Reconsidering psychic assault

Jeremy Horder

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Journal Article

Criminal Law Review

Crim. L.R. 1998, Jun, 392-403

Subject
Criminal law

Keywords
Actus reus; Assault; Offences against the person

Crim. L.R. 392 **Summary:** *Psychic assault has always been something of an anomaly in English law. Much of the ground it covers is now also covered by statutory offences concerned with threats. Nonetheless, the current proposals to put it on a firm statutory footing should be supported, albeit only in a modified form. Psychic assault has a unique element that distinguishes it from other crimes concerned with threats: the element of fear created by a threatening confrontation.*

The importance of defining assault

In its recent Consultation Paper, [1] the government has indicated a firm intention "to ensure that the courts are able to apply a single definition of assault in all those many offences which use the concept of assault, wherever they occur" (para. 3.5). Accordingly, clause 4 of the Offences Against the Person Bill will place on a statutory footing clause 6 of the Law Commission's definition [2] of assault in the following terms:

"A person is guilty of assault if--

(a) he intentionally or recklessly applies force to or causes an impact on the body of another--

(i) without the consent of the other, or …

(b) he intentionally or recklessly, without the consent of the other, causes the other to believe that any such force or impact is imminent." [3]

There are some well-documented difficulties with this definition. In focusing on "force or impact," for example, the definition fails to make it crystal clear that the law does and ought to characterise as assault many wrongful, non-consensual trespasses to the person, such as stroking someone's hair, or leaving one's hand in contact with another person longer than is socially or morally appropriate, even ***Crim. L.R. 393*** though the wrong involved in such examples does not lie in any simple use of force or causing of an impact. [4] Such wrongs are physically "exploitative," rather than "violent," and the *actus reus* of assault needs to be unequivocally broad enough to encompass them within its scope. [5] Given that the definition in clause 4 is to apply to indecent assault as well as to common assault (para. 3.6), such a lack of clarity is most unfortunate.

Furthermore, where what may conveniently be called "psychic assault" is concerned, set out in clause 4(b), the definition mistakenly places emphasis on the cognitive state D induces by his conduct, the *belief* that force or impact is imminent. [6] It is obvious that it can sometimes be wrong to lead someone to believe something, even something true. It might be wrong, for example, for me to tell B he was adopted, if the knowledge or belief that he was would cause him great distress. It seems highly unlikely, though, that this kind of wrongdoing is the kind at issue in the law of assault. What one should be emphasising here, instead, is the "affective" state (of which the belief mentioned in clause 4(b) is clearly an integral part) D brings about in psychically assaulting, namely V's *fear* of the threat; for only this really explains why psychic assault is a wrong. [7] In this article, however, I shall be little concerned with such matters. My main focus will be the old but as-yet-unresolved question of whether, in a psychic assault, it matters that the "force or impact" one believes one is to suffer need be (believed to be) "*imminent*".

The meaning of "imminence" in the common law of assault

Glanville Williams tells us [8] that it has been settled law since the middle ages that the *actus reus* of assault had a technical meaning, different from battery, and focused on the apprehension that unlawful force was about to be applied to the victim. A ***Crim. L.R. 394*** short modern statement of the common law is to be found in the speech of Lord Hope in *Ireland* [9]: "[A]n assault is any act by which a person intentionally or recklessly causes another to apprehend immediate and unlawful violence." [10] In this regard, Williams opines that "[i]t is immaterial that the actor is not at that moment within striking distance, but he must, it seems, be sufficiently near to apply the force then and there …", [11] a view supported in other sources. [12] From very early on, however, the need for an assault to be imminent has been interpreted with a high degree of flexibility. In *Smith v. Newsam,* [13] for example, D was said to be plainly guilty where she was standing in a cutler's shop, and shook a sword at the plaintiff, even though he was across the other side of the street. In the well-known case of *Smith v. Superintendent of Woking Police Station,* [14] D was thought by the Divisional Court to be guilty of assault when he looked through V's bed-sitting room window, intending to frighten her, when she was in her night clothes, even though he would have had to break in to commit any battery on her. [15] Most recently (and most remarkably of all) in *Ireland,* [16] the House of Lords has held that telephone calls in which the caller remains silent can amount to the *actus reus* of an assault on the listener. Lord Steyn explained this ruling in vivid terms thus: "Take now the case of the silent caller. He intends by his silence to cause fear and he is so understood. The victim is assailed by uncertainty about his intentions. Fear may dominate her emotions, and it may be the fear that the caller's arrival at her door may be imminent. She may fear the *possibility* of immediate personal violence." [17] One implication of this dictum appears to be that Williams' understanding of the imminence requirement, cited above, [18] cannot stand as an interpretation of the modern law. Ireland could not conceivably have been regarded as "sufficiently near to apply the force then and there". That leaves us with the puzzle of what imminence does mean, in the law of psychic assault, and that puzzle inevitably raises the question of what the rationale for the requirement of imminence really is.

