On the General Part of the Criminal Law

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1. The idea of the general part

It was, I think, Glanville Williams who first envisaged the formal division of English criminal law into a 'special part' and a 'general part'.[1] He explicitly borrowed the distinction from continental legal systems, many of which carry it on the face of their criminal codes.[2] Although Williams did not state it consistently, it seems that the distinction is supposed to be drawn along the following lines. The special part supplies the details of particular criminal offences, and arranges them into families. The general part, meanwhile, is made up of doctrines which cross the boundaries between (some or all of) these different families of criminal offences. One source of problems in the application of this distinction is readily apparent. It comes of the idea of a 'family' of offences. You may well ask: When does the application of a certain doctrine across a number of offences turn those offences into a 'family', such that the doctrine in question belongs to the special part rather than the general part? And don't some 'families' of offences (such as 'sexual offences', 'offences of specific intent', and 'inchoate offences') overlap, so that some doctrines unavoidably spill over from one family to another, and mutate in the process from special part doctrines into general part doctrines? These are certainly challenging questions. I hope that the argument which follows will help us to make progress towards some answers. But one thing that the questions already bring to light by themselves is that the distinction between the general

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[1] *Criminal Law: The General Part* (Stevens, London 1953)

[2] Ibid, v.

part and the special part is bound to have some grey areas, in which convention and convenience may well be the only points of reference.

It does not follow, however, that the whole distinction should be written off as a distinction of convenience, devoid of any deeper significance. It seems to me that, on the contrary, different attitudes to the general part, and different views about the role it ought to play in the law, can reflect profound philosophical divergences. Many of the leading academic criminal lawyers of our age - Williams himself is a notable example - have been unabashed enthusiasts for the general part, typically pressing for more doctrines to be more conscientiously and more consistently applied, other things being equal, to an ever-wider range of criminal offences.[3] This academic enthusiasm was at an early stage injected into, and continues to infect, the Law Commission's work on criminal law codification, which aims to set out the largest number of criminal laws with the smallest amount of doctrinal variation among them.[4] Of course, it is crucial for all of these enthusiasts that the doctrines in question should be sound ones. Nobody, to the best of my knowledge, commends the generalisation of what they believe to be an unsound doctrine just for generalisation's sake. But so long as doctrines are sound their generality is regarded as a further boon. The common assumption seems to be that a substantial dose of generality is needed to displace what Williams calls 'the ramshackle creations' of English criminal law's history.[5] To modernise our criminal law, the thinking goes, we must tame its unruly special part by

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[3] Some classic remarks lamenting the definitional variety of the criminal law: Williams, *Textbook of Criminal Law* (2nd ed., Stevens, London 1983), 73 and 934; J.C. Smith and Brian Hogan, *Criminal Law* (8th ed, Butterworths, London 1996), 71 and 76 (also in previous editions); Andrew Ashworth, *Principles of Criminal Law* (1st ed., Clarendon Press, Oxford 1991), 281 and 358.

[4] See e.g. Law Commission, *Criminal Law: A Criminal Code for England and Wales,* (Law Com. No. 177, HMSO, London 1989), esp. vol 1, paras 2.8-2.9.

[5] Williams, *Textbook of Criminal Law*, above note 3, 17.

subjecting it to the disciplined governance of a more expansive, more exacting, and indeed more general general part. Only thus can we move closer to the ideal of 'a rational and principled criminal law', to borrow the oft-cited words of J.C. Smith and Brian Hogan.[6] And who could be against such a move?

One obvious philosophical issue raised here is whether the last question is rightly framed as a rhetorical one. I believe that it is. To my way of thinking it is analytically true that the criminal law should be rational and principled. Criminal law is a human institution, which can be reformed and altered (whether *ad hoc* or systematically) by human hand. It is therefore precisely the kind of thing which answers to (practical) reasons and to (practical) principles. I do not mean that every doctrine of the criminal law is already supported by reasons and principles, let alone by good reasons and sound principles. I only mean that it can always be asked, perhaps without much hope of a convincing answer, but at least without making a category mistake: 'Why should we enact or retain a criminal law like this? For what reason? On what principle?' That is the only test that needs to be satisfied to show that the criminal law is capable, in theory, of being rational and principled.[7] Moreover it is built into the very ideas of the rational and the principled that anything which is, in

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[6] Smith and Hogan, *Criminal Law* (4th ed., Butterworths, London 1983), v.

[7] Contrast Alan Norrie, *Crime, Reason and History* (Weidenfeld, London 1993), 11, where a different test is used, according to which the theoretical inevitability of pervasive conflict among reasons and principles casts doubt upon the criminal law's theoretical capacity to be rational and principled. I agree with Norrie about the theoretical inevitability of pervasive rational conflict. But I think that this inevitability makes it theoretically easier, not theoretically harder, for the criminal law to be rational and principled. Where there is a conflict between two reasons (or two principles) which cannot be resolved by any further reasons (or principles), that makes it rational (or principled as the case may be) to follow *either* of them, not neither of them. Both alternatives are acceptable. So the range of rational (and/or principled) ways forward is increased.

theory, capable of having these qualities ought to have them, the former unconditionally and the latter *ceteris paribus*.[8] This has the implication that anyone who commends their absence in such a setting has necessarily misunderstood them. If one accepts this, it follows that the ambition to have a more rational and principled criminal law cannot be open to doubt.

Thus, in engaging with the widespread enthusiasm for the general part identified above, our attention has to shift away from the demand for rationality and principle *per se*, and onto the supposed connection between rationality and principle on the one hand, and generality on the other. Here we encounter further, and I think more troublesome, philosophical issues. They concern the resources of reason and the power of principles, and the extent to which we should expect these to conspire in exerting a largely homogenising, rather than diversifying, pressure on legal doctrines. It must be admitted that many people nowadays, and not only the writers of criminal law textbooks, expect reason to be allied with principle in the cause of tidiness and uniformity. We even have a fashionable word - 'rationalisation' - which conveys the common assumption that tidiness and reason go hand-in-hand. When some institution or practice or organisation is being 'rationalised', idiosyncrasies and incongruities are the target. Loose ends are to be tied up. I think the implication here that rationality abhors loose ends is false, and moreover can be explained in a way which shows what is false about it. The explanation is not, however, a straightforward one, and only a crude sketch-map can be given over the following pages. It forces us to confront a variety of intimidating problems about the components of a good life, the nature of morality and moral agency, and the concept of responsibility. Before that, it involves us in isolating, and diagnosing the cause of, a mistaken view about the

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[8] The difference in the qualifications here stems from the fact that all (valid) principles are reasons, but not all (valid) reasons are principles. This means that there can be rational alternatives to being principled, whereas there are no principled (or rational) alternatives to being rational.

proportion of rationality's work which is done by principles. One major dimension of rationality, namely its non-instrumental dimension, is wrongly but understandably viewed by many as the exclusive domain of principles. In ways which I hope will become clear, this dimension of rationality looms large in the justification of criminal laws, and thus the error makes a notably striking impact here. The implications, however, go much wider and deeper. In ways which I can only hint at, they bear on our whole conception of ourselves and our relationship with and role in the world we inhabit.

2. A preliminary classification

The general part, as I explained it, is made up of 'doctrines'. But doctrines come in more than one form, and perform more than one function. A more refined understanding of the idea of the general part can be achieved by dividing its doctrines into three groups.

1. The *auxiliary* general part, with which we will not be much concerned in the pages that follow, provides for the automatic or semi-automatic creation of various parasitic modes of criminal liability. When a certain activity is criminalised, the auxiliary general part can transform certain other activities logically connected with that activity into crimes as well, and in many legal systems it does so by default. The main doctrines of the auxiliary general part in English criminal law are those dealing with inchoate forms of liability, and those governing secondary participation in crime. With few exceptions, if ϕing is a crime known to English law then, by operation of law, so is attempting to ϕ, inciting others to ϕ, or conspiring to ϕ, as well as aiding, abetting, counselling or procuring ϕing by others. Although it need not be so, in England the doctrinal content of the auxiliary general part remains more or less constant for any given ϕ. But notice that the auxiliary general part, by its very nature, remains silent on the subject of how the crime of ϕing itself may be constructed, organised, delimited, or characterised, save, of course, that for the auxiliary

general part to operate on it, ϕing must be the kind of thing which can be attempted, incited, counselled, etc.[9]

2. There is no such silence on the part of the *supervisory* general part, which contains guiding principles for the creation, interpretation, and application of new criminal laws. There may of course be principles in the supervisory general part which govern the workings of the auxiliary general part, but the supervisory general part has a wider sphere of influence, being capable of governing the creation, interpretation, and application of non-auxiliary crimes as well, i.e. capable of bearing on the criminalisation of ϕing itself. The supervisory general part may also bear on the provision of criminal defences. The applicable principles may be mandatory, advisory, or even permissive. They may apply to judges, or to legislatures, or to both. Familiar examples in English law include the *Woolmington* principle that the burden of proof is on the prosecution,[10] as well as our rather narrow version of the *nullum crimen sine lege* principle, by which express words are needed to create a new statutory criminal offence. Also included is the oft-cited principle that *actus non facit reum nisi mens sit rea*. Some would say that the latter is too often dishonoured in English law to be counted as an authentic example. But that depends not only on what it means, but also on how general it is supposed to be. The supervisory general part, like the rest of the general part, may be more or less general. It is possible that in English law the *actus non facit reum* principle crosses the boundaries between some families of criminal offences but not between all, and thus is not necessarily being dishonoured on every occasion on which a crime is created which is devoid of mens rea elements. So long as it applies across at least some families of

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[9] Thus the operation of the auxiliary general part tends to be obstructed or confused by e.g. crimes of possession, where the actus reus is not strictly an action or activity but a state of affairs with a subsidiary active dimension. See Smith and Hogan, *Criminal Law*, above note 3, 325-6.

[10] *Woolmington* v *DPP* [1935] AC 462.

crimes, and on condition that it provides a principle by which, in the eyes of the criminal law itself, particular acts of criminalisation or decriminalisation may be judged, the doctrine nevertheless belongs to the supervisory general part.

3. I identified the doctrines of the supervisory general part as 'principles' to distinguish them from the doctrines of the *definitional* general part, which also governs the creation, interpretation, and application of new criminal laws, whether auxiliary or otherwise. Principles are standards at a relatively high level of abstraction, which leave the question of *how* they are to be complied with open: in theory there is more than one way to do their bidding.[11] This openness is, correspondingly, the hallmark of the supervisory general part. But the doctrines of the definitional general part are not open in the same way. They are doctrines which specify how crimes (and defences to crime) are to be defined. They provide the detailed linguistic and conceptual apparatus of the law. This does not mean that they are always mandatory doctrines; like those of the supervisory general part, the doctrines of the definitional general part may equally be advisory or permissive. Nor does it mean that the doctrines of the definitional general part are typically of less general application than those of the supervisory general part; they may, like any other general part doctrine, vary enormously in point of generality. It only means that they set down the *hows* rather than the *whys* of criminalisation and decriminalisation. The question of whether the words 'intention' and 'recklessness' (and their cognates) should bear standard meanings across different families of offences is a question about whether they should be adopted into the definitional general part. So is the question of whether these terms, or the concepts identified by them, should be *used* more generally in English criminal law, e.g. as the recommended or even the prescribed way of fulfilling the otherwise open demands of *actus non facit reum nisi mens sit rea*. This last example draws attention to one consequence of the

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[11] Joseph Raz, 'Legal Principles and the Limits of Law', *Yale Law Journal* 81 (1972), 823 at 837; Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, Oxford 1977), 259ff.

fact that the supervisory general part is more abstract than the definitional general part. Doctrines in the supervisory general part can help to justify doctrines in the definitional general part, but not vice versa.[12] That remains true even if, as seems to me quite likely, the distinction is one of degree, i.e. even if some principles are more principled than others.

3. Between principle and policy

Lawyers sometimes contrast arguments of principle with arguments of policy. The contrast was famously put to philosophical use in Ronald Dworkin's early writings. Arguments of principle for legal rules, he argued, were the legitimate province of judges, while arguments of policy were properly available only to legislatures.[13] Few follow Dworkin in putting the distinction to this particular use. That judges too may resort to (at least some) policy considerations is widely agreed, and not only among judges themselves. But many have nevertheless taken their cue from Dworkin in making the principle/policy distinction pivotal to their arguments about the justification of legal rules. Take, for example, Andrew Ashworth's characteristically trenchant remarks about the retention of some rules of constructive liability in English criminal law:

> Whether this is properly described as a policy or a principle is open to debate. Some of its adherents take no trouble to develop a principled argument, whereas others argue that the decision that is morally most significant is the decision to cause harm intentionally to another: once a person has crossed this moral threshold, there is good reason to impose liability for whatever consequences ensue. However, even

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[12] Raz, 'Legal Principles and the Limits of Law', previous note, at 838.

[13] Dworkin, 'Hard Cases' in his *Taking Rights Seriously* (Duckworth, London 1977), 81ff.

> those who accept this moral foundation appear not to apply it generally throughout the criminal law. It seems to be reserved, presumably for policy reasons, to cases where a person intentionally inflicts physical harm on another.[14]

One feature of this passage is particularly worthy of note. The principle/policy distinction is portrayed by Ashworth, not only as exclusive,[15] but also as exhaustive. Any argument for or against maintaining a rule of criminal liability falls to be interpreted either as an argument of principle or as an argument of policy or as a mixture of the two. This contrasts dramatically with Dworkin's repeated warnings that the principle/policy distinction should not be conceived of as exhaustive: 'These two sorts of argument do not exhaust political argument';[16] there are 'principles, policies, and other sorts of standards.'[17] Ashworth's departure from Dworkin's position on this point may reflect a supposition that principles and policies are the only argumentative tools available in the justification of criminal laws, even if other argumentative tools are available elsewhere in the affairs of the state, or elsewhere in life; but Ashworth does not explain why this should be so. And in the absence of such an explanation, unfortunately, his construction of the principle/policy distinction

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[14] Ashworth, *Principles of Criminal Law* (2nd ed., Clarendon Press, Oxford 1995), 85-6. For a similar invocation of 'principle and policy', see the report *Criminal Law: Codification of the Criminal Law. A Report to the Law Commission* (Law Com. No. 143, HMSO, London 1985), para 1.8.

[15] I will not dwell here on the issue of the distinction's exclusivity, although for myself I cannot see any sensible way of avoiding the conclusion that something like 'serving the greatest happiness of the greatest number' counts as both a policy and a principle. Compare Neil MacCormick's critique of Dworkin's distinction in *Legal Reasoning and Legal Theory*, above note 11, at 259ff.

[16] 'Hard Cases', above note 13, 82-3.

[17] 'The Model of Rules I' in *Taking Rights Seriously*, above note 13, 14 at 22.

as exhaustive is apt to beg the question in favour of a particular account of the relationship between the supervisory general part and the definitional general part, and of the relationship, consequently, between the general part and the special part.

