

RATIONALITY AND THE RULE OF LAW IN OFFENCES AGAINST THE PERSON

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1. THE CHARGES AGAINST THE 1861 ACT

The Offences Against the Person Act 1861 is much disparaged by today's criminal lawyers. Its provisions have been described as "impenetrable" by the Court of Appeal.¹ The House of Lords could not conceal its dissatisfaction with what it called "the irrational result of this piecemeal legislation".² Andrew Ashworth has written of the "antiquated and illogical structure"³ of an Act which the Law Commission regards as "unsatisfactory in very many respects".⁴ Most recently Brooke J., launching the latest version of the Commission's reform package, lambasted the operation of the 1861 Act as "a disgrace", and claimed that this hostile view is shared in every corner of the criminal justice system.⁵

Although the Act as a whole is often found guilty by association, these serious accusations are being levelled, for the most part, at just a few of its provisions. These are the provisions dealing with what have come to be regarded as the core, workaday offences against the person of a non-fatal and non-sexual kind, namely sections 18, 20 and 47. The charges against these provisions fall under two broad headings. Some charges are laid against the three provisions *individually*, stressing difficulties of comprehension and adaptation. The language is archaic, the preoccupations are quaint, miscellaneous alternatives are herded uncomfortably together within single definitions, redundant verbiage is included while essential specifications are left out, interpretations have been forced to ever more absurd technicality in the struggle to maintain a

semblance of applicability to modern circumstances, etc. To these are added charges against the three provisions *collectively*, stressing the peculiarities of their interrelation. The provisions have miscellaneous elements in common and miscellaneous differences, leave inexplicable gaps, overlap in arbitrary ways, are chaotically dispersed through the Act, etc. These latter deficiencies obviously cannot be remedied merely by clarifying and updating the definitions of the relevant offences taken one at a time; what is required is a wholesale reorganisation of this part of the criminal law.

The Law Commission has for some time advocated such a wholesale reorganisation, supported and informed by arguments falling under both of the headings just identified. Against the provisions individually, the Commission has principally urged what I will call the rule of law argument. Owing to their unclarity, sections 18, 20 and 47 can no longer serve as adequate guides to those whose actions and decisions are supposed to conform to them. The rule of law is thus violated. Against the provisions collectively, meanwhile, the Commission's main argument has been what I will call the rationality argument. The offences differ from each other in ways which defy any rational explanation, and for that reason fail between them to provide tolerably systematic coverage of the basic range of aggressions with which the law ought to be concerned. My own view is that neither of these arguments yields anything like as strong a case against the 1861 Act as the Law Commission wants us to believe. Over the following pages, indeed, the relevant provisions will be defended against both of the Commission's arguments. Whatever may be their deficiencies, individually or collectively, and however strong may be the case for their reform, the deficiencies are not those identified by the Commission, and the case for reform is not that upon which the Commission relies. And the result of mistaking the problems, as we will see, is the mistaking of the solutions. The Commission's reform proposals promise a statutory regime which would possibly do more to damage the law relating to offences against the person than it would do to improve it.

2. THE RATIONALITY ARGUMENT

The rationality argument figures less prominently in the Law Commission's latest report than it does in the consultation paper which preceded it. One can only speculate as to the causes of its demotion, but its spirit certainly lives on in the draft Bill. The spirit of the argument is captured in the Commission's comment that "sections 18, 20 and 47 of the 1861 Act . . . were not drafted with a view to setting out the various offences with which they deal in a logical or graded manner".⁶ The assumption is that the three offences can, in substance, be graded, and that this would be the logical way to define and organise them. Between them they deal with matters which would most naturally be dealt with in a hierarchy of more and less serious offences all conforming to a standard definitional pattern. The irrationality of the 1861 Act lies in its failure to take this natural path, its failure to carry the underlying hierarchy of seriousness over into the actual definition and organisation of the offences. Thus, section 18 should be regarded, in substance, as an aggravated version of section 20; and yet there are miscellaneous differences between the two sections which do not appear to bear any rational relation to the aggravation. Likewise, section 20 should be regarded, in substance, as the more serious cousin of section 47; and yet the two offences are drafted in quite different terms, so that the essential difference in point of seriousness is obscured by a mass of other, utterly irrelevant differences. If the sections were properly graded in definition as they are in substance, then section 18 would surely cover a narrower class of cases than section 20 which would cover a narrower class of cases than section 47; and yet section 47 is, in at least one respect, the narrowest offence of the three, while section 18 is, in at least one respect, broader than section 20. That is surely irrational. The law on such matters should be thoroughly governed, in the Law Commission's words, "by clear distinctions . . . between serious and less serious cases".⁷

That a section 18 offence should be regarded, in substance, as a more serious version of a section 20 offence is easy enough to understand. Section 20 covers

malicious wounding and the malicious infliction of grievous bodily harm. Section 18 covers malicious wounding and maliciously causing grievous bodily harm, when these things are done with an intention to do grievous bodily harm or to prevent or resist arrest. The extra element of intention required for a section 18 offence obviously accounts for the difference between the sentencing maxima (five years' imprisonment under section 20 and life under section 18), and marks a difference in point of seriousness (or potential seriousness) which the Law Commission is rightly anxious to retain in its new hierarchy of replacement offences. The Commission has not even felt the need to explain its decision, however, to eliminate the difference in the *causal* elements of sections 18 and 20. Section 20 requires that grievous bodily harm be *inflicted*, whereas for section 18 it need only be *caused*. The law at present tells us that infliction requires violent force. One may cause grievous bodily harm by, for example, passing on an infection or poisoning. But one may not inflict grievous bodily harm in that way.⁸ If that is right, one may commit a section 18 offence without using violent means, but a section 20 offence requires such means. This the Commission apparently holds to be a self-evidently irrational point of distinction between the two offences. One may glean the reasons. In the first place the distinction between "causing" and "inflicting", as the law presents it, fails the test which the Commission uses to determine what factors may affect the seriousness of a crime in this area of the law. For the Commission, seriousness varies only "according to the type of injury that [the defendant] intended or was aware that he might cause".⁹ In the second place, and more straightforwardly, the distinction we are looking at appears to operate back to front. The extra element of violence is required for the less serious offence, not the more serious. The distinction is not merely irrational, it may be said, but perverse.