One way of trying to rationalise legal developments is to draw an analogy with the requirement, in defences such as duress, that there have been no reasonable and realistic chance of escaping from implementation of the threat. [19] On this view, in psychic assault cases, the imminence requirement can be justified as follows: V must ***Crim. L.R. 395*** have to fear that D intended to use unlawful force on him before V can avail himself of any reasonable opportunity to seek escape or official protection. Such an understanding would, perhaps, adequately explain *Smith v. Superintendent of Woking Police Station.* It would also

explain the civil case of *Thomas v. NUM.* [20] The case concerned an ugly confrontation between striking and working miners, arising out of the miners' strike in 1984-1985. Working miners going to work in their cars were subjected to abuse and threats of violence by an average of 50-70 striking miners who were gathered at the colliery gates, but who were held back to allow the cars to pass through by large numbers of police officers. Scott J. found that the striking miners' actions did not constitute an assault on the working miners. He said:

"Assault is defined in *Clerk and Lindsell on Torts,* 15th ed. (1982), para. 14-10 as "an overt act indicating an immediate intention to commit a battery, coupled with the capacity to carry that intention into effect.' The tort of assault is not, in my view, committed, unless the capacity in question is present at the time the overt act is committed. Since the working miners are in vehicles and the pickets are held back from the vehicles, I do not understand how even the most violent of threats could be said to constitute an assault." [21]

From a criminal law perspective, there are two errors in *Clerk and Lindsell's* definition. First, there is no need for D to have the capacity to carry out the threat, so long as V thinks P has that capacity (a threat with an imitation gun might suffice), and secondly, there is no need for D actually to intend to commit an immediate battery, so long as he intentionally or recklessly causes V to fear one. [22] Even so, Scott J.'s decision is defensible in terms of the rationale for the imminence requirement outlined above. Given the availability of on-the-spot official protection, coupled with the fact that the plaintiffs were safely inside their cars, the threats could not constitute an assault on them. [23]

Despite the superficial attractiveness of this rationale for the imminence requirement, it has significant drawbacks. It does not account for either *Smith v. Newsam* or *Ireland,* where both victims must have known that there was ample opportunity to escape the threat or to seek official protection. [24] More importantly, a test of "imminence" in terms of whether V realised that there was a reasonable and realistic opportunity to escape the threat, or to seek official protection, creates an unacceptable vagueness in the limits of the offence unfavourable to the accused. In duress cases, the law can afford not to insist on too much specificity in what amounts to a reasonable opportunity to seek escape or official protection from the threat, because a certain amount of elasticity in the test rightly favours a defendant who (*ex hypothesi*) only acted under extraordinary pressure. In assault cases, by way of ***Crim. L.R. 396*** contrast, one is dealing with the limits of an offence, rather than of a defence, and such limits ought, where possible, ideally to be stated with a much higher degree of specificity. In *Ireland,* immediately before the passage cited above, Lord Steyn said:

"After all, there is no reason why a telephone caller who says to a woman in a menacing way "I will be at your door in a minute or two' may not be guilty of an assault if he causes his victim to apprehend immediate personal violence." [25]

Whether true or not, this example raises the awkward question, not addressed in *Ireland,* of when a threat of future violence could not be regarded as an assault because of the length of delay between the threat itself and the infliction of the violence. What if Lord Steyn's hypothetical caller had said, "I will be at your door within the hour"?, or "I will be at your door later tonight"? It is not a sufficient answer to say that the question of whether such threats amount to a threat of *imminent* violence, and are thus an assault, can be left to the jury. For what is lacking in such an answer is an account of the qualitative--as opposed to the quantitative--difference between (say) a threat of violence "in a minute or two", and a threat of violence "later tonight", that warrants marking out the former alone as an assault.

Are fear-inducing threats at the heart of the wrong?