That is so because this construction artificially narrows the range of rational resources which lie at our disposal in justifying relatively localised variations in the definitions of criminal offences and defences. Arguments of principle, as I said earlier, are arguments conducted at a relatively high level of abstraction. This means that, as Ashworth rightly observes, they have a built-in tendency towards generalisation. If the law does not in fact allow them to apply as generally as, by virtue of their high level of abstraction, they apparently ought to, we want to know the reason why. Here is where, in Ashworth's thinking, arguments of policy come in. For they do not share the relatively high level of abstraction, and the consequent built-in tendency towards generalisation, which is the essence of an argument of principle. They can therefore restrict the power of arguments of principle to standardise the definitions of particular offences and defences. They can rationally account for local variations. Does this mean that an argument of policy is simply an argument which is conducted at a relatively low level of abstraction, and therefore with less of a tendency towards generalisation than an argument of principle? We could certainly stipulate such a definition, but it misses a key nuance of the word 'policy' which Dworkin, Ashworth, and most other users of the contrast evidently wish to retain and exploit. It neglects to draw attention to the fact that a policy argument is by its nature an *instrumental* argument. A policy argument is, in Ashworth's terms, a 'pragmatic' argument 'about what is expedient',[18] or, in Dworkin's terms, 'sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community.'[19] Here we can immediately see why Dworkin warned against regarding the principle/policy distinction as exhaustive. If it is regarded as exhaustive, considerations which are neither instrumental

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[18] *Principles of Criminal Law*, above note 14, 58 and 92.

[19] 'The Model of Rules I' in *Taking Rights Seriously*, above note 13, at 22

nor at a relatively high level of abstraction mysteriously drop out of the picture. Not being instrumental, they are not policy considerations. Not being at a relatively high level of abstraction, they are not principles either. In the context of the criminal law, the elimination of this class of considerations pushes one into a position where the special localised features in the definitions of particular criminal offences and defences have to be defended instrumentally or not at all. This summarily deprives the special part of the criminal law of a whole range of rational resources for its own defence. The general part enjoys a correspondingly summary boost in its doctrinal significance. In particular, it becomes more likely that the definitional general part will enjoy an enhanced role in shaping the criminal law. For if there are fewer localised considerations to provide a rational basis for the non-standard definition of particular offences and defences, then the justificatory route from the supervisory general part to the definitional general part is less prone to be complicated or obstructed by such localised considerations, and the cause of definitional standardisation is thereby artificially enhanced.

4. Actions and their consequences

To bear out this accusation of artificial enhancement, we do of course need to arm ourselves with a clearer explanation of the distinction between instrumental and non-instrumental considerations, so that we can at least envisage what a localised non-instrumental consideration might look like. The core idea is obvious enough: instrumental considerations point to the consequences of our actions (or, in this context, of their criminalisation or decriminalisation) while non-instrumental considerations are concerned with the qualities of the actions themselves. But to get this distinction across more thoroughly, I want to explain it in terms of a slightly different, although related, distinction. This is the distinction between action-reasons and outcome-reasons.

Among the various reasons people may have for and against acting, there are some that focus on the performance of certain actions, and others that focus on certain things happening (or tending to happen) when and because we act.[20] Friends have some reasons to tell the truth to each other through thick and thin, i.e. whatever may come to pass in consequence of their doing so. On the other hand friends also have some reasons to perform actions - that is to say, any actions - which will reduce the risk of their friends coming to grief. One familiar dilemma of friendship, then, is the dilemma of the protective lie: should I lie to my friend (contrary to one rational dictate of friendship) if telling the truth will leave my friend exposed to extra dangers or difficulties (contrary to another)? We have all encountered the conflict in some form. But notice that this is a conflict not only between different reasons, but also between reasons of different types. The first is an action-reason, i.e. a reason why a certain action (namely lying) should not be performed, whatever might happen as a consequence. The second is an outcome-reason, i.e. a reason why *any* action should be performed (be it lying, smiling, commanding, catching the bus, doing a handstand, or whatever) just so long as it has the tendency to prevent certain things happening (namely, to prevent dangers or difficulties befalling a friend).

This distinction is sometimes forgotten or neglected, not least because some actions are logically, as well as causally, related to things that happen. Take the action of killing, for example. This is partly constituted by someone's dying. It means that we may overlook the difference between the action-reason not to kill, and the outcome-reason not to do anything which has someone's dying as a consequence. That is particularly a risk if we take a reductive view of causation, according to which all causal connections are alike. Such a

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[20] Derek Parfit, *Reasons and Persons* (Clarendon Press, Oxford 1985), 104. Parfit speaks of 'aims' rather than reasons, but since whatever we aim at is regarded by us as a reason, Parfit's distinction can also be adapted to provide a classification of types of reasons. See also Joseph Raz, *The Morality of Freedom* (Clarendon Press, Oxford 1986), 145-6, which is the source of my terminology.

view means that we can no longer see the fundamental causal difference between 'killing' and 'doing something - *any*thing - which has someone's death as a consequence'.[21] Thus the action-reason and outcome-reason are run together. Sometimes students and teachers of criminal law slip into this collapse when they explain the law of homicide. They give its common-law actus reus as 'doing something, the consequence of which is death within a year and a day' instead of 'killing, the death occurring within a year and a day'.[22] Fortunately the criminal law itself does not make the same mistake. Procuring another to kill is, as English criminal law recognises, an action which has someone's death as its consequence.[23] Yet, as English criminal law also recognises, procuring another to kill is not itself an action of killing. Thus procuring another to kill grounds secondary, not primary, liability for murder or manslaughter - that is to say, liability as an accomplice rather than liability as a principal. Of course we may say, even as lawyers, that procuring a killing was *tantamount* to killing, or that it was killing *in effect*, or that the secondary participant *as good as* killed the victim.[24] Fair enough - so long as one takes the italicised qualifications seriously. What the

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[21] On the viability of this distinction, see e.g. David Lewis's valuable note on 'Insensitive Causation' in his *Philosophical Papers II* (Clarendon Press, Oxford 1986), at 184-6, or (better still) Jennifer Hornsby's discussion of causal transitive verbs in her *Actions* (Routledge and Kegan Paul, London 1980), at 124-132.

[22] See, e.g. Glanville Williams, *Textbook of Criminal Law*, above note 3, 378.

[23] *Attorney-General's Reference (No. 1 of 1975)* [1975] QB 773; *Attorney-General* v *Able* [1984] QB 795.

[24] That is surely what the Accessories and Abbettors Act 1861 is getting at in section 8: 'Whosoever shall aid, abet, counsel or procure the commission of any indictable offence ... shall be liable to be tried, indicted and punished as a principal offender.' We may interpret: accomplices are not principals but they are to be treated as principals because they are principals *in effect*.

qualifications invite us to do is to remember that there are outcome-reasons as well as action-reasons at stake in a homicide case, and that these bring the various modes of homicide closer together even as the action-reasons prise them apart. The principal in murder acted against one action-reason (the reason not to kill) while the accomplice acted against a different action-reason (the reason not to procure a killing). But both acted against one and the same outcome-reason (the reason not to do anything, in consequence of which someone will die). What needs to be remembered, although it is rarely at stake in the law, is that in theory the action-reasons could exist without the outcome-reasons, or vice versa. Here, for example, is an intelligible (I do not mean to suggest sound) view about Hitler's demise. During the war, there was for most people no reason not to perform actions - actions in general - which would have made Hitler's death more likely, or even inevitable. Hitler's death would not as such have been a matter of regret, but of pure celebration. But there were still reasons not to kill him or to procure his killing by another. Even without any loss in the outcome, there would still have been prima facie wrongs in performing various possible actions with that outcome. Perhaps, indeed, *every* feasible action with that outcome was coincidentally countermanded by an action-reason not to perform it. But even in that case, the massed ranks of action-reasons against various death-dealing actions are not to be mistaken for one overarching outcome-reason against actions with, or tending towards, fatal consequences. For the former focus on what is done, and the latter on what happens; and that remains a line etched in logic even when, as is often the case, what is done is logically related to what happens.[25]

Now it cannot be stressed often enough that the distinction between outcome-reasons and action-reasons does not exactly map onto the distinction between instrumental and non-instrumental considerations. All non-instrumental reasons are action-reasons, but the

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[25] Some things (e.g. what we often call 'reflex reactions', such as blinking as something flies into one's face or laughing spontaneously at a good joke) lie on the bordeline between what we do and what happens to us, so the line etched in logic is not a perfectly sharp one.

opposite is not true. That is because actions may be among the consequences of other actions. The example of procuring a killing is a case in point. This action of procuring a killing does not only have a death among its consequences, but also, obviously, a killing. Thus even if we are considering the purely instrumental case for prohibiting this kind of complicity, action-reasons as well as outcome-reasons may figure in the argument. In framing such a prohibition, we may want there, not only to be fewer deaths in the world, but also fewer killings. It follows that, on the definition of a policy argument as a specifically instrumental kind of argument, action-reasons as well as outcome-reasons may figure in policy arguments. Thus my challenge to Ashworth's use of the principle/policy distinction is not that it fails to accommodate the possibility of action-reasons which are of local significance only to certain corners of the criminal law, such as reasons not to kill, or reasons not to deceive. My challenge is rather the familiar one faced by those strict consequentialists who are flexible enough to grant the possible existence of action-reasons.[26] If action-reasons are rationally relevant when they figure instrumentally, then why are they not rationally relevant when they figure non-instrumentally? If the fact that performing action ϕ now will bring about three more actions ϕ later can give you three good reasons for performing or not performing action ϕ now, why can't it give you four? If my lie will have as its consequence three further lies, and there are action-reasons not to lie, then why count the three instrumental action-reasons and not the fourth non-instrumental one? Of course Ashworth does not face the challenge in this simple form, because he,

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[26] Parfit is a consequentialist who accepts the possibility of action-reasons (*Reasons and Persons*, above note 20, 112-3); likewise Amartya Sen ('Rights and Agency', *Philosophy and Public Affairs* 11 (1982), 3). Both maintain the apparent strictness of their consequentialism, and answer the challenge posed here, by treating the fact that I ϕed as a consequence of my ϕing, so that non-instrumental action-reasons cast an instrumental shadow, and can therefore be counted instrumentally. This achieves the right result but dodges the issue of practical rationality's non-instrumental aspect.

unlike the strict consequentialist, does allow the fourth action-reason to count. He allows it to count under the heading of principle. But that is only on condition that it is an action-reason operating at a relatively high level of abstraction. And this only goes to compound and deepen the puzzle faced by strict consequentialists. Why should action-reasons have to sneak into the criminalisation argument *either* instrumentally, under the heading of policy, *or* abstractly, under the heading of principle? Why not otherwise?

5. Moral agency as a matter of principle

One possible answer is that the set of action-reasons left over when one subtracts reasons of principle and reasons of policy is an empty set, because action-reasons are always reasons of principle. That this answer is so tempting reflects a complicated set of contemporary assumptions about the role of action-reasons in practical thought. One widespread assumption, starkly presented in the work of Hume and influentially worked out by his utilitarian successors, is that human well-being is a fundamentally passive affair. A life going well is a life in which predominantly good things happen, in which, e.g., we have pleasant feelings and experiences, we are materially prosperous, our wishes come true, things go as we want them to, and so on. Except in so far as actions make or tend to make such good things happen to us, we are led to suppose, they have no special role in our (or anybody else's) well-being. This assumption tends to predispose us to be more sceptical about action-reasons than we are about outcome-reasons. For we can instantly see where (at least some) outcome-reasons acquire their rational force. Nobody could doubt that, other things being equal, it is better to have a better life, and therefore rational to want and pursue one. Of course people differ in their views about which happenings, exactly, *make* for a better life: some accounts are more objective (i.e. desire- and belief-independent) than others, some more pluralistic than others, some more materialistic or hedonistic than others, etc. People also differ in their views about which reasons of well-being apply to

whom: some hold agent-neutral views according to which each of us is rationally concerned with the well-being of all indiscriminately, whereas others hold more or less agent-relative views according to which each of us is rationally concerned with the well-being only of some people, or of some more than others, or indeed only of ourselves. But whether one is subjectively or objectively inclined, pluralistically or monistically inclined, materialistically or hedonistically or spiritually inclined, agent-neutrally or agent-relatively inclined, it is an easy matter to combine the prevailing passive view of well-being with the tautologous proposition that well-being is worthwhile to make the existence of outcome-reasons very easily digestible, even among sceptical moderns like ourselves.

The pay-off, however, is that action-reasons are, for many of us, harder to stomach. They demand fuller explanation. For, *ex hypothesi*, they cannot take their rational force from the importance of human well-being. And what is there, for human beings with a humanistic outlook, but human well-being? What comes to the rescue here is a thought with Christian roots, most influentially adapted into secular thinking by Kant. This is the thought that moral considerations are considerations in a different key from considerations of well-being - that moral considerations offer us flourishing in another dimension, respecting our higher or more perfect nature as human beings. They transcend our mundane day-to-day preoccupation with being better off, calling us away from what Kant called our merely 'prudential' concerns. Here we find an alternative dimension for action-reasons to inhabit. But the need to provide a fuller explanation of action-reasons does not go away merely because we have found some logical space for them. Indeed it escalates into a demand for a fuller explanation of morality itself. What is it for? Why should anyone care about it? What gives it rational force?[27] Against the backdrop of such hostile

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[27] Thus the extensive literature which asks whether there are further (non-moral, usually self-interested) reasons for being moral, a superior but still profoundly misguided example of which is David Gauthier's 'Morality and Advantage' in J. Raz (ed), *Practical Reasoning* (Oxford University Press, Oxford 1978), 185. A natural riposte to the 'why should

interrogation, the pressure to systematise morality is hard to resist. And without a supreme legislator to give morality a law-like, source-based systematisation, humantistically minded people feel constrained to provide it with a content-based systematisation instead. Each time a putative moral reason is cited, someone is bound to ask 'and why is *that* a reason?' Denying themselves a resort to the word of God, the reason's advocates feel compelled to climb to a higher level of abstraction and generality to provide a justification. As we show how each of morality's apparently diverse dictates is in fact an application of a more general moral doctrine, and that in turn an application of a yet more general doctrine, we gradually move towards systematisation of the whole of morality on the foundation of an ever-more restricted set of highly abstract principles. If action-reasons inhabit only this moral domain, then they too are hostage to this strongly felt need for content-based systematisation. Accordingly, we come to expect every action-reason to be a reason of principle, i.e. to operate at, or at any rate to be a straightforward application of a further action-reason which operates at, a relatively high level of abstraction and generality.

This is, of course, a fairly rough-and-ready sketch of a huge body of thought. People differ widely on the details, as well as the terminology. But even my simplified and impressionistic explanation brings an important conundrum to the surface. When I first introduced principles into the discussion, a few pages back, I connected their abstractness, not only with generality but also with *openness*. I said that a principle, being relatively abstract, by its nature leaves more or less open the question of how it is to be complied with. When I introduced the distinction between action-reasons and outcome-reasons, meanwhile, I stressed that action-reasons are reasons for or against certain actions, whereas outcome-reasons are reasons for or against actions only in virtue of those actions making, or tending to make, certain things happen. One of the implications of this second contrast, you may say, is that action-reasons, unlike outcome-reasons, cannot be open. They are

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I be moral?' of Gauthier and his fellow Hobbesians is 'why should I be self-interested?', which (somewhat skittishly) puts the ball back in their court.

action-reasons precisely in virtue of the fact that they *do* dictate how, i.e. by which action, they are to be complied with. This suggests that my sketch of contemporary assumptions about practical thinking must be a *reductio ad absurdam*, for it seems to commit some people to believing that considerations which cannot by their nature be open (action-reasons) are considerations which are by their nature open (reasons of principle). But I do not mean my sketch to be a *reductio*, because there is a way out of the conundrum. It involves adopting a restrictive view of moral agency, according to which the various apparently diverse specific actions that people perform (such as admitting the truth, firing a rifle in the air, laughing at jokes, going for an early night, or overthrowing the government) count, morally speaking, as mere instances of more general actions (such as treating people as equals, betraying oneself, using someone as a means, acting with integrity). Our repertoire of possible actions may be large, the argument goes, but our repertoire of possible *moral* actions is dramatically narrower. Many different actions are, in moral perspective, very much alike. Morally, they vary only in a limited number of dimensions. The effect is that an action-reason's built-in specificity, in combination with the thesis that all action-reasons are moral reasons, turns into a built-in generality instead. For the specific actions that action-reasons refer to are now, by their nature, actions described in moral terms, and thus described in terms of a restricted range of morally salient common features, and thus described at a higher level of abstraction, and endowed with a corresponding degree of openness.

