
[84] Bringing with it the typical notion of duty of care, breach and damage caused by breach
[85] With a specific development of coaches now being placed in positions of trust under criminal law, therefore coming within the scope of Sexual Offences Act 2003
[86] *Jonas Gutierrez v Newcastle Utd* (ET, 2016)

sufficient safety measures. However, the law must remain cognisant of the potential for powerful monopoly bodies to be driven by capitalism.

Athletes live unique lives within a rapidly evolving market, affected by mass commercialisation, globalisation and technical advances. Certain facets of athletes' lives and the agreements they make with their sporting bodies may create difficulties under the current tests of employment, even at the more discretionary worker stage. However, in light of recent authorities, there remains a genuine possibility for athletes to achieve either employee or worker status.

Unreasonable risks: The overlooked element of recklessness in the English criminal law

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I – INTRODUCTION AND BACKGROUND

The current definition of recklessness in criminal law, as adopted by Lord Bingham in *G and R,* is that a person is reckless in respect of a result when "[1] he is aware of a risk that it will occur, and [2] it is, in the circumstances known to him, unreasonable to take the risk".[1] The first element of this definition was subject to much judicial and academic debate following *Caldwell*.[2] However, the second requirement – that the risk be an unreasonable one to take – has not received significant attention, aside from its inclusion by the Law Commission in the definition adopted by Lord Bingham and the earlier brief allusion to it in *Stephenson*.[3] This is understandable: in common scenarios where a defendant does an act with a high risk of causing serious injury or damage, the risk is plainly an unreasonable one and so the point does not need to be addressed before an appellate court or when directing a jury.

This article argues that the 'unreasonable risk element' is vital to understanding the concept of recklessness and has important implications for the distinction between recklessness and intention. It also draws attention to several scenarios (sports injuries, horseplay, and everyday touching) where the unreasonable risk element arguably *is* operating to negate criminal liability, albeit without this analysis being explicitly adopted by the courts.

Before addressing those scenarios, it is worth setting out a classic hypothetical which clearly explains that not all foreseeable risks are reckless. Following *Ireland*, causing another person to develop a recognised psychological condition is capable of constituting an offence against the person.[4] Suppose I am in a relationship with a partner who I know to be in some way emotionally vulnerable, and foresee that if I break up with him, he is likely to develop a recognised psychological condition.[5] Am I guilty of a reckless offence against the person if I

[1] [2003] UKHL 50, [2004] 1 AC 1034 [41] (Lord Bingham)
[2] [1982] AC 341 (HL)
[3] [1979] QB 695 (CA) 703 (Geoffrey Lane LJ)
[4] [1998] AC 147 (HL)
[5] I take this example from a revision class given by Trenton Sewell.

end the relationship? The intuitive answer is probably not, and the way to reason this is that, even in these circumstances, breaking up with a romantic partner is something which is reasonable to do. Perhaps not everyone will share this intuition in the case of an excessively aggressive or vindictive way of ending the relationship, but this illustrates the usefulness and flexibility of the reasonable risk approach: there is room to disagree about *which* risks are reasonable to take in which circumstances, but the basic framework is clear. It would therefore be open to a jury or magistrate to conclude that a careful, respectful break-up which led to psychological harm was a reasonable risk to take (and so the individual is not criminally liable), but that a break-up in different circumstances unreasonably risked the other person's psychological health.

II – IMPLIED CONSENT: THE CASE FOR REINTERPRETING SPORTS INJURY CASES

Continuing to focus on the law of offences against the person, one problem encountered by the courts is that of sporting injuries. Frequently the players of professional and amateur sports (especially contact sports) inflict injuries on each other that are, in themselves, no doubt serious enough to fit within the scope of the criminal law. The question is essentially a line-drawing exercise: when do such injuries lead to criminal liability, and when are they permissible as part of their sport context?

In *Barnes*, Lord Woolf CJ made clear that the boundaries of acceptable conduct were not determined solely by the rules of the game: injuries inflicted outside the rules, especially in the 'heat of the moment' would not necessarily lead to criminal liability.[6] Instead, the threshold for criminal liability depends on various relevant factors including: "[t]he type of the sport, the level at which it is played, the nature of the act, the degree of force used, the extent of the risk of injury, the state of mind of the defendant".[7] It is notable that, aside from the last factor (the

[6] [2004] EWCA Crim 3246, [2005] 1 WLR 910 [15]
[7] Ibid

defendant's state of mind),[8] all of these factors fit very naturally into an assessment of 'reasonableness in the circumstances'.[9]

However, the reasoning in *Barnes* (and other sporting injury cases) was based on implicit consent as the route to negating criminal liability, rather than being directly based on the reasonableness of risks taken. The implicit consent approach is workable in the sports context, but there are several reasons to suggest that a more direct approach based on the unreasonable risk element would be preferable here.

Constructed consent and the ability to withdraw

Firstly, even if there is intuitive appeal in the idea that, by taking part in sporting activity, players genuinely do consent to the risk of some harm, it is clear that the *boundaries* of this consent[10] are entirely constructed by the court. Lord Woolf's suggested factors of relevance mostly speak to *external* attributes of the game, rather than the internal state of mind of the victim. That is not to downplay the extent to which the external circumstances do affect what the victim (subjectively) consents to: if I take part in a very relaxed amateur football game, it is unlikely that I anticipate or consent to aggressive and risky tackles one might expect in professional sport. To put the point at its lowest, however, a direct unreasonable risk approach is no *worse* practically than consent: it too can take into account these concerns, as part of the circumstances against which the reasonableness of the risk is to be judged. One point about the nature of this

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[8] It is interesting to speculate on the implications of considering the defendant's state of mind as a relevant factor: perhaps the effect is to make the *awareness* of risk element of recklessness less of a binary than it might seem. Alternatively, Lord Woolf may simply be referring to the need to decide whether the infliction of an injury was in fact intentional.

[9] See, for instance (albeit in the tort context) *Tomlinson v Congleton Borough Council* [2003] UKHL 47, [2004] 1 AC 46 [34] (Lord Hoffmann)

[10] It might alternatively be argued that Lord Woolf is not defining the boundaries of the (implicit) *consent* but rather defining the boundaries of the 'lawful sport' category. Although this approach can derive a great deal of support from Lord Woolf's phrasing, the problem is that to negative liability, the facts must fall within the category *and* there must in fact be consent. This consent must come from a presumption that players, by taking part in lawful sports, consent to all risks exactly up to the point that the conduct stops being lawful sport. This means that even if Lord Woolf was purporting to set out the boundaries of lawful sport, he was in practice also setting out the boundaries of the *actual* consent.

standard is worth noting at this stage. For example, Lord Woolf notes in *Barnes* that conduct justifying "a warning or even a sending off" will not always be criminal.[11] It might *seem* that such conduct is 'unreasonable' in a common sense understanding of the word, but the question is whether it is *legally unreasonable*, on the *standard* set by this area of criminal sporting law, which might directly mirror what Lord Woolf says here.[12] In this context the unreasonable risk approach can therefore achieve everything implied consent can. The unreasonable risk approach has the benefit, however, of 'cutting out the middleman' and being more honest about the reasons for affirming or negating liability: the court is deciding what is acceptable in the context of the game.

Where implied consent arises as a construction of the court, it is also unclear the extent to which the potential victim can withdraw this consent.[13] Certainly, it would not be effective for a football player silently to decide that he no longer consents to the risk of being injured in a tackle, and in fairness, this situation can be dealt with by some concept of awareness (or belief) of consent: unless the withdrawal of consent is communicated, it is fair for other players to assume the consent persists. But even so, it is not obvious how directly effective a player's communication modifying his 'implied consent' will be in the eyes of the criminal law. If I join a high-stakes amateur football match but announce to the other players beforehand 'take it easy on me; I don't consent to any risks of harm', it is not clear whether this will be effective if I am ultimately injured by someone taking a risk. Perhaps this withdrawal *would* be factored in. But either way, the reasonable risk analysis can deal with the situation by addressing whether the announcement has sufficiently changed the *circumstances* of the game in such a way as to render taking the risk unreasonable. This is more flexible and more reflective of the actual considerations the court will have to take into account.

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[11] [2004] EWCA Crim 3246, [2005] 1 WLR 910 [15], as referred to above in relation to the 'heat of the moment'.

[12] This is a normal and workable feature of the law's use of 'reasonableness', as seen frequently in tort law: on the facts of *Nettleship v Weston* [1971] 2 QB 691 (CA), it might seem 'reasonable' by common sense for an inexperienced learner driver to make mistakes, but the *legal* standard applied is different.

[13] See, albeit in the everyday touching context Jonathan Herring, Criminal Law (13th edn, OUP 2023), 102

The category approach: not just consent

The second difficulty is the fact that consent is now not always capable of negating liability for actual and serious bodily harm, following the decision in *Brown*,[14]. To negate liability in a particular situation, it seems the law requires both consent and a *reason why that consent should be operative*. What has emerged is a system of categories delineated by subject matter, which to some extent derive from a general test of public interest, but in practice simply exist as instances where the courts have decided consent is sufficient.[15] A full assessment of the category approach is beyond the scope of this article, but the point to be made here is that in the sports context, where the courts are dealing with reckless injuries,[16] it would again be simpler and easier to 'cut out the middleman' and recognise the unreasonable risk element as capable of replacing the role of consent. Although justifying sports as a category where consent should be valid is trivial,[17] there is a great simplicity in avoiding the thorny question entirely.

Clearer boundaries with the unreasonable risk element?

As noted above, the main reason that the unreasonable risk element is apt for the sports context is that the factors used to determine the boundaries of implied consent align almost directly with the factors relevant to assessing the reasonableness of a risk. This raises the question of whether the unreasonable risk element actually provides clearer boundaries than an analysis based on consent. The starting point is again to put the point at its lowest and highlight that the reasonable risk analysis is at least *no less clear* than constructed

[14] [1994] 1 AC 212 (HL)
[15] See the observations in *BM* [2018] EWCA Crim 560, [2019] QB 1 [38]-[41] (Lord Burnett CJ), where the court resolved not to recognise new categories by reference to any wider principle, but rather develop the law only by analogy to existing ones. Although at [40] the court identified two aspects "which appear to underpin almost all of the exceptions" (social benefit and unreasonable to criminalise the activity), it is clear that there is no test against which each individual set of facts can be tested. The categories are, to all intents and purposes, fixed.
[16] For present purposes, this excludes boxing or any other activity where the infliction of harm is intentional, on which see Section IV below.
[17] Lord Woolf referred in *Barnes* at [11] to the obvious public policy merits.

consent, if broadly the same factors are being assessed. The benefit, then, lies in the law being transparent about *where* these factors come from (as also noted above).[18] This should make the line-drawing exercise easier for finders of fact because it avoids confusion deriving from vague assertions about what the victim probably consented to. Where the goal is to establish that a risk was objectively reasonable to take, arguments about the boundaries of acceptable play will be forced to point clearly to *concrete facts* about the circumstances which justify the conduct. By contrast, if the goal is to prove that the victim impliedly consented to the particular conduct, there is a risk of appeals to largely irrelevant thoughts that may have been part of the victim's state of mind.[19] The unreasonable risk approach therefore does not guarantee clearer boundaries *per se*, but it helps to focus the inquiry.

Focusing on the core of the wrong

A final benefit of basing the analysis of sports cases on the unreasonable risk element (and of focusing on the unreasonable risk element more generally) is that it focuses the recklessness inquiry on the element which is the core of the wrong. Where I take the risk of a prohibited consequence (such as causing actual or serious bodily harm to a fellow football player), that prohibited consequence is intuitively the *basis* for describing the conduct as criminal. The link, therefore, between my mental state and the prohibited consequence is the fact that I am (1) aware of the risk and (2) on the facts as I understand them, it is unreasonable (read: wrong) for me to take the risk. If we set aside the subjective awareness requirement, the wrong *is* that of taking an unreasonable risk. If I am unaware, or

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[18] See the text to footnote 10 above: even if Lord Woolf is setting out the boundaries of 'lawful sport', the factors must relate to the extent of the implied consent *itself* as well. The point is that the courts will explain whether particular conduct is reasonable in the sporting context by reference to a wide range of factors. Simply explaining that these factors point to the behaviour being 'lawful sport' is less clear in explaining *why* it is acceptable to injure others as part of lawful sport.

[19] An interesting point surrounding the need to prove a lack of consent in the sexual offences context is made by Jonathan Herring and Sorcha McCormack, 'Reframing rape: from consent to responsibility'. Gender and Justice, Bristol University Press, 2025. They argue (Section 6 in particular) that consent as a matter of fact unjustly puts the 'spotlight' on the victim, leading to traumatic trials and spurious defences being raised, and that instead the concept of reasonable belief in consent (which focuses more on the defendant) should entirely replace factual consent.

I make a mistake of fact,[20] that may stop me from being criminally liable, but the *wrong* still exists. The unreasonable risk analysis is best at locating that wrong. There is a slight caveat to this analysis deriving from the fact that many offences, including (famously) s.47 and s.20 Offences Against the Person Act 1863, are constructive: they do not require recklessness relating to the actual level of harm that is risked, but rather recklessness relating to a lesser harm.[21] What constitutes the wrong in the mental element of the offence is the unreasonable taking of the *risk of the lesser harm*.[22] The unreasonable risk approach is not undermined by the fact that, if a more serious result does occur, the offence is upgraded to a more serious one without any further *mens rea*.

This is clear in the sports context when we make a comparison to the tort context, where the assessment of fault admits no subjective element. In the recent case of *Elbanna v Clark*, the Court of Appeal confirmed that a finding of fact that the defendant was 'reckless' (in the context of a sporting tackle) entailed a finding of negligence.[23] Although, as the court emphasised, the proper terminology in tort cases is negligence, the finding is significant because it confirms that the *idea* of recklessness (purely as a matter of terminology) is unreasonable risk-taking. This may be obvious, but it highlights how the criminal law's longstanding debates over subjective and objective recklessness have somewhat obscured this core idea. Nicola Davies LJ said in *Elbanna* that recklessness in the tort context was a "higher and more stringent" test than

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[20] See Section III below on mistakes of fact

[21] *Parmenter* [1992] 1 AC 699 (HL)

[22] Note that the amount of harm *actually foreseen* might be relevant to the reasonableness analysis (alongside other factors): if I do an act which I perceive as risking only minor harm, this risk could be reasonable in appropriate circumstances, and the fact that more serious harm unluckily results makes no difference. The risk was reasonable and so I lack *mens rea*. It is not a problem for the analysis that, were the risk unreasonable to take, the label (and penalty) of the offence I would be convicted of would reflect more than the minor harm foreseen. That said, the issue is, admittedly, messy: this analysis would appear to take a lot of the 'bite' out of constructive offences when we consider that the facts on which the reasonableness assessment is to be based are to be taken (at least in theory) entirely as the defendant perceived them to be. This is an inevitable tension between strongly subjective recklessness and constructive liability, solved in practice by the fact that the situations which justify risking even minor harm are relatively limited, and such justifications rarely succeed in circumstances where major harm is in fact risked (even without taking the actual risk of major harm into account). One such rare situation is horseplay, for which see Section III.

[23] [2025] EWCA Civ 776 [24] (Nicola Davies LJ)

negligence,[24] and it is possible to understand this as either a statement that recklessness is an unreasonable (negligent) risk *plus* a subjective mental state as to that risk (irrelevant in tort) or that recklessness implies a *more* unreasonable risk than mere negligence. Either way, the central element of the linguistic description 'reckless' is the unreasonable risk.

III – PUSHING THE BOUNDARIES: THE HORSEPLAY CASES

Another situation, in many ways not too distant from sport, where the law uses implied consent but might be aided by unreasonable risk analysis instead, is that of horseplay. In *Aitken*, the Court Martial Appeal Court quashed the convictions of RAF officers who, as part of an extended session of horseplay, unintentionally caused a fellow officer serious harm by setting fire to his fire-resistant suit.[25] The basis for this finding was that the victim's presence in the activities was capable of constituting implicit consent to the risk, in the defendants' honest belief, and that this was sufficient to negate liability,[26] referring to the earlier case of *Jones*.[27] Again, instead of directly using consent analysis, it would be possible to say that in the circumstances of horseplay amongst seemingly-willing participant RAF officers, the risk was a reasonable one to take. This, however, raises two important points surrounding consent and reasonable risks.

Honest yet unreasonable beliefs

Possibly the most controversial aspect of *Aitken* is the finding that genuine proof of an *honest yet unreasonable* belief in consent is sufficient to negate liability for an offence against the person in the horseplay context. This approach to the issue of mistake is a clear feature of the common law, as emphasised in the House of Lords decision in *K*,[28] and it is only in the context of legislation such as the Sexual Offences Act 2003 that this position is now explicitly altered. If we

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[24] Ibid
[25] [1992] 1 WLR 1006 (CMAC)
[26] [1992] 1 WLR 1006 (CMAC) 1018 (Cazalet J)
[27] (1986) 83 Cr App R 375 (CA)
[28] [2001] UKHL 41, [2002] 1 AC 462

analyse reckless horseplay through unreasonable risk analysis instead, does this position change? The simple answer is that it does not. The definition of recklessness adopted by Lord Bingham in *G and R* is clear that the objective question of whether a risk is reasonable to take is assessed *on the facts as the defendant believed them to be*.[29] If the defendant perceives a participant to be more willing and comfortable in a horseplay situation than the participant in fact is, this mistake will be taken into account in the defendant's favour.[30] There is, however, a subtle beneficial difference in that the unreasonable risk analysis is less binary than consent. If a victim must either have consented or not consented, it is easy for the defence (unjustly) to assert even a remote possibility that the defendant simply *thought* the victim consented, leading to an all-or-nothing situation. By contrast, the unreasonable risk analysis adverts the jury to a slightly wider range of factors in the defendant's belief which they may be able to assess more carefully.

The 'moral magic' of consent

The second big question raised by *Aitken* and the other cases is why horseplay has been recognised as a category where consent is effective in negating liability. An explanation based on the public interest (if that is the best principle available) is not obviously convincing. This issue highlights a question of how exactly consent itself fits into the proposed unreasonable risk analysis, which has largely been ignored by this article up to this point. One option would be to say that, as a general rule, a risk is reasonable to take in the circumstances if (1) the victim consents and (2) something else about the circumstances (for example, whether the situation fits into a recognised sporting or horseplay context). This approach would do very little in terms of re-analysing the existing law but adopting it would be to assert the 'moral magic' of consent. That is to say, the analysis would afford the concept of consent the privilege that *it and only it* is capable of converting some types of criminal conduct into non-criminal conduct.

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[29] [2003] UKHL 50, [2004] 1 AC 1034 [41] (Lord Bingham)

[30] This is assuming there is no self-induced intoxication, which probably alters the honest mistake analysis: *Richardson and Irwin* [1999] 1 Cr App R 392 (CA)

This approach is not, however, the best way to explain the unreasonable risk concept, and this arguably tells us something about the nature of consent.