There can now be no doubt that psychic assault is a crime in its own right, and not merely parasitic on battery. Not every battery involves a psychic assault (as when, unseen, I rap you on the shoulder from behind), so not every assault is an attempted battery. [26] A person may be guilty of assault even if he or she had no intention of committing a battery, because what matters is whether s/he means V to *fear* physical interference. [27] As it was put in *Comyn's Digest* over 150 years ago, "the damage consists in the inconvenience produced by the fear which the act impresses upon the plaintiff's mind". [28] But if the essence of the wrong in assault is a threat that induces a fear of physical interference, what differences does a requirement of imminence make to the nature of the wrong? On the face of it, the answer appears to be "none". Indeed, the weakness of the moral justification for an imminence requirement is (unwittingly) brought out by Williams in his discussion of *Light,* [29] where D held a shovel over his wife's head and said: "If it were not for the policeman outside I would split your head open". Of this case Williams says:

"It seems right to say that where the act is of a very menacing character, as it was in *Light,* the mere fact that words are spoken indicating no present intention to assault does not necessarily negative an assault in law … Even if reassuring words are heard and attended to, they may be wholly outweighed by ***Crim. L.R. 397*** the menace of the act. The victim may well fear that the aggressor will *suddenly* change his mind and attack notwithstanding the fact that the condition he has stated is not fulfilled." [30]

One of the weaknesses in Williams' analysis here is that he does not explain what the connection is between the "very menacing character" of a threat such as Light's, and the likely suddenness of D's possible change of mind. [31] Williams gives us no reason to think that the greater the menace inherent in D's act, the more sudden and imminent V is likely to think the attack will be when D changes his mind, if and when he changes it; and it is not easy to see how there could be such a reason. A better way to analyse the case is as follows.

D's "reassuring words" to V in *Light* make it clear (*contra* Williams) that V is not under an imminent threat of death or serious injury. V is, none the less, still being threatened by D. D's conduct and words were experienced by V as a threat, inducing a fear of violence in the latter, albeit a fear unrelated to any time-frame within which the threat was to be implemented, and that is what should matter. This is because D's "reassuring words" make implementation of the threat subject merely to what can be called a "suspensory condition": V could easily infer from what D said that had the police officer disappeared, D might have carried out his attack. If so, D's conduct and words ought to be regarded as capable of amounting to an assault, because they may leave V still fearing future violence upon the elimination of the suspensory condition. D's words did not amount to a "defeating condition" which negates the very threat in itself. [32] It is respectfully suggested that this is a more convincing reason for upholding the view that there was an assault in *Light* than the reasons given by Williams. [33] My reasoning also supports the view that the striking miners' conduct in *Thomas v. NUM* should have been regarded as capable of amounting to an assault. There, the conditions holding the threat in suspense were the physical restraint of the miners by the police, and the physical barrier of the working miners' cars; but threats are none the less real for being held in suspense. *Smith v. Superintendent of Woking Police Station,* and *Logdon v. DPP,* can both be analysed in a similar manner. In all of these cases the nature of the conditions holding the threat in suspense is different; but it is the fact that there is such a threat, inducing a fear of violence, that matters. And in this regard, the amount of time during which the threat's implementation is suspended, the degree of imminence, should be regarded as of little moral significance. Taken together, all these cases are good illustrations of the weakness of the case for an imminence requirement in the law governing the *actus reus* of psychic assault.

Such a conclusion is reinforced by considering the potentially important offences that have had to be created to make good the deficiency of the common law, when ***Crim. L.R. 398*** it comes to protecting people from threats other than those of immediate violence. Obvious examples are the Malicious Communications Act 1988, s.1(1), which makes it an offence, in certain circumstances, for D to send a letter conveying a threat "if his purpose, or one of his purposes, in sending it is that it should … cause distress or anxiety to the recipient …", and the Criminal Law Act 1977, s.1, dealing with bomb hoaxes, which makes it an offence (*inter alia*) to "[dispatch] any article … with the intention … of inducing in some other person a belief that it is likely to explode or ignite and thereby cause personal injury or damage to property …". There are, doubtless, many other examples of such offences, where a requirement of imminence regarding the implementation of threatened harm has been rightly thought to be an inappropriate restriction on the scope of the *actus reus.* [34]