This indeed was Kant's own solution to the conundrum I identified. He adopted a restrictive view of moral agency according to which the various otherwise diverse actions we perform are morally salient, and hence fall within the bounds of our moral agency, only insofar as they are actions of compliance with, or violation of, the ultimate moral principle which he labelled 'the Categorical Imperative'. In this way apparently localised action-reasons (e.g. reasons in favour of keeping promises, or against lying, or for and against conscientious objection) are transformed into mere instantiations of one large and highly abstract action-reason. As one attempts to provide a rational basis for the apparently localised action-reasons, one moves through higher and higher levels of abstraction until

one arrives at a principle of action that can only be rejected on pain of self-contradiction. One can then brush aside further 'why' questions with confidence. Here one has reached, says Kant, the Categorical Imperative, a principle which entails its own rational force. To its content and implications we will return in just a moment. The key point for now is that the Kantian way of rehabilitating action-reasons by carrying them up through the levels of abstraction is one to which many writers and thinkers nowadays exhibit a strong allegiance, even if unconsciously. It has the implication that action-reasons are not as localised as they may seem. In fact, so far as this way of defending them is concerned, they are all reasons of principle. This provides an intelligible and sympathetic basis for Ashworth's treatment of the principle/policy classification as an exhaustive classification of the criminal law's argumentative resources. On this account, Ashworth has artificially deprived the special part of no rational resources at all. Any non-instrumental reasons which could conceivably help to justify doctrines in the special part must, in the end, be capable of abstraction and generalisation, gravitating in the process from the justificatory apparatus of the special part to that of the general part instead. This not only expands the doctrinal content of the supervisory general part, but at the same time effects a wholesale reduction in the range of localised countervailing considerations which might lie in wait, ready to exercise their disruptive force, on the justificatory route from the supervisory general part to the definitional general part. The account just sketched thus exerts a doubly expansive pressure upon the doctrines of the definitional general part.

6. Principled moral agency turned in upon itself

The Categorical Imperative was variously formulated by Kant. In its most famous formulation, it requires one always to act on a maxim through which one could at the same time will that it should become a universal law, i.e. a suitable maxim for all other rational

beings as well as oneself.[28] The basic idea is that one's own will, to qualify as rational, could not claim a sovereignty which it would deny to other rational wills. Kant thought that this requirement could put an end to successive challenges to the validity of some action-reasons, since, as I already mentioned, shunning it was in his view self-contradictory. Whenever we act, we arrogate to our wills absolute authority. If one grants authority to the will, is it not inconsistent to deny authority to the will in general, irrespective of the accident of whose will it happens to be? I will not dwell on the well-rehearsed argument that this kind of inconsistency is moral rather than logical inconsistency, and thus does not establish so much as presuppose the validity of at least some moral action-reasons.[29] Instead of focusing on Kant's undoing, I want to stress the ways in which his Categorical Imperative qualifies as a philosophical triumph. For here we will find the source of its tremendous influence on modern intellectualising about normative problems, including the problems of the criminal law and its organisation.

Kant's master-stroke was to focus all moral attention on the rational quality of an agent's will. Whenever we act, our will is implicated.[30] For the will is none other than the faculty which translates reasons into actions. It follows that an ultimate moral principle governing the operations of the will is a principle by which *every* action may be tested and judged. Accordingly, no human actions occupy an entirely morality-free zone; everywhere

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[28] Kant, *Groundwork of the Metaphysic of Morals* (trans H.J. Paton, Harper and Row, New York 1964), 88.

[29] For a sympathetic reconstruction of Kant's idea of consistency, see Onora O'Neill, 'Consistency in Action' in N. Potter and M. Timmons (eds), *Universality and Morality* (Reidel, Dordrecht 1985), 159.

[30] Again we need to be aware of the exceptional cases on the borderline between what we do and what happens to us, some of which we classify as 'involuntary actions', i.e. actions without the involvement of the will (see note 25 above).

we go, morality goes with us. By the same token, a focus on the will provides an ideal way of factoring out, for moral purposes, the rich diversity of possible human actions. I already mentioned the restrictive view of moral agency, according to which the various apparently diverse particular actions that people perform are, morally speaking, mere instances of more general actions. Moving the golf ball with one's foot is a mere instance of cheating, cheating is a mere instance of breaking trust, breaking trust a mere instance of failing to respect others, etc. Now Kant's focus on the will takes us, in a sense, to the most general action of all. For him, everything worthwhile we do is, morally speaking, just an instance of our willing something correctly, since the Categorical Imperative binds only the will. The inevitable role of the will in action is the morally salient qualification which all actions have in common and in virtue of which, and to the extent of which, they are moral actions. Thus, while our agency may go further, our moral agency begins and ends with our wills. And this in turn allows for a sharp contrast between the moral realm and the realm of well-being or prudence. The realm of well-being is out there in the world, dense with fortuity and contingency. The moral realm, on the other hand, is within us, insulated from all that fortuity and contingency. The idea is not, as the banal determinist parodies it, that the will is uninfluenced and unaffected by the world beyond. Of course, as Kant appreciated, there is contingency and fortuity in the will one happens to have, as well as the predicaments one faces, and the use to which one puts one's will in those predicaments. That is not the point. The point is just that the contribution of the will is *logically* independent of what happens, i.e. can be *specified* independently of it. Thus by the time questions of what happens arise, questions of what we did are, for moral purposes, over and done with. There is, morally speaking, no action of saving a life, where that implies success, i.e. someone staying alive. Morally speaking, one can but try to save, trying being the most that the Categorical Imperative, with its concentration on the will, can require. It follows that Kantian action-reasons are logically independent of, and not merely logically distinct from, outcome-reasons. To hold otherwise, thinks Kant, would be to muddy the water between morality on the one hand and well-being or prudence on the other; and this would undermine the

original premiss, which was used to make the search for action-reasons intelligible in the first place, that morality offers us flourishing in a different dimension from the dimension of well-being, respecting our higher or more perfect nature as human beings, and calling us away from our mundane prudential concerns. Our well-being is 'heteronomously' outside us, but our morality is 'autonomously' within us, and while often enough the twain shall enjoy a chance encounter, never the twain shall be forced together by logical interdependence.

This is the basis of Kant's well-known opposition to the possibility of what has come to be known as 'moral luck', which was, in spite of more recent attempts to turn it into a more sweeping campaign,[31] an opposition only to the possibility of moral luck *in the way our actions turn out*, i.e. to the possibility of a logical dependence of moral action upon its outcome. Even when it is correctly read subject to this limitation, there are, I should stress, certain profound difficulties in transposing the argument directly into the criminal law context. One of these is that Kant's doctrine of legality does not exactly replicate, even though it builds on and is consistent with, his doctrine of morality. Kant required that possession of a rational will, and compliance with the Categorical Imperative, should be *sufficient* to stay on the right side of the law. He never held that such a will should be *necessary* for legal fidelity, as it is for moral flourishing.[32] Thus it would be perfectly possible to draft

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[31] I am thinking primarily of Thomas Nagel's 'Moral Luck', *Proceedings of the Aristotelian Society Supplementary Volume* 50 (1976), 137, in which Kant's objection to the possibility of moral luck in the way our actions turn out is progressively broadened out to confront other kinds of moral luck until '[t]he area of genuine agency ... seems to shrink ... to an extensionless point' (146).

[32] It would have been perverse to hold it necessary, since those who already have a rational will are *ipso facto* those who have the least need of the law's guidance on what to do. Compare, however, John Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford

a criminal law which would be violated only on a certain eventuality being realised, without deviating from Kant's views on moral luck, so long as one could *also* avoid violating it by rational will alone. That would allow much constructive liability through the Kantian net, since constructive liability is often triggered by actions which fall within the sovereignty of the will. For instance, constructive manslaughter liability in English law is triggered by intentional perpetration of an unlawful and dangerous act, the unlawfulness of which does not derive merely from the negligent manner of its performance; one can therefore avoid being a constructive manslaughterer by avoiding all unlawful and dangerous acts. There is also the important point that the Categorical Imperative is a principle of *right* action, while the principles governing the criminal law obviously have to be principles of *wrong* action. It would be a mistake to assume comprehensive symmetry between right and wrong, between good and evil, between positive action-reasons and negative ones. On one very credible interpretation, Kant's restrictive doctrine of moral agency applies only to the positive side. Whether one does the right thing depends on the rationality of one's will. But one may do the wrong thing either by facing one's will towards irrationality, or by failing to face it towards rationality. There is one way to do right, but there are at least two ways to do wrong. It would follow from this interpretation that unthinking as well as deliberate wrongdoing could pass through the Kantian net, both in law and in morality. But these detailed interpretative problems need not detain us here.[33] The key point for our purposes is that the broadly Kantian view of moral considerations as lying autonomously within us, and thus of morality as binding on the will, and thus of moral agency as an agency of trying rather than succeeding, has exerted a profound influence in our contemporary intellectual

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1980), 231-2, where the role of the law in specifying *how* to do what the rational will directs us to do is emphasised.

[33] I have given more detailed attention to them in 'The Purity and Priority of Private Law', *University of Toronto Law Journal* 46 (1996), 459.

culture.[34] It is not the technical working out, but the thrust of the Kantian doctrine - the coextensiveness of moral agency and the power of the will - which has caught on. This forges a very direct connection between the view that all action-reasons are reasons of principle and the view that all action-reasons are reasons for or against trying rather than reasons for or against succeeding. It is no coincidence, accordingly, that those who are enthusiasts for the general part of the criminal law tend also to be, like Ashworth and the English Law Commission, prima facie antagonists towards criminal liability which depends on luck in the way things turn out.[35] They can see how such liability might be defended on instrumental, or policy, grounds, e.g. by referring to the damaging public disquiet which comes of failure to mark a death or injury, even if fortuitous, in the ways crimes are defined and administered. But for them it cannot successfully be defended non-instrumentally, unless as a matter of principle, because all non-instrumental reasons are action-reasons, all action-reasons are moral reasons, and all moral reasons are reasons of principle. And what is more it cannot successfully be defended even as a matter of principle, because all moral reasons are reasons for or against trying rather than reasons for or against succeeding, and so morality cannot yield action-reasons which are violated or complied with depending on the luck of how the action in question turns out. And if morality cannot yield them, then there cannot be such action-reasons, since (by the earlier premiss) all action-reasons are moral reasons.

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[34] I stress *intellectual* culture. There is little evidence that the idea has caught on in public culture at large, although there is evidence of some confusion over the issue.

[35] Ashworth, 'Taking the Consequences', in Stephen Shute, John Gardner and Jeremy Horder (eds), *Action and Value in Criminal Law* (Clarendon Press, Oxford 1993), 107; Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com. No. 237, HMSO, London 1996), 37ff.

7. An alternative starting-point: active well-being

You may suspect that, by switching attention from the question of the general part's scope and significance to the question of its content, these last remarks represented a gratuitous digression from the topic of this paper. But the digression was, in fact, far from gratuitous. My challenge to the view that all action-reasons are reasons of principle, and hence to the view that the general part has a monopoly on non-instrumental justification, is intimately connected with a challenge to the view that all action-reasons are reasons for or against trying, irrespective of success. The challenge begins at the very first step down the Kantian road. Kant's account of morality, you will recall, was forged against the backdrop of a view of human well-being which his philosophical adversaries had brought to prominence, namely the view that well-being is a passive condition, a matter of what happens to us. Kant did not challenge this view of well-being. Rather he accepted it under the heading of 'prudence', while seeking to depose it as a be-all-and-end-all by showing that there is more to life than well-being. We may agree with Kant that there is more to life than well-being. But this does not mean that we should follow him in granting his adversaries' view that well-being is a passive condition. There is an alternative, and broadly Aristotelian, view according to which human well-being is an active condition.[36] In the formulation I will adopt here, which I believe captures the main Aristotelian themes, our well-being consists in the wholehearted and successful pursuit of worthwhile activities.[37]

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[36] Of many works exploring this point, a good starting point is John Ackrill, 'Aristotle on *Eudaimonia*', *Proceedings of the British Academy* 60 (1974), 339.

[37] The formulation comes from Joseph Raz, 'Duties of Well-Being' in his *Ethics in the Public Domain* (Clarendon Press, Oxford 1994), 3, and its elements are also defended in Raz's book *The Morality of Freedom*, above note 20. Among many others who have defended an (at least partly) active view of well-being are Robert Nozick in *Anarchy, State, and Utopia* (Basic Books, New York 1974), 42-5; Bernard Williams in his debate with J.J.C. Smart

While the Humean view of well-being demoted actions to a secondary role, as mere vehicles for making things happen, the Aristotelian view does just the reverse. It demotes what happens to us to a secondary role in our well-being, by determining the importance of what happens to us largely in terms of the contribution it makes (whether instrumentally or constitutively) to our success in pursuing worthwhile activities. The illusion that what happens is paramount for well-being then has an obvious source in the requirement of *success*. Because our success often depends, not only instrumentally but sometimes also constitutively, on what happens to us, this requirement misleads us into supposing that what happens to us is the key to our well-being. But once we remember the earlier point that many actions are partly constituted by the way they turn out, we can see that the key thing was not what happened as such, but what happened *qua* necessary constituent of a successful activity. It was not that one ended up on top of a mountain that made the contribution to one's well-being. It was the fact that one climbed the mountain all the way to the top. Nor was the value of climbing the mountain to the top ultimately owed to something further that happened when one did, e.g. that one's desire to get to the top was satisfied, or that one was pleased to be there.[38] Climbing the mountain to the top was what ultimately mattered. That one desired to climb the mountain, and therefore had a satisfied desire when one got there, and was pleased to be there, testifies to the wholeheartedness of one's engagement in the climbing enterprise, which is a matter of no little importance. But otherwise one's desire to climb the mountain is but a pale reflection of the fact that

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published as *Utilitarianism: For and Against* (Cambridge University Press, Cambridge 1973), 108ff; Elizabeth Anderson in *Value in Ethics and Economics* (Harvard University Press, Cambridge, Mass. 1993), 22-6.

[38] It may be owed, of course, to further things one *did* there, e.g. sampling the view, taking photographs, hang-gliding, resuscitating an unconscious mountaineer. That would obviously allow being at the top of the mountain to contribute to one's well-being independently of how one got there, without switching attention away from what one did.

climbing the mountain was independently worthwhile, and that succeeding in climbing it (assuming one climbed it wholeheartedly) accordingly contributed to one's well-being. That one's desire was satisfied by successfully and wholeheartedly performing a worthwhile activity shows only that one's desire was rational. There was, first and foremost, an action-reason to climb to the top, and that was the very reason which made it rational to want to do it. So far as one's well-being is concerned, then, the attendant outcome-reasons, e.g. the raw pleasures and personal satisfactions of being on top of the world, turn out to be of largely derivative significance.