Instead, the position argued for is the following: although the 'categories of consent' that have arisen in the English case law may have some overarching basis in reasonableness, consent is *not powerful enough* to facilitate a general formula of the form 'consent plus something else equals reasonable'. Consent, rather than a magic binary which, if present, has intrinsic value, is instead a combination of various factors which *themselves individually* have weight in the reasonableness analysis. This is clear in the sports context, where implicit consent is constructed out of some of these factors, but may apply more generally. The factors part of consent might include the relevant situations (for instance, age, acquaintance) of the other participant(s) in the activity, the context, and (most obviously) the extent to which other participant(s) appear to be willing. The benefit of analysing (at least) the sports and horseplay scenarios through the unreasonable risk element rather than consent directly is that this rightly denies consent a role as a single, binary concept. Attention is focused more widely on all the relevant factors, and so, for instance, critics of the current law of horseplay can argue that it is unreasonable to take serious risks in these circumstances, perhaps particularly where children are involved.[31]

IV – EVERYDAY TOUCHING AND THE ISSUE OF INTENTION

A further situation of non-liability which the unreasonable risk element of recklessness can begin to explain is the accidental touching that often occurs in everyday life. If I rush onto a busy train, I may well foresee brushing past and coming into physical contact with other passengers. I am clearly not guilty of battery, and one way to explain this is to say that the risk of touching other people is no doubt a reasonable one to take in the circumstances.

[31] As was the case in *Jones* (1986) 83 Cr App R 375 (CA)

Everyday touching was addressed in *Collins v Wilcock*,[32] where the Divisional Court recognised "a broader exception [to battery] to allow for the exigencies of everyday life".[33] Goff LJ noted one way to analyse this exception was through implied consent: presence on a train or at a supermarket (for instance) entails accepting the risk of some accidental touching.[34] The problems with this approach broadly mirror those identified above in the sports context:[35] the boundaries of the implied everyday consent seem to be more a construction of law than a conscious choice by potential victims, and it is not always clear that individuals can withdraw their consent to everyday touching.[36] An alternative approach Goff LJ noted was to say that everyday touching simply lies outside the scope of battery.[37] This avoids the implied consent difficulty, but encounters the conceptual problem that what is acceptable depends on the *circumstances*,[38] and so it is not the case that a particular type of physical intrusion is *inherently* excluded from the bodily autonomy rights protected by battery law. An analysis based on what is reasonable in the circumstances would appear to fit better.

However, the everyday touching examples also highlight a key shortcoming of focusing on the unreasonable risk element: the analysis can only apply to cases of *reckless* offending. An example of everyday touching explicitly recognised as lawful in *Collins v Wilcock* was "touching a person for the purpose of engaging his attention"[39] such as tapping someone gently on the shoulder. This touching is intentional rather than reckless and so it is impossible to say that liability is negated because a reasonable risk has been taken.[40] The analysis also fails in the context of intentional harms in sport, for example, such as boxing. The

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[32] [1984] 1 WLR 1172 (DC)
[33] [1984] 1 WLR 1172 (DC) 1177 (Goff LJ)
[34] Ibid
[35] See Section II above
[36] Jonathan Herring, *Criminal Law* (13th edn, OUP 2023), 102
[37] That is, it "fall[s] within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life": [1984] 1 WLR 1172 (DC) 1177 (Goff LJ)
[38] [1984] 1 WLR 1172 (DC) 1178 (Goff LJ)
[39] [1984] 1 WLR 1172 (DC) 1177-8 (Goff LJ)
[40] Unless we take an extremely narrow view of what constitutes intention and suggest that if I tap you on your shoulder to get your attention, I 'intend' only to get your attention, and merely 'risk' touching you. Such a view might derive some support from *Steane* [1947] KB 997 but is realistically untenable in that it confuses intention with motive.

unreasonable risk element therefore cannot fully replace the concept of consent or the rules surrounding everyday touching. Nevertheless, understanding the true operation of the unreasonable risk element in the recklessness contexts highlights valuable points about the difference between intention and recklessness.

If we assume for practical purposes that the core idea of intention is factoring a consequence into one's plan or goal,[41] we can build a distinction between intended consequences and recklessly risked consequences. For instance, if it is my plan to cause a prohibited consequence (and do in fact cause it), the intention means that I am inherently mentally linked with this prohibited consequence. That is not to say that I cannot escape criminal liability, but that the *way* I must exonerate myself is by proving a specific supervening defence. Conversely, if I take the *risk* of causing a prohibited consequence (and the risk materialises), but it is not my plan to cause it, the mental 'link' between me and the consequence only exists (on the current English law) if I foresaw the risk, and the risk was an unreasonable one to take.

The practical effect of this can be illustrated with an example. If I slap you on the arm, and that is my *goal*, the only way to avoid criminal liability is to argue that, despite my prohibited purpose, the case fits within a specific defence (or negation of liability) such as self-defence, duress or consent.[42] By contrast, if I slap you on the arm, but my goal is to kill a wasp which has landed there, there are two *general* routes by which I can avoid criminal liability (quite independent of any specific defences which may also apply). I can argue that I genuinely did not foresee that killing the wasp would cause me to batter you, or that in the

[41] John Finnis, 'Intention and side-effects' in Raymond Frey and Christopher Morris (eds) *Liability and Responsibility* (CUP 1991)

[42] The phrasing of 'defence' is used quite loosely in this section: none of the analysis here relies on any assumption about the burden of proof or anything else specific to defences as opposed to elements negating liability. The analysis in Section IV is fully compatible with the view that non-consent is part of the actus reus of offences against the person.

circumstances, it was reasonable to take the (almost certain) risk of battering you.

The difference between the *general* routes to avoiding liability in recklessness and the need to rely on a *specific* defence to intentional wrongs is significant in that it explains one sense in which intention is 'worse' or 'more serious' than recklessness. The need for a *specific* defence to intentional wrongs is emphasised by the courts' constant determination to avoid establishing a general lesser-of-two-evils necessity defence,[43] and the upshot of this is that there is something *inherently* wrong about intending a prohibited consequence, such that the law is anxious to avoid permitting individuals intentionally to cause harm. That is not to say that there are no specific justificatory defences to intentional wrongs: self-defence, for instance, may be an example. But the justification element of (for example) self-defence comes from something inherent in the content of *that* defence. Intentional wrongdoing is otherwise inherently wrong. By contrast, merely risking a prohibited consequence is less serious in that it will only be wrong where, in the circumstances, there is nothing *general* to justify taking the risk.[44]

Whilst a more detailed theoretical discussion of the differences between intention and recklessness is beyond the scope of this article, the distinction drawn above does invite a brief side point about *Woollin*.[45] The House of Lords allowed the direction where necessary (and ostensibly only in murder cases) that the jury "are not entitled to [find] the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the

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[43] See the attempt of Ward LJ in *Re A (Conjoined Twins)* [2001] Fam 147 (CA) 204-5 to confine the narrow necessity defence he identified to the specific facts of this "very unique case", and also of course *Dudley and Stephens* (1884) 14 QBD 273 (QB)

[44] This only establishes intention as 'more serious' (more inherently wrong) than recklessness in this technical sense: see the text to footnote 50 below: there is nothing in this analysis that suggests all intentional wrongs are always more *culpable*.

[45] [1999] 1 AC 82 (HL)

defendant appreciated that such was the case."[46] The question is raised, therefore, whether *Woollin* 'intent' (as it might be called) is properly understood as intention, or is instead a special form of recklessness sufficient for murder. A crucial detail of the *Woollin* direction is the negative formulation 'not entitled to find…unless',[47] which allows the jury 'moral elbow room' to decide that a defendant who foresaw a consequence as virtually certain is nevertheless not guilty of murder.[48] This would appear to be a *general* (albeit limited) way of avoiding liability, more comparable to the unreasonable risk element of recklessness than any normal aspect of intention. To modify the classic example from Section I, if I break up with my romantic partner, foreseeing that it is *virtually certain* he will develop a recognised psychological condition as a result, I can probably avoid criminal liability even though, following *Woollin*, the jury have the *option* to equate virtually certain foresight with 'intention'.[49] If, therefore, the availability of a (comparatively) general reasonableness 'defence' is characteristic of recklessness (as opposed to intention), *Woollin* would appear to be best described as a special (very culpable) form of recklessness. This also helps to move away from the model that intention is *inherently* more culpable than recklessness: where the risk is very unreasonable (for example, because of its seriousness, high chance of occurring, or a combination of the two), recklessness could be equally or more culpable.[50]

V – CONCLUSION

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[46] [1999] 1 AC 82 (HL) 96 (Lord Steyn)

[47] The importance of allowing the jury the option not to find intention was subsequently stressed in *Matthews and Alleyne* [2003] EWCA Crim 192, albeit that the conviction was nevertheless safe in that case.

[48] See Andrew Ashworth, 'Principles, pragmatism and the Law Commission's recommendations on homicide law reform' [2007] Crim LR 333, who is critical of affording the jury this "latitude" and regarded its inclusion in the Law Commission's 2006 Report on *Murder, Manslaughter and Infanticide* as "unfortunate".

[49] Of course, this hypothetical assumes that *Woollin* applies to charges other than murder. In practice, *Woollin* is most meaningful in murder cases because these are among the relatively few situations which require a finding of intention rather than recklessness.

[50] Finnis notes (at 60) Glanville Williams' example of the 'eccentric surgeon' who decides to remove a patient's heart for an experiment, not intending to kill, but rather "quite happy that the patient should go on living if he could do so without a heart". Finnis suggests this *would* be murder "[b]ut not because D intends to kill P". Instead, using D as an instrument in this way (as I would put it: taking a seriously unreasonable risk with D's body) is equally (or arguably more) culpable.

By way of conclusion, it is worth summarising three key reasons to focus on the unreasonable risk element of recklessness. Firstly, it is useful to move the discussion and judicial focus in recklessness from the intense debate between advertence and inadvertence. Whether or not subjective foresight is always necessary to establish criminal liability, the core *idea* of recklessness should be understood in the unreasonableness of the risk taken, which links the defendant's mental state to the prohibited outcome. Secondly, moving away from reasoning *directly* focusing on consent in sports and horseplay, and instead analysing whether the circumstances (including the victim's willingness) justify taking the risk, puts more pressure on courts and the law to avoid the overly simplistic use of consent as 'moral magic'. It is not enough to establish that the victim consented: we must also explain *why* that consent negates criminal liability. Finally, the inability of unreasonable risk analysis to deal with situations of intentional harm should be understood (to use a computer programming analogy) as a 'feature, not a bug'. The unreasonable risk element, combined with the requirement of awareness of the risk, provides a *general* route to avoiding criminal liability for reckless harms, which differentiates recklessness from intention.

Between Reason and Reality: A Values-Based Reconstruction of the English and Chinese laws of self-defence

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INTRODUCTION

The law of self-defence sits at the intersection of morality, public policy, and practical human experience. Even as it protects individuals who act to safeguard themselves or others, it should also guard against the abuse of force. Across jurisdictions, this balance is struck in different ways, reflecting both legal tradition and cultural values. This essay undertakes a comparative analysis of the English and Chinese law of self-defence and, drawing on Markus Funk's value-centric framework, and proposes three reforms to make the law of self-defence more coherent, fair, and practical.

First, self-defence in English law should not apply to defendants who have made unreasonable mistakes of fact, and only to those who have made honest and reasonable mistakes. The reasonableness of a defendant's belief should be dispositive as to whether they might rely on self-defence, and not simply evidence of whether their belief was honestly held.

Chinese law, on the other hand, should extend a complete defence to those who make reasonable mistakes in self-defence, and not only those who happened to be correct that they were being attacked.

Lastly, English self-defence should abandon its all-or-nothing approach on the question of proportionality. It should borrow from the Chinese concept of 'excessive defence' to allow a partial defence to defendants who defend themselves with excessive force in the reasonable belief that they are being attacked.

Section 1 will provide an overview of the English and Chinese law of self-defence. Section 2 will analyse Funk's value-based model and evaluate both English and Chinese law against it. Section 3 will then make the case that self-defence in

English law should be restricted to those who are reasonably mistaken. To allow a complete defence of honest belief, even where unreasonable, is inconsistent with doctrine and misaligned with important values that self-defence purports to protect. It excuses dangerous actors who fail to show proper regard or caution towards others, and undermines collective interests in violence reduction. An objective standard of reasonableness would restore coherence with related doctrines such as duress, better reflect moral culpability, and preserve the balance between protecting the autonomy of the defender and the legitimacy of the law.

Section 4 then dissects certain fallacies in the Chinese law of self-defence, most notably, its tendency to evaluate the defendant's decision-making on a post-facto, and quasi-sage basis. Judicial conservatism towards self-defence has rendered it a 'zombie provision'.[1] This section will discuss how Chinese law has been heavily influenced by Confucianism, and propose that defendants who have made reasonable mistakes should be allowed to plead a full defence, as is the case in English law.

Finally, in Section 5, the essay will draw on Funk's distinction of external-internal justification, his value metrics, and Herring's 'Universal Vulnerability Theory' to justify why the requirement of reasonableness is so normatively significant.

I - AN OVERVIEW OF THE LAW OF MISTAKEN SELF-DEFENCE IN THE UK AND CHINA

In England and Wales, the law of self-defence consists of two limbs. Under the first limb, the defendant must have subjectively believed in the existence of an unlawful threat, ignoring any effects of self-induced intoxication or insanity. The second limb requires that the degree of force used be objectively reasonable. As

[1] (规范刑法) (Normative Criminal Law) (3rd edn, China Renmin University Press 2013) 149; see also Chen Xingliang (陈兴良), 'Zhengdang Fangwei Ruhe Caineng Bimian Chengwei Jiangshi Tiaokuan – Yi Yu Huan Guyi Shanghai An Yishen Panjue Weili De Xingfa Jiaoyi Fenxi' (正当防卫如何才能避免沦为僵尸条款——以于欢故意伤害案一审判决为例的刑法教义分析) ('How Can Justifiable Defense Avoid Becoming a Zombie Clause – A Doctrinal Analysis of Criminal Law Based on the First-Instance Verdict of Yu Huan Intentional Injury Case') (2017) 32(5) *Faxuejia* (法学家) (*Jurist*) 89.

to the first limb, *Williams (Gladstone)* clarified that 'even if the jury came to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it'.[2] Section 76(3) of the Criminal Justice and Immigration Act 2008 reiterated that there is no need to show that the defendant's belief must be reasonable.[3]

The Chinese law of self-defence is set out in Article 20 of the Criminal Law of the People's Republic of China in 1997, which stipulates:

'Any act taken to stop the unlawful infringement in order to protect the interests of the state and the public, or the personal, property and other rights of himself or others from the ongoing unlawful infringement, which causes damage to the unlawful infringer, belongs to justifiable defense and shall not bear criminal responsibility. If justifiable defense obviously exceeds the necessary limit and causes major damage, criminal responsibility shall be borne, but it shall be mitigated.'[4]

Therefore, to successfully plead self-defence, an unlawful infringement must be ongoing; the defence must be against the unlawful infringer himself; the defensive behaviour should not exceed the necessary limit and cause undue damage; and the party claiming the defence must have intended to act in defence. Unlike the first limb of English defence that allows defendants to rely on an honest but unreasonable belief, defendants in Chinese law will be barred from self-defence if their perception of a threat was mistaken, or if they mistakenly believed a threat was ongoing when it had in fact ended or had been neutralised.

In other words, as far as mistaken self-defence is concerned, English and Chinese law occupy opposite poles: English law allows the defendant to rely on

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[2] *R v Williams (Gladstone)* [1987] 3 All ER 411 (CA); see also *Beckford v The Queen* [1988] AC 130, 133; Criminal Justice and Immigration Act, s 76(7).
[3] Markus Dirk Dubber Funk, *Rethinking Self-Defence: The 'Ancient Right's' Rationale Disentangled* (Hart Publishing 2009) 18-19.
[4] Zhonghua Renmin Gongheguo Xingfa (中华人民共和国刑法) (Criminal Law of the People's Republic of China, adopted 1 July 1979, revised 14 March 1997, as amended by the Eleventh Amendment 26 December 2020), art 20.

any honest belief in a threat, while Chinese law is strictly objective and does not defer to even reasonably held beliefs that are mistaken.

II - THE MERITS OF FUNK'S VALUE-CENTRIC FRAMEWORK

The juristic basis of self-defence is important because it determines the limits of the defence. To that extent, this essay will argue that Funk's value-based approach should be preferred to Leverick's right-based model, or Schopp's act-based justifications. Funk recharacterises the debate on self-defence as a weighing exercise between competing but equally valid normative values, and therefore offers 'a more transparent and rational discussion'.[5]

The crucial difference between Funk's value-based approach and that of competing theories is its pluralistic framework. Leverick's right-based model to self-defence views the attacker's right to life as a 'fundamental value' that no consideration, such as deterrence or human dignity, can outweigh,[6] while Schopp's act-based justification places a 'near-singular' emphasis on the protection of the defender's autonomy, arguing that 'the victim's sovereignty and standing takes priority over the concrete interest in the culpable aggressor's life'.[7] Both are built on a single value, albeit at opposite ends of the spectrum. Leverick considers the'right to life' as the 'be-all and need-all' explanation for self-defence, when it is in truth merely a starting point.[8] Because of this, Leverick is forced to treat rape as 'equivalent as a deprivation of life itself' to defend why lethal defensive force,[9] even though not strictly proportional to a non-life-endangering threat, should be justified.[10] At the other end, Schopp argues that using deadly force to avert a non-deadly threat can be justified, since the aggressor has transgressed another's 'sphere of personal sovereignty', and can be met with a defence that injures their own 'protected domain's moral character'.[11]

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[5] Funk (n 5) 18-19; see also M Fenster, 'The Opacity of Transparency' (2006) 91 *Iowa Law Review* 885, 894–902; J Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001) 781.
[6] Fiona Leverick, *Killing in Self-Defence* (OUP 2006) viii.
[7] Richard F Schopp, *Justification Defenses and Just Convictions* (CUP 1998) 9.
[8] Boaz Sangero, 'In Defense of Self-Defence in Criminal Law and on Killing in Self-Defence – A Reply to Fiona Leverick' (2010) 44 *Crim L Bull* 3, 23.
[9] Leverick (n 8) 143-158.
[10] Ibid 157-158.
[11] Ibid 77.

Funk, however, involves a multitude of values in his model: protecting the state's monopoly on force (value #1); protecting the individual attacker's (presumptive) right to life (value #2); maintaining the equal standing between people (value #3); protecting the defender's autonomy (value #4); ensuring the primacy of the legal process (value #5); maintaining the legitimacy of the legal order (value #6); and deterring attackers (value #7). These abstract interests are to be 'placed on scales'.[12] These seven values can be grouped in various ways to enable different value-metric assessments. For instance, value #1, #5, #6 and #7 reflect broader societal interests, while values #2, #3 #4 protect personal or individual interests. The seven values provide a framework against which the legitimacy of self-preferential force can be evaluated coherently but flexibly.[13]

Comparative criminal law, in particular, benefits from the value-centric analysis that Funk advocates for. It examines the precise justifications for self-defence that cut across jurisdictions, reduces 'hidden normativity' and enhances 'transparency of decision-making', while acknowledging that these justifications might be weighted differently based on cultural norms and jurisprudential influences.[14] Only through Funk's moral framework can we unravel the values at work in the law of self-defence, and start to explain the differences between the English and Chinese positions.