Not so. The distinction is easy enough to understand. One must begin by thinking of section 20 as the basic offence, and infliction as the basic mode of causation with which the two offences together are concerned. That is not hard to do. Only someone who mistakes the *harm* in section 20 for the *wrong* in section 20 would think it irrelevant

how the harm came about. For the wrong is that of bringing the harm about in that way. In morality, as in law, it matters how one brings things about. It matters, first and foremost, in deciding which wrong one committed. You have not been mugged, although you have been conned, if I trick you into handing over your money by spinning some yarn. You have not been coerced, although you have been manipulated, if I get you to do something by making you think you wanted to do it all along. You have not been killed, although you have been left to die, if a doctor fails to prescribe life-saving drugs. These are matters of intrinsic moral significance. The fact that one inflicted harm rather than merely causing it can be, likewise, a matter of intrinsic moral significance. It is this, among other things, which distinguishes the torturer, who continues to enjoy a distinctive offence all of his own in the Law Commission's proposals, and an offence, moreover, which is still explicitly defined in terms of "infliction".¹⁰ The old section 20 builds on the same moral significance, although without restricting attention to the special case of the torturer. Under section 20, that is to say, one does not merely end up grievously harmed. One is a victim of violence. This is the common factor, moreover, which unites the infliction of grievous bodily harm with wounding, accounting for the fact that these sit side by side in a single offence.¹¹ Thus section 20 is correctly regarded, not merely as a core offence against the person, but as a core crime of violence. Violence is the basic section 20 theme which has to be adapted for the purposes of the more heinous offence under section 18.

That the process of adaptation involves extending the crime to cases where grievous bodily harm comes about other than by violence – cases where it is caused without being inflicted – may sound paradoxical, but it is in fact a natural move to make. The move is connected with the familiar maxim that intended consequences are never too remote. That maxim paints a somewhat exaggerated picture, but to the extent that it speaks the truth it proceeds from the thought that those who intend some result could otherwise enjoy a bizarre kind of mastery over their own normative situation. They could evade a moral or legal rule which is means-specific simply by adopting different

means. Since the very fact that one adopts means to some result *entails* that one intends it, this kind of evasion is by definition unavailable to those who do not intend the result. So there is good reason, other things being equal, to withdraw some or all of the means-specificity from a moral or legal rule where its violation consists in the intentional pursuit or achievement of some result.¹² That is precisely what section 18 does. Lest the fact that it does this be summarily dismissed as mere slip of the draftsman's pen, it is worth noting that section 18 explicitly confirms the profound importance of the point by including the words "by any means whatsoever" in its definition, words which contrast neatly with section 20's infliction-oriented proviso "with or without any weapon or instrument".¹³ So whether or not one believes that there should be specific crimes of violence among the most basic offences against the person, as soon as one appreciates that section 20 creates such a crime, one can at once grasp the rational explanation for the differences between it and section 18.

None of this contradicts the Commission's view that section 18 should be regarded as the more serious version of section 20. On the contrary, it confirms that view. It merely casts doubt on the Commission's reductive assumption about the kind of variations one should expect to find between the definitions of more serious offences and those of less serious offences. These need not be restricted, as a matter of principle, to variations in the configuration of *mens rea* and resulting harm. That is the clear message of the relationship between sections 18 and 20. When we come to relate sections 18 and 20 to section 47, however, the message is quite different. What needs to be uprooted here is the assumption that the former relate to the latter, in substance, as more serious offences to less serious. That assumption needs to be replaced with a sensitivity to the essential qualitative differences between section 47 offences and those covered by sections 18 and 20. They are incomparably different types of offences, with different basic themes. Looking at the 1861 Act one might have thought this obvious. In the first place, section 47 has the same maximum sentence as section 20. That instantly alerts one to the possibility that offences under sections 20 and 47 should be

regarded like those under sections 1 and 17 of the Theft Act 1968 (i.e. theft and false accounting), as offences which are, in essence, neither more serious nor less serious than each other.¹⁴ In the second place section 47 belongs clearly to its own family of offences, namely those of assault (sections 38 to 47). Since the rest of that family is not treated as having some simple scalar relation to section 18 and 20 offences, one may ask why section 47 should be thought to be any different.

The answer lies, once again, in mistaking the harm for the wrong. Section 47 prohibits assault occasioning actual bodily harm. Because actual bodily harm is plainly a less serious variant of grievous bodily harm, too much focus on the harm can lead one to think that section 47 is, in substance, a less serious variant of section 20. And the harm is obviously where one focuses, at the outset, if one adopts the Law Commission's view that seriousness varies in this context only "according to the type of injury that [the defendant] intended or was aware that he might cause". But in fact one should pay attention first, in section 47, to the assault, not the harm. Here we find a major point of distinction between section 47 and section 20. For in spite of the fact that most assaults do involve violence, assault is not a crime of violence. Its essential quality lies in the invasion by one person of another's body space. As every law student knows, such an invasion may take one of two forms. It may take the form of a *mere* assault, an invasion of body space without bodily contact but with the apprehension of its imminence, or it may take the form of a battery, when the contact between the two bodies actually takes place. The Law Commission's own proposed redefinition of assault makes it sound as if the contact, apprehended or actual, must be violent. Their draft provisions speak of "force" and "impact". But this has never been the common law's emphasis, and it distorts the substance of the offence. One may assault someone without violence: by removing their coat or shoes, by sitting too close to them, by stroking their hair, etc.¹⁵ Conversely, one may subject another to violence without assaulting them: by luring someone into the path of an express train, for example, or by leaving a brick where it will fall on someone's head.¹⁶ These are not peripheral but central cases. They reveal

how far the subject-matter of sections 38 to 47 of the 1861 Act differs, in substance as well as in detail, from that of section 20. The accident of drafting is not so much that the assault crimes in sections 38 to 47 diverge from the crimes of violence in sections 18 and 20. The accident, on the contrary, is that they ever coincide.