Again this is a crude thumbnail sketch of a complex tradition of thought. By way of elaboration, I will confine myself to commenting on just a few aspects which are of significance for the criminal law. First, the focus is on 'activities'. Working as a novelist or an engineer, going on a protest march or to church, doing up one's own house or doing over someone else's, sharing a flat or having an affair, going on a picnic or a pub crawl, playing in a football team or an orchestra, are all examples of activities. An activity is simply a recognisable complex, or scheme, of actions (a category which, for these purposes, includes omissions). Larger-scale activities are also recognisable complexes, or schemes, of smaller-scale activities. Going on holiday is a complex or scheme of travelling, relaxing, engaging in recreational pursuits, adapting to different customs and cultures, leaving work behind, etc. Each of these (often overlapping) sub-activities breaks down into various actions, e.g. swimming in the sea, catching the train, eating shellfish, lying in the sun, climbing the ramparts, sizing up the local talent, turning off the mobile phone, etc. Not all of those who go on holiday engage in all of the constituent smaller-scale activities, and not all of those who engage in the smaller-scale constituent activities act exactly alike. It is true of most activities that there is more than one way to engage in them, although some, like driving a car and dancing an eightsome reel, are physically constrained or rule-bound to such an extent that engaging in them does entail engagement in a highly standardised pattern of specific actions. The distinction between an individual action and an activity is

not always clear-cut, but modern criminal law tends, for various rule-of-law reasons,[39] to regulate individual actions (having incestuous sexual intercourse,[40] making an abusive telephone call, failing to provide an adequate safety barrier on scaffolding[41]) while remaining relatively blind to the activities that they go to make up (having an incestuous relationship, pursuing a campaign of intimidation, running a cowboy operation). Occasionally, however, the criminal law regulates activities as such (membership of a proscribed organisation, living off immoral earnings), and sometimes it regulates individual actions only on condition that they form part of a certain activity or range of activities (putting incorrect prices on display in a shop, accepting bribes in a public office). As these examples illustrate, the relationship between the value or disvalue of activities and the value or disvalue of their component parts can be very varied. Sometimes what makes the activity worthwhile (or worthless or base, as the case may be) is the combined worth (or unworth) of the actions which go to make it up. On other occasions, conversely, actions take their

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[39] I say a little more about rule-of-law reasons in section 13 below.

[40] Sexual intercourse is, of course, an activity to most of us; but to the law it is an action forming part of that activity, namely an action of penetration: see *Kaitamaki* v *R* [1984] 2 All ER 435.

[41] The example is chosen to make clear that actions, for present purposes, include omissions. Of course one of the implications of taking an active view of well-being is that actions and omissions with the same consequences may nevertheless differ in value. However, in keeping with the arguments to be developed below I doubt whether there is any *systematic* difference in value between actions and omissions, such that if one has a choice between doing some harm and failing to prevent the same harm, then other things being equal there is always, or normally, or depending on what is being held equal, a prima facie reason to choose the latter. A valuable discussion is A.P. Simester, 'Why Omissions are Special', *Legal Theory* 1 (1995), 311.

value or disvalue from the fact that they form part of a certain activity. Often, as activities like stalking and pimping illustrate, it is a two-way street. The actions of stalkers and pimps are some of them independently evil, some of them independently innocuous, and some of them in-between. The innocuous actions are tainted with evil when and because they are part-and-parcel of the activity, which is in turn tainted with the evil of the independently evil actions which form part of it. The activity bequeaths evil to some of its component actions while it inherits evil from others, and sometimes, indeed, bequeaths evil to and inherits evil from one and the same action.

This brings us to the second, and more troublesome, issue which calls for elaboration. I have just been speaking of the independent value and disvalue, even the independent *evil*, of actions and activities. You may protest at my apparently conclusory use of the word 'independent'. If human well-being consists in the successful and willing pursuit of worthwhile activities, we presumably need to know what makes these activities worthwhile apart from the contribution which successful and wholehearted pursuit of them makes to our well-being. If no such independent account of the value of activities can be given, then this Aristotelian account of well-being surely falls down the same hole as the Kantian account of morality, in that it presupposes the existence of the very action-reasons it purports to defend. But that conclusion is premature. In the first place, I did not assume that all value, even as it bears on well-being, is to be counted in terms of well-being itself. There may be other kinds of value, and hence other families of reasons, in the world. Aside from the question of how our lives are going - the question of our well-being - there is also the key question of how we rate as people - the question of our virtues and skills. To some extent, once we embrace the active account of well-being, the question of how we rate as people is answered by asking how well our lives are going, and then shifting into a more personal idiom by asking which aspects of our lives reflect upon us personally (the issue of our *responsibility* for what we do). Assessment of our lives therefore comes (logically) first, and assessment of us as people comes second. This may lead you to think that issues of virtue and skill will tend to be derivative or shadow issues in moral philosophy. But in fact

it is, philosophically, a true chicken-and-egg situation. For our lives are going well, on the active account of well-being, if we are engaging in worthwhile activities, and one of the things which makes activities worthwhile, and independently so, is the virtue and skill which, successfully engaged in, they demand of us. Different activities call for different virtues and different skills, lending the activities different intrinsic worth. These virtues and skills do not, however, owe their value only to considerations of well-being. Being good at golf contributes to one's well-being if one likes golf and plays it. That is true because golf is a worthwhile pursuit, and that in turn is true partly thanks to the valuable element of skill involved in playing it well. The value of the skill does not, however, stem purely from the contribution which playing golf well, i.e. playing it with skill, makes to one's well-being. That would get us into a truly vicious circle. On the contrary, while it strikes me that the value of skills and virtues, or of some skills and virtues, does owe something to the well-being they bring into the world, it seems likely that the fundamental issues about the value of virtues and skills cannot be resolved by reference to an account of well-being alone. We still face the somewhat Kantian challenge of divining a further and complementary source of value separate from the value of human well-being. The difference is that, unlike Kant, we would not now be looking for two self-contained points of view - the 'moral' and the 'prudential', the higher form of flourishing and the lower - but rather for two families of considerations which constantly refer us back and forth to each other. In particular we are looking for value, as I said, which bears fundamentally on our well-being even though it is not the value of well-being itself.

The mind-boggling challenge of explaining this value cannot be taken up here. Suffice it to say that the value which our virtues and skills bring to our worthwhile activities is by its very nature intrinsic, or constitutive, value. Many activities, however, are also instrumentally good or bad. And when we come to the question of instrumental value, happily, there is no vicious circularity in tracing the value of worthwhile activities to the value of well-being itself. This kind of value can therefore serve to illustrate the main point.

Take being an aid-worker in a war zone. True, it is an example of an activity with positive value, but on this score most of the lessons can be applied *mutatis mutandis* in the case of worthless or base activities, such as being a torturer or a child-molester or a sender of hate-mail or a wife-beater, as well. The value of being an aid worker in a war zone comes primarily of the service it does to the well-being of the victims of war. Their well-being may in turn lie in the valuable work they are able to do with success and enthusiasm when returned to health and vitality, and that work may in turn be valuable because of the way it ultimately serves the well-being of yet further groups of people, e.g. by promoting reconciliation or building railways. Alternatively, the well-being of those people aided by aid-workers may simply lie in the life of prayer or scholarship to which they can return, or the restoration of home and garden to which they can attend, without further consequences for the well-being of third parties. All of this is well-being instrumentally served by aid-workers: the well-being of those aided, or others, is augmented as a consequence of the aid work. So surely none of it entails that the activity of being an aid-worker is intrinsically worthwhile, i.e. that there are action-reasons to be an aid-worker as such? Given the instrumentality of one's contribution to the well-being of the victims of war, isn't it rationally beside the point whether one makes one's contribution to the victims of war by being an aid worker or by some other route, such as sending donations or lobbying government, just so long as the contributions make the same impact on the beneficiaries, net of cost and effort? The answer is a resounding 'no' so far as one's own well-being is concerned. For well-being, actively conceived, consists in the successful and wholehearted pursuit of worthwhile activities, and however the activities may *come* to be worthwhile, one's well-being is constituted by one's successful and wholehearted pursuit of them *qua* activities. Thus if well-being is worth wanting and having, as we have all along assumed it to be, one has reasons to engage wholeheartedly and successfully in the relevant activities as such (i.e. action-reasons to be a successful aid-worker, action-reasons to be a successful lobbyist, or whatever) *as well as* reasons to do whatever will have the consequences that these activities may have or tend to have. Those consequences, in turn,

may be happenings or further actions. Insofar as they are consequences for well-being, on the active account of well-being they will be further actions (e.g. actions of restarting businesses, going fishing with one's children, or reconstructing villages). The mere fact that these too will contribute to well-being because they too are worthwhile activities successfully and wholeheartedly engaged in, and that their value too may come, in some measure, from instrumental contributions they make to someone's well-being further down the line, shows no damagingly infinite regress. We have no cause to want our manifold stock of action-reasons ultimately to be traceable to outcome-reasons, or indeed to more abstract action-reasons, unless we are prima facie sceptical about action-reasons. And we have no reason to be prima facie sceptical about action-reasons unless we tilted the odds against them at the outset by adopting a passive, Humean account of well-being.

8. The standards of success

But haven't we just done exactly what we purported to avoid, and traced all our newly-uncovered action-reasons to one highly abstract action-reason, turning all action-reasons back into reasons of principle in the process? If all Kantian action-reasons are straightforward applications of his principle of dutiful trying, the Categorical Imperative, aren't ours straightforward applications of an alternative principle of wholehearted success? That brings us to the third and in some ways most important point about the active account of well-being. What counts as success varies from activity to activity, depending on the internal standards of the activity itself. Notice that Kant's Categorical Imperative is open, but not fundamentally incomplete. It specifies not only that one should try, but also, admittedly at a high level of abstraction, what one should try to do: one should try to do what can, at the same time, be willed as a universal law.[42] But the principle that (to live well)

[42] This is why, for all he defends a highly restricted view of moral agency, Kant presupposes a more diverse account of agency in general. For moral agency to consist in

one should succeed willingly in worthwhile activities is radically incomplete. It does not specify, even at a high level of abstraction, which actions one should perform. Rather it refers one back to the standards of the activities themselves for guidance on this point. The guidance of these internal standards need not be in any respect uniform. There need be no common themes uniting what a successful priest does with what a successful politician does, or linking either of these to what a successful grandparent or a successful lover does. Not only need there be no common themes; what is more there may be inconsistent themes. Success in body-building may mean disabling oneself from meeting some of the constituent standards for successful ballet-dancing, so that one cannot, even conceivably, enjoy both successes in the same period of one's life. Success in environmental campaigning may, likewise, mean opposing some of the constituent standards of success as a stockbroker, so that success in the latter means failure in the former. The fact that the internal standards of these activities are not only different but conflicting does not entail that one of the activities is good and the other bad (although that may coincidentally be the case). It only entails that none of the actions in question are dictated by any harmonising principle of wholehearted success, analogous to the Kantian Categorical Imperative, which purports to set the same standard for all activities.

That the active account of well-being does not elevate everything to a matter of principle is also illustrated by the ease with which Kantian standards can themselves be incorporated piecemeal into it, and their appeal re-explained in the process. In some activities, putting in the right kind of effort might itself be a secondary form of success. The consolation prize at school sports days is not meant ironically; the dedicated loser is not an outright failure by the internal standards of school sports days, even though, quite possibly, she is an outright failure by the internal standards of the individual competitive

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trying to do things, there must be other things one can do apart from trying. Otherwise the Categorical Imperative would involve a real infinite regress: you must try to try to try ... and so on.

sports involved. Some teachers believe, similarly, that diligence should be rewarded even when it does not combine with talent and skill to produce excellent schoolwork. They hope to redefine the internal standards of success at school, at least in part, to give some localised credence to Kantian values. Perhaps, when school work tests only a very narrow range of talents and skills, these teachers have a point, since their attitude militates against crude and damaging rankings of pupils at a time when their lives may be forever blighted by official assessment. In my view, however, such cases should be regarded as deviant cases; in relatively few activities can trying alone count as a form of success, let alone unqualified success. But be that as it may, the very possibility that trying might *sometimes* count as succeeding helps to bring out the point that there is no unifying principle of success, of which apparently localised action-reasons to succeed are applications. Accordingly, there is no Aristotelian counterpart to Kant's Categorical Imperative. Each success in a worthwhile activity is a success in its own relatively localised terms. It is a success, the quality of which cannot properly be explained in abstraction from the activity in question and its menu of constituent actions. Thus the active account of well-being has no particular tendency to turn action-reasons into reasons of principle. Of course there may be some activities which are decidedly principled, and which therefore set, predominantly, relatively abstract internal standards of success. Dworkin wrongly supposed judging to be an example; better examples might be those of working as a priest or a human rights campaigner, in which fields of work hypocrisy is often held to be the greatest vice of all. But there are no grounds for supposing that all activities are like this, so that the only worthwhile activities in the world (or the very best ones) are highly principled activities. Accordingly there are no grounds for those who accept the active account of well-being to assume that all action-reasons will be reasons of principle. In turn, those who adopt the active account of well-being into the criminal law are liberated from the assumption that reasons which are not reasons of principle must always be reasons of policy instead. They need not fear that a non-instrumental argument will always tend to favour generality, inflating the general part at the expense of the special part. For, on the

active account of well-being, a non-instrumental argument could be at a very high, or equally at a very low, level of abstraction. Accordingly, it could be an argument of very general, or equally of very local, application.

9. Success by design, failure by mistake

Only in deviant cases, I suggested, will trying be a logically sufficient condition of success in our activities. But is it a logically necessary condition? Some would say that it has to be, on the ground that trying is a necessary condition of all action, and of course the success we are talking about is success in action. Whatever we do, it is said, we do by trying to do something.[43] This is not a view I share: there are things, to my mind, which we do without trying, and by that I mean not only without trying to do those things but without trying to do *anything*. I give great credence to the idiomatic usage which tells us that some people succeed in what they do effortlessly, 'without even trying'. But I do agree that, barring exceptional cases on the borderline between what we do and what happens to us, it is true that whatever we do we do by doing something *intentionally*.[44] That is the real way in which the will enters into every action; it converts reasons into actions through the medium of intentions, which may or may not necessitate trying. And this certainly does point to a possible area of common ground between the Aristotelian account of well-being and the Kantian Categorical Imperative. Could it be that wholehearted success in worthwhile activities, like compliance with the Categorical Imperative, is by its very nature intentional on the part of the agent? The answer, subject to a couple of caveats, is affirmative.

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[43] E.g. Jennifer Hornsby, *Actions*, above note 21, 33-45

[44] Which Hornsby treats as equivalent to the 'trying' criterion: see her essay 'On What's Intentionally done' in *Action and Value in Criminal Law*, above note 35, 55 at 58.