Funk's position is that a defender must be 'both externally and internally justified' to positively assert the right to self-defence.[15] He must be objectively acting to defend himself against a genuine threat, the force he employed must be objectively reasonable or proportionate against the threat, and that he must be acting with the knowledge of, and intention to, defend himself against said threat. Each condition is justified by specific values. The requirement of a

[12] Boaz Sangero, *Self-Defence in Criminal Law* (Hart Publishing 2006) 90 –106; see also Boaz Sangero, 'A New Defense for Self-Defense' (2006) 9 *Buffalo Criminal Law Review* 475.
[13] Ibid.
[14] Ibid 74.
[15] Funk (n 5) 98.

genuine, ongoing threat vindicates value #1 (collective reduction of violence), value #5 (primacy of the legal process), and value #6 (legitimacy of the legal order): society will only authorise private force where it is necessary to avert real harm, minimising needless escalation. The demand that force be objectively reasonable or proportionate safeguards Value #1 again, but also signals that Value #2 (the attacker's life and bodily integrity) is not expendable once the danger has passed. Finally, the knowledge-and-intention requirement centres Value #4 (protection of defender autonomy) and Value #3 (equal standing), recognising that the moral force of self-defence lies partly in the defender's agency and their right to repel wrongful attack as an equal participant in the moral community.

This essay will focus on mistaken self-defence because it is a flashpoint between Funk's various values, and reveals the latent assumptions of the subjectivist English, and objectivist Chinese approach to self-defence. Mistakes involve both internal and external justifications, and force the law to choose how to balance Funk's value. Ultimately, in arguing for a reasonableness requirement in self-defence, this essay accepts the disorienting effect of a perceived threat, but maintains that the law should not exculpate individuals who exercise force at the expense of social order.

III - DIFFICULTIES WITH THE ENGLISH LAW OF MISTAKEN SELF-DEFENCE

As outlined above, English law does not discriminate between reasonable and unreasonable mistakes in self-defence. The defendant is entitled to plead self-defence if he genuinely believes in an imminent, unlawful infringement. But the law's approach to insanity already reveals that this basic principle is problematic. It also does not reflect the values that self-defence should uphold, on Funk's account.

In *Oye*, the Court of Appeal drew a line where self-defence was based on insane or delusional beliefs, and where it was based on other honestly held beliefs. It warned that to excuse dangerously deluded actors might undermine the collective interest in violence reduction. It added that, if insane beliefs could be invoked in self-defence, 'the more insanely deluded a person may be in using violence in purported self-defence, the more likely that an entire acquittal may result'. The public would be 'exposed to possible further violence from an individual with a propensity for suffering insane delusions without intervening preventive remedies'.[16] In other words, the court was clearly conscious that grounding self-defence on unreasonable, albeit honestly held, beliefs, may gravely disregard Value #1 (collective reduction of violence) and Value #2 (protecting the purported attacker's autonomy), while magnifying Value #3 (equal standing) and Value #4 (protection of the defender's autonomy).

When the accused acts on an unreasonable belief in an imminent attack, he displays a lack of respect or concern for the life or bodily integrity of another.[17] For instance, the law cannot possibly condone violence on another when the defender has not been sufficiently alert, or where he might have associated certain features of the 'attacker' such as race, gender or religious attire with an imminent threat. This could, for example, a racist who shoots a racial minority to rely on self-defence, if he has interpreted his request for money as a lethal threat, based on the honest but unreasonable belief that the racial minority is violent.[18]

It is also difficult to reconcile the law's approach to self-defence with how it treats duress. A defendant who pleads duress must show that he reasonably believed himself to be subject to a threat of death or grievous bodily harm. Self-defence was previously subject to a similar reasonableness requirement. In the 1879 case of *Weston*, it was ruled that self-defence applied only if the

[16] *R v Oye* [2013] EWCA Crim 1725.
[17] F Leverick, Killing in Self-Defence (2006) 165-168.
[18] People v Goetz, 497 NE 2d 41 (1986), discussed in G P Fletcher, *A Crime of Self-Defense: Bernard Goetz and the Law on Trial* (1988). For further examples, see C K Y Lee, 'Race and self-defence: towards a normative conception of reasonableness' (1996) 81 Minnesota Law Review 367.

defendant used deadly force 'against serious violence or the *reasonable* dread of it'.[19] This was followed in *Rose*,[20] where the court explained that the self-defence was available because when the defendant shot his father, he had 'honestly believed, and *had reasonable grounds* for the belief, that his mother's life was in imminent peril, and that the fatal shot which he fired was absolutely necessary for the preservation of her life'. The principle that a mistake as to the justifying circumstances had to be reasonable was well-established, until *Williams (Gladstone)* and subsequently the Criminal Justice and Immigration Act 2008.

It might be argued that a subjective approach avoids injustice, and mirrors a wider trend towards subjectivity in the criminal law. This was what motivated the House of Lords to overrule *Caldwell* in *Re G* and restore the subjective *Cunningham* test for recklessness. The fact that a risk was obvious or foreseeable to a reasonable person did not amount to recklessness if the defendant had not actually foreseen the risk.[21] But it is important to note that *Parker* survives *Re G*. [22] In *Parker*, it was ruled that recklessness was established where the defendant had 'closed his mind to the obvious' and had smashed a telephone in a fit of rage. Jeremy Horder likewise distinguishes between physical incapacity or disability that prevents one from foreseeing an otherwise obvious fact, which should be exculpatory, and lack of imagination, ignorance, stupidity and inadvertence, which should not.[23] A defendant should still be culpable if they *could* foresee the risk, but chose not to due to indifferent callousness.

In the same vein, a reasonableness requirement should be adopted for the first limb of self-defence. As Fletcher has pointed out, to allow unreasonable mistaken belief in self-defence is to 'sanction thoughtless, negligent over-reaction' when in fact, 'the lack of restraint, the indulgence, the failure to

[19] *R v Weston* [1879] 14 Cox CC 346, 35.
[20] *R v Rose* [1884] 15 Cox CC 540, 541.
[21] *Metropolitan Police Commissioner v Caldwell* [1982] AC 341; *R v Cunningham* [1957] 2 QB 396.
[22] *R v Parker* (1977) 63 Cr App R 211.
[23] Jeremy Horder, 'Intention in criminal law: a rejoinder' (1995) 58 MLR 678; F Stark, 'It's only words: on meaning and mens rea' (2003) 72 CLJ 155; C Crosby, 'Recklessness – the continuing search for a definition' (2008) 72 JCL 313; D Kibel, 'Inadvertent recklessness in criminal law' (2004) 120 LQR 548.

discipline one's reactions . . . are all grounds for blaming the person who claims his wrongdoing is excused'.[24]

Funk has likewise argued that self-defence requires both internal and external justifications. Without a true objective threat, the external justification, and hence Value #1 (collective reduction of violence), Value #5 (primacy of the legal process) and Value #6 (legitimacy of the legal order) fall away. But internal justification might still be present, as would be Value #4 (protecting the defender's autonomy) and Value #7 (deterring attackers), that must be reconciled with Value #2 (protecting the attacker's right to life) and Value #3 (maintaining the equal standing between people).[25]

IV - DIFFICULTIES WITH THE CHINESE LAW OF MISTAKEN SELF-DEFENCE

A successful plea of self-defence is so rare in Chinese criminal law that scholars have called the provision 'dormant'. A study of 100 randomly selected cases where self-defence was pleaded, from 34 provincial-level divisions, found that in 98 instances, self-defence was denied.[26] Chen Xingliang, a leading Chinese criminal law scholar, has observed that judges might not sufficiently consider the accused's circumstances or whether it might have been to respond to the perceived threat. Courts tend to focus narrowly on outcomes, such as death or serious injury, while overlooking context, including escalation of tension or prior provocations.[27] The defence has been interpreted on the basis that 'people should always remain rational'.[28] Unlike English law which evaluates the proportionality of defendants' use of force from the perspective of the perceived threat, rather than objective events, Chinese law is highly rational and compares

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[24] G P Fletcher, "The psychotic aggressor: a generation later" (1993) 27 Israel Law Review 227, 241.
[25] GP Fletcher, 'The Right and the Reasonable' (1985) 98 *Harvard Law Review* 949, 975; Joshua Dressler, 'New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking' (1984) 32 *UCLA Law Review* 61, 86–88.
[26] Wei Shen, 'Does China Have Biased Judicial Moralism in Justifiable Self-Defence Trials? – Empirical Investigation and Philosophical Underpinnings' https://ssrn.com/abstract=4147484 or http://dx.doi.org/10.2139/ssrn.4147484 accessed 9 September 2025.
[27] Chen Xingliang (陈兴良), *Guifan Xingfa* (规范刑法) (Normative Criminal Law) (3rd edn, China Renmin University Press 2013) 149; see also Chen Xingliang (陈兴良), 'Zhengdang Fangwei Ruhe Caineng Bimian Chengwei Jiangshi Tiaokuan – Yi Yu Huan Guyi Shanghai An Yishen Panjue Weili De Xingfa Jiaoyi Fenxi' (正当防卫如何才能避免沦为僵尸条款——以于欢故意伤害案一审判决为例的刑法教义分析) ('How Can Justifiable Defense Avoid Becoming a Zombie Clause – A Doctrinal Analysis of Criminal Law Based on the First-Instance Verdict of Yu Huan Intentional Injury Case') (2017) 32(5) *Faxuejia* (法学家) (*Jurist*) 89.
[28] BBC News 中文, 'Kunshan Fanshaan Jiaodian: Zai Zhongguo Rending Zhengdang Fangwei You Duonan' (昆山"反杀案"焦点:在中国认定"正当防卫"有多难') (13 September 2018) https://www.bbc.com/zhongwen/simp/chinese-news-45365148 accessed 7 October 2025.

the defendant to a calm, collected individual capable of judging the existence and degree of danger with almost pinpoint accuracy. The strict emphasis on objectivity as to the existence of the threat also spills over to the assessment of proportionality. In many cases, the complete defence has been substituted for the partial defence of excessive defence. Arguably, if Chinese law allows defendants to rely on reasonable, albeit mistaken, beliefs in the existence of a threat, it would better reflect the plurality of values relevant to self-defence.

The narrowness of self-defence is best exemplified by the 2016 case of Yu Huan.[29] The defendant, Yu Huan had borrowed money at high interest rates but was unable to repay the debt. The lender gathered 11 others and one Du to demand repayment of the debt. They confined Yu Huan and his mother to an enclosed space for six hours, confiscated their mobile phones, and repeatedly insulted them. Out of desperation, Yu Huan picked up the fruit knife on the table and warned Du and others not to approach. This was not heeded. Yu Huan stabbed Du in the abdomen in the ensuing struggle, killing Du and injuring three others.

The court at second instance conceded that the illegal detention of Yu Huan and his mother, alongside the degrading insults and physical assaults like pushing, slapping, and choking, constituted an ongoing infringement for the purpose of the defence. However, the threat was not as grave as he perceived it to be, so his response was excessive, and Yu Huan was sentenced to five years' imprisonment. Du might have been unarmed, but the court arguably failed to fully consider how Yu Huan was being accosted by at least eleven others and how his mother was being treated in a dehumanising manner, that both had been detained for six hours, and were beaten and demeaned. Taken together, these could have amounted to a grave and imminent threat that a reasonable person in Yu Huan's position might have perceived as genuinely threatening. One can only

[29] Shandongsheng Liaocheng Shi Zhongji Renmin Fayuan (山东省聊城市中级人民法院), *Lü 15 Xingchu Zi No 33 Xing Shi Fu Dai Minshi Panjue* (鲁15刑初字第33号刑事附带民事判决) (2016) (Lu 15 Xing Chu No 33 criminal incidental civil judgment of Liaocheng Intermediate People's Court of Shandong Province (2016))

speculate how the English courts might have decided such a case. But Yu Huan had made a reasonable mistake as to the intention of Du and his companions to hurt him, and felt truly threatened by the cumulative effect of the intimidation, humiliation and detention.

Liang Genlin of Peking University has proposed that when applying the law on self-defence, Chinese courts tend to fall prey to the four fallacies: 'sage standard theory', 'hindsight judgment theory', 'results-only theory' and 'equal armed theory'.[30] The 'sage standard theory' demands that the defender must make an objective, calm, rational and precisely proportionate response to unlawful infringement, as if they have conducted a cost-benefit analysis and calculated to the exact degree the response they ought to employ against the threat. The 'hindsight judgment theory' retrospectively attributes the knowledge gained after the event to the defender and evaluates their action based on an *ex post facto* standard, such as the subsequent finding of fact that Du was not intending to harm Yu Huan and his mother, but simply sought to frighten them. The 'equal armed theory' penalises the defender when equipped with a weapon against an unarmed defender, while the 'results-only theory' is informed by whether the offender was killed or severely injured by the defender.

Funk's value-based model reveals the normative ideals behind the Chinese approach. In Chinese law, the principle of equal standing (Value #3), the attacker's autonomy (Value #2) and the defender's autonomy (Value #4) are accorded limited weight while the state's monopoly on force (Value #1), the primacy of the legal process (Value #5), the legitimacy of the legal order (Value #6), and deterring attackers (Value #7) are more prominent.[31]

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[30] Liang Genlin (梁根林), 'Fangwei Guodang Bufa Panduan De Lichang, Biaozhun Yu Luoji' (防卫过当不法判断的立场、标准与逻辑) ('Position, Standard and Logic of Unlawful Judgment of Excessive Defense') (2019) 64(2) *Faxue Yanjiu* (法学研究) (*Law Journal*) 14; see also Gao Mingxuan (高铭暄), 'Zhengdang Fangwei Yu Guodang Fangwei De Jiexian' (正当防卫与过当防卫的界限) ('The Boundary between Justifiable Defense and Excessive Defense') (2020) 65(1) *Huashi Xuebao (Shehui Kexue Ban)* (华师学报(社会科学版)) (*Journal of South China Normal University (Social Science Edition)*) 157.

[31] Philip CC Huang, *Chinese Civil Justice, Past and Present* (Rowman and Littlefield 2010). The existence of an office for restricting violence with the duty to subdue violence and turmoil among the ordinary people in Western Zhou and a decree that confiscated all privately owned weapons in Qin Dynasty are two examples. See Charles Sanft, 'Bow Control in Han China: Yuqiu Shouwang on Self-Defense' (2008) 42 *J Asian History* 146.

The concept of a 'gentleman', or *junzi*, captures the virtues that one aspired to have in imperial Chinese society. The *junzi*, or Confucian moral gentleman, copes with disputes through *rang,* 'conciliation', and *ren,* 'forbearance'. And on a macro level, Chinese legal culture is centred on *he,* 'harmony', or a society without litigation where gentlemen rise above disputes and antagonism. On a Confucian view, *he* relegates the law to a secondary mechanism in protecting social order, since rites of propriety equip one with the motivation to act as a *junzi*, rather than the artificial penal force of the state.[32] As the Confucian Analects explain:

'If the people be led by laws, and uniformity sought to be given them by punishment, they will try to avoid punishment but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good'. (The Analects, II:3).[33]

Neither will a virtuous *junzi* be ruled by extreme emotions such as fear or anxiety, or prioritise individual interests. Instead, he acts with virtue and seeks true harmony with society. Funk's value-based model provides a lens to make these embedded values explicit. By balancing competing factors, the model clarifies why Chinese courts operate stringently and take a different path from the English.

V - THE MIDDLE WAY OF REASONABLE MISTAKES

This essay proposes that neither self-defence for honest and unreasonable mistakes, nor self-defence that excludes reasonable mistakes, is satisfactory. The most normatively desirable solution is a reasonableness requirement.

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[32]Norman P Ho, 'Legal Realism and Chinese Law: Are Confucian Legal Realists, Too?' (2020) 13 *Tsinghua China L Rev* 127, 134–35; see also Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* (University of Georgia Press 1996) 11.

[33] *Lunyu* (论语) (*The Analects of Confucius*), tr James Legge, 'II.3' http://wengu.tartarie.com/wg/wengu.php?no=335&l=Lunyu accessed 9 September 2025.

As Antony Duff argues, when the defender makes a mistake, his use of force is not a 'freely chosen action-plan manifesting [their] moral character'.[34] To Duff, it is circular to argue that harm is intrinsically 'harmful', and then to assign blame to the human action that caused it. For example, rape is evil not because of 'the consequentialist idea of an occurrence', but because it attacks the victim's protected interests, driven by the intention with which the wrongdoer acts.[35] A murderous attack is not the same kind of wrong as a killing reasonably believed to be in self-defence.[36]

But as exhaustively argued above, Duff's view does not consider the impact of unbridled, but mistaken, force on social stability and legal order. It is submitted that Jonathan Herring offers a path forward and implicitly justifies a reasonableness requirement. Herring has proposed a 'universal and beneficial theory of vulnerability'.[37] To Herring, we are all vulnerable, as 'individuals are anchored at each end of their lives by dependency and the absence of capacity'.[38] Humans are inherently 'susceptible to wounding and to suffering',[39] and are 'mutable and porous'.[40] We are defined by our relationships with others either out of necessity for physical survival or emotional connection.[41]

So to portray individuals as atomistic, self-sustaining and self-interested is a fiction. Both Schopp and Leverick trade on this fiction: they assume that either defender or attacker is totally autonomous, and fail to recognise how autonomy is not a fixed capacity, but rather a relational concept influenced by threat, fear, social position, and personal history.

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[34] Robin Antony Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Blackwell 1990) 112.
[35] Ibid.
[36] Jeremy Horder, 'Redrawing the Boundaries of Self-Defence' (1995) 58 *Modern Law Review* 433.
[37] Jonathan Herring, *Law and the Relational Self* (Cambridge University Press 2019) 25.
[38] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law & Feminism* 1.
[39] Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a Theory of Vulnerability' (2012) 5 *International Journal of Feminist Approaches to Bioethics* 11, 12.
[40] Herring (n 45) 32.
[41] Kenneth J. Gergen, *Relational Being* (Oxford University Press 2009); Kelly McLaughlin, *Surviving Identity: Vulnerability and the Psychology of Recognition* (Routledge 2012).

The vulnerability of all humans means that all defensive decisions are made under conditions of partial information and temporal pressure, especially in situations where we believe we are subjected to unlawful infringement.[42] The fight-or-flight response, a deeply embedded evolutionary mechanism, exemplifies how our reactions to perceived aggression are rapid, affect-driven, and inherently fallible.

It follows that the 'reasonable' person should be reimagined as a vulnerable moral agent whose decisions under threat are shaped by biological, social, and cultural constraints. If so, then both English and Chinese self-defence law might allow reasonable mistakes without abandoning their distinct moral traditions. The result is a law of self-defence that balances collective interests in restraint and harmony with individual autonomy and equal standing, because it recognises the shared vulnerability of defender and attacker.

VI - CONCLUSION

This essay has shown that neither the English nor Chinese approach to mistaken self-defence fully reconciles moral principle with human reality. English law, by excusing all honest mistakes, privileges autonomy at the expense of restraint and risks legitimising negligent violence. Chinese law, by contrast, subordinates moral agency to social order, demanding an unrealistic, quasi-sage standard of rational composure from the endangered. Each, in its own way, distorts the equilibrium between autonomy, dignity, and collective security.

Funk's value-based model reveals that the legitimacy of defensive force rests not on a single principle; it is situated within a matrix of seven interlocking values. The proposed middle way introduces a reasonableness threshold to mistaken self-defence. It aligns culpability with the epistemic limits of human judgment while preserving respect for life and the integrity of legal order.