It is, of course, no accident that section 47 adds a harm requirement to the element of assault. That is precisely what distinguishes a section 47 assault from an assault *simpliciter*, and from the various other special categories of assault specified in the 1861 Act and elsewhere. It would be a mistake to jump to the conclusion, however, that the harm plays the same logical role in section 47 that it plays in sections 18 and 20. In common with other aggravated assault provisions, but quite unlike sections 18 and 20, section 47 creates a crime of constructive liability, i.e. a crime which one commits by committing another crime. Committing a certain crime, e.g. assault or dangerous driving, may always carry the risk of harm, or other primary risks. But in a constructive liability context, it also exposes one to secondary risks, risks of additional liability, which one would not have faced but for one's commission of the original crime. Under section 47, those who commit the crime of assault take the risk, not only that it will occasion harm (the primary risk), but also that, if it does, they will have committed a more serious crime (the secondary risk). They likewise take the risk, under section 51 of the Police Act 1964, that their assault will be upon a police officer in the execution of his duty (the primary risk), and that, if it is, they will again have committed the more serious crime of assaulting a police officer in the execution of his duty (the secondary risk). And so on. By committing an assault one changes one's own normative position, so that certain adverse consequences and circumstances which would not have counted against one but for one's original assault now count against one automatically, and add to one's crime.

Constructive offences, although common enough even in modern legislation,¹⁷ are not easily accommodated within the criminal law principles espoused by many contemporary criminal lawyers, and taken for granted by the Law Commission. In particular, such offences violate what Andrew Ashworth calls the "correspondence

principle”, whereby every element of the *actus reus* must carry with it a corresponding element of *mens rea*.¹⁸ Fortunately, this “correspondence principle” is not and never has been a principle of English law. The relevant principle of English law is *actus non facit reum nisi mens sit rea*: no guilty act without a guilty mind.¹⁹ Constructive offences, when they are properly conceived and designed, do not violate this principle. The more basic offences with which they are associated require *mens rea*, and that *mens rea* is naturally carried over into the constructive offence. The guilty act must therefore still be attended by a guilty mind, in line with *actus non facit reum nisi mens sit rea*. What need not be attended by any *mens rea* are the consequences and circumstances, the risk of which one bears because one committed the original crime. For if these were attended by *mens rea*, that would make a nonsense of the idea, at the heart of all constructive liability, that those who embark on crimes, or at least certain risky crimes, change in the process their own normative positions regarding the risks they take. That is why there is no grand departure from principle in the House of Lords’ recent, and I would say overdue, confirmation that section 47 of the 1861 Act has no *mens rea* requirement apart from the *mens rea* of assault.²⁰ It also explains the causal element in section 47, the element of “occasioning”. The chain of “occasioning” should be regarded as very elastic, stretching to harms rather more remote than any which are caused or inflicted. You lunge towards me, I step backwards, someone’s umbrella trips me up, I fall backwards, a cyclist runs me over. The assault occasions the resulting harm even though it does not cause it.²¹ Section 47 liability may therefore arise even though the actual bodily harm comes about by a very indirect route, perhaps involving successive coincidences. In committing an assault, on this view, one bears not only the risk that harm will come about, but also, up to a point, the risk of *how* it will come about. In respect of the harm, then, some of the protection of the doctrine of *novus actus interveniens* is forfeited by the assaulter, along with some of the protection of the doctrine of *mens rea*.

In line with its general principle of offence seriousness, the Law Commission would restore both of these protections. In the process it would remove the section 47

offence from the assault family, drop its constructive elements, and replace it with an offence in the same family as those offences which would serve as replacements for sections 18 and 20. Yet this move is not a replacement of less rational organisation with more, as we can now see, but a choice between two possible rational arrangements in the law of non-sexual and non-fatal offences against the person. After all, we have just supplied a perfectly rational explanation for the main features of the section 47 offence, understood as a variation on the assault theme. There are also, as the Law Commission shows, rational explanations for the features of the proposed replacement for section 47, understood as a variation on the theme of sections 18 and 20. The point is, however, that one cannot have it both ways, since the assault theme (invasion of body space) is not the same as the theme of sections 18 and 20 (personal violence). The Law Commission can make their proposed arrangements seem to have it both ways only by diluting the two themes so that they become harder to distinguish. The violence theme is weakened in the replacements for sections 18 and 20 by the eradication of the “infliction” paradigm. At the same time the spatial invasion theme is weakened in the restatement of assault by concentration on “force” and “impact”. But this two-way *rapprochement* generates a regrettable loss of discrimination in the law of offences against the person which no amount of rational reordering can compensate. It represents a triumph of reductive thinking. Codification need not be like this. In the law of offences against property, excellently codified during the 1960s and 1970s, we find many different offences involving much the same harms. Whether one is a victim of theft, deception, criminal damage or making off, one is harmed by being deprived of one’s belongings. Yet this codification did not seek to eradicate the different themes of the different offences, and turn out some general scale of seriousness. On the contrary, it went out of its way to capture these different themes in precise and differentiated language. That is because, in the realm of property offences, the harm does not capture all that is interesting, or rationally significant, about the wrong. Nor are things any different in the law of offences against the person. In substance, the wrong of an assault

crime is different from the wrong of a section 20 crime much as the wrong of theft is different from the wrong of fraud. The two may happen to overlap, even across a large proportion of their terrain, but one cannot in principle unify them into a neatly scaled family of crimes. Indeed the Law Commission recognises this, in spite of its own inclinations, by preserving distinct offences of poisoning and torture, and by hiving off the sexual offences to a different corner of the codification agenda.²² One may ask why the basic thematic separation of sections 18 and 20 from section 47 does not also deserve preservation. Certainly the rationality argument does not supply the answer; for there is nothing irrational, to speak of, in either section 47 or sections 18 and 20.

3. THE RULE OF LAW ARGUMENT

Part of the answer is to be found, perhaps, in the Commission's second main argument for the reform of the 1861 Act, which I call the rule of law argument. This argument is, if anything, bolstered in the transition from consultation document to final report. In the latter, particular stress is laid on the extent to which the guiding light of the law has been dimmed by the antiquity of the legislation. Firstly, the provisions need to be translated into entirely different language to make them clear enough to use.²³ Secondly, this linguistic unclarity opens the law up to judicial development and redevelopment on a scale which seriously hinders the certainty of the law.²⁴ The Commission is most explicitly concerned about the effect of this on juries and magistrates and police officers who are trying to apply the law. But we are plainly supposed to take it for granted that, if there is a rule of law problem for juries and magistrates, there must be a rule of law problem for those who may be on the law's sharp end, i.e. potential offenders.²⁵ If the law cannot even be a source of reliable guidance in the courtroom, how can it be a source of reliable guidance in the pub or in the street? The Law Commission's proposed simplification and systematisation of the non-fatal and non-sexual offences against the

person is therefore held out as being not only in the interests of the administration of justice, but also in the interests of crime prevention and avoidance, which only a straightforward, publicly ascertainable framework of criminal law can secure.