A notable feature of the offences just mentioned, however, is that, unlike assault, they do not require fear or distress actually to have been induced by the threat or hoax. All that matters is that the defendant *intended* to cause distress, anxiety, or a belief in the likelihood of an explosion (which comes to much the same thing). [35] As Peter Alldridge rightly points out, [36] these subtle differences raise difficult issues about when criminal liability should be attached to the making of the threat, irrespective of the effect it actually has, and when liability should attach to the causing of fear, alarm, distress, and so forth, *howsoever* caused (*i.e.* whether by threats or otherwise). As he puts it:

"It could be suggested that the core of a threats offence is the causing of fear, and that fear is the harm. The gravity of the offence would then be determined by reference to how much fear was created, measured, perhaps, on a scale of immediacy, intensity and duration, with some provision to deal with abnormally sensitive people. The actual offence which is threatened (and, indeed whether a criminal offence is threatened at all) would be of no relevance." [37]

This raises a further problem for the law of assault. If the imminence requirement is redundant because what matters is the inducing of fear of physical interference (whether of imminent harm, or of harm to be inflicted at some later time), why should it even matter that fear is induced by a threat? If I falsely tell you that there is someone following you who intends to kill you when he gets the chance, I may wrongfully induce in you fear, anxiety and distress, but I do not do so by threatening you. One

may go further. A very similar psychological impact on V may be wrought even when any potential "threat" has been negated by a defeating condition. If you ***Crim. L.R. 399*** call on me and repay an overdue debt, I may afterwards unexpectedly say, "had you not paid me today, I would have killed you". In such circumstances, you may well suffer some shock and distress, but this will (*ex hypothesi*) not be because you fear a threat, for the threat has been negated by the defeating condition. One should, though, be wary of attributing too much significance to such cases. It will often readily be inferred, in such examples, that you did indeed fear violence in the future, and that the supposed defeating condition was nothing of the sort: how are you to be sure that what I am saying is not a coded way of hinting that I may take revenge on you at some point for your late repayment? Even so, we must face the question of whether, in the law of psychic assault, it can really be said that there is anything of substantial moral significance in the fact that V endures fear induced through a *threat.*

As John Gardner has pointed out,[38] one of the grave defects of the Law Commission's proposals for reform of the offences against the person, carried over into the new Offences Against the Person Bill,[39] is the patchy and inconsistent manner in which attention is paid by the Commission to the moral significance of *the way in which* harm is done, to the important differences between, say, occasioning, causing and inflicting harm. I hope I will be forgiven for citing at length what Gardner has to say:

"In morality, as in the 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 … 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 …"[40]

If one sees "causing" fear, as the essence of the wrong in assault, then it can indeed begin to seem as if not only the imminence requirement, but also the use of threats to induce fear, are unnecessary qualifications to the essential wrong. On the contrary, however, I think that an independent role for the element of fear-inducing threat in the crime of assault can be carved out from the myriad ways in which fear can be caused. This can be done by concentrating on the (I would argue) morally significant way in which the harm in psychic assault is almost always done: through *confrontation.*

Assaults as threatening confrontations

It is odd that fear remains comparatively under-analysed by criminal lawyers, as a possible species of harm, as compared with bodily and psychiatric injury (of great concern both to criminal and civil lawyers) or with "moral offence" (of great concern to liberal political thinkers). As a species of harm, fear has a relatively ***Crim. L.R. 400*** transitory character inconsistent with its recognition as a kind of "bodily" harm for the purposes of the Offences Against the Person Act 1861.[41] None the less, some kinds of fear--perhaps especially the fear of physical mistreatment--unacceptably detract from the kind of "moral environment" in which people can be expected to flourish in both their public and their private lives.[42] In this, the kind of setback to one's interests that it constitutes, fear shares something with the much-discussed notion of "offence to others": moral offence.[43] But (crucially), fear of physical interference is not generated by the largely moral disapproval of others' activities that gives rise to the notion of "offensiveness", and which makes the latter so controversial as a basis for criminalisation.[44] That does not mean, however, that, even if it were permissible, it would necessarily be appropriate to seek to criminalise *every* means by which an unjustified fear of physical interference is induced in another. So, what is morally significant about the wrong in psychic assault, if not the mere causing (by whatever means) of apprehension?