[42] Catriona Mackenzie, Wendy Rogers and Susan Dodds, 'Introduction: What Is Vulnerability, and Why Does It Matter for Moral Theory' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability* (Oxford University Press 2014) 1.

Reimagining the ‘reasonable person’ as a vulnerable, relational moral agent honours the Confucian virtues of restraint and harmony while preserving the Anglo-American commitment to personal autonomy and equal moral standing. It transforms self-defence from a doctrinal battleground into a site of moral dialogue between legal cultures.

Thus, a value-based, reasonableness-centred reconstruction unites reason with reality. The moral justification for use of defensive force lies not in the triumph of either individualism or collectivism, but in an aspiration toward humane legality - one that treats both defender and aggressor as participants in a shared, relational moral community.

Cards Against Immunity: Reverse Settlement Payments

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INTRODUCTION

In major antitrust jurisdictions, reverse payment settlements have been the subject of antitrust scrutiny. Such settlements are usually the product of pharmaceutical patent litigation where an originator (otherwise referred to as a brand name manufacturer) brings a patent infringement suit against a generic seeking to market a biosimilar. Such litigation sometimes leads to patent validity challenges, where the generic seeks invalidation of the originator's patent. When parties settle in these cases, pecuniary consideration may be provided by the originator for the generic to honour the patent and stay out of the market.

The predictability, fungibility, and quantitative aspect of monetary settlements make it perhaps the most flexible instrument for litigants to avoid the uncertainty and costs in litigating to judgment. Settlements allow litigants to arrive at common ground. This common ground, often pecuniary in nature, reflects parties' perceived odds of winning and tolerance for risk.

However, these same qualities also provide a veil for litigants to obfuscate their true commercial intention. On one hand, large reverse payments could suggest the originator's high aversion to risk or reflect higher expected costs of continued litigation. On the other, large settlements could indicate a more pernicious development where parties agree to avoid competition, instead choosing to collude in preserving the originator's patent-conferred monopoly and sharing in the resultant profits.

Where antitrust is concerned, the latter scenario is a naked restraint if the patent is not valid and infringed. It also creates a method for originators to foreclose potential entry by generics, thereby allowing originators to artificially increase the strength and scope of their patents. Both consequences create an unmeritorious increase in patent value and weaken competitive constraints on the patentee.

This article will examine (i) how 'scope of the patent' was applied in cases pre-*Actavis*, and why the strict construction of patent rights is essential to a correct application of the doctrine; (ii) the presumption of validity attached to patents in litigation and the antitrust effects of this presumption; and (iii) how 'by object' should be preferred to the 'rule of reason' when assessing antitrust legality.

INTRODUCTION

The conflict between patent and competition law has historically been divisive for courts. While the former grants a patent holder the right to exclude others, the latter seeks the opposite by maintaining the competitive mechanisms of markets. In attempting to reconcile these two areas of law, courts have tried to assert the primacy of one over the other. The issue of antitrust legality in reverse payment settlements has offered a fresh lens to examine this tension, challenging courts to strike a more nuanced balance between patent rights and antitrust principles.

Before *Actavis*[1], lower US courts took the view that no such conflict between patent and antitrust law inhered in reverse payment settlements, so long as the settlement only kept generics out of the market for the duration of the patent. The majority in *Actavis* repaired this approach, holding that such settlements can violate antitrust law and were therefore not immune to antitrust.

This article will critically examine the underpinnings of *Actavis*, as well as alternative approaches taken by the European Court of Justice ("ECJ") regarding reverse payment settlements.

[1] 570 U.S. 136 [2013]

First, the article will argue that the 'scope of the patent' approach was misapplied by the dissent in *Actavis*. Second, the article will refute the *presumption of validity* and argue that stricter assessments are warranted for determining antitrust legality. Third, the article will explain how European and American jurisdictions differ in their approach to reverse payment settlements and briefly comment on each jurisdiction's method of assessment.

The Decision in Actavis

The leading authority on the issue is *Actavis.* The majority held that, not only were reverse payment settlements subject to antitrust scrutiny, but they were also subject to the 'rule of reason' assessment. *Actavis* recognised that courts should not simply ask whether a settlement was within the nominal boundaries of a patent, but instead go further to assess whether a settlement produced anticompetitive effects beyond what was intended in the granting of a patent to its holder.

The dissenting opinion, delivered by Chief Justice Roberts, sought to avoid antitrust scrutiny altogether. Chief Justice Roberts sought to apply the 'scope of the patent' approach in its loose sense, and deemed the case an issue of patent law, not antitrust law i.e. a settlement does not violate antitrust so long as it falls within patent lifespan.

The ECJ's approach in Lundbeck and Generics

Elsewhere, the ECJ took a markedly different approach. In *Lundbeck*[2] and *Generics*[3], the ECJ held that the reverse payment settlements involved were unlawful under Article 101 TFEU, even if they only operated within patent term. The ECJ not only rejected the notion of immunising the agreements from antitrust but also found them illegal "by object".

[2] Case C-591/16 *Lundbeck v Commission* [2021]
[3] C-307/18 *Generics (UK) v Commission* [2020]

I - ‘SCOPE OF THE PATENT’ APPROACH

For the imposition of antitrust scrutiny on reverse payment settlements, the ‘scope of the patent’ doctrine must first be addressed. This doctrine remains a longstanding pillar of US antitrust law and formed a key part of appellants’ submissions in *Lundbeck* and *Generics*. There is no definitive answer as to what this doctrine entails as it depends on whether one interprets patent rights in the strict or loose sense.

The strict sense construes patent rights as nothing more than the right to exclude; derivative rights flowing from the right to exclude are thus assailable by the general law. On the other hand, the loose interpretation takes derivative rights, like the right to settle, to be part of the patent grant. This results in a broader grant, where derivative rights also become immune to general law.

In this first section, I will argue that the ‘scope of the patent’ should rely on a strict construction of patent rights, and that the loose construction should not have been applied in *General Electric*[4] and subsequently by the *Actavis* dissent.

Historical cases invoking ‘scope of the patent’

‘Scope of the patent’ has always been used to express the boundary circumscribed by a patent within antitrust. Per *Line Material*[5]*,* “*If the limitations in a license reach beyond the scope of the statutory patent rights, then they must be tested by the terms of the [antitrust legislation]*[6]”.

In *General Electric,* the court greenlighted an agreement where a patentee fixed the resale prices of its licensee. The court ruled that this agreement was within the monopoly grant of the patent and thus did not violate antitrust law. It echoed

[4] *General Electric Co v United States*, 272 US 476 (1926)
[5] *United States v Line Material Co.*, 333 U.S. 287 (1948)
[6] *Ibid.* at 353

the idea in *Bement*[7] that "*the very object of [patent law] was monopoly*", and that price fixing was "*the essence of that which secures proper reward to the patentee*[8]". This was characteristic of American courts' loose interpretation of patent rights at the time — instead of dealing with patents as plainly granting a right to exclude others from an invention, the courts had allowed them to encompass derivative rights.

Line Material ("*Line*") provided counterweight to the reasoning in *General Electric.* The majority in *Line* declined to recognise that *General Electric* meant a sort of general latitude for patentees to shield their restraints using patent-derived agreements. Rather, it excepted *General Electric* as a rare instance of the law allowing patentees to price-fix with licensees, holding that the latitude granted in *General Electric* was not the rule.

Douglas J, concurring in *Line,* argued that *General Electric* should be overturned — this was a step up from the majority's decision to distinguish *General Electric*. Ultimately, it was held that the combination of multiple patent monopolies through various cross-licensing agreements exceeded the limits of the patent monopoly and thereby violated antitrust.

The majority in *Line* rejected the submission that patentees who cross-licensed their patents were acting within the scope of their patent grant just because they did not exceed any nominal parameters i.e. the patent term. Importantly, the majority in *Line* held that "***patent grants are to be construed strictly***[9]".

The court in *Line* cited *Masonite*[10] when deciding whether a particular agreement came within the crosshairs of antitrust. Ultimately, this would depend on (i)

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[7] *Bement v National Harrow Co*, 186 US 70 (1902)
[8] *Ibid. at 39*
[9] *Line* at 38
[10] *Masonite Corp v United States* 316 US 265 (1942)

whether the agreement was "*beyond the necessary requirements of the patent statute*"; and (ii) if there was a "*powerful inducement to abandon competition*[11]". If both factors are satisfied, an arrangement would have exceeded the patent grant.

From *Line* and *General Electric*, we see two approaches to patent rights — the strict and loose construction.

The court in *General Electric* and *Bement* took the loose construction. Such was a logical necessity to remain consistent with the premise that the very object of patents was monopoly. The court needed patents to be constructed loosely so that these patent-conferred monopolies were not frustrated by the ambit of antitrust law.

Elsewhere in *Line*, the court distinguished its antitrust jurisprudence with a strict construction. Its starting point was markedly different — that patent law was a statutory carve-out within antitrust law, and only Congress could expand the patent's ambit. Courts were thus entitled only to the strict construction. The concurring opinion went a step further. It clarified that the very object of patent law, *per* the United States Constitution, was the promotion and progress of science and the useful arts. Patent law's object was, contrary to *Bement,* neither monopoly nor securing reward to inventors. Here the court could finally reconcile patent and antitrust; and this is respectfully submitted to be the correct starting point for reasoning, contrary to *General Electric* and *Bement.*

The reasoning in *Line* seems more compelling as it directly addresses the underpinning object of patent law, which is the advancement of the public interest through the introduction of novel inventions by private parties. It takes a

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[11] *Ibid.* at 280-281

preceding step that explains the underlying reason why patent law is concerned with securing reward to inventors.

With this in mind, we refer to *Cipro III*[12] to see how American courts applied 'scope of the patent' before *Actavis* was decided.

(Mis)applying 'scope of the patent' to reverse settlement payments

Lower American courts before *Actavis* reasoned that the right to settle was within the nominal 'scope of the patent' and would bring no harm to markets. This was seen early on in *Cipro III*, where the court observed that:

"*Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless,* ***there is no injury to the market cognisable*** *under existing antitrust law, as long as competition is restrained only within the scope of the patent*[13]."

This seems right at first, but the court ascertained the legality of restraints solely by examining whether a settlement fell within nominal scope — that is, the patent term. The court thus rejected the plaintiffs' submission that anticompetitive effects were demonstrable[14].

The court reasoned that, as the settlement only involved the term of the patent, it was well within its scope. It considered only the nominal patent, not its intended anticompetitive force. Given the presence of the patent, competitors were excluded anyway — a settlement of this dispute did not enhance the patentee's anticompetitive ambit[15].

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[12] *In re Ciprofloxacin Hydrochloride Antitrust Litig*., 363 F. Supp. 2d 514
[13] *Ibid.* at 61-62
[14] *Ibid. at 96*
[15] *Ibid. at 25-26*

Further, it was a decision based on policy. Antitrust scrutiny of reverse payment settlements might cause parties to litigate to judgment when in fact parties would have settled, going against the general policy favouring settlement of disputes. Hence, the court in *Cipro III* precluded antitrust inquiry into reverse payment settlements that were within patent term.

The reasoning in *Cipro III* was also relied upon in *Tamoxifen*[16], *Watson*[17], and finally the *Actavis* dissent — "*a patent holder acting within the scope of its patent does not engage in any unlawful anticompetitive behaviour; it is simply exercising the monopoly rights granted to it by the Government*[18]". It is worth noting that the dissent in *Actavis* only considered the nominal scope when referring to 'scope of the patent' as well.

There are three reasons why a loose construction of 'scope of the patent' should fail.

1. The nominal, loose construction of the patent deviates from precedent in Line and Masonite.

Case law indicates that the 'scope of the patent' should not simply mean the nominal lifespan of a patent, but rather its anticompetitive potential.

In *Masonite* the court held that "*[b]eyond the limited monopoly which is granted, the arrangements by which the patent is utilized are subject to the general law*[19]." The question is how these limits are measured. This was a main contention in *Actavis* — the majority preferred to define this limit as the anticompetitive effect of the patent (hence adopting the 'rule of reason'), while the dissent preferred to look at the nominal limit (e.g. a patent's term).

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[16] *Joblove v Barr Labs., Inc. (In re Tamoxifen Citrate Antitrust Litig.),* 429 F.3d 370 at 72
[17] *FTC v Watson Pharms., Inc.,* 677 F.3d 1298 at 1310
[18] *Actavis* at 161
[19] *Masonite* at 277

Precedent that subscribed to the strict construction supports the *Actavis* majority's conclusion. Conduct exceeds this limited monopoly if "*the struggle for profit is less acute*[20]" as a result. This especially relates to reverse payment settlements arising out of the patentee and challenger settling to share in the profits of the patent monopoly. Not only is the struggle for profit less acute, but parties also act in concert to discard competition, sharing in the resultant profits.

On a separate note, the right to settle is a derivative of the right to exclude. Given that "*patent grants are to be construed strictly*[21]," this derivative right to settle should not be considered as part of the patent grant. An untrammelled right to settle (even if within patent term) exceeds the right to exclude because patentees can theoretically exclude ***any*** challenger by paying them inordinately large sums, whereas the original right to exclude only applies insofar as the patent is valid and infringed. That is, a patent excludes others based on how novel and broad the patent claim is, and these are mutually governing traits. The right to settle must therefore be fettered by antitrust.

Hence, even in the absence of sham litigation or patent invalidity, the *Actavis* dissent is wrong in its presumption that a patentee acts within the scope of its patent by settling within patent term.

2. Rewarding inventors is a subordinate objective of patent law, not its primary objective.

Before examining the reasoning in *Line* that leads to this submission, it is important to recognise different theoretical accounts that form the basis of intellectual property. Two are relevant here — a natural law account that the primary objective should be rewarding the inventor, and an instrumental account that the primary objective should be the advancement of the public interest i.e. maximising welfare.

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[20] *Line Material* at 39
[21] *Ibid.* at 38

The natural law account is outlined by notions of desert. It explains that when someone takes an idea out of the commonly owned pool of resources and mixes it with their labour to produce a product, they thereby acquire a natural right in respect of the new intellectual property. It therefore merits a reward to the inventor for introducing their invention to the public domain; the reward to the inventor is thus a natural law consequence of making the invention public. The corollary is that rewarding inventors should be the primary objective of patent law, while advancement of the public interest remains incidental[22].

The court in *Bement* and *General Electric* was strongly persuaded by the natural law account. The court in *Bement* endorsed the approach in *Wilson v Rousseau*[23], "*The law has thus impressed upon it all the qualities and characteristics of property for the specified period; and has enabled him to hold and deal with it the same as in the case of any other description of property belonging to him*[24]*".*

The emphasis on property in *Wilson v Rousseau* formed the basis of the natural law account of patent law. It advanced the idea in *Bement* and *General Electric* that the "*very object of [patent law] was monopoly*[25]," so that the inventor could be adequately rewarded and that the aspect of desert in natural law is satisfied.

The natural law account shares certain similarities with Burton J's dissent in *Line.* American patent rights traced their origins to Great Britain, which appeared to have been the first nation to issue patents that secured inventors the right to their invention. These patents, or *litterae patentes*, had a like form to "patents" issued by the sovereign to trade guilds and corporations which were essentially a grant of monopoly. Patents should thus be construed as grants of monopoly.

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[22] Justine Pila and Paul Torremans, *European Intellectual Property Law* (2nd edn, Oxford University Press 2019) at 80
[23] 45 US 646 (1846)
[24] *Bement* at 34
[25] *Ibid. at 39*

On the other hand, the instrumentalist account explains that patents are legal instruments that the state uses to incentivise and disincentivise certain behaviours. It proceeds from a belief that deploying patents will advance the public interest by preventing the erosion of incentives to innovation. Central to the instrumentalist account are the principles of distributive justice and consideration — the public confers the patent right to the inventor insofar as the public receives a novel invention. The public would not have conferred the patent grant if, on balance, it was more harmful than beneficial to its interests.

The instrumentalist account captures the notion that the public would not provide a patent grant if the patent grant was used in such a way as to produce a net decrease in welfare — a core idea that the natural law account does not include[26].

The court in *Line* took on an instrumentalist account and concluded that "patent grants are to be construed strictly" so that patents remained consistent with the wider goal of advancing the public interest. It essentially observed that (i) the right to exclude and the method of rewarding inventors are distinct; and (ii) the prime object of patent law is the advancement of the public interest through encouraging innovation.

Douglas J, delivering the concurring opinion in *Line*, took a pragmatic and textualist view. Tracing the rights of Congress back to the Constitution, he observes that "*It is to be noted first that all that is secured to inventors is 'the exclusive right' to their inventions; and second that the reward to inventors is wholly secondary*[27]*".*

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[26] n 22, at 85.
[27] *Line* at 47

It is submitted that the instrumentalist account is more apposite for dealing with whether, and to what extent patent rights should limit antitrust. It is only through the instrumentalist account that antitrust and patents seem to share common ground and a fair comparison can be made.

Hence, whenever courts are faced with a right that is derivative and not explicitly part of the patent grant (e.g. right to settle), courts should ground the inquiry on the instrumentalist approach, asking whether a loose construction (of taking the derivative right as part of the patent grant) is loyal to the public interest. If the answer is no, then the derivative right is outside the patent grant and therefore subject to general law i.e. antitrust law.

3. A patent does not grant an immutable monopoly.

I now turn to characterise the legal character of the patent itself. This section will argue that, disregarding the issue of patent validity, patents are insufficient to grant their holders a 'monopoly' in the true and real sense.

It is helpful to consider, in practice, what a patent does. The *Actavis* dissent argued that the patent is the grant of an immutable monopoly, and that the market loses the ability to discipline the patentee after granting the patent in exchange for a novel invention. Citing *General Electric*, "*[T]he precise terms of the grant define the limits of a patentee's monopoly and the area in which the patentee is* ***freed from competition***[28]". But this characterisation is wrong — a patent is a grant of competitive relief not amounting to monopoly; and a patent does not ensure a monopoly.

At best, a patent grants a limited form of 'monopoly'. But this 'monopoly' is vitiated if (i) a challenging party causes the patent to be found invalid; (ii)

[28] *Actavis* at 161

someone invents a product that serves the same purpose but circumvents the patent; or (iii) someone infringes the patent, but the patentee does not challenge the infringement. That is, a patent is no guarantee nor guardrail against potential competition, but rather an additional hurdle which substantially softens the competitive constraints felt by the patentee from its potential competitors.

As the ECJ put it in *Lundbeck*, a patent is not an "*insurmountable barrier*[29]". It would be more accurate to say that the patentee faces less potential competition by virtue of his patent, rather than none at all. In metaphorical terms, a patent is not a 'walled garden[30]' within which patentees can operate but rather a 'speed bump' that discourages competitors from attempting to enter the market.

Potential competition significantly restrains the patentee, *contra Cipro III*. By price-gouging, the originator might reap the rewards of its patent to the detriment of consumers, at least in the short term. Seeing this extreme supernormal profit, generics can now justify a higher sunk cost of entry (e.g. validity challenges, willingness to risk infringement claims), and this consequent increase in risk and labour required to protect its patent monopoly disciplines the originator. An unfettered right to settle gives originators the choice of colluding with willing entrants and allowing them to share in the profits which deprives the market of its ability to discipline incumbents.