The Commission is obviously right to think that the law in this area must be clear if it is to provide satisfactory guidance. But it would be a mistake to suppose that all interests in clarity will be served, in the context of the law relating to offences against the person, by the same kind of clarity. To be sure, that may be a reasonable expectation in some areas of the law. The very same clarity in the law of contract which will help courts in their interpretation and enforcement of contracts, for example, will also help many of those who want to make or terminate contracts to do so without recourse to the courts. The same may be true in some areas of criminal law, e.g. trading standards or food hygiene offences. In the specialised pursuits with which such offences are concerned, it is proper to expect and encourage some degree of specialised acquaintance with the relevant law, and the same clarity which will help juries and magistrates and the police to acquire that specialised acquaintance for the purpose of determining whether offences have been committed will also help shopkeepers and restaurateurs do the same for the purpose of avoiding the commission of offences. That is also the case in those areas of the criminal law where one is explicitly told of the crime one is about to commit whenever one is about to commit it, e.g. when one is making declarations on tax forms or social security forms. Here again, the very clarity which would help a jury or magistrate to apply the law will also help the potential offender not to fall foul of it. In all of these situations, what is needed on all sides, and what the rule of law unequivocally demands, is what we might call *textual* clarity. The law is textually clear if it is stated in straightforward, unornamented language, avoiding great technicality or complexity of drafting, and minimising the scope for conflicting interpretations.

In other areas of the law, however, the textual clarity which helps the court, including its lay members, is not the same clarity which helps with ordinary public understanding and conformity. After all, there are many parts of the law, including

much of the general criminal law, which are rarely encountered in textual form, except by police officers, lawyers and those participating in trials. Nor should we wish it to be otherwise. The presumption that everyone knows the law, or at any rate knows the general criminal law, becomes untenable if we insist that people can only know the law by its texts, and we proceed to design the law accordingly. Most people have better things to do than acquaint themselves with a mass of legal materials, however easy to read and understand. Most people, most of the time, need to know roughly what the law says on non-specialist matters without knowing, or caring, how the law says it. Textual clarity is here an irrelevance. The clarity which is needed here we may call *moral* clarity. Moral clarity is secured, not by the use of straightforward and unornamented language in legal texts, but by the adequate replication in the law of clear distinctions and significances which apply outside the law, together with reasonably clear indication (in the titles of Acts, the common names and classifications of offences, etc.) of which cluster of distinctions and significances people can expect to find replicated where.

Now it may be thought that, if and to the extent that the rule of law does demand this moral clarity, its ambitions must be contained within the limits prescribed by what has come to be known as “the harm principle”. For the harm principle, like the rule of law, reflects the importance of making the law compatible with people’s need to be, to a substantial degree, the authors of their own lives; and while the rule of law makes its contribution to this aim by requiring the law to advertise its own restrictions, so that legal liability and the resulting disruption do not take people unawares, the harm principle makes its parallel contribution by limiting the types of moral considerations to which the law may have regard in shaping its restrictions, so that over a wide range of issues people have freedom to decide for themselves even if they do not decide rightly. So one may be tempted to conclude that the rule of law can consistently demand the legal replication of moral distinctions and significances only if they are moral distinctions and significances admissible within the terms of the harm principle, i.e. those that relate to the nature or degree of the harm. This idea resonates with the Law

Commission's view, already mentioned more than once, that offences against the person should be divided up only "according to the type of injury that [the defendant] intended or was aware that he might cause". But it is based, all the same, on a misinterpretation of the harm principle. The harm principle says that the law should not be used to restrict or punish harmless activities. Perhaps it adds that the law should not restrict or punish harmful activities in ways which are disproportionate to the harm.²⁶ But beyond this, it says nothing about how, or even when, harmful activities should be dealt with by the law. Such matters remain to be settled on other grounds. Sometimes the law may legitimately decline to deal with certain harmful activities at all. On other occasions the law may legitimately elect to deal with them only on certain terms, attaching limitations and provisos and conditions which have nothing much to do with the nature or degree of the harm. That explains why one should not, in the words of the previous section, reduce the wrong to the harm. It also explains, more to the immediate point, why there need be no significant conflict between the demands of the harm principle and the demand for moral clarity which is, at least where the general criminal law is concerned, a central demand of the rule of law. For without violating the harm principle one may rely on countless moral distinctions and significances in the definition of a crime, including those that have little or nothing to do with the nature or degree of harm, so long as the activity being criminalized is indeed harmful and the means used to suppress it are not disproportionate to the harm in question.

It should already be fairly clear how these observations engage with the remarks I made in the previous section about the rationality of the 1861 Act. For this Act, like the Theft Acts 1968 and 1978, strives for moral clarity by dividing up the offences which fall within its scope into strikingly different moral categories, distinguished not, or not only, by the degree of harm involved, but rather by how the harm is brought about. Crimes of violence, in particular, are distinguished from assault crimes, where invasion of body space is the central theme, even though bodily harm may be equally at stake in both scenarios. The original text of the 1861 Act, casually amended over the intervening

century, went even further in its moral discriminations. The possible modes of violence, in particular, were further divided up. Section 18 spoke, in the alternative, of intents to “maim, disfigure or disable” as well as the generic intent to do grievous bodily harm. Lesser known provisions of the 1861 Act still preserve this further degree of moral specificity. Section 21 deals with choking, suffocating, or strangling; section 22 deals with the use of stupefactants and overpowering substances, sections 23 and 24 with poisoning, section 26 with starving and exposing to the elements; sections 28 to 30 deal with burning, maiming, disfiguring and disabling by use of explosives, and in the case of section 29 by use of corrosive substances; section 31 deals with spring guns and man traps, sections 32 to 34 with endangering railway passengers by various finely specified means, and so forth. These different crimes, some crimes of violence and some not, are notable for the moral clarity with which they are differentiated.²⁷ Like the differences marked in the Theft Acts between theft, obtaining by deception, false accounting, making off without payment, handling stolen goods, and so on, these provisions single out for specific prohibition some, although not all, of the many different modes of wrongdoing in which the harms with which the Act is concerned may be at stake. And they single them out in ways which resonate in the moral imagination of the ordinary people to whom the law must provide its clear guidance.