For Williams, an assault is just one kind of "unlawful interference with another",[45] but the notion of an "interference" is, without more, too abstract to be imbued with much of moral significance. Closer to the mark is Gardner's contention that "[i]ts [assault's] essential quality lies in the invasion by one person of another's body space".[46] This contention suggests something of moral significance in assault other than simply causing fear, namely the invasion of body space, but the problem is that it is difficult to square with cases in which unusual physical proximity (such as "eyeball-to-eyeball" hostilities) is clearly absent, but where there is nevertheless an undoubted assault, as in *Smith v. Newsam* or *Ireland.*[47]

I suggest that what should be regarded as morally significant about the *actus reus* of a psychic assault is that it is experienced as a threatening *confrontation* by the victim. The victims in, for example, *Smith v. Newsam, Ireland, Thomas v. NUM* and *Smith v. Superintendent of Woking Police Station* were all confronted by a threat. What is, in this regard, to be regarded as

a "confrontation"? To be confronted by a threat, for the purposes of the law of assault, should be to perceive it as it is being made. There is something approaching an analogy here with the importance (albeit now somewhat diminished) still attributed, in limiting claims in tort for damage due to ***Crim. L.R. 401*** nervous shock, to the fact that the shock resulted from "the sensory and contemporaneous" observance of the accident or its immediate aftermath.[48] What matters is not physical propinquity to what is happening, but actual perception of what is happening or has just happened: sensory and contemporaneous awareness, involving what Lord Ackner vividly describes as, "the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind".[49] My claim is not, of course, that it is necessarily *worse* to perceive a threat as it is made, to be confronted with the making of it, then it is to receive notification of it (say) by letter.[50] Distinctions of moral significance between offences do not necessarily bear on their relative gravity, just as similar distinctions between defences do not necessarily alter their effect on liability.[51] Consider this analogy. The legal effect of having acted under duress *per minas* is, for most purposes, much the same as having acted under duress of circumstances or conditions of necessity. But the experience of being threatened by another is not the same kind of experience as that of responding to a natural emergency, and different evaluative considerations may be involved in each.[52] My claims are that (i) a psychic assault is the sensory and contemporaneous experience of being threatened, being "confronted" with a threat, an experience that induces a fear of physical interference--whether or not to be inflicted immediately--being done by the threatener,[53] and (ii) that this experience is morally distinct as a form of harm, albeit not necessarily more serious, from receiving a threatening letter or the like.

Understanding psychic assault in this way, we can confidently assert that there was an assault in *Ireland,* just as there was in *Smith v. Newsam* and in *Smith v.* ***Crim. L.R. 402*** *Superintendent of Woking Police Station.*[54] For, in *Ireland,* the threat was perceived by the victim as it was made by the defendant (*i.e.* there was "sensory and contemporaneous" perception: Lord Ackner's "sudden appreciation by sight or sound of a horrifying event"), inducing a fear of physical interference (Lord Ackner's notion of a violent agitation of the mind) in the former. This morally distinctive element of a fear of physical interference, induced through a confrontation, renders irrelevant the fact that the defendant, in *Ireland,* was clearly unable to implement his implied threat immediately. As explained above,[55] moreover, the emphasis on V's perception of D's words as threatening, as the *actus reus,* also allows us confidently to defend the view that there was an assault in *Light,* as there was in *Tuberville v. Savage.* Following a quarrel, Tuberville laid his hand on his sword and said to Savage: "If it were not assize-time I would not take such language from you". It is commonly supposed that the Court held that this was not an assault because (in my terms) Tuberville was setting out a defeating condition: "the declaration of [Tuberville] was, that he would not assault him, the judges being in town".[56] The argument I have put forward suggests that the supposed ruling ought now to be questioned. Tuberville's words can only be regarded as a defeating condition if one assumes that threats in assault cases must be of immediate violence. But if one abandons this assumption, Savage had every reason to think Tuberville was setting out a mere suspensory condition: he (Tuberville) might well have been saying that he would attack Savage when the judges left town. If Savage thought this (if he was led by Tuberville's words to fear that Tuberville would attack him at some time in the future), then Savage *was* psychically assaulted when Tuberville uttered his now famous words, because of his "sensory and contemporaneous" observance of the threat, his "sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind".[57]