As a result of the above, the conclusion in *Cipro III* that there is no cognisable harm to competition is untrue. The harm to the market is cognisable, albeit not immediately appreciable.

The theory of harm is therefore based on the weakening of potential competition. This was briefly mentioned in *Line Material* — "*The patentee creates by that*

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[29] *Lundbeck* at [58]
[30] Herbert Hovenkamp, "the rule of reason and the scope of the patent" (2015) 52 San Diego Law Review 515 at 527

method a powerful inducement for the abandonment of competition, for the cessation of litigation concerning the validity of patents, for the acceptance of patents no matter how dubious, for the abandonment of research in the development of competing patents[31]."

The *Actavis* dissent thus wrongly observed that the terms of the patent grant define a monopoly, or that the patentee is freed from competition by virtue of the patent grant. The patent grant merely softens the blow of direct competition; the archaic "patents" issued by the British sovereign are perhaps more compatible with this characterisation, but modern patents are not.

For the above reasons, the *Actavis* dissent misapplied 'scope of the patent' by construing patents loosely and wrongly characterised patents as a source of freedom from competition.

The true 'scope of the patent' is precisely what the majority in *Actavis* arrived at — the patent grants exclusionary rights to its holder, and the holder can sometimes use these exclusionary rights to restrain competition in ways where they effect greater harm to the market than the patent was intended to. Thus, it calls for a 'rule of reason' inquiry to examine the effects of the reverse payment settlement.

However, this approach could be refined further if courts recognise the distinction between an unchallenged patent and a challenged patent. Most patents are not challenged; patents that are challenged by generics, however, have a good chance of being found invalid. The next section will argue that patents facing a validity challenge must be treated as having a particularly high likelihood of invalidity.

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[31] *Line Material at 44*

II - THE PRESUMPTION OF VALIDITY

The court in *Actavis* did not comment on the quality of patents that come under validity challenges, only recognising that patents "*may or may not be valid, and may or may not be infringed*[32]". But this is generally true of any patent, whether under litigation or not. Another doctrine that stands in the way of the majority's reasoning in Actavis is the presumption of validity. This section seeks to refute this presumption and suggest stricter approaches that require less burdensome standards for proving antitrust infringement.

Background

The *presumption of validity* requires courts to defer to a patent office's initial determination that an invention qualifies for patent protection; unless a challenger can show by 'clear and convincing' evidence that the patent office has erred, a patent will be held valid by default[33]. In essence, patents are presumed valid until proven otherwise.

The presumption of patent validity originates as a doctrine of patent law. The underlying considerations are threefold[34]:

First, given the patent office's institutional competence, courts generally exercise curial deference and defer to its initial decision to grant the patent. Courts generally do not substitute decisions by expert regulatory bodies with their own.

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[32] *Actavis at 163*

[33] Douglas Lichtman and Mark A Lemley, 'Rethinking Patent Law's Presumption of Validity' (2007) 60 *Stanford Law Review* 45 http://www.jstor.org/stable/40040376 accessed 20 September 2025.

[34] *Ibid.*

Second, the presumption disincentivises wasteful and unmeritorious validity challenges. This saves the courts from second-guessing already approved patents, especially when institutional competence favours the patent office.

Third, the presumption increases patent value and reduces uncertainty by buttressing patents against validity challenges. The presumption reassures that the default outcome of litigation would be a finding of validity unless the challenger can show 'clear and convincing' proof otherwise. With this, patentees face lower uncertainty associated with invalidation when laying out capital. The higher value of the patent from its perceived strength against invalidation also facilitates licensing.

The presumption is incompatible with antitrust

The court in *FTC v Watson Pharmaceuticals*[35], concurring with the decision in *Valley Drug Co. v Geneva Pharmaceuticals*[36], imported the presumption of validity into the antitrust assessment — "*The patent in Valley Drug had the potential to exclude competition at the time of settlement because, at that time, 'no court had declared [the] patent invalid*'[37]".

Despite sound justification for the presumption, the doctrine should not fetter antitrust assessment. The reasons are threefold.

First, the presumption is not a valid surrogate for litigation outcome. The presumption sets out the default outcome if insufficient proof is adduced — it merely orders procedure and clarifies burden of proof without shedding light on the actual outcome of a patent dispute.

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[35] 677 F.3D 1298 (11th Cir. 2012)
[36] *Valley Drug Co. v Geneva Pharms.,* 344 F.3d 1294 (2003)
[37] *FTC v Watson Pharmaceuticals* at 1308

Second, the nature of a patent dispute settlement is probabilistic, not binary. The patent should not be treated, as Roberts CJ suggests, as either valid or invalid. Rather the patent lies on a sliding scale of varying strength, depending on how novel the invention is[38].

Given this indeterminacy, when an originator settles with a generic, the perceived strength of the patent determines the size and direction of value transfer.

The *presumption of validity* is at odds with this and should not form the basis of antitrust jurisprudence. The presumption discounts the weakness of the patent and instead accords a weak patent the same full strength as a 'rock-solid' patent. It is ill-advised to then extend this presumption to reverse payment settlements, where the patents are probably weak.

Third, the *presumption of validity* is empirically unjustifiable for antitrust. Around 40 per cent of validity challenges lead to a finding of invalidity, in whole or in part[39]. If nearly half of challenged patents are invalid, there is no justifiable basis to treat patents as presumptively valid when deciding antitrust ambit.

In the first place, these characteristically strong validity challenges are borne of the *presumption of validity* that filters for meritorious claims. Courts should take this as part of the context surrounding reverse payment settlements; given the contextually high rate of invalidity, American courts could consider stricter assessments instead.

Hence, it would be of great assistance if the *presumption of validity* can be directly rebutted by courts, in the context of American antitrust, as it may

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[38] Herbert Hovenkamp, *the rule of reason and the scope of the patent* (2015) 52 San Diego Law Review 515 at 531-532
[39] Michael Carrier, 'A Little More Than Forty Percent' (*Patent Progress*, 15 May 2018) https://patentprogress.org/2018/05/a-little-more-than-forty-percent/ accessed 20 September 2025.

persuade the court to consider approaches alternative to 'rule of reason', such as those proposed by the plaintiffs in *Actavis.*

III - HOW EU AND AMERICAN COURTS ASSESS REVERSE PAYMENT SETTLEMENTS

Both EU and US apex courts have grappled with the issue of reverse payment settlements. The first major EU instance was *Generics*, where the court adopted a different approach to assessing reverse payment settlements as compared to *Actavis.* It will be argued that the 'by object' approach in *Generics* goes even further to prevent potential harm to competition and should be preferred over the 'rule of reason' approach taken by the majority in *Actavis*.

How the presumption of validity is treated

The ECJ expressly dispensed with the patent's *presumption of validity*. The court held that presumption as merely "*the automatic consequence of the registration of a patent and its subsequent issue to the holder*[40]", which sheds no light on the outcome of the patent dispute. The substantive emptiness of the presumption lacked merit in precluding potential competition between the generic and patentee. With potential competition established, an antitrust assessment was justifiably imposed.

Contrast this with the *Actavis* dissent that antitrust had no business "*prying into a patent settlement so long as that settlement confers [...] no monopoly power beyond what the patent itself conferred*[41]". The dissent's basis was that the patent conferred the right to settle within the patent's nominal term, during which competition was excluded. Without competition, there was thus no need for competition law scrutiny. It did not deal with the existence of potential competition as a source of antitrust scrutiny, as the ECJ did in *Generics*.

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[40] *Generics* at 48
[41] *Actavis* at 169

It is submitted that the ECJ's approach is preferred. Validity challenges are a normal facet of competition between potential entrants and incumbents in the pharmaceutical market[42]. Patentees still face potential competition from entrants who can challenge and infringe their patents. Such notions were echoed by the petitioners in *Actavis* who recognised that, in the context of pharmaceutical markets, generics are selective and deliberate in assessing market entry — their profits depend on successfully invalidating originator patents or defending against infringement claims. Generics are thus prone to choosing drug markets where patents are weaker[43].

How infringement is established

Second, the 'by object' test of infringement in *Lundbeck* and *Generics* differs significantly from the 'rule of reason' test set out in *Actavis.*

The 'by object' test prohibits certain 'candidate objects' for their potential harms to competition — collusion, exclusion, and limitation of intra-EU trade[44]. This involves a more complex procedure than identifying *per se* infringements, which are presumptively unlawful arrangements. Ascertaining *per se* infringements involves the inquiry of whether such an anticompetitive arrangement existed[45], whereas the 'by object' approach allows courts to retain an *ex ante* assessment of more complex arrangements that cannot simply be identified as *per se* restraints on trade.

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[42] *Ibid.* at 51-52
[43] Federal Trade Commission, *Reply Brief for the Petitioner, Federal Trade Commission v Actavis, Inc.* (No 12-416, Supreme Court of the United States, 18 March 2013) https://www.ftc.gov/system/files/documents/cases/130318actavisreplybrief.pdf accessed 19 Oct 2025.
[44] P Ibáñez Colomo, 'Restrictions by object under Article 101(1) TFEU: From dark art to administrable framework' (2024) 43 *Yearbook of European Law* 224
[45] Michael A Carrier, *'The Four-Step Rule of Reason'* (2019) 33 (2) *Antitrust* 50 (American Bar Association) https://www.antitrustinstitute.org/wp-content/uploads/2019/04/ANTITRUST-4-step-RoR.pdf accessed 8 November 2025.

By contrast, the 'rule of reason' assessment is a four-stage test that culminates in a balancing of the procompetitive and anticompetitive effects of a restraint by the court. First, the plaintiff must show significant anticompetitive effect due to a restraint. Second, the defendant must demonstrate a legitimate procompetitive justification for the restraint. Third, the plaintiff must show that the restraint was not reasonably necessary for its objectives, or that the defendant's objectives could have been achieved less restrictively. Finally, the court balances the anticompetitive and procompetitive effects of the restraint[46].

Comparing 'by object' and 'rule of reason'

The 'by object' assessment asks the *ex ante* question — whether parties' objects fell within one of three prohibited 'candidate objects'. The test expresses the Ordoliberal roots of EU competition law, which place emphasis on the process of competition rather than the effects. Several reasons have been suggested for this uniquely EU preference, among which is that civil law traditions of Member States have remained traditionally incompatible with an economic analysis of law[47].

It does not concern itself with the counterfactual, nor does it inquire about the restraint's actual effects on the market. So long as a 'candidate object' is ascertained, harm to the market will invariably arise. A weighing of procompetitive and anticompetitive effects would therefore be irrelevant to the inquiry — the court in *Ski Taxi SA*[48] rejected such balancing as it would amount to "applying a rule of reason[49]".

However, it is noted that in *Generics*, the ECJ accepted that the 'by object' approach was not solely concerned with *ex ante* considerations. *Per* AG Kokott, the court accepted that procompetitive effects must be duly considered as part

[46] *Ibid.*
[47] Monti G, *EC Competition Law (Law in Context)* (Cambridge University Press 2007) Pg 20
[48] Case E-3/16
[49] *Ibid.* at 3

of the assessment, insofar as they cast doubt on the 'by object' finding of infringement[50].

On the other hand, 'rule of reason' asks the question *ex post* — of whether a restrictive arrangement, on balance, caused harm to the market. The test finds its roots in the Chicago School that permeates modern US antitrust jurisprudence, which emphasises efficient markets and resultantly an effects-based approach to competition.

Unlike a 'by object' assessment, the 'rule of reason' inquiry lacks the extrapolative leap when deciding whether an arrangement was harmful to the market. 'Rule of reason' may ensure a more rigorous examination of arrangements for their effects; yet, this rigour comes at the cost of enforcement simplicity, creating a more procedurally onerous process for plaintiffs and courts.

In *Generics,* the ECJ was satisfied with finding an infringement 'by object' where "*competitors deliberately substitute practical cooperation between them for the risks of competition*". The assessment was "*whether the net gain of the transfers of value for which they provide can be explained only by the commercial interest of [parties deciding] not to engage in competition on the merits.*[51]" This principle was reaffirmed in *Lundbeck*[52]*.*

The court's focus on protecting "*competition on the merits*" is fundamental to EU competition jurisprudence — in *Astra/Zeneca*[53], the GC explained that:

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[50] *Generics* at 103
[51] *Lundbeck* at 134
[52] "*[generic manufacturers] had no incentive to challenge Lundbeck's new process patents after concluding the agreements at issue, since the* ***reverse payments broadly correspond to the profits*** *that those manufacturers expected to make if they had entered the market* […] *and, second, that even if those payments were of an amount less than the expected profits, they nevertheless* ***constituted a certain and immediate profit****, without those manufacturers having to take the risks that market entry would have entailed.*"—*Lundbeck* at 135
[53] Case T-321/05

"*a strategy whose object is [...] to deal with competition from generic products is legitimate and is part of the normal competitive process, provided that the conduct envisaged does not depart from the practices coming within the scope of competition on the merits*[54]".

The courts in *Austrian Banks*[55] and *GSK*[56] further clarified that Article 101 TFEU (i) prevents a distortion of competition and (ii) promotes the proper functioning of the internal market[57], again reflecting the Ordoliberal focus on protecting the process of competition.

A preference for the 'by object' assessment

It is submitted that the 'by object' assessment is the more precise instrument for identifying harmful reverse payment settlements. The root of all competitive harm from these settlements lies in an unmeritorious exclusion of potential generic entrants, thus vitiating competitive constraints on the originator.

An unmeritorious exclusion invariably harms competition and no competitive good can arise — where two rational parties collude rather than compete during the settlement process, the exclusionary force of the settlement necessarily increases (e.g. higher payments; greater delay in generic entry until patent expiry). At best, collusion only results in higher payments when an originator is more risk-averse, but this only leaves markets indifferent, not better off. It is therefore the 'by object' assessment that properly targets such collusive behaviour.

CONCLUSION

[54] *Ibid* at 804
[55] T-213/01
[56] C-501
[57] *Austrian Banks* at 115; *GSK* at 62-64

Reverse payment settlements have provided much-needed ventilation for issues relating to the patent-antitrust interface. They demonstrate that a strict construction of patent rights confines patents to their true statutory purpose — the promotion of innovation in the public interest. A loose, nominal construction undermines this and puts patents at risk of becoming instruments of collusion. Equally, the presumption of validity should be confined to patent law. To transpose this presumption into antitrust would be to mistake form for substance.

Balancing Patents and Public Health

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INTRODUCTION

A 'manufacturing-for-export' exception may be understood as a rule permitting the manufacture and export of a product protected by a patent or supplementary protection certificate to jurisdictions where the invention is off-patent or otherwise unprotected.[1]

Its compatibility with The Agreement on Trade-Related Aspects of Intellectual Property Rights **(**TRIPS) Agreement[2] squarely raises the long-debated tension between safeguarding patentees' exclusive rights and meeting developmental and public-health needs. In pharmaceuticals in particular, such an exception could facilitate timely exports of generics to countries without relevant protection; conversely, IP-exporting states and industry groups caution that it could weaken exclusivity and, with it, innovation incentives.

This essay evaluates whether a manufacturing-for-export exception is permissible under international intellectual property law, drawing on treaty text and structure, post-TRIPS instruments, and case law. It proceeds in four parts. Section I maps the potential benefits and risks. Section II considers the UK's supplementary protection certificate waiver as an analogy to 'manufacturing-for-export' exceptions**.** Section III focuses on the framework of the TRIPS Agreement and subsequent instruments. Section IV applies that framework to three questions: (1) the consistency of a manufacturing-for-export rule with the wording and structure of TRIPS; (2) how later developments - notably the Doha Declaration[3] and Article 31bis[4] - bear on the compatibility of the exception; (3) whether any such rule must be sector-specific (e.g., pharmaceuticals) or whether it can be applied across other sectors as well.

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[1] Neeraj Solovy and Deepali Raju, 'A Manufacturing for Export Exception to Patent Protection: Advancing Global Health through Access to Medicines' [2018] 41 Fordham International Law Journal 1393

[2] Agreement on Trade - Related Aspects of Intellectual Property Rights (adopted 15 April 1994 ,entered into force 1 January 1995) 1869 UNTS 299

[3] WTO, 'Declaration on the TRIPS Agreement and Public Health' [2001] WT/MIN(01)/DEC/2

[4] WTO, 'Amendment of the TRIPS Agreement, Article 31bis' [2005] WT/L/641

I - BENEFITS AND DOWNSIDES FOR A ‘MANUFACTURING-FOR-EXPORT’ EXCEPTION

There are several reasons why a ‘manufacturing-for-export’ exception could be beneficial. Most notably, it could improve global access to essential goods, particularly medicines, by enabling the timely export of affordable generics to countries with limited manufacturing capacity and no relevant patent barriers. Such a pathway would be especially salient for urgent public-health needs in low- and middle-income countries, where treatment gaps persist due to high prices and supply constraints. By permitting clearly defined export-oriented production, the exception could also strengthen and diversify pharmaceutical supply chains and reduce reliance on a small set of producer countries. Additionally, it could lower transaction costs associated with negotiating voluntary licenses or navigating the TRIPS framework for exceptions, particularly for countries with limited legal or negotiating capacity.

Despite the potential benefits, there are however significant counterarguments rooted in concerns about weakening patent protection and the global intellectual property system. First, allowing production in one country solely for sale abroad blurs the territorial boundaries on which patent law rests and complicates cross-border enforcement. It also creates a diversion risk: goods made ‘for export’ can be re-imported or leak into protected markets, shortening the effective exclusivity that helps firms recoup research and development (R&D) in high-income settings. At the system level, such an exception is also likely to be read by major IP-exporting states as a step toward looser patent rules, inviting political pushback from industries that shape trade policy.

II - A COMPARISON WITH THE UK’S SUPPLEMENTARY PROTECTION CERTIFICATE (SPC) WAIVERS

The existence of similar exceptions in the UK makes the compatibility of a 'manufacturing-for-export' exception with current international legal standards a particularly interesting object of discussion. For instance, the UK adopts EU regulation allowing for a waiver of supplementary protection certificates (SPCs).[5] SPCs extend protection for pharmaceutical and plant protection products beyond the standard patent term, compensating for time lost during regulatory approval processes. Through Regulation (EU) 2019/933 amending Regulation (EC) No 469/2009, the EU introduced an SPC "waiver" comprising two elements. First, Article 5(2)(a) lays down the conditions for EU-based manufacturers to produce generic or biosimilar versions of SPC-protected medicines for export to countries where no SPC or patent protection exists. Second, it permits stockpiling so that products can enter the EU market immediately after SPC expiry.[6] Framed this way, the SPC waiver seeks to balance innovation incentives with the need to encourage competition and to protect public health goals. The Commission's impact assessment expected it to level the playing field for manufacturers vis-à-vis countries without SPC-type rights, remove competitive disadvantages, and by enabling export and controlled stockpiling, help lower prices and support the sustainability of health systems.[7]

The UK's SPC waiver shows how patent rights and competition law can be balanced to protect legitimate interests, not least those living in countries with a lack of access to medical products. Nonetheless, it is crucial to keep SPC waivers and manufacturing-for-export exceptions distinct. An SPC is a *sui generis* EU right that extends patent-derived exclusivity for certain medicines and the waiver narrows that right during the SPC term by permitting export manufacturing and limited stockpiling. Crucially, this is with the purpose of "creat[ing] a level playing field between makers established in the Union and third-country makers" which

[5] Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products (codified version) [2009] OJ L 152/1
[6] Regulation (EU) 2019/933 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EC) No 469/2009 concerning the supplementary protection certificate for medicinal products [2019] OJ L 153/1
[7] European Commission, 'Impact Assessment Accompanying the Proposal for a Regulation amending Regulation' (EC) No 469/2009 concerning the supplementary protection certificate for medicinal products' SWD (2018) 240 final

are not disadvantaged by SPCs, according to Recital 9 of the Introductory Text of the Regulation (EU) 2019/933.[8] By contrast, a manufacturing-for-export exception would be a direct limitation on patent rights operating during the patent term which effectively gives makers established in the UK an *advantage* over third-country makers. Hence, a separate assessment of TRIPS-compatibility is required, and the following sections undertake this analysis.