Notice that there are two separate but related points here. The distinctions in the 1861 Act between different ways of causing harm are being held up as genuine moral distinctions, possessing the rational appeal of which I made a great deal in the previous section. They are also being held up as distinctions which appeal to the popular moral imagination, so that they are accessible and vivid to people in search of the law’s guidance. The two points should not be collapsed. Morality certainly should not be confused with anybody’s beliefs about it. On the other hand, the independence of the two points should not be exaggerated. The relationship of the popular moral imagination to the moral distinctions embodied in the 1861 Act is not *merely* the ordinary relationship of beliefs to their objects. The popular moral imagination also has, within

limits, a constitutive role to play. Remember that we are talking about distinctions, not between different types or degrees of harm, but between different ways of bringing harm about. These distinctions relate, not to the effects of the relevant criminal actions, but to the very nature of the actions themselves. It is a matter of intrinsic rather than instrumental differentiation, differentiation not in terms of what the actions *cause* or *bring about* but rather in terms of what they *express* or *convey*.²⁸ This is where we come to the important move. For to speak of what an action expresses or conveys is to speak of its meaning, and the meaning of an action is its public meaning. If an act of race discrimination is an act expressing contempt, for example, that is not because the discriminator means it to be contemptuous nor because the person discriminated against reads it that way. It is because that is the meaning which acts of race discrimination have in the public culture in which this race discrimination takes place.²⁹ This does not mean that race discrimination is only as bad as it is thought to be by people in that culture. For people may underestimate how bad it is to express the contempt which, by virtue of its public meaning, race discrimination necessarily expresses, or may fail to see the additional instrumental factors, some of them independent of public meaning, which buttress its undesirability. Yet the authentic rational significance of discrimination, and the possibility of rationally distinguishing between discriminatory and non-discriminatory actions, still depends in part on the fact that race discrimination has the public meaning it has. Likewise the intrinsic differentiation between violent and non-violent means, between deceptive and non-deceptive means, between terrorists and poisoners, between rapists and philanderers, etc. These depend on the public meanings of the different actions involved. And those public meanings are not only reflected, but also constituted, in the collective moral imagination of those who inhabit the public culture in which the acts being differentiated take place. So the claims about the rationality of the 1861 Act made in the previous section are not related in some merely coincidental way to the claims about its moral clarity which are being made in the present section. On the contrary, they share the same foundations. Both the Act's

rationality and the Act's moral clarity depend, at least in part, on the fact that it reflects distinctions between actions which even now differ in the popular imagination, hence have different public meanings, and hence have different intrinsic moral significances.

In itself this does not show that the 1861 Act is superior in any way to the Law Commission's proposals for replacing it. It does show, however, that the Commission's rule of law argument against the 1861 Act is every bit as overstated as its rationality argument. Not only do the main provisions of the 1861 Act still represent a perfectly rational way of organising the law relating to offences against the person, but they also live up to the demands of the rule of law in at least one vital respect, in that they have a good dose of the moral clarity which makes them accessible to the ordinary people who must be guided by them. But it may still be asked whether this moral clarity really has to be so much at the expense of textual clarity, which is also an important demand of the rule of law. Do the two really need to conflict? The Law Commission could point to its draft provisions on poisoning and torture, at least, to show that morally clear distinctions and significances need not be couched in the ornamented, arcane and technical language of the 1861 Act. So one may well wonder why sections 18, 20 and 47 should not be translated into similarly clear and simple modern language, so that the interest of ordinary people in the moral clarity of the general criminal law can be reconciled with the interest in textual clarity of those who participate in trials and others who must actually consult the law's texts.

The answer to this comes in two parts. The first part begins with a concession that the language of sections 18, 20 and 47 is in places arcane and ornamented, so that there are indeed some marked deficiencies of textual clarity. And some of these could indeed be removed without detracting from the moral clarity of the sections. The word "malicious" in sections 18 and 20, for example, while it is certainly not redundant,³⁰ has probably outstayed its welcome. The job which it now does, and is rightly asked to do, is not one which it does particularly well. It is an ordinary straightforward word, to be sure, with an ordinary straightforward meaning, but if it were used in sections 18 and 20

to convey that meaning, then those sections would not only compromise much of the moral clarity which I have claimed for them but would also gratuitously violate other sound principles of criminal law, such as the principle that the law does not look to an offender's motive. The word is now fanciful, and we can certainly find a clearer way of saying what it is now supposed to say. The same is not true, however, of all the arcane and ornamented expressions in sections 18, 20 and 47. I am thinking in particular of the expressions "grievous bodily harm" and "actual bodily harm". These are certainly quaint, and you might say unnecessary. Everybody knows that grievous bodily harm is serious³¹ and actual bodily harm need not be.³² Why not dump the ornamental terms "grievous" and "actual"? The Law Commission itself has the answer. Throughout the draft codification process, arcane and ornamental words have been preserved from the common law. "Rape", "murder", "manslaughter", "assault", "riot" and "affray" are still to be with us. "Assault", in particular, still figures in the definition of certain proposed aggravated offences, as it currently does in section 47. The reason is simple. These words carry their moral force with them. Whether or not they began as legal terms of art, and some of them are now so ancient that one cannot be sure how they began, they are now words which help to constitute the very intrinsic moral significances and distinctions which, in law, they exist to capture. They represent justified departures from the textual clarity of the law in the name of moral clarity. The Law Commission evidently does not think that the expressions "grievous bodily harm" and "actual bodily harm" have the same pedigree. But I beg to differ. These expressions (and even their abbreviations "GBH" and "ABH") have entered the popular moral imagination, and now help to constitute the very moral significances which they quaintly but evocatively describe.³³ One cannot therefore remove the quaintness, the arcane and ornamented language, without detracting from the moral clarity which it carries with it and constitutes. One must choose, to this extent at least, between moral clarity and textual clarity. And in this case, as with murder and rape, one should choose moral clarity. That is because, here at least, the price of the textual unclarity is minimal. Unlike the term

“malicious”, the expressions “actual bodily harm” and “grievous bodily harm”, arcane and ornamented though they may be, have never given much trouble to those who must deal with the law in its textual manifestations. The deficiency of textual clarity here has barely cast a fleeting shadow across the guiding light of the law.