Let me begin with the caveats. First, the requirement of intention should not be confused with the requirement of wholeheartedness. Criminal lawyers, at least, should find it easy to appreciate the difference between the two. A mercy killing need be no less intentional than a grudge killing, but the latter can be wholehearted where the former, by its nature, cannot. Conversely, the killing of passengers by blowing up an aircraft for cargo insurance need be no less wholehearted than the killing of passengers by blowing up an aircraft for life insurance, but the latter is intentional killing and the former is killing as a side-effect, or incident, of destroying property.[45] Lawyers will recognise the 'cargo bomber' case as one to which judges and commentators sometimes stretch the legal definition of 'intention'.[46] We can already begin to see one of the reasons why they might do this: they regard the lack of intention as somehow compensated by the presence of wholeheartedness when they are rating the heinousness of the crime, and manipulate the legal definition of 'intention' to reflect this. Perhaps this is even a morally legitimate manoeuvre in a clay-footed institutional system like the law. But we should nevertheless take care, in the less institutional context of a philosophical discussion, not to confuse the requirement of wholeheartedness with the requirement of intention. The requirement of intention actually comes, not of the wholeheartedness requirement, but rather of the *success* requirement. One is not succeeding, in the relevant sense, if one has no relevant intentions. And what are the relevant intentions? That takes us to the next caveat. The suggestion that success in our activities has to be intentional success may conjure up an image of a person both unpleasantly ambitious and oddly self-conscious. Unpleasantly ambitious, because intent upon success. Oddly self-conscious, because continuously aware of the nature of her activity and the standards of success it sets. This image is doubly distorted. Contrary to the impression of excessive ambition, what the requirement of success demands in the way of

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[45] The example originates from Glanville Williams, *The Mental Element in Crime* (Megnes Press, Jerusalem 1965), 34-5.

[46] Memorably Lord Hailsham in *Hyam* [1975] AC 55 at 74.

intention is not an intention to succeed, but an intention to engage in the activities in which, happily, one does succeed. The point is that, by the nature of success, one can only succeed in activities which one meant to engage in. Meanwhile, contrary to the impression of excessive self-consciousness, success does not require that one intends to engage in one's activities *under that description*. One must merely intend to engage in the actions which constitute the activity. And even these one need not engage in self-consciously, i.e. under a particular description.[47] A successful film critic must be good at the interpretation of films. But she need not conceive herself either as a 'film critic' or as performing acts of 'interpretation'. Indeed she need not be aware of the practices, or even possess the concepts, of 'film criticism' and 'interpretation'. All she does, she may say, is tell people what is good or bad about films. That suffices so far as the relevant intention is concerned. For all that is needed to meet the requirement of intentional success is that a person intends, under some description, to perform the actions which go to make up the activity in which she succeeds. This final formulation makes it clear, in case you envisaged the Aristotelian and Kantian doctrines enjoying a total rapprochement regarding the centrality

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[47] Some treat the locution 'under a description' as a licence to be reductivists about agency, holding that all we 'really' do is try (or will, or move) and the other things we say we do (e.g. eat, paint the house, play squash, torture animals) are just so many 'descriptions' of our tryings (or willings or movings). The *locus classicus* is Donald Davidson, 'Agency' in his *Essays on Actions and Events* (Clarendon Press, Oxford 1980), 43 at 58-9. Rarely has a philosophical claim been so influential, and yet so palpably self-undermining. A (valid) description of an action is a description of it in terms of some or all of its constituents. Since reductivists about action strip out all the distinguishing constituents of our diverse actions, they leave nothing in terms of which validly to 'describe' that diversity. Kant's reductivism about moral agency obviously has a lot to answer for here, since it proved to be an inspiration for countless misguided attempts to make human agency, in general, into a contingency-free zone, even though it was only a doctrine of *moral* agency.

of the will, that on the Aristotelian side one's success may be a chance in a million, even a miracle, without foreclosing the evaluative significance of that success. The element of chance, on the Aristotelian view, lies in the realisation of the outcomes which are constituents of the activities and actions in which one succeeded, and which make one's activities and actions successful. It does not lie in the performance of the actions or the pursuit of the activities themselves, which, I repeat, always has to be intentional.

It is, however, no coincidence that both the Kantian and Aristotelian doctrines do give intention a central role in their ideals of human flourishing. The central role of intention in human flourishing is dictated by some of the most fundamental features of practical rationality, ecumenically recognised across diverse philosophical traditions. These features cannot be investigated here.[48] As I already hinted in connection with the Categorical Imperative, however, these features do leave us with some important scope for asymmetry between the good life and the bad life, between the case of flourishing and the case of downfall. Good need not mirror bad, right need not mirror wrong, positive value need not mirror negative. That becomes particularly apparent when we look at the structure of the active account of well-being. On this account, there are more ways of going wrong in life than there are ways of going right, more ways of detracting from one's well-being than ways of augmenting it. One augments one's well-being only to the extent that one succeeds wholeheartedly in worthwhile activities. One may detract from one's well-being, on the other hand, in three quite different dimensions: *either* by failing in worthwhile activities, *or* by engaging in worthwhile activities half-heartedly or reluctantly, *or* by engaging in worthless or base activities. In the latter dimension, moreover, success and wholeheartedness both serve to make things worse, not better. If you are a gangland

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[48] I have investigated them, or at least some of them, in my paper 'Justifications and Reasons' in A.T.H. Smith and A.P. Simester (eds), *Harm and Culpability* (Clarendon Press, Oxford 1996), 103. In particular I have attempted to explain the basis of the asymmetry between right and wrong which I reintroduce here.

hitman, then other things being equal it is better to be both a failed and a reluctant one. If you are the kind of hitman who prides himself on never missing, that only goes to show that you are leading, other things being equal, a sad life of compound debasement: debased first by the baseness of your activity, second by your success in it, and third by the perverse pride you take in this success, which testifies to your wholeheartedness in pursuing it.[49] But if being a hitman were a worthy occupation, it would be *lack* of success or *lack* of pride which would do the damage. This means that intention can only have a rather fragmented or patchy role in people's downfall compared to the role that it has in their flourishing. Where they engage in worthless or base activities, success only makes things worse, and since intention is a component of success, intention forms part of what makes things worse in such cases, even though it does not by itself make things worse. But people's downfall often lies in failure at worthwhile activities rather than success in base ones, and there is, in general, no necessary connection between intention and failure. I say 'in general' here because sometimes, of course, failure consists in the performance of certain actions, the *omission* of which is a constituent of success at a certain activity. People fail as parents when they discriminate systematically between their children, fail as people of honour when they break their promises, fail as barristers when they turn down unappetising clients for that reason, etc. Some such 'actions of failure' happen to be definitionally intentional, such as deceits and manipulations, while others, such as denigrations and breaches of promise and

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[49] There is a complication here which arises out of the role of skill in well-being. Skills are partly a *means* to success in worthwhile activities and partly a *source* of worthwhileness in their own right. Thus the fact that one has and uses a skill does something for one's well-being even if one uses it for base ends. Nevertheless, one's success in these base ends detracts from one's well-being. We could say that, in such situations, skill gives with one hand and takes away with the other. Hence one (of several) ways in which we can be 'admirably immoral'. On which see e.g. Michael Slote, *Goods and Virtues* (Clarendon Press, Oxford 1983), 77ff.

killings, do not have this feature. Where an action of failure is definitionally intentional, then that obviously introduces a requirement of intention into failure. But otherwise the issue of whether one failed does not depend on one's having the intention to do whatever constituted one's failure. One failed, for example, if one's actions simply did not turn out as they needed to make the activity successful (e.g. if one never got anywhere near the top of the mountain one was trying to climb). One also failed in an activity if, for example, one failed to perform a certain action which is crucial to success in that activity (e.g. if one was a film critic who never actually bothered to watch a film), or failed to perform enough of the menu of possible constituent actions for one's actions to add up to the activity (e.g. if one went on holiday but, with or without realising it, spent the whole time working). Equally one failed in an activity if one performed the constituent actions, but not intentionally under any description (e.g. if one was a shot-putter who won a competition only when one let the shot slip clumsily out of one's hand in mid-air). Where the cause of one's downfall in a given activity (generally or on a particular occasion) is failure in that activity, the last example makes clear, not intention but *lack* of intention may sometimes be the hallmark of one's failure. It shows that once we switch attention from those who are augmenting their well-being to those who are detracting from it, on the active view of well-being intentional agency quickly becomes just one of several modes of human agency which may do the detracting. At this point intention loses consistent evaluative significance.

10. Success and failure in criminal law

Many are familiar with the principle that *harmless* activities should not be proscribed by law.[50] Some regard this as a more liberal alternative to the principle that *worthwhile* activities

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[50] The 'harm principle' first defended by J.S. Mill in 'On Liberty', in the collection of Mill's work *Three Essays* (Oxford University Press, Oxford 1975), 5 at 15.

should not be proscribed by law, which they fear brings excessively moralistic considerations to bear on the scope of legislation and adjudication. My own view is that both principles bind the state under modern liberal conditions, so that, as a rule, activities should not be banned (or for that matter made so costly or difficult as to be wiped out in practice) unless they are *both* harmful *and* base or worthless. Troublesome cases for criminalisation then include not only virtually harmless activities (like the use of some recreational drugs, simple trespass on open land, and loitering) where invoking the law is using a sledgehammer to crack a nut, but also those (like boxing, some disruptive trespassing, and possession of firearms) which may have seriously harmful effects but nevertheless have notable redeeming value, either constitutively or instrumentally. The question of what exactly should be criminalised lies beyond the scope of the present enquiry. But the view that, as a rule, we should not be prevented by the state from engaging in worthwhile activities has implications, not only for *what* should be criminalised but also for *how* things should be criminalised. If the law should normally target worthless or base activities rather than worthwhile ones, then the paradigm criminal is not a failure in his or her activities, but on the contrary a success. For in the case of worthless or base activities, according to the explanation in the previous section, it is better to fail than to succeed, even though the opposite holds in the case of worthwhile activities. It follows (so long as we grant the modest assumption that the more heinous the crime, the closer to the paradigm the criminal comes) that the paradigm criminal is the successful criminal rather than the failed one. Much the same line of argument makes the paradigm criminal a wholehearted one rather than a half-hearted or reluctant one. This does not mean that the criminalisation of the half-hearted or the failed criminal is objectionable, even prima facie. It only means that the successful and wholehearted criminal is the key case relative to which the situation of the failed or half-hearted criminal falls to be assessed and determined.[51] Notice that this

[51] On this method of analysis, which is fundamental for every concept with both institutional and evaluative dimensions, including the concept of law itself, see John Finnis, *Natural Law and Natural Rights*, above note 32, 6ff.

necessarily brings intention, as well as wholeheartedness, to the centre of the criminal law's attentions. Success, in worthless or base activities as much as worthwhile ones, depends on the intention to engage, under some description, in the actions which add up to one's success. It does not follow from this that intentional crime is *ceteris paribus* worse than unintentional crime. That would not necessarily hold where the crime in question lies in the zone of failure beyond the paradigm. All that follo
ws is that the paradigm criminal is one who intends, under some description albeit not necessarily the law's description, her criminal actions.

This thesis, that crime is paradigmatically both intentional and successful, has been thoroughly and sensitively defended elsewhere by Antony Duff.[52] Although many of Duff's arguments could be interpreted as reflecting a broadly Aristotelian account of the good life, I am not clear whether he would agree with me in regarding the fact that crime is paradigmatically intentional as a pay-off of the fact that crime is paradigmatically successful. What I am clear about, however, is that Duff's views and mine part company just as soon as we leave the paradigm behind us. For Duff, as for many criminal law textbook-writers, the modes of criminality appear to spread outwards from the paradigm of intentional criminality in concentric circles, like the ripples from a stone that lands in the water. Beyond intention there is a band of recklessness, and then a band of negligence.[53] My own

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[52] In his *Intention, Agency and Criminal Liability* (Blackwell, Oxford 1990), 111-115 (intended crime as paradigm) and 184-192 (successful crime as paradigm). Although these two passages have similarities, their interrelation is not brought out.

[53] The picture comes across in *Intention, Agency and Criminal Liability* at 139 (on the recklessness band) and 156-7 (on the negligence band). I am indebted to Antony Duff for suggesting the image of 'concentric circles' to describe it. The image is complicated somewhat by the fact that Duff sometimes identifies two competing paradigms or central cases, involving two different concepts of intention (e.g. at 114), roughly equivalent to what others have called 'direct' and 'oblique' intention. This complication is not relevant to the

view is that, once we go beyond the paradigm of intention (touching on the way some genuinely borderline cases between the intended and the unintended), the mentalities of crime quickly fragment, and lack any intelligible general ordering.[54] There are a number of reasons for this. The first is a consequence of the active account of well-being itself. When we leave the paradigm of success, our attention turns to failure. And there are, as I explained above, many ways of failing in one's activities, whether they are worthwhile or otherwise. Some ways of failing involve intention to do the very actions which seal one's fate. Other ways of failing are ways of failing precisely for the absence of intention, for the fact that they are blunders. Some, I should add, require knowledge, or inkling, of what is going on, e.g. where one's failure consists in actions of betrayal or complicity. A great deal turns here on the peculiarities of the specific actions going to make up specific activities, since different actions have different mental elements built into their definitional fabric (and some have none at all). That is compounded by the second consideration, which has a more institutional character. As I already mentioned, there are rule-of-law reasons why the law by and large regulates individual actions rather than whole activities. One important pay-off of this is that an action which may form part of a base activity or equally a worthwhile one is sometimes subject to criminalisation. Possessing drugs and possessing firearms are obvious examples; animal vivisection is a more controversial case. In these cases the law may try to use a licensing system to do the differentiation. But failing this, e.g. in dealing with insider trading or certain forms of harassment, it must often add a variety of complex riders and provisos to the definitions of crimes, typically including specialised mental elements, to try and ensure that the worthwhile activity in question is not pulled down with its worthless or base counterpart. Apart from looking to the manner of

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present discussion, save that I should say that my own references to intention in this paper are to direct intention only.

[54] Here I attempt to bear out an objection Heike Jung and I raised in 'Making Sense of Mens Rea: Antony Duff's Account', *Oxford Journal of Legal Studies* 11 (1991), 559.

performance, or focusing on certain distinctive ulterior intentions, the criminal law may attempt to isolate a certain kind of attitude or outlook which it thinks typifies the base activity but which is missing from the worthwhile one. Words like 'dishonesty', 'recklessness', 'negligence', and 'malice' have all played such a role in the law. It is a relatively localised role, once again, because needless to say such words connote attitudes and outlooks which typify different groups of base activities.

The matter is complicated yet further by the fact that, sometimes, the criminal law deliberately targets what it takes to be worthwhile activities, aiming to institutionalise clear standards of success and failure where the internal standards are in doubt or come to be widely disregarded. This is one way (among many) to demarcate the elusive category known as 'regulatory' crime: regulatory crime, in this sense, is crime consisting of failure in (supposedly) worthwhile activities rather than success or failure in (supposedly) worthless or base ones. Examples might include driving without due care and attention and failing to display fire exit notices in a public building. Notice that regulatory criminalisation, in this sense, need not violate the principle that worthwhile activities should not be banned or effectively ruled out by law. Regulatory criminalisation complies with that principle on condition that the risk of failure in the activity in question, and consequent criminal conviction, does not *de jure* or *de facto* foreclose successful engagement in it.[55] Nevertheless, the consequence of the fact that regulatory crime in this sense is directed at failure in worthwhile activities rather than success in worthless or base ones is that the paradigm of intentional criminality is subverted. Since the paradigm of intentional criminality comes of the paradigm of successful criminality, where the focus is instead on failure the automatic

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[55] One important factor to bear in mind here is that some activities, e.g. friendship, are regulation-sensitive, meaning that they are destroyed by being officially regulated. I have discussed this problem in 'Private Activites and Personal Autonomy: At the Margins of Anti-Discrimination Law' in Bob Hepple and Erika Szyszczak (eds), *Discrimination: The Limits of Law* (Mansell, London 1992), 148.

centrality of intention is lost. We could say that regulatory crime forms its own alternative paradigm in which intention is, in general, neither here nor there. That is just one of several reasons why, as I have said, we should not regard the paradigm of intentional and successful criminality as imposing any general ordering, whether supervisory or definitional, upon the various mentalities of crime which lie beyond it.