Conclusion

The law sometimes makes criminal liability, particularly aggravated criminal liability, depend on whether the defendant has passed through certain narrow "gateways" to illegality. As Gardner indicates,[58] assault is sometimes used as a "gateway" offence. An obvious relevant example is under section 38 of the Offences Against the Person Act 1861. Under this section, intending to resist or prevent ***Crim. L.R. 403*** lawful apprehension is no offence unless that intention manifests itself through an assault. This is a significant matter, since the government intends to reproduce a modified section 38 in clause 7 of the new Bill,[59] to accompany the other assault-based offence of assault on a constable (clause 5, replacing section 89(1) of the Police Act 1996). The rationale of gateway offences like this one is that there are "fair warning" advantages to confining some kinds of criminalisation to instances when the wrong is committed through the "gateway conduct". Assuming the "gateway conduct" is of a common and familiar kind, this will provide a measure of certainty and predictability to the scope of criminalisation, particularly where an ulterior intent, such as the intention to resist or prevent lawful apprehension, is at the heart of the wrong.[60] But such certainty and predictability will not, of course, be attained unless one's account of the gateway offence--here, assault--is itself both definitionally secure and in accordance with ordinary understandings of the moral wrong in question. My claim that the *actus reus* of psychic assault is the sensory and contemporaneous experience of being threatened with physical interference,

being "confronted" with such a threat, an experience that induces a fear of wrongful physical interference (whether or not to be done immediately) being perpetrated by the threatener, is designed to provide just such an account of that crime.

Footnotes

1 *Violence: Reforming the Offences Against the Person Act 1861,* Home Office (1998). References to this Paper will be to the paragraph number, placed in brackets in the text.

2 See *Legislating the Criminal Code: Offences Against the Person and General Principles.* Law Com. 218, Cm. 2370 (1993).

3 *ibid.* Appendix A, cl. 6. It is the government's intention to leave the definition of consent as that which currently governs at common law, pending further Law Commission research: see Violence: *Reforming the Offences Against the Person Act 1861,* n.1 above, para. 3.27. For further detailed discussion, see J. C. Smith, "Offences Against the Person: The Home Office Consultation Paper" [1988] Crim.L.R. 317.

4 For an excellent brief discussion, giving the hair-stroking example, see J. Gardner, "Rationality and the Rule of Law in Offences against the Person" (1994) 53 C.L.J. 502 at 508.

5 The root of the problem is the common failure to bear in mind that assault has its roots in civil trespass, involving the merest (threatened) physical interference. Suppose that I make as if to spray acidic vapour in your direction, so that you believe you will be caused pain following inhalation, although (unbeknownst to you) I do not actually intend to spray it. Here, I threaten you with physical interference, but clearly not by way of the use of force or the causing of an impact in the ordinary sense. I ought to be guilty of assault, and probably would be at common law, but would clearly be not guilty under cl. 4. In theory, assaults may go beyond physical interference. Suppose a doctor must give a patient methodone at a particular time of day, otherwise the patient will suffer immediate and painful withdrawal symptoms. Is the doctor guilty of assault if--at the relevant time--he makes as if to throw the methodone away, thus frightening the patient into thinking he will not get his methodone, and will suffer the pain of immediate withdrawal symptoms? For simplicity's sake, I shall assume that assault is focused on any kind of physical interference.

6 Glanville Williams, *Textbook of Criminal Law* (London: Sweet and Maxwell, 2nd ed., 1983), p.173, is a proponent of the view that V must merely be made to believe that force is about to be applied to him; s/he need not experience the *fear* that it is. He cites no case, however, in support of this proposition. A contrary view is taken in *Comyn's Digest*: see text at n.12 below.

7 See further, text at n.36 below. On the distinction between cognitive and affective states, and its relevance to the criminal law, see S. Shute, "*The Second Law Commission Consultation Paper on Consent* (1) Something Old, Something New, Something Borrowed: Three Aspects of the Project" [1996] Crim.L.R. 684 at 686-687.

8 Williams, n.6 above, at 172.

9 [1997] 4 All E.R. 225.

10 [1997] 4 All E.R. 225 at 239, citing *Archbold's Criminal Pleading, Evidence and Practice* (1997), p.1594, para. 19-66. On the supposed need for apprehension of "violence", see n.6 above.

11 n.6 above, at 174.