So much for the first part of the answer, the confession and avoidance part. Now we come to the denial. For the language of sections 18, 20 and 47 is not in all respects so ornamented, arcane and technical as the Law Commission’s observations suggest, and thus the deficiencies of textual clarity are by no means comprehensive. In particular, the causal words “inflict” and “occasion” in sections 20 and 47, like the word “cause” in section 18, are ordinary English words which in the 1861 Act carry, even after a century of interpretation, much their ordinary English meanings. It is hard to believe that these words give juries and magistrates problems because of their unclarity, and equally hard to believe (since the proposed definition of torture contains the very word “inflict”) that the Law Commission sincerely found these words unclear. What creates problems with these words, if anything does, is the assumption of some criminal lawyers, particularly academic criminal lawyers, that they need to provide definitions of these words which specify all the necessary and sufficient conditions of their application. This cannot but lend an unnecessary veneer of technicality to the terms. It is an unnecessary veneer because one does not need to be able to articulate the necessary and sufficient conditions of something in order to understand it perfectly well. Sound understanding does not dispense with grey areas. For many grey areas are not the product of any defect of understanding, or even failure of articulation, but part of the very thing being understood and articulated, which is constituted in part by the role it plays in our more global understanding and articulation of the world around us. Even criminal lawyers now accept this, I hope, when they are dealing with the word “appropriation” in the Theft Act 1968, the word “intention” in its many appearances in statute and at common law, and many other important legal words.³⁴ It is time they got used to the same thing where causal terms are concerned, and stopped regarding the variety of causal relations

in terms of which our world is organised as some kind of failure of clarity in our thinking and language. The word “wounding” in sections 18 and 20 affords another example of the same point. Here the courts have, it must be admitted, gone doubly astray, attempting to define wounding principally by defining a wound, which has in turn been defined by stating a supposedly necessary and sufficient condition, viz. a “puncturing of the skin”.³⁵ But the mistakes here do not lie in the choice of the ordinary and clear word “wounding” to do its ordinary English job in the 1861 Act. The mistakes lie in the spurious demand for a further definition which sharpens the unsharp periphery of a word, when the very thing to which the word applies has an unsharp periphery which the unsharp periphery of the word clearly and accurately replicates. This shows that one should not mistake even the fullest textual clarity for maximal certainty in the law. Textual clarity requires the avoidance of arcane, ornamented language, the avoidance of great technicality and complexity of drafting, and a minimisation of the scope for conflicting interpretation. But some of what lawyers regard as “conflicting interpretation” has nothing to do with unclarity of language, and everything to do with the structure of the world which the language attempts to capture. To iron out the grey areas of that world for the sake of certainty is not necessarily to enhance textual clarity, but on occasions, as the case of wounding nicely illustrates, to retard textual clarity by adding extra legal technicality. If certainty and textual clarity are both demands of the rule of law, then here we have, questions of moral clarity apart, a real source of conflict within that ideal.

It is partly the Law Commission’s ambition to maximise both certainty and textual clarity at the same time which leads it into what I earlier called its reductive thinking. For these two aspects of the rule of law often work against one another. Beyond a certain point, the sharper one tries to make the law’s distinctions at the margins, the more technical terms one must tolerate. To reduce such conflict the Commission’s codification team have come up with two strategies. The first is to cut down the number of elements in each criminal offence so that the opportunities for both unclarity of word

and uncertainty of world are minimised. The second is to insist that the elements of each offence are chosen, wherever possible, from a relatively limited palette of approved elements which are either defined in the statute or thought to be relatively free of greyness in both world and word. But this is unfortunately no solution. For to the extent that it does resolve the conflict between certainty and textual clarity, it does so at the expense of other important aspects of the rule of law.³⁶ Of these the demand for moral clarity is the most important, and it demands what the Law Commission normally refuses to supply, namely offences differentiated by the very nature of the action, and not only by the harm done or the *mens rea* conditions associated with that harm. The Commission refuses to supply these, I venture, because once intrinsic action classifications are involved, the prospects for reconciling maximal certainty and maximal textual clarity are minimal. One is dealing with aspects of the world which invariably have extensive peripheries as well as cores, and from which the peripheries can only be eliminated by the use of technical terms and complex drafting, thereby compromising textual clarity. But the Commission's argument for textual clarity is itself compromised by reliance on demands of the rule of law, demands for public ascertainment and access, which in fact often militate against it.

4. A SPECIAL VERDICT

This last conclusion, like that of the section before, lives up to the ambitions with which the paper began. Those ambitions, let me say again, were modest. The aim was only to show how the two arguments upon which the Law Commission mainly relied in criticising the 1861 Act, and in building its own alternative legislative package, were flawed. It has not been suggested that there is nothing wrong with the 1861 Act, but only that whatever may be wrong with it does not reside, as the Commission has repeatedly charged, in the rationality of its core provisions or in the degree of their

respect for the rule of law. Nor has it been claimed that the Commission's proposals for replacement of these core provisions represent no advance, but only that they represent no decisive advance over the 1861 Act in the particular respects in which they are claimed to represent a decisive advance, i.e. in respect of their rationality and their degree of respect for the rule of law.

This very limited defence of the 1861 Act does, however, help to expose a tension of wider significance. Throughout its long-running codification project, the maxim *actus non facit reum nisi mens sit rea* has been very prominent in the Law Commission's thinking, and almost religiously observed. Indeed it has been fortified considerably, buttressed both by Ashworth's "correspondence principle"³⁷ and by a further demand that *mens rea* be "subjective", i.e. that nobody be held liable on the basis of things done or brought about to which he or she did not advert.³⁸ If this latter fortification of the *actus non facit reum* principle is justified, it is justified on rule of law grounds. It is justified, in other words, not because there is any general moral divide between the advertent and the inadvertent wrongdoer apart from the law, which there is not, but because (if they can be presumed to know the law), those who advert to the relevant features and consequences of their actions also advert to, or can be presumed to advert to, the legal liability to which they are exposing themselves. Those who do not advert to the relevant features and consequences, on the other hand, are then subject to the unexpected disruption of criminal liability, with all that being criminalized means for the course of their lives. If the demand for subjective *mens rea* is justified, in other words, it is justified by the way in which it helps people to steer their lives around the criminal law rather than running straight into it. This is one rule of law reason why the criminal law should not replicate the general negligence liability found in private law, and one to which the Law Commission obviously gives great weight.