11. Well-being and moral agency in criminal law

I have been assuming, in the last couple of sections, that the emphases and distinctions introduced by the active account of well-being are bound to go to the heart of the criminal law's structure. But even if you are attracted by the active account of well-being, you may doubt whether the criminal law should be much affected by it. After all, the non-principled non-instrumental considerations which the active account of well-being introduces into our thinking are based on the well-being *of the agent herself*. What I do is of the essence for my well-being, what you do is of the essence for your well-being, and so on. Correspondingly, what a scoundrel does is of the essence for his well-being: being a scoundrel, he is *ceteris paribus* badly off, leading a rotten life. But why should the criminal law, in regulating the activities of scoundrels, give tuppence for their well-being? To put the challenge less rhetorically: given that they relate to the well-being of the offender, shouldn't we expect the non-principled non-instrumental considerations generated by the active account of well-being to make only a rather trivial difference to the relationship between the supervisory general part and the definitional general part, and between the general part and the special part? Shouldn't we still expect all the *major* work to be done by Ashworth's principles and policies? Even if we grant that in the definitions of criminal offences the law should not be completely oblivious to considerations of the offender's well-being, presumably it should not give these considerations more weight than they have in comparison with the interests of others who are affected by criminality, particularly the actual and potential victims of

crime. And frankly, in comparison with those interests, the way in which offending detracts from the offender's well-being may strike one as trifling. *A fortiori* if one thinks, as I myself earlier proposed, that the very legitimacy of a modern system of criminal law turns on its contribution to the objective of harm prevention.

In meeting this challenge, the first thing to point out is that the broadly Kantian approach favoured by Ashworth and many others is open to a closely related objection. After all, it avowedly delimits criminal offences according to the limits of the offender's moral agency. If something falls beyond the scope of moral agency, then (at any rate in the absence of forceful policy arguments) it should not figure in the definition of a crime. One might ask: Why grant the offender's moral agency such an extravagant role, allowing it to set the basic structure of criminal offences, when what we are trying to do in a legitimate system of criminal law is, apparently, to protect people from harm? Kant himself fixed the answer to this by elevating all moral considerations to a mandatory status *a priori*. The Categorical Imperative is, as its name suggests, an *imperative*, so that at least some countervailing considerations are eliminated from consideration, irrespective of their relative weight, whenever it is invoked. To add to the overuse of Dworkin's famous metaphor, the Imperative works as a trump card over at least some policy arguments.[56] Since the Categorical Imperative binds not only the individual agent, but also the state, the state too is duty-bound to treat people as moral agents, to respect them as the bearers of potentially rational wills even when it might be useful not to, and that protection extends, of course, to alleged criminal offenders. Now of course this approach fails if there can be purely advisory moral considerations as well as mandatory ones, something which strikes me as highly probable as soon as we pull ourselves away from strict Kantian dogmatics. Nevertheless, there is an alternative and more ecumenical basis for the idea that the law-maker is duty-bound to treat us as moral agents, even as he or she strives to protect other

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[56] Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press, Oxford 1984), 153.

people from harm. It comes of the fact that a legal system by its very nature claims moral authority over its subjects. For this claim of moral authority to be borne out, legal rules must be of a kind which moral agents could in principle understand and, in their capacity as moral agents, come to accept or reject as guides to their actions. This lends support to the contention that, morally speaking, even a criminal wrong which is not a moral wrong should be defined in such a way that both committing it and avoiding committing it could, in principle, be actions of moral agents *qua* moral agents. Thus treating people as moral agents becomes mandatory for the law-giver even when it might be (*pace* Kant) advisory for the rest of us, who do not normally claim moral authority. It means that the law-giver's legitimate ambition of preventing harm must be pursued only in ways which are compatible with the moral agency of potential offenders, and at least some instrumental ('policy') benefits of ignoring that constraint must, however regrettably, be sidelined. An offender's moral agency therefore appears to take centre stage, as a *constraint* on criminalisation, even though (let us suppose) the main *point* of legitimate criminalisation is not to respect the moral agency of offenders but to protect their victims from harm.[57]

Now much the same train of thought can still be followed after we embrace the active account of well-being. We can still insist, and on the same grounds, that the criminal law should not simply sacrifice respect for our moral agency on the altar of harm-prevention. The only significant difference is that the active account of well-being has its account of moral agency built into it, rather than elevating moral agency to a separate dimension or

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[57] This is, of course, the essence of H.L.A. Hart's famous differentiation between the general justifying aim of criminal law and the distributive constraints on its enforcement against particular people: see his 'Prolegomenon to the Principles of Punishment' in Hart, *Punishment and Responsibility* (Clarendon Press, Oxford 1968), 1 at 8-13. (I should add that I do not accept what I granted for the sake of argument in the text above, viz. that the prevention of harm is a legitimate criminal law's main justifying aim. I accept only that its legitimacy turns on its contribution to this aim.)

sphere of reasoning, with separate foundations, serving as an external constraint on the pursuit of well-being. It serves instead as a built-in constraint. Remember that the Kantian idea of morality as a higher or more perfect mode of flourishing, operating as a self-contained system, came into (secular) currency against a backdrop of acquiescence in the passive Humean view of well-being subsequently popularised by utilitarianism. With that passive view abandoned, the motivation to think of morality as a self-contained system instantly evaporates. There is no remaining objection to holding that some considerations of well-being may be moral considerations as well. Thus there is no objection to holding that my well-being and my moral flourishing may be, at least on some occasions, but two sides of the same coin. We may decide that the action-reasons to give to charity or to be a good parent or friend, action-reasons which arise directly from the active nature of well-being, are also moral reasons. We may take the same view, at the other extreme, for action-reasons against being a scoundrel or a pimp or a bigot. And we are at liberty, correspondingly, to determine the scope of moral agency by considering the range of actions which add up to success in such activities, and which therefore constitute their contribution to, or detraction from, our well-being.

Things are made difficult here by the diversity of uses to which we put the word 'moral'. We sometimes label considerations 'moral' in contrast to 'legal' or 'institutional', to mean that the considerations in question do not take their force from the say-so of any authority; or in contrast to 'political', to mean that the considerations are matters for personal conscience rather than public resolution; or in contrast to 'pragmatic' to mean that the considerations are not considerations of short-term instrumental gain; or in contrast to 'self-interested' to indicate that considerations stem from the interests of a wider range of people than just the person who acts on them, or in contrast to 'aesthetic' to mean that the considerations bear primarily on action rather than primarily on appreciation, and so on. Once we are liberated from the Kantian idea of morality as a self-contained system, it is no longer a matter of great philosophical importance which of these various usages we adopt, so long as we make our meaning plain by context. The only important thing for our

purposes, since we based the importance of the law's respect for moral agency upon the law's claim to moral authority, is that there should be consistency in the use of the word 'moral' on both sides of this equation, so that the demand for moral agency picks up the *point* of the law's claim to moral authority. I believe this condition is met if we regard the word 'moral' as simply indicating, in this context, the *fundamentality* of the considerations in question. The law's claim to moral authority is a claim to speak authoritatively even to the most basic aspects of our lives and identities. Our moral agency, meanwhile, is the agency which fixes our most elemental relations with the world around us. And by this standard, any attempt to forge a wholesale division between our well-being and our moral agency obviously has to be an artificial one. For if one thing is certain it is that considerations of well-being, which depend on *wholehearted* as well as successful engagement in our own pursuits, go right to the core of our lives and identities. It follows that the actions which add up to our success in our activities, from the most worthwhile to the most base, are *by that token* actions which fall within the scope of our moral agency in the relevant sense. Again I do not rule out that there might be other actions which belong to our moral agency on other grounds, relating to other fundamental groups of considerations. Therefore I do not rule out that one could, in theory, address someone as a moral agent without attending to that tranche of her moral agency which is organised around her well-being. But that is not what is at issue here. The objection we started this section by considering comes from those who say that the deterioration of the offender's well-being which criminality entails cannot be a matter of overriding concern for the criminal law, when put alongside the well-being of victims and others affected by his crimes, especially once we have conceded the discipline of the 'harm principle'. I have just explained, in outline, how it can, on the contrary, come to be a matter of major concern for a criminal law which cares about the offender's moral agency. That the criminal law should care about the offender's moral agency is common ground between the Aristotelian model of criminal law sketched here and the traditional Humean/Kantian model offered by Ashworth and others. The main difference lies in the fact that, on my account, moral agency does not stop at the will, but

extends out into the world beyond it. Killing, which is partly constituted by a death, is an action; so is turning right, which is partly constituted by ending up facing right. Both are, moreover, actions within the scope of our moral agency. I have now explained why. It is because our well-being turns on our success in worthwhile activities. Assuming always that our well-being is a matter of moral significance, our moral agency extends straightforwardly into those actions which go to make up that success, and success, as I have been at great pains to emphasise, is very rarely a matter of will alone.

This remains true, to my mind, whether the activities in question are principled or not. If the criminal law should treat us as moral agents, then that affects the ungeneralisable, unprincipled dimensions of our moral agency neither less nor more than the generalisable, principled dimensions. And while the Kantian view of moral agency turns the whole of moral agency into a matter of principle, the Aristotelian account stresses the role of particular actions in the successful pursuit of diverse morally significant activities. Our moral agency simply extends as far as those actions extend. The Aristotelian account therefore does little to inflate, and indeed much to deflate, the role which has traditionally been carved out for the definitional general part of the criminal law. For it yields considerations which, being at a low level of abstraction and generality, are not at home in the principled justificatory apparatus of the supervisory general part, and yet which, being non-instrumental considerations of moral agency, are not policy considerations either. If we accept that the framers of criminal laws are duty-bound to treat us as moral agents because of the moral authority that they claim over us, this third family of considerations is capable of explaining and justifying a great deal of otherwise bewildering diversity in the way in which criminal offences are conceived, organised, articulated, and interpreted.

12. The role of responsibility

The law as whole is bound to address us as moral agents. But the criminal law has a special feature not shared by private law, which may lead us to underestimate the role of active well-being in disrupting the dictates of its general part. The criminal law gets personal. To be convicted of a crime is to be criticised, or even sometimes condemned, as a person. Now I already granted that the evaluation of people and evaluation of their lives occupy distinct, although closely interrelated, evaluative dimensions. One may fail in one's worthwhile pursuits (i.e. in aspects of one's life) because of one's weaknesses and limitations (i.e. aspects of oneself), and the 'because' in this proposition may fall to be read constitutively or causally depending on the internal standards of the pursuit in question. But one may also fail for reasons independent of any of one's weaknesses or limitations, or for that matter succeed in spite of one's weaknesses and limitations. Notably, as I explained, one may succeed or fail because of how one's actions turn out. The criminal law, it might be thought, dramatically parts company with the active account of well-being in situations like this. For in cases where the quality of a life, i.e. success or failure in worthwhile or base activities, is not a function of the quality of the person living it, the criminal law's interest must surely follow the person, not the life. Under such conditions, whether she succeeds or fails, and at what, is surely quite beside the point, and the active account of well-being therefore drops out of the picture.

This argument certainly points us in the right direction for a more complete understanding of the relationship between criminal law and the rest of the law. But in its enthusiasm it overshoots the mark. It is true that the criminal law, unlike other areas of law, does not evaluate aspects of our lives irrespective of how we come out of them personally. But nor, going to the other extreme, does it evaluate us as people irrespective of how our lives are going. It is not an inquisition into our virtues and skills as such any more than it is an inquisition into our quality of life as such. Its mode of evaluation represents a *tertium quid* between these two possibilities, focusing on us as agents whose actions, as well as adding

up to the story of our lives, are capable of reflecting on us personally. This *tertium quid* is not an artificial one designed by the law itself. On the contrary, it figures equally in moral thinking under the familiar heading of 'blameworthiness', or 'culpability'. The distinctive point about a question of blameworthiness is that it synthesises attention to what we do with attention to who we are. It does not ask (simply) whether we are worthy or unworthy people, nor (simply) whether we did worthwhile or worthless things. It asks whether what we did both testifies and contributes to who we are. That is a difficult two-way relationship which calls for a great deal of elaboration. For our purposes it is adequate, and I hope accessible, to say that a judgment of (moral) blameworthiness requires a judgment of (moral) agency to be supplemented with an account of (moral) responsibility. In determining whether someone is to blame, we must ask first whether they did anything wrong, and secondly whether they were responsible for doing it. The order of inquiry here is of the essence. The question of whether we are responsible does not arise until the question of what we are supposed to have done is answered.[58] This is closely reflected in the very grammar of 'responsibility'. In the relevant sense, I cannot be responsible *tout court*.

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[58] There are notoriously many senses of the word 'responsible'. In one sense, sometimes known as the 'causal' sense, the question is whether I am responsible for such things as deaths, explosions and misunderstandings, i.e. for certain things that happen. Often (although not always) this question spawns the further questions of whether the deaths, explosions and misunderstandings were consequences of my actions, and if so in what way, e.g. did I actually kill or did I just prompt or inspire a killing? This 'causal' sense is not the sense of 'responsible' I am invoking here. In the sense invoked here I can only be responsible for my actions, not for things that happen. On this and many other distinctions in the language of responsibility, a good starting-point is H.L.A. Hart's 'Varieties of Responsibility', *Law Quarterly Review* 83 (1967), 346.

I must be responsible *for* some action or actions of mine.[59] It is true that very often we ask, rather sweepingly, 'was she responsible *for her actions* at the time?' or even 'was she a responsible agent?' We do not isolate the *particular* action or actions in question. But this only goes to show that being responsible for what we do is, to a large extent, a continuing rather than a fleeting predicament. That is because many of the conditions of responsibility in the relevant sense are status conditions (that we were not infants, that we were not seriously mentally ill, that we were not brainwashed, etc.). I would go so far as to say that being responsible for what we do is our default condition, which falls into doubt only when our status as rational creatures is called into question. This does not make the question of what exactly we did redundant, or even subsidiary to the question of whether we were responsible for doing it. On the contrary the question of our responsibility for what we did can only intelligibly arise when the question of what we did has been answered. A demarcation of one's (moral) agency, to put it tersely, is always logically prior to a demarcation of one's (moral) responsibility. And only both together can add up to (moral) blameworthiness. To the extent that the criminal law trades in blameworthiness, then, it can never put on one side the questions of moral agency which are answered, at least in part, by the active account of well-being. Like the rest of the law it is bound by the principle that, in claiming moral authority over us, it must speak to us as moral agents. When it comes to the point of judgment, correspondingly, it must begin with questions about what the defendant is supposed to have done, before it can raise the vexed question of the defendant's responsibility for doing it. It cannot dispense with attention to our moral agency and move straight to the question of our moral responsibility. The more personal dimension of

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[59] Many have discussed the conditions of responsibility. On the no less important but widely neglected question of the *parameters* of responsibility (i.e. the 'to' and 'for' elements), see Joel Feinberg's 'Responsibility *Tout Court*' and 'Responsibility for the Future', both in *Philosophy Research Archives* 14 (1988), 73 and 93 respectively. Feinberg's essays also help to develop some of Hart's suggestions about the various different senses of 'responsible'.

evaluation cannot be arrived at without going through the more impersonal dimension of evaluation, represented by the concerns of the active account of well-being, on the way.