III - DEFINITION OF TERMS AND LEGAL BASIS

The concept of permitting the manufacture and export of a product protected by a patent to importing countries where the invention is not protected by a patent would be, at first instance, non-compliant with Article 28.1 of the TRIPS Agreement (*Rights Conferred*). The Article states that a patent owner has a number of exclusive rights derived from the patent, including preventing "third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product".

Correa (2022) highlights two components to the 'manufacturing-for-export' exception: an 'export' component and a 'manufacture' component.[9] For the former, he argues that *exports* are not covered by the patentee exclusive rights as they are outside the scope of Article 28. He also stresses the territorial nature of the right of the patent by referencing decisions of the US Supreme Court such as the *Deepsouth Case:*[10] the patent aims to limit selling by third parties within the territory where the invention is patented. However, when it comes to the *manufacture* component of the 'manufacturing-for-export' exception, this would be non-compliant with Article 28, as it would impede on the exclusive right of 'making' of the patentee.

[8] Regulation (EU) 2019/933 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EC) No 469/2009 concerning the supplementary protection certificate for medicinal products [2019] OJ L 153/1, recital 9

[9] Carlos M Correa, 'Manufacturing for Export: A TRIPS - Consistent Pro- Competitive Exception' (2022) 25 Journal of International Economic Law 435

[10] *Deepsouth Packing Co v Laitram Corp* 406 US 518 Pg no.s (1972)

As a consequence, it is worth to analyse whether it would be permissible under Article 30 and Article 31 of the TRIPS Agreement which incorporates a degree of flexibility to the TRIPS Agreement, by allowing for certain exceptions and limitations. Article 30 permits “limited exceptions" to patent rights, provided they do not "unreasonably conflict with a normal exploitation of the patent" or "unreasonably prejudice the legitimate interests of the patent owner." This provision is significant in assessing whether manufacturing for export could be deemed a "limited exception". In contrast, Article 31 addresses compulsory licensing, allowing states to authorise use without the patent holder’s consent, subject to conditions such as prior negotiation, adequate remuneration, and predominantly domestic use (Article 31(f)). This provision posed difficulties for countries unable to manufacture pharmaceuticals themselves. As such, the first issue to be assessed will be whether the ‘manufacturing-for-export’ qualifies as an exception under Articles 30 and 31, despite Article 28.1. WTO case law also sheds light on how TRIPS flexibilities are interpreted. As we will observe, the *Canada – Patent Protection of Pharmaceutical Products* (2000)[11] may be instrumental in interpreting the reading of Article 30.

More recent legal developments such as the formal amendment in Article 31bis and the Doha Declaration on TRIPS and Public Health (2001) also inform our understanding of whether a ‘manufacturing-for-export’ exception would be permissible. Under Article 31bis, WTO Members can issue compulsory licences specifically for the manufacture and export of pharmaceutical products to eligible importing countries. This provision includes various procedural safeguards and is to date the only explicit exception under TRIPS allowing export of patented products under compulsory licensing. Similarly, the Doha Declaration on TRIPS and Public Health (2001) clarified that TRIPS should be interpreted in light of public health needs and affirmed the right of WTO members to use TRIPS flexibilities fully.

[11] Panel Report on *Canada – Patent Protection of Pharmaceutical Products* [2000], WT/DS114/R

Lastly, the paper tests the feasibility of a pharmaceutical-only "manufacturing-for-export" exception and its compatibility with TRIPS Article 27.1, which requires patents to be available in all fields of technology and enjoyed without discrimination as to field, place of invention, or import status. It also evaluates the principle of technological neutrality and the risk of legal inconsistencies within the wider WTO framework.

IV - DISCUSSION

A) An interpretation of Articles 30 and 31 of the TRIPS Agreement

The first question to consider is whether the criteria outlined in Article 30 and Article 31 of the TRIPS Agreement would allow for the proposed 'manufacturing-for-export' exception, under the current wording of the Agreement as it stands.

Article 30

Article 30 permits WTO Members to introduce "limited exceptions" to the exclusive rights conferred by a patent, provided three conditions are met:

(i) The exception must be limited;

(ii) It must not 'unreasonably conflict with a normal exploitation of the patent';

(iii) It must not 'unreasonably prejudice the legitimate interests of the patent owner.

All three conditions must be interpreted 'taking account of the legitimate interests of third parties'.

Some considerations on the wording and interpretation

Before discussing the applicability of this exception to manufacturing-for-export exceptions, it is important to address the debate as to its interpretation. Specifically, there is disagreement as to whether these conditions should be regarded as cumulative or not.[12] In the WTO Panel decision in *Canada – Patent Protection of Pharmaceutical Products* (2000), which examined Canada's regulatory review and stockpiling exceptions, the panel concluded that the three conditions were cumulative.[13] However, this contrasts with what is written in the Declaration on Patent Protection, Regulatory Sovereignty under TRIPS, stating instead that the three conditions are not cumulative and that "the three-step test may be understood to require a comprehensive overall assessment rather than a separate and independent assessment of each criterion. Failure to comply with one of the three conditions need not result in the exception being disallowed".[14] As such, further clarification should be provided on the interpretation of the test to better assess whether a 'manufacture-for-export' exception would be permissible under Article 30 of TRIPS.

Additionally, there has been disagreement and lack of clarity about the language of the conditions of the three-part test. First, it is unclear what exactly is understood as a 'limited' exception; whether this refers to the scope of the exception, its duration, or other features of it.[15] Once more, an interpretative reference can be found in the WTO Panel decision in *Canada – Patent Protection of Pharmaceutical Products* (2000).[16] The decision evaluated both the regulatory review exception (or "Bolar"), which permits use of the invention solely to generate data for research and trials, and the stockpiling exception, which allowed manufacture and storage of patented medicines during the last six

[12] Carlos M Correa, 'Manufacturing for Export: A TRIPS - Consistent Pro- Competitive Exception' (2022) 25 Journal of International Economic Law 435

[13] Panel Report on *Canada – Patent Protection of Pharmaceutical Products* [2000], WT/DS114/R

[14] Max Planck Institute for Innovation and Competition, 'Declaration on Patent Protection: Regulatory Sovereignty under TRIPS' [2014]

[15] Carlos M Correa, 'Manufacturing for Export: A TRIPS - Consistent Pro- Competitive Exception' (2022) 25 Journal of International Economic Law 435; Xavier Seuba, Luis Mariano Genovesi and Pedro Roffe, 'A Manufacturing for Export Exception' in Bryan Mercurio and Daria Kim (eds), *Contemporary Issues in Pharmaceutical Patent Law: Setting the Framework and Exploring Policy Options* (Routledge 2017) 161–185.

[16] Panel Report on *Canada – Patent Protection of Pharmaceutical Products* [2000], WT/DS114/R

months of the patent term. The Panel upheld Bolar as a "limited" exception that did not unreasonably conflict with the patent's normal exploitation but struck down stockpiling as not "limited" and as conflicting with normal exploitation. Stockpiling failed because despite being limited to the last six months, it allowed unlimited volumes and no restriction on destination, creating a commercially significant encroachment on the period in which patentees extract value. In the Panel's terms, it was not "limited" and it unreasonably conflicted with "normal exploitation".[17]

By contrast, the regulatory review exception passed because the permitted acts were strictly confined to what was necessary for regulatory approval, with no commercial use of outputs. The scope of unauthorized acts was small and narrowly bounded, so it did not unreasonably interfere with exploitation. The Panel noted that though regulatory approval processes may require substantial amounts of test production to demonstrate reliable manufacturing, the patent owner's rights themselves are not impaired any further by the size of such production runs, as long as they are solely for regulatory purposes and no commercial use is made of resulting final products.[18]

When assessing the language of the second condition of Article 30, there also has been uncertainty about the interpretation of the "normal exploitation" of a patent. In the *Canada – Pharmaceuticals* case, the panel adopted a broad interpretation, suggesting that "normal exploitation" refers to the commercial activities through which patent holders extract economic value from their patents.

Conversely, other readings of the second condition have also been proposed. Nuno Pires de Carvalho, for example, argues that 'normal exploitation' of a patent does not refer to the exploitation of the possible resulting revenues, but rather

[17] Ibid para 7.37
[18] Ibid para 7.45

the right to the invention itself, thus disagreeing with the formulation given by the Panel.[19]

Applying 'manufacturing-for-export exception' to Article 30

However, applying the three conditions in Article 30 to a manufacturing-for-export exception exposes deeper problems.

Seuba et al. (2017) maintain that a manufacturing-for-export rule could satisfy Article 30's three conditions. First, it is "limited" because it targets a specific act (making) for a specific purpose (export to jurisdictions without relevant protection), with volumes supposedly capped by foreign demand. Second, it does not unreasonably conflict with normal exploitation because patentees earn their core returns at home and domestic rights do not reach foreign markets. Lastly, for any remaining prejudice to patentees' legitimate interests, these can be tempered by devices such as equitable remuneration.[20]

Although Seuba et al. (2017)'s view is facially attractive, the Panel in *Canada–Pharmaceuticals*[21] read "limited" as a narrow, purpose-bound curtailment, exemplified by Bolar-type non-commercial testing that does not create saleable inventory.[22] Pre-expiry manufacture for export is the opposite: it authorizes commercial scale making during the term, functionally akin to the stockpiling the Panel rejected, thus making it likely that condition 1 on "limited exception" will not be satisfied. Moreover, Solovy & Raju (2017) add that condition 2 on "normal exploitation" includes the option value of keeping the patentee as

[19] Nuno Pires de Carvalho, 'The TRIPS Regime of Patent Rights' [2002] Kluwer Law International

[20] Carlos M Correa, 'Manufacturing for Export: A TRIPS - Consistent Pro- Competitive Exception' (2022) 25 Journal of International Economic Law 435; Xavier Seuba, Luis Mariano Genovesi and Pedro Roffe, 'A Manufacturing for Export Exception' in Bryan Mercurio and Daria Kim (eds), *Contemporary Issues in Pharmaceutical Patent Law: Setting the Framework and Exploring Policy Options* (Routledge 2017) 161–185.

[21] Panel Report on *Canada – Patent Protection of Pharmaceutical Products* [2000], WT/DS114/R

[22] Ibid

the exclusive exporter.[23] While that may matter where entry is intended, where a patentee opts out of weaker markets the expected foreign revenue is essentially negligible and hence there cannot be said to be any option value. However, this would be difficult to prove, as the subjective intentions of the exclusive exporter will have to be scrutinised. Hence, a manufacturing-for-export rule likely does not fit Article 30's cumulative test, prompting the application of other mechanisms to allow for such an exception to be put in place.

Applying 'manufacturing-for-export exception' to Article 31

Having concluded that a manufacturing-for-export rule does not fit within Article 30's cumulative test, the analysis must shift to Article 31. Article 31 of the TRIPS Agreement provides a detailed framework for the use of patents without the authorization of the patent holder, primarily through the mechanism of compulsory licensing. The provision establishes several key conditions under which compulsory licensing may be granted, and one of the most important limitations in this context is the requirement that 'any such use [of the patented invention] shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use' as outlined in Article 31(f).This provision reflects the underlying principle of compulsory licensing as a tool primarily designed to address domestic public health needs or to remedy anti-competitive behaviour within the domestic market. Consequently, it is unlikely that the manufacturing-for-export exception will be rendered compatible with TRIPS by virtue of Article 31.

B) An interpretation of Post-TRIPS Agreements

Following the direct analysis of the relevant articles of the TRIPS Agreement, it is worth assessing more recent developments that could further inform our interpretation of them, as well as any other grounds under which the exception might be possible. These are mainly Article 31bis and the Doha Declaration.

[23] Neeraj Solovy and Deepali Raju, 'A Manufacturing for Export Exception to Patent Protection: Advancing Global Health through Access to Medicines' [2018] 41 Fordham International Law Journal 1393

Article 31bis

Adopted as a waiver in 2003 and formally entered into force in 2017, Article 31bis enables production and export of patented pharmaceuticals under compulsory licences to countries lacking manufacturing capacity.[24] This provision is highly specific and includes three procedural safeguards:

(1) the importing country must notify the WTO with proof of its lack of manufacturing capacity;

(2) the exporting country must then issue a compulsory licence;

(3) the products must be clearly identified and not enter other markets.

The very fact that WTO Members adopted a specific waiver and then amended TRIPS could be widely read as evidence that export-oriented manufacture was not covered by the Agreement's general exception clauses and that such flexibility could not be inferred from Article 30.

However, the complexity of Article 31bis has rendered it largely unused. In 2007, Rwanda requested to import a generic version of a patented drug from Canada under the Article 31bis system.[25] Canada issued a compulsory licence, marking the first — and so far, only — use of the provision. Despite being hailed as a success, the process was lengthy and bureaucratically burdensome, discouraging future use. This has reignited debates about whether a broader, more flexible interpretation of Article 30 could better serve public health needs, particularly in low- and middle-income countries.

Additionally, while Article 31bis establishes a formal legal basis for one form of manufacturing-for-export, it is limited to pharmaceuticals, and to circumstances where the importing country cannot manufacture the product itself.

[24] WTO, 'Amendment of the TRIPS Agreement, Article 31bis' [2005] WT/L/641

[25] WTO Council for TRIPS, 'Notification under Paragraph 2(a) of the Decision of 30 August 2003: Rwanda' [2007] IP/N/9/RWA/1

The Doha Declaration

The Doha Declaration on the TRIPS Agreement and Public Health, adopted in 2001,[26] is frequently cited as a cornerstone document supporting the use of TRIPS flexibilities to advance public health objectives.

Paragraph 4 says that "the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health" and that the agreement "can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all"[27]. Such wording would confirm a commitment to prioritise common and public interests over private ones, which provides an interpretative lens for Article 30.

However, whether this support extends to allowing a 'manufacturing-for-export' exception to patent rights is more contentious. On one hand, the Declaration reaffirms the right of states to use the existing TRIPS flexibilities, such as compulsory licensing (paragraph 5(b)) and the ability to determine national emergencies (paragraph 5(c)).[28] These affirmations arguably widen the interpretive scope of Articles 30 and 31,[29] potentially creating space for exceptions where export is necessary to meet cross-border health needs. This is especially relevant in the context of insufficient manufacturing capacity in many developing countries — a concern directly addressed through the subsequent Article 31bis mechanism. Yet, this amendment also reveals the Declaration's limitations: rather than implicitly authorising broader export-oriented exceptions under Article 30, WTO Members opted for a specific legal pathway in Article 31bis, subject to procedural constraints and international notification

[26] WTO, 'Declaration on the TRIPS Agreement and Public Health' [2001] WT/MIN(01)/DEC/2
[27] Ibid para 4
[28] Ibid para 5
[29] Agreement on Trade - Related Aspects of Intellectual Property Rights (adopted 15 April 1994,entered into force 1 January 1995) 1869 UNTS 299

requirements. The very existence of this amendment may thus be interpreted as evidence that export-oriented flexibilities were not originally covered under TRIPS general exception clauses. Moreover, while the Doha Declaration offers political legitimacy to measures taken in pursuit of public health, it does not override the legal text of TRIPS itself. The Doha Declaration lends normative and contextual weight to a broader reading of TRIPS, but it does not independently authorise a manufacturing-for-export exception. Whether such an exception is permissible still depends on its compatibility with the substantive requirements of the TRIPS provisions it seeks to invoke.

C) Exception limited to pharmaceuticals or extendible to other sectors as well?

Having discussed how a 'manufacturing-for-export' exception could breach parts of Articles 30 and 31 TRIPS, it is worth asking whether a sector-limited version, focused on pharmaceuticals, could nonetheless be justified. This is mostly because the pharmaceutical sector is often treated as exceptional because of its public-health implications and the role of trade in access to affordable medicines. Several precedents already reflect this exceptionalism: SPCs restore time lost to marketing authorisation typically for pharmaceuticals and plant-protection products; Article 31 of the TRIPS Agreement allows for compulsory licensing, enabling governments to authorise the production of generic versions of patented medicines without the patent holder's consent during public health crises; and regionally, the EU permits parallel imports from countries where medicines are priced more affordably and, in defined cases, shortened data-exclusivity to support the faster introduction of generic medicines[30].

In light of these precedents, it is worth examining whether a 'manufacturing-for-export' exception to patent rights, limited exclusively to the pharmaceutical industry, could be introduced as a legally viable and ethically

[30] Council Regulation (EC) 726/2004 of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency [2004] OJ L136/1_

justifiable mechanism. Such an approach might strike a balance between preserving the rights of patent holders and responding to urgent health and developmental needs in countries where the patented product is not protected, or where patents are not enforced.

However, the legal feasibility of such a sector-specific exception under the TRIPS Agreement remains contentious for the reasons identified above.

Furthermore, limiting a 'manufacturing-for-export' exception to a particular sector such as pharmaceuticals raises concerns under Article 27.1 of the TRIPS Agreement, which provides that "patents shall be available for any inventions, whether products or processes, in all fields of technology," and that patent rights must be "enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced." A sector-specific exception, even with a strong justification such as public health, could be seen as violating the principle of non-discrimination embedded in this provision.

Nonetheless, *Canada*[31] provides a useful precedent to assess the possibility of crafting a limited manufacturing-for-export exception that could possibly operate within the boundaries of the TRIPS Agreement. For instance, if an exception were made with the purpose of assisting in research abroad, or for non-commercial aid in third-world countries, this might be considered a narrowly bounded exception which does not unreasonably interfere with exploitation. Moreover, the exception could place a limit on volumes and destination, providing an argument that such an exception would not constitute a commercially significant encroachment on the period in which patentees extract value.

CONCLUSION

[31] Panel Report on *Canada – Patent Protection of Pharmaceutical Products* [2000], WT/DS114/R

In conclusion, while the TRIPS Agreement imposes strict conditions on the use of patented inventions, it also leaves room for carefully constructed exceptions that prioritise public health and developmental needs. Read in light of the Doha Paragraph 6 process and the waiver that became Article 31bis, the better view is that export-oriented manufacture was not envisaged under Article 30's general exception. Nonetheless, *Canada* provides a useful reference point for the possibility of a narrowly tailored manufacturing-for-export exception — limited to research uses abroad or non-commercial humanitarian supply and constrained by caps on volume and anti-diversion safeguards — so that it does not unreasonably interfere with normal exploitation or amount to a commercially significant encroachment on patentees' value-extraction period.