But it is not the only rule of law reason why the criminal law should not replicate such a general negligence liability, nor the most important. For the general negligence liability that we know of from private law is also, as we might put it, action-unspecific. It

governs the doing of anything – just about anything at all – without due care. This means that one is not alerted to the fact that one may be risking negligence liability by the mere fact that one is performing actions of a certain kind, e.g. shooting guns rather than building houses, driving cars rather than playing golf, etc. In criminal law we should normally demand this extra source of alertness. We should expect the criminal law to attach itself to particular actions, so that one has, by virtue of this as well as by virtue of one’s advertence, a good idea of when one is running into trouble. As the draftsman of the 1861 Act himself put it, specifying “each and every act intended to be subjected to any punishment . . . has the advantage of calling direct attention to all the acts that are made penal”.³⁹ To this extent, a prohibition on say, negligent driving or negligent shooting is superior to a prohibition on negligent actions generally. The Law Commission, however, neglects this axis of differentiation in its proposals to recodify the law relating to offences against the person. The new replacements for sections 18 and 20 – “intentionally causing serious injury” and “intentionally or recklessly causing serious injury” – lack the characteristic action-specificity of the 1861 Act’s offences, which focus on acts of violence. The new replacement for section 47 – “intentionally or recklessly causing injury” – likewise lacks the action-specificity of the existing offence, which warns one off assaults, and makes liability for the aggravated assault turn on whether one failed to heed the warning. By engineering these shifts, the Law Commission fails to carry through the robust support for the rule of law which drives its most dearly held “subjectivist” principle.

Let me spell the irony out in simpler terms by dwelling a little more on section 47. As far as conformity to the rule of law is concerned this provision is in one respect worse than the Commission’s proposed replacement for it, and in one respect better. It is worse because, since one need not appreciate the risk of actual bodily harm in order to be liable, one admittedly cannot rely on any such appreciation to give one warning of the liability one faces. On the other hand section 47 is better because, since one needs to commit an assault in order to commit an assault occasioning actual bodily harm, one is

warned of the risk of such constructive liability by the very fact that one engages in the original assault. This argument does not always work to defend constructive liability against challenges based on the rule of law. But it does work to defend constructive liability, and defend it well, when certain further conditions are met. Of these the most important by far is the one of which I have made so much in the preceding pages, and which the crime of assault occasioning actual bodily harm meets, viz. responsiveness to the rationally significant intrinsic differences between actions which play such a large role in, and are structured by, the popular moral imagination.⁴⁰ Even if constructive, an offence specification which meets this condition of responsiveness can do more, I venture, to address the concerns underlying “subjectivism” than does the pursuit of “subjectivism” itself. And yet the Law Commission, for all it is wedded to “subjectivism”, eschews such responsiveness altogether in its treatment of the core offences against the person. In the process, it underestimates the resources of rationality, and takes the risk of retarding the very ideal of the rule of law which its reforms are claimed to advance.

* Fellow of Brasenose College, Oxford. I am grateful to participants in a seminar at Caius College, Cambridge for comments which helped me to improve this paper in several respects. For their detailed criticisms of subsequent drafts, I would also like to thank Simon Gardner, Stephen Gough, Tony Honoré, Jeremy Horder, Stephen Shute, and Emma Young.

¹ R v *Parmenter* [1991] 2 All ER 225 at 233 per Mustill LJ.

² R v *Savage*, R v *Parmenter* [1991] 4 All ER 698 at 721 per Lord Ackner

³ *Principles of Criminal Law* (Oxford 1991), 281.

⁴ *Legislating the Criminal Code: Offences Against the Person and General Principles* (Law Commission Consultation Paper no. 122, London 1992), para 7.8., hereafter LCCP 122.

⁵ “Call for new law on assault”, *The Guardian*, 17 November 1993. The occasion was the publication of *Legislating the Criminal Code: Offences Against the Person and General Principles* (Law Com. no 218, London 1993), hereafter LC 218.

⁶ LCCP 122, para 7.4.

⁷ LCCP 122, para 7.40.

⁸ R v *Wilson* [1983] 1 All ER 448 at 454-5.

⁹ LC 218, para 13.5.

¹⁰ Section 10 of the Commission’s draft Bill, LC 218, at 94, a wider version of an offence already in force under section 134 of the Criminal Justice Act 1988. The demands of the torture scenario make it clear that the law relating to “infliction” as stated in *Wilson* needs to be modified slightly to accommodate the possibility of psychological violence. Since section 20 is concerned with *bodily* harm only, that possibility passed the court by.

¹¹ On the element of violence in wounding, see R v *Beckett* (1836) 1 Mood & R 526; R v *Spooner* (1853) 6 Cox CC 392.

¹² There is no associated reason, however, to withdraw the protection of *novus actus interveniens*, which, being a doctrine concerning the effects on liability of the unexpected, cannot by its nature be manipulated. This explains why I rejected “intended consequences are never too remote” as an

exaggerated maxim. But see page 9 below for a situation, involving unintended consequences, in which even the doctrine of *novus actus interveniens* arguably falls to be modified.

¹³ The draftsman of the 1861 Act explains his use of the expression “by any means whatsoever” differently. It was needed, he says, to bring section 18 into line with the law of attempted murder as consolidated elsewhere in the 1861 Act: C.S. Greaves, *The Criminal Law Consolidation and Amendment Acts* (2nd ed, London 1862), at 52. But that does not detract from my point, since the reason I give for this expression’s presence in section 18 is also the reason for its presence in the old statutory provisions on attempted murder which the draftsman of the 1861 Act was consolidating.

¹⁴ The point about sections 1 and 17 of the Theft Act 1968 only stands since the maximum penalty for theft was reduced by the Criminal Justice Act 1991. Before that change, the same point could have been made concerning sections 1 and 15 of the Act (theft and obtaining by deception)

¹⁵ See, for example, *R v George* [1956] Crim LR 52, or *Faulkner v Talbot* [1981] 3 All ER 468.

¹⁶ But compare *DPP v K* [1990] 1 All ER 331, in which an analogous mischief (leaving a dangerous chemical in a hot air drier where it might blow out onto someone's skin) was misconstrued as an assault for the purposes of a section 47 charge. The case does illustrate the need for some new endangerment offences to be devised roughly along the lines of the railway offences in sections 32-4 of the 1861 Act.

¹⁷ A perennial favourite is the offence of causing death by dangerous driving (previously by reckless driving), now found in the Road Traffic Act 1988, s1.