What is the practical pay-off of approaching the inquiry in this order? Take, once again, a passage of Ashworth's dealing with the controversy over constructive liability:

> If E committed a battery upon V, from which a reasonable person would have foreseen the risk of some harm (albeit not serious harm), and death resulted, a manslaughter conviction would follow [in English law]. Subjectivists would argue that this is contrary to principle. E intended only a fairly minor battery, and it is unfair to impose the 'manslaughter' label when the unlucky result was unforeseen and unforeseeable. ... Whether or not a satisfactory analytical distinction can be drawn between what E tried to achieve (the assault) and what actually resulted (the death), it would be wrong to blame E morally or legally for the result, in view of the absence of culpability in relation to such a serious outcome.[60]

Everything turns here on Ashworth's extremely restrictive view of moral agency, a super-Kantian doctrine according to which what we do is, morally speaking, that and only that which we will. Our moral agency accordingly extends to none of the further things that we also do, perhaps quite accidentally, *by* willing what we will. Morally speaking, all E did was hit V, so that some extra outcome-oriented doctrine needs to be dragged in to bump her liability up artificially from assault to manslaughter. But this is not how English law approaches constructive manslaughter - and nor should it, by the lights of the broadly Aristotelian view of moral agency outlined here. Constructive manslaughter, in English law, is not acting dangerously with fatal consequences. It is killing by acting dangerously. That makes all the difference in the world. The key action in the actus reus, which brings with it the threat of primary rather than secondary liability for homicide, is that of killing, and the Aristotelian doctrine of moral agency allows that this could still count as a morally

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[60] Ashworth, 'Taking the Consequences', above note 35, at 118.

significant action even when unintended, and hence fall within the scope of E's moral agency. Now, it is only once that action has been identified as falling within the scope of moral agency that the further question of moral responsibility arises. But Ashworth has already, by this stage, begged the question against our asking: Was E morally responsible for her actions when she killed? For on his analysis killing was not something that, morally speaking, E ever did. All she ever did, morally speaking, was assault. Thus we are now restricted to the question: was E morally responsible for her actions when she *assaulted*? And *that* question naturally makes a manslaughter conviction seem like a grotesque result. It does so, however, by stacking the cards at the very outset, before questions of responsibility even arise. By adopting a restricted account of moral agency, the possible objects of moral responsibility are narrowed down in advance to a small set of actions which pass the tough super-Kantian test. Thus all the hard work now has to be done by moderate defenders of constructive liability, who face the uphill struggle of showing why (on policy grounds) liability should be upgraded from assault to manslaughter, rather than the downhill slope of showing why, in view of the fact that the killing was accidental, the liability should be manslaughter rather than murder (intended killing being the paradigm). If the latter is the argumentative route which defenders of constructive liability envisage - and it is certainly the route which I would advocate - then they do not tend, as Ashworth alleges, 'to adopt an unduly narrow view of moral responsibility'.[61] Rather, they tend to share in a less restricted and more flexible view of moral agency, perhaps along the lines of the account outlined here, which can include agency going beyond the will's domain. They may then proceed to supplement this with any of a wide range of broader or narrower accounts of moral responsibility. But their account of moral responsibility (be it broad or narrow) must always play second fiddle, as it must for Ashworth too, to their view of moral agency. Before we can ask whether E was morally responsible for the killing of V, we must be prepared to acknowledge that killing V is, morally speaking, one of the things that E did.

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[61] *Principles of Criminal Law*, above note 14, at 86.

If we will not acknowledge that, as Ashworth will not, then we are not adopting an account of moral responsibility such that E is not morally responsible for the killing. On the contrary, on such a view, since the killing is not on the agenda, the question of E's moral responsibility for it simply does not arise.

13. Having it both ways on autonomy?

Throughout all this I have stood by the principle that the criminal law, like the rest of the law, should treat us as moral agents. According to the Kantian doctrine, the law treats us as moral agents if it treats us as *autonomous* agents. For Kantian morality, as I explained, conceives of our agency as logically independent of the heteronomous world beyond, a matter of our wills and our wills alone. I have rejected this doctrine of autonomous moral agency. But you may complain that I have been trying to have it both ways on the significance of autonomy. For I have invoked in passing a number of familiar principles - notably Mill's famous 'harm principle' and the principles of 'the rule of law' - which are fundamentally autonomy-based principles. They are principles of law-making and law-application which are needed if the law-maker or law-applier is to respect and protect the autonomy of those who are subject to the law. If I conceive of people as autonomous agents for the purposes of these principles, am I not bound, at the same time, to conceive of them as autonomous agents for the purpose of the principle that the criminal law should respect the moral agency of those subject to it? Am I not bound, in other words, to concede the key Kantian point that moral agency is autonomous agency?

The key to dissolving this apparent inconsistency is to understand that people can be autonomous in a number of different, and only indirectly related, senses. What Kant had in mind was a condition that, in Kantian vein, we could label *moral* autonomy. The morally autonomous agent is master of, rather than slave to, her own desires and inclinations. Not only can she grasp and apply reasons for action towards which she has no prior affective

leaning, she can also act, as appropriate, on such reasons, and rebuild her affective leanings, as appropriate, in the light of them. It means that she has both the power of reason and the power of will. Of course she may fail to use these powers, on occasions or habitually. Kant sometimes spoke as if failure to use these powers was to be equated with failure to have them, i.e. as if someone who allowed his inclinations to lead him into error and never exercised his powers of reason or will was in the same predicament of heteronomy as the person who never enjoyed such powers in the first place. Neither had entered the Kingdom of Ends, the distinctively moral domain. One consequence of this was an occasional hint, in Kant's writings, that the only morally autonomous agents were good ones, that moral agency in wrongdoing was a contradiction in terms. This was not Kant's considered view. His considered view was that autonomous agency was located in the capacity rather than in its exercise. His error, meanwhile, was to treat this capacity as a condition of moral agency rather than as a condition of moral responsibility. Or rather, we should perhaps say, to make moral responsibility itself a condition of moral agency. The effect of this was to balance the whole edifice of morality upon the single pivot of the rational will. Once we are liberated from this error, we are liberated too from the famous anxieties about moral autonomy that it creates. In particular, we are liberated from the thought that the moral world, with its emphasis upon the autonomy of the agent, is hermetically sealed against contingency, and never interacts with the natural world of causality. For now there is moral agency beyond the will, even out of the will's control. That is because the question of whether such and such an action was autonomously performed, so that its agent was morally responsible for performing it, does not also serve to dictate what the action in question *was*. It does not, as Kant assumed it would, turn all moral agency into the agency of the rational will alone. It therefore casts no doubt on the soundness, or the relevance, of the active account of well-being.

So much for *moral* autonomy, a capacity which is a condition of moral responsibility and should be reflected in the criminal law to the extent that the criminal law asserts the moral responsibility of those whom it judges. Such autonomy can be contrasted with

personal autonomy, a particular ideal of human well-being which has come to prominence in the Western post-industrialised cultures of today. The ideal of personal autonomy is an ideal of a life shaped substantially by the successive choices of the person leading it. It is the ideal of a life that could have been otherwise, if the person leading it had made it so. Moral autonomy is neither a necessary nor a sufficient condition of personal autonomy. It is not sufficient, because one's personal autonomy depends not only on one's powers of reason and will, but also directly on one's environment. One's personal autonomy depends, in particular, on the variety and number of alternative valuable actions and activities that are open to one at each turn, and the extent to which one is free from the will of others in selecting from among these alternatives. On the other hand, moral autonomy is not strictly necessary for personal autonomy because the specific powers of reason and will it requires, i.e. powers over one's inclinations and desires, are not inevitably implicated in pursuing a life of one's own choosing. One may be fortunate enough to face alternatives all of which suit one's inclinations and none of which requires any self-control. One need not encounter reasons except as they already figure in one's desires, and one may never have need to shape one's desires. Actually this last point needs to be qualified. A life led so wantonly, although it can be personally autonomous to some degree, cannot be a life of full personal autonomy. There is, for example, some personal autonomy available to people with very serious learning disabilities, who may lack sufficient control over their reason and will to be morally autonomous. They may be stuck in a never-ending infancy, and yet we rightly care about honouring their wishes, where we can, about how they are cared for, so as to give them some taste of personal autonomy, some small authorship of some small part of their own lives. But it can never be a life of full personal autonomy that they lead, because the fact of their lacking moral autonomy puts a narrow *a priori* limit on the range of options to which they can realistically have access. This shows that there can be connections between being morally autonomous and being personally autonomous. Nevertheless, the point remains that, even here, the connection between moral autonomy and personal autonomy is an indirect one. One feature which causes confusion between them is that fact that

coercion necessarily violates them both. A person who is coerced is someone whose power over their own will is bypassed; their will is annexed to the will of another. This both eliminates or diminishes their moral responsibility for what they do and detracts from their well-being by violating their independent existence as moral agents. This local convergence has led some, including some neo-Kantians, to neglect the distinction between personal autonomy and moral autonomy across the board. The collapse can work in two contrasting directions. On the one hand, our moral responsibility is sometimes taken to depend on the history of our lives and the alternative lives we might have led. A thief is not morally responsible for what he does if he had a tough time of it with few opportunities and narrow horizons. The responsibility becomes society's instead; the thief was merely a casualty. This drops personal autonomy into the role of moral autonomy, turning an ideal of well-being into a condition of moral responsibility. On the other hand, whether our lives are our own, and we are well-off leading them, is sometimes taken to depend only on the freedom of our rational wills. A sane adult with little opportunity and narrow horizons is therefore as well-off as the principles of freedom demand so long as she is not coerced or subjected to one of a small range of related usurpations. This puts moral autonomy into the role of personal autonomy, inflating a mere condition of moral responsibility into an ideal of well-being. We may like to think of these as the left-wing liberal and the right-wing liberal confusions respectively. But both are equally confusions.[62]

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[62] I regard the central 'antinomy' of Alan Norrie's contribution to this volume ('"Simulacra of Morality"? Beyond the Ideal/Actual Antinomies of Criminal Justice', above page 000) as an instance of what I am calling the 'left-wing' confusion. Shamefully, many people living in broadly liberal societies such as ours suffer a paucity of options which leaves them a long way from the liberal ideal of personal autonomy. Nobody should pretend or deem otherwise. But in convicting these people of crimes on the same basis as other people the criminal law does not pretend or deem that they are more personally autonomous than they are. It does not assume that the 'actual' lives up to the 'ideal'. It only asserts that those convicted of crimes are *morally* autonomous and therefore morally

The liberal legal principles which I have endorsed in passing, such as the harm principle and the principles of the rule of law, take their special force in western post-industrialised cultures from the importance of personal autonomy in those cultures. We who live under the conditions of modernity can only thrive if we lead autonomous lives. This is the key ideal of human well-being for our age. Like all other ideals of well-being it has often been reconstructed as a passive ideal. In the eyes of some it takes it force from the prosperity it brings to cultures in which it dominates, from the fact that by choosing for ourselves we are more likely to have the experiences we want, from the fact that it has an egalitarian distributive side to it, etc. But all of this is putting the cart before the horse. To the extent that it matters, under modern conditions, whether we are prosperous, equally resourced, or have the experiences we want, that is primarily because it matters for our personal autonomy. Personal autonomy itself is an intensely active ideal, demanding not a wide variety of experiences, sensations, possessions, etc. but a wide choice of worthwhile actions and activities, complete with their diverse internal standards of success and failure. The value of having money, comfort, entertainment, security, etc. lies in the service these things do to our having a range of valuable pursuits to choose from and from our choosing some over others and pursuing them successfully. In the autonomous life, the passive

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responsible for their actions, which by and large they most certainly are. To deny this responsibility would be to compound the dehumanisation inflicted on these people by their appalling social conditions. That is because responsible agency is a condition of self-respect, without which nobody can thrive. If the consequence of being held responsible (viz. criminal punishment) seems to be no less dehumanising, and no less of a threat to self-respect, than the denial of responsibility would have been, then the answer is not to deny the responsibility but to reform the structures and institutions of criminal punishment, and/or to use it more parsimoniously. And this is exactly what liberal-minded criminologists and penal reform campaigners have bravely struggled to achieve, against the blood-lust of populist government, throughout the modern age.

serves the active, not vice versa. That is equally true of other familiar valid ideals of well-being, such as the classical ideal of personal honour, and the Marxian ideal of self-realisation through labour. The validity of all of these ideals as ideals of human well-being turns on the fact that they are active ideals. The governmental and legal principles which they generate are correspondingly active in their orientation. I do not mean that they are principles of active government. They may or may not be. I mean only that the principles of government under these ideals are to be given, other things being equal, an interpretation which emphasises their relationship to action. The harm principle is a good example. It has sometimes been passively conceived, so that a 'harm', in the relevant sense, is something that happens to one's body or mind, or an unwelcome experience, etc. But a harm, in the sense required by the liberal harm principle, is none of these. It is an attenuation of capacity or opportunity for action, reducing the range of alternative actions and activities which are available to the person who is harmed. Sometimes the reason for the loss of capacity or opportunity is that one was in pain, or lost a leg, or was shocked into submission. But be that as it may, it is the loss of capacity or opportunity, and not the pain or lost limb or shock in itself, which constitutes the harm. That is, perhaps, where the active quality of the ideal of personal autonomy shows its face most strikingly in the principles which govern the making and administration of the law.

The same active dimension also shows up in the principles of the rule of law. The value of personal autonomy turns respect for the rule of law into an obligation, rather than just a counsel of prudence, for modern governments. For respect for the rule of law ensures that, so far as possible, people will be able to predict their collisions with the law in order to be able to steer their lives around it. In the criminal law, the rule of law militates in favour of clear and certain offence definitions, good publicity, and conformity between announced rule and adjudicative standard. The same considerations also militate in favour of devices which allow those who are about to cross the threshold into criminality to be put on notice that they are doing so. This can be achieved in many ways, e.g. by placing warning notices, requiring an oral warning to be given by some official, setting up

specialised training for those (e.g. drivers) whose specialised activities may put them constantly on the verge of criminality etc. In the absence of such devices one may achieve roughly the same effect by including an element of 'subjective' mens rea in one's offence definition. Such an element means that, assuming one knows the law itself, one also knows that a violation of it is now a possibility, since such knowledge is built into the very definition of the crime. This is a strong argument for making many common-or-garden criminal offences into offences of subjective mens rea; indeed, it provides one of the key contemporary arguments for the principle *actus non facit reum nisi mens sit rea*. Here we have in our sights the most dramatic source of confusion, for contemporary criminal lawyers, about the role of considerations of autonomy in the criminal law. For many, requirements of subjective mens rea are responsibility requirements. Their connection with autonomy, on this view, comes of the fact that responsible agents are autonomous agents. But responsible agents, as I explained above, are in fact merely *morally* autonomous agents. They are agents who have the power of reason and the power of will, whether or not they used it. No consideration of moral autonomy supports any requirement of subjective mens rea in the criminal law. In fact mens rea elements in crimes, subjective or otherwise, have nothing much to do with questions of responsibility. What does not follow is that the general principle of subjective mens rea in the criminal law should be abandoned. For as I just explained such a principle is supported, quite differently and quite generally, by considerations of *personal* autonomy, which gives rise to an obligation of respect for the rule of law. Since the ideal of personal autonomy is an ideal of active well-being, this reminds us that the active nature of well-being does not militate automatically against generality in the criminal law.