Feature Article

Unlawful Command Influence: Why we don’t care about war crimes anymore

Mark. M. Hull, JD, PhD, FRHistS, FRSA

The single point of failure for military law, regardless of specific nation, comes in the form of unlawful command influence (UCI). It occurs when a commander interferes in the administration of military justice at the investigation, pretrial, trial, sentencing, and post-sentencing phases to achieve a personally desired outcome. Essentially, an official who is by law empowered to give binding commands puts their thumb on the scale of justice. This article describes the steady, deliberate erosion of military law and the laws of war in the United States as the most senior officials decide the preferred results. Every instance of unlawful command influence is corrosive and an ideological and political pattern can be fatal.

1. US Military Law, the short version

American military law stems from the Constitution. It gives Congress is the authority under Section 8, Clause 14 "[t]o makes Rules for the Government and Regulation of the land and naval Forces."[1] The different branches of the United States Armed Forces are bound by the Uniform Code of Military Justice (UCMJ), first established in 1950 to replace the earlier Articles of War. In addition to prescribing rules of evidence and procedure, the UCMJ contains fifty-seven punitive articles which detail the most serious criminal offences, provisions that incorporate other federal laws, and 'catch-all' articles aimed at punishing conduct detrimental to military discipline.[2] The UCMJ provides service members with rights and privileges comparable to those afforded to defendants under federal, and state laws, albeit with some notable differences. A General Court-Martial (GCM) is reserved for those bound over for the most serious offences, such as rape, murder, and treason. Most violations of the laws of war are prosecuted there.[3] An accused is provided with military defense trial counsel free of charge and can retain civilian attorneys at their expense. While courts-martial are constitutionally exempt from the grand jury requirement, a military accused is afforded an Article 32 hearing, where a

[1] https://constitution.congress.gov/browse/essay/artI-S8-C14-1/ALDE_00001076/ [Accessed 27 Sept 2025]
[2] Manual for Courts-Martial (MCM), 2024 edition at jsc.defense.gov/Portals/99/2024%20MCM%20files/MCM%20(2024%20ed)%20(2024_01_02)%20(adjusted%20bookmarks).pdf [Accessed 27 Sept 2025]
[3] Rules for Court Martial (R.C.M.) 203 (b), p. 15, included in the MCM.

Preliminary Hearing Officer makes a recommendation as to whether probable cause exists to send the case forward.[4] At a court-martial, consistent with protections of the US Constitution, the accused has the right to testify or to refuse to testify with no negative inference being drawn. In the same vein, the accused has the right to question all witnesses for the prosecution and to call any witnesses in support. They can also represent themselves, though this is strongly discouraged for obvious reasons.[5] Courts-martial have their own version of a jury – a "panel" – composed of serving military personnel. The decision to convene a court-martial lies completely with the "convening authority," usually the most senior officer at a military installation – meaning a general officer – who also selects the panel members and affirms any sentence of the court.[6] They can likewise amend or overturn the verdict in some instances.[7] Under the Constitution and the National Security Act of 1947, the President of the United States and the Secretary of Defense are at the apex of this command structure with the power to intervene; formerly, it was a power rarely used.

2. Unlawful Command Influence

Article 37 of the Uniform Code of Military Justice specifies "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof . . ."[8] UCI can also separately

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[4] 10 U.S. Code § 832 - Art. 32 at https://www.law.cornell.edu/uscode/text/10/832 [Accessed 27 Sept 2025]
[5] MCM, Article 27 at /jsc.defense.gov/Portals/99/2024%20MCM%20files/Supplemental%20Material%20-%202024%20ed.pdf?ver=MOhX1c1Yj6V0ghDyTP8uFw%3D%3D [Accessed 27 Sept 2025]
[6] The National Defense Authorization Act in 2022 and 2023 altered the UCMJ to remove certain offenses from command discretion, creating the Office for Special Trial Counsel in cases of murder, sexual assault, domestic violence, child abuse, kidnapping and other serious criminal offenses, as well as mandating a randomized selection of panel members instead of that process being commander-directed. Michael Lewis, "Major Changes in the Uniform Code of Military Justice," *American Bar Association*, 7 Oct. 2022 at https://www.americanbar.org/groups/judicial/resources/jd-record/2022/major-changes-uniform-code-military-justice/ [Accessed 27 Sept 2025]
[7] Six civilian officials can also act as convening authority: President, the Secretary of Defense, the Secretaries of the Army, Navy, and Air Force, and the Secretary of Homeland Security. In our present circumstances this means Donald Trump, Pete Hegseth, three political appointees, and Kristi Noem. See 10 U.S. Code § 822 - Art. 22 at https://www.law.cornell.edu/uscode/text/10/822 [Accessed 26 Sept 2025]
[8] 10 U.S.C. § 837 (2006) at https://www.law.cornell.edu/uscode/text/10/837 [Accessed 27 Sept 2025]

create due process concerns, where for example unlawful influence undermines a defendant's right to a fair trial or the opportunity to put on a defense.

There has been a significant line of cases to assist the court in recognizing and applying the prohibition against UCI.[9] The party making the allegation must show: (1) facts, which if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the unfairness.[10]

In plain terms,

> "A provision within the UCMJ provides that it is improper and unlawful for any person to attempt to influence the action of an appointing or reviewing authority or the action of any court-martial in reaching its verdict or pronouncing sentence. In modern practice, the most common but nebulous type of UCI is the appearance of UCI. Its appearance exists where an objective and disinterested observer who is fully informed of all of the facts and circumstances would harbor a significant doubt about the fairness of the court-martial proceedings."[11]

Instances of UCI predate the current Uniform Code of Military Justice, and was one of the reasons why the UCMJ was codified.[12] Indeed, the presence of rules against UCI in military justice is viewed as foundational beyond the courtroom. In the words of the U.S. Army's 22nd Chief of Staff, General George H. Decker, "it is essential that our excellent court-martial system generate public confidence in the basic fairness of the administration of military justice. No other single factor has greater tendency

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[9] E.g. *United States v. Adamiak*, 4 USCMA 412 (1954) is foundational. See also *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006); *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999); *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994). In *United States v. Sayler* (C.A.A.F. 2013) a finding of UCI led to the dismissal of charges.

[10] *United States v. Richter* , 51 M.J. 213, 224 (C.A.A.F. 1999) (quoting *Biagase* , 50 M.J. at 143, 150 (C.A.A.F. 1999)).

[11] James F. Garrett, Mark "Max" Maxwell, Matthew A. Calarco, Franklin D. Rosenblatt, "Lawful Command Emphasis: Talk Offense, Not Offender; Talk Process, Not Results," The Army Lawyer, August 2014, p.14 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4877860 [Accessed 27 Sept 2025]

[12] Ibid.

to destroy public confidence in the system than allegations of [unlawful] 'command influence.'"[13]

The Army JAG Center notes, "Unlawful command influence is divided into two types: accusatory, that is, unlawful influence in how the case is brought to trial; and adjudicative, that is, unlawful command influence in how the case is tried." This includes the sentencing and post-sentencing phases.[14]

To date, UCI has been exclusively used on behalf of defendants who alleged detrimental command interference at some stage in investigative or judicial proceedings. The drafters of Article 37 and the military courts of appeal in the years that followed never conceived of a situation where unlawful command influence benefitted a defendant and disabled impartial military justice in war crimes cases.[15] But that is the place where we are now. This begs the key question, does Article 37 apply in cases where the commander in chief of the armed forces uses UCI against the prosecution and the military justice system as a whole?

3. United States v. Clint Lorance

On 2 July 2012, in Kandahar Province, Afghanistan, First Lieutenant Clint Lorance was leading a platoon[16] patrol of the 4th Brigade Combat Team, 82nd Airborne Division when three Afghan men on a motorcycle were spotted some 180 metres away. The men were unarmed, yet Lorance ordered one of the privates in his unit to

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[13] SUBCOMM. ON CONST. RTS. OF THE S. COMM. OF THE JUDICIARY, 88TH CONG., REP. ON CONST. RTS. OF MILITARY PERS. 16 (Comm. Print 1963), at http://www.loc.gov/rr/frd/Military_Law/pdf/const-rights-milpers.pdf [hereinafter CONST. RTS. REPORT] (quoting a 5 February 1962 letter from General George Decker, Army Chief of Staff, on the subject of command influence). [Accessed 27 Sept 2025] Decker was CoS from 1960-62.

[14] Criminal Law Deskbook, US Army Judge Advocate General's Legal Center and School at https://tjaglcs.army.mil/criminallawdeskbook/topic/02_Unlawful_Command_Influence/loc/TopicHistory/ShowHistory/58. [Accessed 25 Sept 2025] It is filled with citations to military cases involving UCI, and the 10 Commandments of UCI in Appendix A is particularly helpful.

[15] See Joshua Kastenberg, "Fears of Tyranny: The fine line between Presidential authority over military discipline and unlawful command influence through the lens of miliary legal history in the era of Bergdahl," Hofstra Law Review, Vol. 49, Issue 1, 2020.

[16] There are 30-40 soldiers in an infantry platoon. The 4th BCT was deactivated in 2014. Drew Brooks, "4th Brigade Combat Team Shut Down by Army Restructuring, Fayetteville Observer," 15 May 2014 at https://www.fayobserver.com/story/news/military/2014/05/15/4th-brigade-combat-team-shut/22163671007/ [Accessed 27 Sept 2025]

shoot them – the private deliberately missed – and the Afghans ran for help to members of the Afghan National Army (ANA) that accompanied the Americans.[17] The ANA soldiers refused to intervene and when the three men turned to leave, Lt. Lorance ordered a soldier in a gun truck to kill them. Two died, and the third escaped.[18] Members of Lorance's platoon, who despised their officer for a number of reasons, reported the killings.[19] At his court martial in August 2013, nine members of Lorance's unit appeared for the prosecution. He was convicted of murder, obstruction of justice, and lesser charges, and sentenced to 20 years confinement, dismissal from the Army, and forfeiture of pay. The sentence was upheld by the Army Court of Criminal Appeals in 2017.[20]

His conviction was taken up almost immediately as a *cause célèbre* by groups such as the United American Patriots, which provides a wide range of support to Americans accused of committing war crimes. This was seconded by the Republican Party in Illinois which unanimously approved an appeal to then-President Donald Trump to pardon Lorance.[21] Texas Congressman Louis Gomert, founder of the "Congressional Warriors for Justice," organized a letter to the Army Clemency and Parole Board, urging Lorance's immediate release.[22] President Obama had refused all entreaties for a pardon.

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[17] Nathaniel Penn, "The Last Patrol," *California Sunday Magazine*, 27 Sept. 2020 at https://story.californiasunday.com/clint-lorance-court-martial-pardon-the-last-patrol/ [Accessed 27 Sept 2025]

[18] Kyle Rempfer, "Army officer convicted of murder to get another look by civilian court," *Army Times*, 1 July 2019 at https://www.armytimes.com/news/your-army/2019/07/01/army-officer-convicted-of-murder-in-afghanistan-to-get-another-look-by-civilian-court/ [Accessed 25 Sept 2025]

[19] At trial, Lorance was revealed to have threatened the families of local Afghan civilians and ordered his men to shoot in the direction of a nearby village to scare them into compliance. *United States v. Clint A. Lorance*, Army Court of Criminal Appeals at https://www.courtlistener.com/opinion/4661777/united-states-v-first-lieutenant-clint-a-lorance/ [Accessed 27 Sept 2025]

[20]https://www.jagcnet.army.mil/Apps/ACCAOpinions/ACCAOpinions.nsf/MOD/331E0265DC59E54F8525814E006BA1DC/$FILE/mo-lorance,%20ca.pdf [Accessed 25 Sept 2025]

[21] Elizabeth Crisp, "US Rep Garrett plays key role in getting presidential pardon, eyes more cases," *The Advocate*, 8 Dec. 2019 at https://www.theadvocate.com/baton_rouge/news/politics/article_edfc9d08-0d7b-11ea-a7e8-eb6ac6c39f4c.html [Accessed 27 Sept 2025]

[22]The Internet Archive Wayback Machine at https://web.archive.org/web/20200111095927/https://gohmert.house.gov/uploadedfiles/scanned_letter_signed_for_lorance_with_hice.pdf [Accessed 26 Sept 2025]

The commander of the 82nd Airborne Division and the Army Court of Criminal Appeals rejected Lorance's appeal, confirming his sentence, with the Army general removing one year for the time Lorance served in pre-trial confinement.

Following strident defense of Lorance on FOX News by commentators Pete Hegseth (now the US Secretary of Defense) and Sean Hannity, President Trump awarded a full pardon on November 15, 2019.[23] In promulgating this get-out-of-jail-free decree, the White House added, "For more than two hundred years, presidents have used their authority to offer second chances to deserving individuals, including those in uniform who have served our country. These actions are in keeping with this long history. As the President has stated, "when our soldiers have to fight for our country, I want to give them the confidence to fight."[24]Since his release, Lorance has appeared on stage at political rallies with Trump[25]. Freed from disqualifying legal impediments, he attended law school in Virginia and now practices in St. Louis, Missouri .[26]

The UCI in this instance is post-conviction – freeing a convicted defendant for political, not evidentiary reasons. The subtextual message sent to Army authorities was clear: prosecuting Americans for killing Afghans is unwelcome; stop doing it. The Army listened, and there were no further war crimes prosecutions following Trump's decision to pardon Lorance.[27]

4. United States v. Matthew Golsteyn

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[23] YouTube, "Fox News Exclusive: Clint Lorance gives first interview since pardon by Trump" at https://www.youtube.com/watch?v=ne3AX9tasKY [Accessed 27 Sept 2025]
[24] Ibid.
[25] Maggie Haberman, "Trump Brings 2 Officers He Cleared of War Crimes Onstage at Fund-Raiser," New York Times, 8 Dec. 2019 at https://www.nytimes.com/2019/12/08/us/politics/trump-war-crimes-pardons.html. For photos of Trump posing with both Lorance and Matthew Golsteyn at his political rally: https://www.uap.org/case/matthew-golsteyn/ [Accessed 25 Sept 2025]
[26] https://www.linkedin.com/in/clintlorance/ [Accessed 24 Sept 2025] The best book on the subject is Annie Jacobson*, First Platoon: A Story of Modern War in the Age of Identity Dominance* (Hialeah, FL: 2021)
[27] During the same period, Trump's statements in another court-martial, that of Sergeant Bowe Bergdahl – which said Berdahl should be executed – led to that conviction being overturned on the basis of UCI. https://www.armfor.uscourts.gov/newcaaf/opinions/2019OctTerm/190406.pdf [Accessed 28 September 2025]

In March 2010, Major Matthew Golsteyn was serving in B Co., 1st Battalion, 3rd Special Forces Group in Marjah, Afghanistan. After two Marines were killed in a roadside bomb attack, Golsteyn received information of uncertain provenance that a local villager named Rasoul was the bombmaker. Acting on his own initiative and accompanied by another soldier, Golsteyn snatched Rasoul and killed him, then hiding the body. He later returned with more men and took the corpse to a burn pit on the military base, destroying any traces of the crime.[28] No one reported the incident and no further action followed until 2011 when Golsteyn underwent a polygraph examination as part of his application to the Central Intelligence Agency. He admitted to the polygrapher that he had murdered Rasoul, leading to an investigation by the Army Criminal Investigation Division.[29]

The investigation was closed quietly and resulted in Golsteyn's Silver Star and Distinguished Service Cross medals being revoked before presentation. Two years later, he faced a retention board that recommended discharge for conduct unbecoming an officer and misconduct, moral, or professional misconduct. Specifically, that he "shot an Afghan…and then took steps to cover it up." Interviewed on Fox News in 2016, he was asked if he killed a suspected bomb-maker and responded, "Yes."[30]

Now that the matter was in the public spotlight, the Army had little choice but to reopen an investigation into the killing, resulting in a charge of murder in 2018. That effort was short-lived. Appeals to Trump from the United American Patriots and the usual coterie of Republican congressmembers and indignant letters from Republican voters had the desired result.[31] In December 2018, Trump wrote on Twitter, "At the request of many, I will be reviewing the case of a "U.S. Military hero,"

[28] Golsteyn maintained afterward that the burning was to prevent the spread of disease. No other members of his unit were charged in the incident.
[29] Dan Lamothe, "See documents excerpts in the Army's war crimes case against a Green Beret war hero," *The Washington Post*, 19 May 2015 at https://www.washingtonpost.com/news/checkpoint/wp/2015/05/19/see-document-excerpts-in-the-armys-war-crimes-case-against-a-green-beret-war-hero/ [Accessed 27 Sept 2025]
[30] Helene Cooper, Michael Tackett and Taimoor Shah, "Twist in Green Beret's Extraordinary Story: Trump's Intervention After Murder Charges," *The New York Times*, 16 Dec. 2018 at https://www.nytimes.com/2018/12/16/us/politics/major-matt-golsteyn-trump.html [Accessed 26 Sept 2025]
[31] https://www.uap.org/case/matthew-golsteyn/ [Accessed 27 Sept 2025]

Major Matt Golsteyn, who is charged with murder. He could face the death penalty from our own government after he admitted to killing a Terrorist bomb maker while overseas. @PeteHegseth @FoxNews." Trump issued a pre-trial pardon to Golsteyn on November 15, 2019, ending the Army's belated criminal inquiry. In the pardon announcement, the White House added, "Clemency for Major Golsteyn has broad support, including from Representatives Louie Gohmert, Duncan Hunter, Mike Johnson, Ralph Abraham, and Clay Higgins, American author and Marine combat veteran Bing West, and Army combat veteran Pete Hegseth."[32]

However, the commander of Army Special Forces Command, LTG Francis Beaudette, refused an appeal to restore Golsteyn's Special Forces tab, and a review board convened afterward likewise refused to restore either the SF tab or his Distinguished Service Medal. Despite the pardon, the Board ruled that the military record of Golsteyn's actions would not be purged.[33]

The UCI here in the pretrial stage directly contradicts the rules of military justice set out by the Judge Advocate General.

5. United States vs. Edward Gallagher

Eddie Gallagher was a Chief Petty Officer assigned to Seal Team 7 in Mosul during the fight to retake the city from the Islamic State (ISIS) in 2017.

Gallagher was arrested in 2018, charged with murder, attempted murder, obstruction of justice, and destruction of evidence. The SEALs in his unit had made multiple reports that his conduct violated the rules of engagement (ROE) and the laws of war, but no action resulted. He bragged to his troops that he had killed three people a day for 80 days.[34] The gravamen of the charge was the murder of a wounded 17-year-old ISIS prisoner. Witnesses said he walked up to the teenager

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[32] https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-97/ [Accessed 25 Sept 2025]
[33] Mathew Golsteyn, No. AR20200000309, Army Bd. for Corr. of Mil. Records, 11 (June 26, 2020)
[34] Navy Times staff, "What motivated fellow SEALs to dime out Eddie Gallagher?" *Navy Times*, 22 April 2019 at https://www.navytimes.com/news/your-navy/2019/04/22/what-motivated-fellow-seals-to-dime-out-eddie-gallagher/ [Accessed 27 Sept 2025]

after announcing, “He’s mine,” and stabbed the victim to death with his hunting knife. It went further. Gallagher decided to hold his 5-year reenlistment ceremony over the corpse and photographed the event. He text-messaged a friend a photo of him holding the dead Khaled Jamal Abdullah’s head by the hair with the caption, "Good story behind this, got him with my hunting knife.” He threatened retribution if anyone reported the killing.