¹⁸ Ashworth, *Principles of Criminal Law*, above note 3, 129-30. Notice that, although liability under sections 18 and 20 is not constructive, these provisions also violate Ashworth's principle in a small way by virtue of the doctrine in *R v Mowatt* [1967] 3 All ER 47 that one may be convicted of a section 18 or 20 offence without foreseeing the grievous bodily harm one did, so long as one foresaw *some* harm.

¹⁹ *R v Tolson* [1886-90] All ER Rep. 26. C.f. Glanville Williams, *Textbook of the Criminal Law* (2nd ed., London 1983), who misinterprets *Tolson* as authority for the correspondence principle, and so regards it as militating against a constructive interpretation of section 47.

²⁰ *R v Savage, R v Parmenter* [1991] 4 All ER 698.

²¹ But compare *R v Roberts* (1971) 56 Cr App Rep 95, in which the distinction is neglected.

²² It is a relief to see that the Commission does not fall into the trap of mistaking rape for a crime of violence, as it does with assault. Some suppose that we would appreciate what is wrong with rape more if we stopped seeing it as a “sexual offence” and started seeing it as a straightforward crime of violence. But it strikes me that the reverse is true. It is precisely the tenacity of the courts in perpetuating the old idea that rape is a crime of violence that has done more than anything else to blunt public appreciation of the rapes which take place under cover of manipulative and exploitative relationships. Rape is a crime of sexual invasion, not a crime of violence. To focus on the use of violence is to detract from the centrality of the invasion.

²³ LC 218, para 12.9.

²⁴ LC 218, para 12.11.

²⁵ LC 218 para 12.6 bemoans the 1861 Act’s “complete unintelligibility to the layman”. Meanwhile, LCCP 122 para 7.11 refers us back, for supporting argument, to the earlier report *A Criminal Code for England and Wales* (Law Com. no. 177, London 1989), paras 2.2-2.7, in which much is made of “the idea that the law should be known in advance to those accused of violating it”.

²⁶ Joseph Raz, *The Morality of Freedom*, (Oxford 1986), 420-1.

²⁷ At this point I should mention my debt to Jeremy Horder, a draft of whose paper “Rethinking Non-Fatal Offences Against the Person” (1994) 14 *Oxford Journal of Legal Studies* 000, first alerted me to the need to defend the fine-grained differentiations of the 1861 Act. My defence is on a different basis from Horder’s, which stresses the importance of fair labelling rather than clear guidance. The two defences, however, are for the most part complementary.

²⁸ Of course, there may be an interaction between intrinsic and instrumental differentiation, since what actions express or convey may give them further consequences. That rape expresses a view of women as less than human, for example, explains why rape is a particularly humiliating mode of violation. But in order to understand where rape gets its particular wrongness, one should not leap straight to the humiliation. Even if it is missing because, e.g., the victim was drugged and never learns of the violation, or has been rendered insensitive to her own humanity by persistently brutal treatment, there still remains the baseness of expressing the base attitude that the violation expresses, independently of any

consequence which that expression may have for the victim herself or for others. I am grateful to Andrew von Hirsch for reminding me to stress this point.

²⁹ I am not denying that the public meaning of some actions may itself have some sensitivity to the intentions or perceptions of the particular people involved. Although this is not true of discrimination, it is true of, e.g., acts of deception and betrayal as well as some physical violations and acts of violence. It is this sensitivity which explains the importance of many *mens rea* distinctions in the criminal law, including the distinction between the *mens rea* of section 20 and that of section 18.

³⁰ *Pace* Diplock LJ in *R v Mowatt* [1967] 3 All ER 47 at 50.

³¹ *DPP v Smith* [1960] 3 All ER 161.

³² Although it must be more than *de minimis*: *R v Jones* [1981] Crim LR 119.

³³ I think back to Alan Bleasdale's successful television serial *GBH*. Can one imagine a drama called, in the words of the Law Commission proposals, *Serious Injury*? It is not a trivial question. One should not underestimate the role of drama (including soap operas, sitcoms etc.) in supporting and reflecting public appreciation of the law in a complex and alienating modern society.

³⁴ See *R v Gomez* [1993] 1 All ER 1 for a competent and insightful discussion of "appropriation" without resort to, or hope of, a comprehensive definition. The discussion of "intention" in *R v Moloney* [1985] 1 All ER 1025, although in some respects less competent, correctly concludes that the grey area at the margins of "intention" cannot be excised by sharper definition except at the price of excessive technicality.

³⁵ *C (a minor) v Eisenhower* [1983] 3 All ER 230.

³⁶ This adds a new dimension to Raz's remark in *The Authority of Law* (Oxford 1979), at 222, that "complete conformity [to the rule of law] is impossible". It is impossible not only because, as Raz points out, "some vagueness is inescapable" but also because the "vagueness" of law may take different forms, and the elimination of one form, pursued to extremes, may be the triumph of another. The rule of law conflicts, not only with other important moral principles, but also with itself.

³⁷ *Report on the Mental Element in Crime* (Law Com. no. 89, London 1978), para 86; *Codification of the Criminal Law* (Law Com. no. 143, London 1985), paras 8.29-8.33; *A Criminal Code for England and Wales*, above note 25, para 8.27.

³⁸ *Report on the Mental Element in Crime*, para 59; *Codification of the Criminal Law*, para 8.20; *A Criminal Code for England and Wales*, paras 8.19-8.20; LCCP 122, para 7.22. This explains the Commission's insistence that offence seriousness should vary, not simply according to the type of injury caused, but "according to the type of injury that [the defendant] *intended or was aware* that he might cause".

³⁹ C.S. Greaves, *The Criminal Law Consolidation and Amendment Acts*, above note 13, xxxvii. This consideration did not make Greaves himself an enthusiast for action-specificity. Indeed he regretted the action-specificity of the 1861 Act, and did his best, he tells us, to circumvent it by sneaking in catch-all provisions where possible. But he is more candid than the Law Commission, I think, in explaining why. It had nothing to do with rationality or the rule of law. It was simply that such definitions collectively leave holes in the law which "afford the artful a chance of evading punishment"

⁴⁰ Andrew Simester has pointed out to me another important and complementary factor that may sometimes further strengthen this defence of constructive liability. It is that the basic offence, onto which the constructive liability is grafted, is itself partly justified by the fact that it helps to prevent the very harms, the occurrence of which activates the constructive liability. This is arguably true of a section 47 offence, and certainly true of the offence under section 1 of the Road Traffic Act 1988.