12 See, *e.g.* s.8 of the Theft Act 1968, defining robbery, where a person commits the offence if he steals and immediately before or at the time of doing so, he uses force on any person, "or puts or seeks to put any person in fear of being *then and there* subjected to force" (my emphasis). See also the fifth edition of *Comyn's Digest,* 11, 275, note *r*: "7. And as such impression (a fear of immediate violence) can only arise where the attempt to injure is coupled with a present ability, the plaintiff must be placed within reach of the offensive means … 8. Thus, if the assault consists in lifting up one's fist, in a threatening manner, the plaintiff must stand within reach of a blow; if in pointing a gun at the plaintiff, he must stand within range …".

13 (1674) 3 Keble 283, doubted by Williams, n.6 above, at 174 n.16.

14 (1983) 76 Cr.App.R. 234.

15 See also *Lewis* [1970] Crim.L.R. 647.

16 [1997] 4 All E.R. 225.

17 [1997] 4 All E.R. 225 at 236 (Lord Steyn's emphasis).

18 See text at n.11.
19 See *Hudson and Taylor* [1971] 2 All E.R. 244.
20 [1986] A.C. 20.
21 [1986] A.C. 20 at 62.
22 On both these points, see Smith and Hogan, *Criminal Law* (London: Butterworths, 8th ed., 1996), p.413.
23 This is endorsed by Smith and Hogan, who take the view that "there can be no assault if it is obvious to P that D is unable to carry out his threat, as where D shakes his fist at P who is safely locked inside his car": n.22 above.
24 I do not mean, by this claim, to underestimate the sense in which victims of "stalking" can be made to feel powerless to escape the persistent attentions of the stalker: see further, C. Wells, "Stalking: The Criminal Law Response" [1997] Crim.L.R. 463. My point is that the imminence requirement in the law of assault is not well-equipped to deal with this problem, because of its emphasis on the importance of the physical proximity of the attacker.
25 [1997] 4 All E.R. 225 at 236g-h.
26 See on this, *e.g.* J. W. C. Turner, "Assault at Common Law" in L. Radzinowicz and J. W. C. Turner (eds), *The Modern Approach to Criminal Law* (MacMillan & Co., London, 1945), pp.348-349. For a recent discussion of the interrelation of the *mens rea* of assault and of battery, see J. C. Smith, n.3 above, at 319-320.
27 *Logdon v. DPP* [1976] Crim.L.R. 121.
28 5th ed., vol. 11 (1822), 275 note *r,* cited by J. W. C. Turner, n.26 above.
29 (1857) D. & B. 332.
30 Williams, n.6 above, at 175 (my emphasis). Williams' argument seems to imply that in the famous case of *Tuberville v. Savage* (1669) 1 Mod. 3, whether or not Tuberville assaulted Savage ought perhaps to have turned on whether laying one's hand on one's sword is an act "of a very menacing character". For detailed analysis of this case, see n.57 below.
31 I take it that by a sudden change of mind, Williams means a change of mind in favour of a sudden attack, consistent with the imminence requirement.
32 On which, see text following n.37 below.
33 The same kind of reasoning, namely that the words used merely held the threat in suspense, could be used to question whether the words spoken could have been sufficient to negate the assault constituted by P placing his hand on his sword in *Tuberville v. Savage* (1669) 1 Mod. 3: see below, text at n.56.
34 See, for example, the Administration of Justice Act 1970, s.40(1), which makes someone, whose object is to coerce another into paying money claimed as a debt, guilty of an offence if he "harasses the other with demands for payment which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat or publicity by which any demand is accompanied, are calculated to subject him or members of his family or household to alarm, distress or humiliation." It is interesting, of course, to compare this wording with the wording of the new Protection from Harassment Act 1997; see Wells, n.24 above. For other examples, see the Public Order Act 1986, Part 1.
35 This point is brought out by Peter Alldridge when he correctly identifies crimes involving threats that are members of the same "family": see his "Threats Offences--A Case for Reform" [1994] Crim.L.R. 176 at 178-179, and he makes the distinction explicitly in his conclusion: *ibid.* at 183.
36 *ibid.* at 182-183 and 185-186.
37 *ibid.* at 183.
38 J. Gardner, n.4 above.
39 n.1 above.
40 n.4 above, at 505.
41 See *Chan-Fook* [1994] 2 All E.R. 552. I do not, of course, exclude the possibility that sustained fear of violence, as experienced (say) by women in violent relationships, may lead to recognisable psychiatric (and hence, bodily) harm.
42 It is protection from this kind of fear that the Protection from Harassment Act 1997 seeks to provide.
43 See, J. Feinberg, *Offense To Others* (Oxford: Oxford University Press, 1985), pp.1-5; and, more recently, P. Roberts, "The Philosophical Foundations of *Consent in Criminal Law*" (1997) 17 O.J.L.S. 389.
44 See, in this regard, David Dyzenhaus's criticisms of Hart and Feinberg on offensiveness and the harm principle: D. Dyzenhaus, "Liberalism, Autonomy and Neutrality" (1992) 42 U.T.L.J. 354.
45 n.6 above, at 172-173.
46 n.4 above, at 507-508.
47 See also *Beach* (1912) 76 J.P. 287, cited by Williams, n.6 above, at 174 n.16, where D threatened V *through a locked door* leading V to believe that D was about to break down the door.