Despite the apparent strength of the prosecution case, there were problems. Gallagher was arrested nearly a year after the killing, leaving Naval Criminal Investigative Service (NCIS) agents with no body or crime scene to examine. Unsurprisingly, some fellow SEALs were reluctant to testify or changed their earlier statements to investigators. At the court martial, the defense contended that Gallagher merely stabbed an already-dead Abdullah, who expired from his earlier wounds, and was only bragging when he made up the story about the murder. One witness, Special Operator First Class Corey Scott, testified under an immunity agreement with the prosecution but on the witness stand confessed that he had killed Abdullah by cutting off his airway, and Gallagher had nothing to do with the death.[35] It was a brazen instance of perjury, from the prosecutor’s view, but there was nothing they could do – their hands tied by the immunity agreement once Scott made the statement in open court. The case effectively collapsed.[36]

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[35] Carl Prine, “Thanks to SEAL’s immunity deals, confessed killer unlikely to be charged,” *The Navy Times*, 24 June 2019 at https://www.navytimes.com/news/your-navy/2019/06/24/thanks-to-seals-immunity-deals-confessed-killer-unlikely-to-be-charged/ [Accessed 26 Sept 2025]

[36] Gallagher’s attorney, Tim Parlatore, would later represent Pete Hegseth when the soon-to-be SECDEF tried to enforce a non-disclosure agreement against a woman who accused him of sexual assault. He also represented Trump himself following the indictment in the retention of classified documents case brought by Special Prosecutor Jack Smith. Parlatore remains Hegseth’s personal attorney. Hegseth direct-commissioned Parlatore to Lieutenant Colonel and tasked him to review JAG training and employment. Daniel Lippman and Jost Gerstein, “Hegseth attorney’s dual roles trip conflict-of-interest alarms,” *Politico*, 3 May 2025 at https://www.politico.com/news/2025/05/03/parlatore-hegseth-navy-conflict-00323266 [Accessed 27 Sept 2025]

The panel acquitted Gallagher on six of the seven charges, finding him guilty of "wrongfully posing for an unofficial picture with a human casualty."[37] Gallagher had already served more than the UCMJ statutory maximum while in pretrial confinement and thus he walked away a free man. Gallagher was demoted in rank from Chief Petty Officer to Petty Officer First Class and allowed to remain in the Navy.

Trump and then-Fox News personality Pete Hegseth, along with the United Americans Patriots (UAP), and Congressman Duncan Hunter[38] became involved at an early stage; the UAP, in particular, helped raise money for the defense. Hegseth sold the idea of a pardon to Trump.[39] In October 2019, Trump discussed the matter with the Chief of Naval Operations.[40] The next month, Trump went further, ordering Gallagher restored to his original rank, despite the court martial recommendation.[41] After Gallagher appeared on Fox News without authorization and described his SEAL superiors as "a bunch of morons," the new SEAL commander Admiral Green ordered a review to determine whether Gallagher should be stripped of his Trident

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[37] Dave Phillips, "Navy SEAL Chief accused of war crimes is found not guilty of murder, "*The New York Times*, 2 Jul. 2019 at https://www.nytimes.com/2019/07/02/us/navy-seal-trial-verdict.html [Accessed 26 Sept 2025]

[38] Hunter was later convicted (March 2020) in federal court of embezzling political campaign funds to support the five affairs he was having with women that were not his wife (she was also convicted as being part of the same scheme). He was sentenced to 11 months in federal prison. Trump pardoned him in December 2020, one month before his sentence was scheduled to begin. His wife received her Trump pardon the next day.

[39] Oliver Darcy, "Fox News host Pete Hegseth has privately encouraged Trump to pardon servicemen accused of war crimes," *CNN*, 21 May 2019 at https://www.cnn.com/2019/05/21/media/fox-news-pete-hegseth-trump-pardon-war-crimes/index.html [Accessed 27 Sept 2025]

[40] Dave Phillips, "Navy Reduces Punishment for SEAL in War Crimes Case," *The New York Times*, 25 Nov. 2019 at https://www.nytimes.com/2019/10/29/us/navy-seal-gallagher-clemency.html [Accessed 27 Sept 2025] Please note, under Article 2, Section II of the US Constitution, the President is Commander in Chief of the armed forces. His every "suggestion" carries with it an implied order. Since the Supreme Court decided in 2023 that the president is presumptively immune from all official acts, there are almost literally no limits to his power to direct the armed forces and their individual commanders in whatever manner he sees fit, be it legal or otherwise. https://www.supremecourt.gov/opinions/23pdf/23-939_e2pg.pdf [Accessed 27 Sept 2025]

[41] Navy Times Staff, "Report: Trump makes SEAL Gallagher a chief again," *Navy Times*, 4 Nov. 2019 at https://www.navytimes.com/news/your-navy/2019/11/04/report-trump-makes-seal-gallagher-a-chief-again/ [Accessed 27 Sept 2025] and Trump's tweet on the matter: "I was not pleased with the way that Navy Seal Eddie Gallagher's trial was handled by the Navy. He was treated very badly but, despite this, was completely exonerated on all major charges. I then restored Eddie's rank." https://x.com/realDonaldTrump/status/1198746358091530241 [Accessed 27 Sept 2025]

(SEAL qualification badge). Trump then took to Twitter: “Navy Seal Eddie Gallagher will be on @foxandfriends this morning at 7:30 A.M. Have no fear, all will end well for everyone!"[42] and still later, “The Navy will NOT be taking away Warfighter and Navy Seal Eddie Gallagher's Trident Pin. This case was handled very badly from the beginning. Get back to business!"[43] At a rally on November 26, Trump said, “I stuck up for three great warriors against the deep state. And you know what I'm talking about. I had so many people say, ‘Sir, don't think you should do that.”[44]

One of the other “great warriors” was First Lieutenant Michael Behenna, who murdered a prisoner by putting a grenade under his head. Trump pardoned him on 6 May 2019.[45]

Gallagher retired from the Navy in November 2019 with full pension and benefits. [46] Eddie and Andrea Gallagher appeared in the Apple TV production, *The Line*, about the incident.[47]

6. Blackwater and the Nisour Square Massacre

On September 16, 2006, employees and gun trucks of the private military contractor (PMC) firm Blackwater were escorting a US embassy convoy through Nisour Square in central Baghdad, while an insurgency raged against US and Allied forces throughout the country. The PMC companies and personnel – mercenaries - operate independent of US military command.[48] Under the pretext of a civilian car deemed a threat by Blackwater employees, their vehicles opened fire at the suspect car as

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[42] https://x.com/realDonaldTrump/status/1198574811678683137 [Accessed 27 Sept 2025]
[43] https://x.com/realdonaldtrump/status/1197507542726909952 [Accessed 27 Sept 2025]
[44] John Fritze, “Trump ramps up attacks on 'deep state,' focuses on Pentagon amid Eddie Gallagher controversy,” *USA Today*, 27 Nov. 2019 at https://www.usatoday.com/story/news/politics/2019/11/27/trump-calls-pentagon-deep-state-amid-eddie-gallagher-controversy/4323327002/ [Accessed 26 Sept 2025]
[45] White House press statement, 6 May 2019 at https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-clemency-michael-behenna/ [Accessed 27 Sept 2025]
[46] https://books.google.com/books?id=YjhSzQEACAAJ
[47] https://www.apple.com/tv-pr/originals/the-line/ This is a four-part documentary on the case. I recommend it.
[48] In this instance, Blackwater provided “security” to the Department of State and the Central Intelligence Agency.

well as other cars in the busy intersection. Fourteen Iraqi civilians were killed and twenty wounded. The initial vehicle was later occupied by a family and posed no threat to the Americans; all the occupants were killed by gunshots and grenades. The dead ranged from a child of 9 to a grandfather aged 77.[49]

In December 2008, a federal grand jury indicted five members of Blackwater on four charges: voluntary manslaughter, attempt to commit manslaughter, using and discharging a firearm in a crime of violence, and aiding and abetting a crime.[50] After appeal and re-hearings, the case against the defendants did not begin until 2014, and the action against one of the defendants was dropped.[51] At trial, all four were convicted; Nicholas Slatten was convicted of first-degree murder and received a life sentence, the remaining three were given sentences of 30 years each.[52]

On December 22, 2020, Trump pardoned all the Blackwater defendants. The statement read, in part, "The pardon of these four veterans is broadly supported by the public, including Pete Hegseth…Mr. Slatten, Mr. Slough, Mr. Liberty, and Mr. Heard have a long history of service to the Nation."[53]

7. Eliminating the Law of Armed Conflict

In what could be seen as a preemptive step toward deploying UCI to benefit war criminals of the future, on 1 April 2025, the US Army announced that it would no longer require troops [outside those at the US Military Academy, ROTC, and Officer

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[49] US Department of Justice Press Release, 22 Oct. 2014 at https://www.justice.gov/archives/opa/pr/four-former-blackwater-employees-found-guilty-charges-fatal-nisur-square-shooting-iraq [Accessed 27 Sept 2025]

[50] United States District Court for the District of Columbia, Grand Jury indictment at https://www.justice.gov/sites/default/files/opa/legacy/2008/12/08/grandjury.pdf [Accessed 27 Sept 2025]

[51] David Ingram, "Blackwater guards face new U.S. charges for Iraq shooting deaths," *Reuters*, 17 Oct. 2013 at https://www.reuters.com/article/us-usa-crime-blackwater-idUSBRE99G1A320131017/ [Accessed 27 Sept 2025]

[52] Matt Apuzzo, "Ex-Blackwater Guards Given Long Terms for Killing Iraqis," *The New York Times*, 13 April 2015 at https://www.nytimes.com/2015/04/14/us/ex-blackwater-guards-sentenced-to-prison-in-2007-killings-of-iraqi-civilians.html [Accessed 27 Sept 2025]

[53] https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-122220/ [Accessed 27 Sept 2025]

Candidate School] to undergo instruction in the Laws of War.[54] Until now, this has been the **only** point in a basic soldier's annual training where they were introduced to the Geneva Conventions – the imperative to take prisoners, to treat them and the civilian population humanely, to refrain from unnecessary damage to persons or property, that targeting civilians was prohibited by US and international law, in-depth explanations of what constitutes a war crime and the duty to refuse illegal orders.[55] It is unreasonable to expect an 18-year old private to refuse an order to kill all the inhabitants of a village if no one has bothered to tell him he has an affirmative duty to refuse. Indeed, our war crimes track record[56] indicates that we need more, not less focus on the laws of war. Secretary of Defense Hegseth has other ideas.[57]

8. Eliminating the Gate Keepers

In February 2025, Hegseth simultaneously fired The Judge Advocates General (TJAG) of the Army, Navy, and Air Force. The TJAGs are the general officers responsible for military justice and uniformed legal advisors in their respective

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[54] Patty Nieberg, "Here is the training that the Army says is no longer mandatory," *Task and Purpose*, 1 Apr. 2025 at https://taskandpurpose.com/news/army-training-changes-optional/#:~:text=The%2520Army%2520is%2520removing%2520resiliency,and%2520more%2520up%2520to%2520commanders. [Accessed 27 Sept 2025]

[55] *Law of War Documentary Supplement* (International and Operational Law Department, The United States Army Judge Advocate General's Legal Center and School: Charlottesville, VA, 2024) at https://irp.fas.org/doddir/army/lawofwar.pdf and https://irp.fas.org/doddir/army/fm27-10.pdf [Accessed 27 Sept 2025]

[56] Parker Yesko, "In the Dark: The war crimes that the military buried," *The New Yorker*, 10 Sept. 2024 at https://www.newyorker.com/podcast/in-the-dark/the-war-crimes-that-the-military-buried [Accessed 27 Sept 2025]

[57] In May 1941, Hitler issued the *Erlass über die Ausübung der Kriegsgerichtsbarkeit im Gebiet „Barbarossa" und über besondere Maßnahmen der Truppe* (Decree on the exercise of military justice in the "Barbarossa" area and on special measures by the troops). One of its provisions was the suspension of punishment for crimes of the Wehrmacht against civilians except in cases where it was necessary to restore discipline. See US Holocaust Memorial Museum at www.ushmm.org/m/pdfs/German-military-context-sheets.pdf. Prior to this, the Germany military, even under Hitler, still nominally abided by the Geneva and Hague Conventions, even putting the *Zehn Gebote* (Ten Commandments) for the honorable treatment of enemy captives and civilians in the paybook of soldiers. For example, "The civilian population is inviolable. A soldier may not arbitrarily engage in plunder or destruction." Learning from the Nazi perversion of military justice, the modern German Bundeswehr operates under a philosophy called *Innere Führung* (Inner Leadership) which goes to great pains to explain to troops not only the basics of the Law of Armed Conflict but also specific instruction on when they are required to disobey orders.

services. As one correspondent noted, “Beyond its statutory responsibilities, TJAG is often perceived “as a conscience of the military and a moral guide as to what’s right and wrong.” Congress affords TJAG — and all judge advocates — the power and protection to be that conscience, explicitly prohibiting any officer or employee of the Department of Defense from interfering with TJAG’s ability to give independent legal advice to the department Secretary or Chief of Staff and from interfering with any judge advocate’s ability to give independent legal advice to commanders.” Further, Hegseth reduced the TJAG from three stars to two. The replacement Air Force and Army TJAGs were selected from politically reliable officers of the state National Guard, bypassing professional officers in the regular Army.[58] Hegseth noted that “the removals were necessary because he didn't want them to pose any ‘roadblocks to orders that are given by a commander in chief.’”[59]

The through-line of using UCI to pardon war criminals in past conflicts should be expected to continue as part of a larger effort to normalize situations where crimes can occur with impunity. As of April 2025, the Trump Administration plans the elimination of the State Department Office of Global Criminal Justice, which oversees US foreign policy in the areas of war crimes and genocide.[60] Trump has also sanctioned both the International Criminal Court as a whole and individuals in

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[58] The Army TJAG previously worked on behalf of the Trump administration on [non-existent] voter fraud investigations. Matt Zapotsky and Amy Gardiner, “New US Attorney in Atlanta brings in assistants who worked on voter fraud issues, raising fears of political interference.” *The Washington Post*, 8 Jan. 2021 at https://www.washingtonpost.com/national-security/atlanta-us-attorney-brings-in-assistants-who-worked-on-voter-fraud-issues-raising-fears-of-political-interference/2021/01/08/c4057f9a-51c9-11eb-83e3-322644d82356_story.html [Accessed 27 Sept 2025] and Jacob Shamsian, “The new Trump-appointed US Attorney in Georgia says he was surprised to find there wasn't any election fraud,” *Business Insider*, 13 January 2021 at https://www.yahoo.com/news/trump-appointed-us-attorney-georgia-161550950.html?guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAHphKBL840fekMWkLSNzM-c0AsJr-Gp5syLTs4PXTLHDpjlPjNZOU2rnDXAbKdDYbqf783wVobLGv6UUYXMdu9U_PcKTnXoe_ArqMBRj02SjDu4PlfFl9vPLNTWnRuFe90cYc-OH8dDUKag0Cc9q5crDkl7Pi0R-uOHnzDSPOl_I [Accessed 27 Sept 2025]

[59] Thomas Novelly and Konstantin Toropin, “'People Are Very Scared': Trump Administration Purge of JAG Officers Raises Legal, Ethical Fears,” Military.com, 24 Feb. 2025 at https://www.military.com/daily-news/2025/02/24/people-are-very-scared-trump-administration-purge-of-jag-officers-raises-legal-ethical-fears.html [Accessed 25 Sept 2025]

[60] Tom Bateman, “Trump administration proposes State Department cuts in major overhaul,” *BBC News* at https://www.bbc.com/news/articles/c5yg2y21yq5o.amp [Accessed 27 Sept 2025]

the prosecutor's office. While this has minimal impact on the US armed services (the US never ratified the Rome Statute creating the ICC), it evidences profound disdain for even the concept of international criminal law.[61]

And one last item. In his 2024 book *The War on Warriors*, Hegseth shares his thoughts about international criminal and humanitarian law:

"The key question of our generation – of the wars in Iraq and Afghanistan – is way more complicated: what do you do if your enemy does not honor the Geneva conventions? We never got an answer. Only more war. More casualties. And no victory. What if we treated the enemy the way they treated us?" he asks. "Would that not be an incentive for the other side to reconsider their barbarism? Hey, Al Qaeda: if you surrender, we might spare your life. If you do not, we will rip your arms off and feed them to hogs."

We are just fighting with one hand behind our back – and the enemy knows it … If our warriors are forced to follow rules arbitrarily and asked to sacrifice more lives so that international tribunals feel better about themselves, aren't we just better off winning our wars according to our own rules?!"[62]

9. Coda

The doctrine of Unlawful Command Influence originated as a shield for troops against command excesses. Now it is the only way to make sense of how the

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61 https://www.whitehouse.gov/presidential-actions/2025/02/imposing-sanctions-on-the-international-criminal-court/ and https://www.state.gov/releases/office-of-the-spokesperson/2025/06/imposing-sanctions-in-response-to-the-iccs-illegitimate-actions-targeting-the-united-states-and-israel [Accessed 27 Sept 2025]; the orders also affect some 900 staff members of the ICC who risk arrest if they attempt to enter the United States. He did this in his first term, too: Human Rights Watch, "US Sanctions on the International Criminal Court," 14 Dec. 2020. "On September 2, 2020, the United States government imposed sanctions on the International Criminal Court (ICC) prosecutor, Fatou Bensouda, and another senior prosecution official, Phakiso Mochochoko. In addition, US Secretary of State Michael Pompeo announced that the United States had restricted the issuance of visas for certain unnamed individuals "involved in the ICC's efforts to investigate US personnel." https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court [Accessed 27 Sept 2025]

62 Jason Wilson, *The Guardian*, 25 Nov. 2024 at https://www.theguardian.com/us-news/2024/nov/25/pete-hegseth-book-attacks-nato-alliances [Accessed 26 Sept 2025]

President has derailed prosecutions and sentences that run counter to ideological goals. There is no other reasonable interpretation of the evidence. The motive is evident: to appeal to a constituency that celebrates the notion that "our boys" can do no wrong, particularly when the victims are non-Americans. This is the true lesson from Lorance, Golsteyn, Gallagher, Blackwater, et al. Yet, the idea that the president can violate Article 37 in courts-martial by sabotaging the prosecution and sentencing has never been tested, although it satisfies fully the language of the Article. It should go without saying that any JAG prosecutor brave enough to raise the issue of UCI would be committing career suicide, probably worse.

For 250 years, military lawyers have ensured the rule of law, provided accountability, stressed morals, and promoted ethical values.[63] It is not a perfect system but it succeeds far more often than it falls short. However, the purposeful destruction of that system and the concomitant implied permission for service members to escape justice for future war crimes is happening in real time, right before our eyes. As Tolstoy asked, "What then must we do?"[64]

[63] The Army JAG Corps was founded on 29 July 1775.
[64] Leo Tolstoy, *What then must we do?* (Devon: Green Books, 1991). It was first published in 1886 and references Luke 3:10 ("Quid ergo nos faciemus?" in the Vulgate) about coming judgment, repentance, and ethical behavior.