And yet the generality of the requirement of subjective mens rea which has just been established is in three crucial respects more limited than some enthusiasts for the general part have wanted it to be. In the first place, there are alternative ways to secure that people will realise when they are about to do something which has been criminalised quite apart from insisting on such realisation as an element of the crime itself. The law may make use

of on-the-spot warnings, licensing systems, and many other devices instead. Secondly, the requirement of subjective mens rea introduced by the obligation to respect the rule of law is a requirement which does not necessarily extend to every element of an actus reus. So long as the law builds in an element of subjective mens rea at the point where people enter the realm of criminality, it matters very much less from the rule of law perspective that they may then commit a variety of different crimes with that same mens rea, some more serious than others. They were, after all, put on warning that this could happen by the fact that the law to that effect was correctly promulgated, publicised, etc. Finally, the requirement of subjective mens rea defended in rule of law terms can be met in a wide variety of ways in the definitions of offences. It is a doctrine of the supervisory general part which need not give rise to any corresponding doctrine in the definitional general part. The law may meet its standards using a wide variety of terminological and conceptual frameworks depending on the particular crime and its structure. The law meets its standards whenever it makes the crime a crime of intentional agency, which is (for other reasons) the paradigm of criminality. The law also meets its standards by insisting on the mens rea elements which are built into particular actus rei, such as possession, conspiracy, or deception. The law may equally meet its standards in a wide variety of other ways, using a wide range of different mens rea words and mens rea concepts. Thus the definitional implications of *actus non facit reum nisi mens sit rea*, even given this 'subjectivist' interpretation, may well be found, and if I have been right about everything else ought to be found, in the special part of the criminal law rather than the general part.

14. The general part in its place

The remarks towards the end of the last section may come as a disappointment. They make the conclusions of this essay seem less radical than some readers may have expected. For whereas I undertook to call into question the traditional view of the general part's centrality

to a rational and principled criminal law, I may seem in fact to have spent a great deal of time reaffirming it. Here are just some of the traditional general part doctrines which have come out of the discussion not only conserved, but indeed defended:

- The doctrine that intended criminality is the central case of criminality. This was defended subject to the caveats that (a) there is a competing paradigm in the domain of 'regulatory' crime and (b) there are no general implications of the doctrine for the ranking or ordering of mens rea elements other than intention.
- The doctrine that *actus non facit reum nisi mens sit rea*. This was defended in its classic 'subjectivist' reading, but on the understanding that it does not require an element of mens rea as to every element of the actus reus (i.e. that it does not entail the 'correspondence principle'), and subject to the caveat that it may be displaced by alternative methods of alerting people to the risk of their own impending criminality.
- The doctrine that unsuccessful criminal attempts (and unsuccessful incitements etc.) are less heinous, *ceteris paribus*, than completed crimes.
- The doctrine that secondary participation in crime, or complicity, can be kept rationally distinct from participation as a principal even though it is not necessarily less heinous, even *ceteris paribus*, than participation as a principal.
- The doctrine that moral responsibility is a condition of criminal liability, so as to exclude young children and some seriously mentally ill people from the criminal law's ambit even when they do commit criminal wrongs.

The list could go on. What it shows is that my main quarrel has not been with the traditional textbook exposition of the supervisory or the auxiliary general part. Of course I have doubted the philosophical foundations upon which many writers have based their arguments for supervisory doctrines such as 'subjectivism' and the centrality of intention, or auxiliary doctrines about inchoate and secondary offending. I have tried to turn the tide against the unholy alliance between Kantian-inspired views of moral agency and utilitarian, outcome-oriented ideals of well-being, an alliance which has tended to dominate the

modern discussion, in this field as in so many others.[63] In places this certainly leads me to tone down or circumscribe traditional claims about the supervisory and the auxiliary general part, as the various caveats and provisos in the above list illustrate. But these caveats and provisos in the supervisory and auxiliary general part were not the main point of the exercise. The main point of the exercise was to show that the doctrines of the supervisory general part do not exert the pressure towards uniformity in the definitional general part which is sometimes expected of them. For they are open to alternative means of compliance within the definitional structure of particular crimes, and the rationality of those means does not depend, as some have thought, on whether one can show 'policy', or instrumental, reasons for departing from some idealised definitional norm dictated by 'principle' alone. On the contrary, much definitional diversity can be attributed to considerations which are neither considerations of principle nor considerations of policy. They are reasons which structure our moral agency, and hence constrain the criminal law non-instrumentally, but which owe their force to no overarching moral consideration along the lines of the Categorical Imperative. It means that the supposition that a 'rational and principled' criminal law must tend towards definitional uniformity is ill-founded. The definition of a particular offence (or defence) may, so far as this argument takes us, be rational (i.e. supported by valid reasons) and principled (i.e. conform to the sound principles of the supervisory general part) without showing any significant similarities to other offence- or defence-definitions, even in the same family of offences, and let alone beyond it.

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[63] For explicit endorsement, see Nicola Lacey, *State Punishment: Political Principles and Community Values* (Routledge, London 1988), 103-5, picked up by Andrew Ashworth in the first edition of *Principles of Criminal Law*, above note 3, 24: 'The significance of welfare is that it is not a qualification or exception to the principle of autonomy but a rival.' The claim was toned down in Ashworth's second edition, above note 14, at 28-9, but its spirit still pervades the book.

The cautionary words 'so far as this argument takes us' should, of course, be taken seriously. In this paper I only considered arguments for relative definitional uniformity which were themselves of a non-instrumental character, i.e. which did not rely on the alleged good consequences of having a criminal law with relative definitional uniformity. Some have said that a criminal law with many different words and concepts haphazardly arranged across its terrain has serious implications for clarity, certainty, and other rule of law values. For example, if the word 'reckless' is used in one statute and the word 'malicious' in another, and the two are held to have slightly different nuances, then whatever the rationality of each definition taken on its own, the juxtaposition of the two will lead to confusion and difficulty on the part of those who are at the law's sharp end. Thus the retreat from definitional generality which I license also commits me to licensing a violation of the rule of law standards which I myself have endorsed. No doubt there is some force in this argument. But I believe its force has been seriously exaggerated. The exaggeration comes of an assumption that the law has only one sharp end, at which everybody's rule of law interests are aligned. In reality, however, what causes confusion and difficulty in the *administration* of the law (what lawyers think of as the law's sharp end) can be the very same thing that makes the law vivid and accessible to people outside the courtroom, on the way back from the pub or driving on the motorway or carrying the takings to the bank. A distinction is needed between the *textual* clarity which aids the law's administrators (legally trained or otherwise) and the *moral* clarity which aids people going about their ordinary lives.[64] Of course both clarities are important; excessive fragmentation in the criminal law can no doubt lead to error in charging, trying and convicting, all of which are deeply disquieting. Nevertheless, sometimes what looks like technicality or inconsistency or even absurdity when we sit in the measured, relatively deliberative

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[64] The distinction was introduced in my 'Rationality and the Rule of Law in Offences Against the Person', *Cambridge Law Journal* 53 (1994), 502 at 512ff, where the points which follow were explored in more detail.

ambience of the courtroom or the interview room is, deep down, the whole point of the law. Jeremy Horder has brought this out excellently by drawing our attention to the wide range of vivid actus rei - maiming, blinding, disfiguring etc. - which were found in the original text of the Offences Against the Person Act 1861.[65] All are different actions, with different intrinsic features, which do not owe their wrongness, so far as I can see, to any unifying principle. But be that as it may, so far as the instrumental value of retaining such particular actus rei is concerned, their moral vividness is both their blessing and their curse. Blessing, because the crimes convey themselves very dramatically to those who are about to commit them, mapping onto bloodcurdling images in the public imagination. Curses, on the other hand, because the fine lines between these various actus rei, and the complex definitional puzzles they consequently pose, lead to trouble in directing juries and advising magistrates or police officers. I cannot go into the consequences of this tension here. Suffice it to say that in my view the instrumental case for relative definitional uniformity depends on the resolution of this tension in favour of eliminating the curse even if at the expense of the blessing, something which, for me at any rate, turns the priorities of the rule of law on their head, putting ease of administration ahead of public accessibility. That, however, is irrelevant to the argument which was conducted here. For what I aimed to show here was not that relative definitional uniformity has no benefits, or that its benefits do not outweigh its hazards. All I aimed to show was that those who call for a trend towards definitional uniformity cannot pretend thereby to be speaking the uniquely authentic voice of a rational and principled criminal law.

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[65] Horder, 'Rethinking Non-Fatal Offences Against the Person', *Oxford Journal of Legal Studies* 14 (1994), 335.

15. 'Families' of offences

There is, however, one final promissory note to be honoured, and one final twist in the story. In the last section, as in the first, I mentioned the idea of a 'family' of offences. I took it for granted that this would be read in the way that academic criminal lawyers customarily read it, as referring to criminal offences gathered together according to the harm which was done, or more broadly the interest which was affected, by the crime. Thus 'homicide crimes' make up a family of crimes defined in terms of their fatal consequences, 'crimes of property deprivation' make up another family including theft and fraud and other offences covered in England by the Theft Acts, and along the same lines we have 'public order offences', 'sexual offences', and so on. I have no real objection to this way of dividing the law into manageable chunks for convenient exposition. But my argument pointed to an alternative possible way of conceiving the limits of a 'family' of crimes. Crimes belong to the same family, on this account, when they are committed by performing the same action or actions. This criterion may, of course, have some piecemeal indirect connections with the more familiar harm-based criterion. Since murder and manslaughter both involve an action of killing, they also both have fatal consequences; they are united both in action and in harm. But we may argue that 'causing death by dangerous driving' does not involve killing even though it has fatal consequences, and so, by this account, should not be regarded as belonging to the same family as murder and manslaughter.[66] Similarly, we may say that theft is not part of the same family as fraud or deception offences in English Law,

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[66] This depends, of course, on where the action of 'causing death' fits into the contrast between 'killing' and 'doing something with fatal consequences'. In the passages cited in note 21 above, Lewis and Hornsby seem to take contrasting positions on this point.

since the former is a crime of appropriation and the latter are crimes of obtaining,[67] while the crime in section 20 of the Offences Against the Person Act 1861 belongs to a different family from the crime in section 47 of the same Act, since in spite of their related harm elements they are committed by logically unrelated actions (inflicting harm or wounding in the former case, and assaulting in the latter).[68] And so forth. Naturally this leaves open the possibility of overlapping families of crimes, since many crimes are committed by more than one action, either alternatively or cumulatively. The section 20 offence just mentioned has two alternative actions by which it can be committed ('inflicting grievous bodily harm' and 'wounding'), while the offence in section 15 of the Theft Act 1968 has two actions which are cumulatively required for its commission ('obtaining' and 'deception', the former performed by means of the latter). Such examples show that the action-based criterion for families of crimes does not create hermetic seals around doctrines applicable to particular crimes, and does not foreclose judicial cross-fertilisation of definitional doctrine through analogical reasoning. But then the arguments of this paper were not meant to foreclose definitional cross-fertilisation, but merely to counter the textbook *idealisation* of such cross-fertilisation, as something to be undertaken wholesale and aimed at minimising definitional variety. The fact that the action-based criterion of a family of offences can create an occasional pressure for localised blurring of familial boundaries is nothing especially to be afraid of. It merely reflects the fact that judges, unlike legislatures, have to use law to make law, and sometimes, *faute de mieux*, have to use the law relating to one criminal offence to develop the law relating to another. Other things being equal these should be offences with some family ties, and if the criterion of a family is action-based rather than harm-based,

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[67] Cf. Peter Glazebrook, 'Thief or Swindler: Who Cares?', *Cambridge Law Journal* 50 (1991), 389, where a harm-oriented understanding of theft and obtaining by deception leads to a claim that any difference between them must be morally insignificant.

[68] I discussed the last example in 'Rationality and the Rule of Law in Offences Against the Person', above note 64, at 507ff.

that in turn means crimes which are committed by performing the same, or logically related, actions, rather than crimes involving the same, or logically related, harms.

To defend fully the move to an action-based criterion of a family of crimes, we would have to take the argument of this paper at least one step further. I have argued only that the localised action-reasons which are generated by the active account of well-being can serve to disrupt the justificatory path from the supervisory general part to the definitional general part, so that definitional variety, to be justifiable, need not be justifiable on policy grounds alone. This argument grants the assumption that the generality of the supervisory general part sets the default condition, so that the problem is always to justify definitional variety. The next step would be to argue that this assumption is misguided - that by default each criminal offence's definition falls to be justified on its own merits, so that definitional diversity is the law's default condition. On this argument the localised action-reasons I emphasised in this paper are very much the starting point. We need to begin by asking which particular actions are wrongful, and only then ask whether some supervisory or other general part doctrines should constrain or inform our attempts to criminalise them. I believe that we should take this further step, and concentrate our interpretative and reforming efforts first and foremost on the job of justifying each crime on its merits, rather than justifying each crime relative to some other crime. Obviously I cannot argue the point here, but I can gesture towards the argument that would be needed by saying that it depends on the claim that the active account of well-being introduces a horde of new rational incommensurabilities on the back of its appeal to localised action-reasons. Such incommensurabilities interfere with the process of justifying the definition of one crime as a variation of another, and hence throw us back much more often on the justification of our offence-definitions taken one at a time. We are left, of course, with small families of crimes within which commensurability holds, and within which relativised sorts of justification remain available. Within these families each variation from the norm does need to be justified, and uniformity is the default. But beyond these families variety is the default, and uniformity is what needs to be justified. The methodology of the special part should

not, in other words, be carried over automatically into the general part, so that the 'rationalization' of the criminal law, the tying up of its loose ends, becomes our ambition across the board. Of course, one side-effect of this argument would be to make each special part doctrine itself more special, i.e. to carve up the terrain of the criminal law into smaller families than we are used to. This paper did not establish, however, that we should embrace this or any other of the more dramatic conclusions ventured in this paragraph. I did not do the work which would be needed to understand the structure of the special part of the criminal law, nor to show that beyond this special part fragmentation rather than uniformity is the criminal law's rational default condition.[69] I only defended the following more modest claim: that even if uniformity were the criminal law's default condition, so that each variation in its doctrines does need to be supported by reasons, the existence of action-reasons which are neither considerations of policy nor considerations of principle means that we should not expect to end up with the relatively expansive, relatively exacting, and relatively uniform definitional general part so beloved of textbook writers and codifiers in the modern English idiom.

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[69] A conclusion which would put me very much in sympathy with the fragmenting or destabilising thrust of Alan Norrie's argument in his *Crime, Reason and History*, above note 7, although simultaneously opposed to his interpretation of that argument as a challenge to the criminal law's claim to be rational and principled. For the record, that is indeed my position.