48 The phrase is that of Tobriner J., in *Dillon v. Legg* (1968) 68 C. 2nd 728 at 740-741. Although there is no *requirement* in English law that the plaintiff who suffers nervous shock, as a result of an accident to another, have perceived the accident, this factor is often still significant. In *McLoughlin v. O'Brien* [1982] 2 All E.R. 298 at 318, Lord Bridge indicated that he would be inclined to hold nervous shock to be reasonably foreseeably suffered by a witness to a train crash who was: "a mere spectator, as, for example, an uninjured or only slightly injured passenger in the train, who took no part in the rescue operations *but was present at the scene after the accident for some time ...*" (my emphasis). For an analysis of the current law, see the Law Commission Report, *Liability for Psychiatric Illness,* Law Com. No. 249 (1998).

49 *Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310 at 401. This depiction of nervous shock can be usefully compared with the description of the damage done by a psychic assault in *Comyn's Digest*: see text at n.28 above.

50 This is a point naturally and rightly picked up by the Law Commission in their proposal to abolish any "shock" or "contemporaneous observance" restriction on the right to compensation in tort for psychiatric injury: n.48 above, at para. 6.16. It does not, however, affect the point being made in the text through the drawing of the analogy, for the obvious reason that moral distinctions relevant to principles of criminalisation may differ from those appropriate for principles of compensation.

51 See Gardner, n.4 above; also S. Shute and J. Horder, "Thieving and Deceiving: What is the Difference?" (1993) 56 M.L.R. 548. Analogously, in the law of evidence, a particular out-of-court statement made in a document may be regarded as in principle no more or less reliable than direct oral testimony to the same effect; but each piece of evidence may have to be evaluated using different criteria.

52 So, for example, the sincerity and ruthlessness of the threatener are in issue where duress *per minas* is concerned, as is the fact that s/he is demanding something specific, whereas these factors do not play a role, at least in this form, in necessity or duress of circumstances cases, where the agent, him or herself makes a judgment of appropriate response to a threat.

53 Or his agent. There seems no reason to distinguish, for the purposes of psychic assault, between someone who says "I am going to hit you", and someone who says "my bodyguard will hit you".

54 Although my view casts doubt on the remarks of the judge in *Thomas v. NUM* about assault, cited above (see text at n.21 above).

55 See text at n.32.

56 (1669) 1 Mod. Rep. 3.

57 Happily, it is the common supposition about what the case decided that is wrong, not the decision itself. Unless one has read the case in the *English Reports,* or is familiar with Williams' full description of the legal background to the case (n.6 above, at 174-175), one is likely to overlook the fact that, as Williams indicates, the Court did not need to decide whether Tuberville assaulted Savage. There may very well have been an assault, if Tuberville laid his hand on his sword *before* uttering the words, a point fully appreciated by Williams (n.6 above) and by Smith and Hogan (n.22 above, at 415). The key issue in the case was that, given Tuberville's indication that he was not in fact going to attack Savage there and then, Savage was not justified in self-defence in putting out Tuberville's eye with a sword thrust, whether or not there was a psychic assault when Tuberville laid his hand on his sword. The case really stands for the proposition that D must believe he is about to be attacked if he is in principle to be justified in making a pre-emptive strike in self-defence.

58 n.4, above, at 508-509.

59 See n.1 above. For analysis of the new offence, see J. C. Smith, n.3 above, at 320-321.

60 See J. Horder, "Crimes of Ulterior Intent", in A. P. Simester and A. T. H. Smith, *Harm and Culpability* (Oxford: Clarendon Press, 1996), p.153 at 167-170. The ulterior intent in cl. 7 of the new Bill is D's intention, in assaulting, "to resist, prevent or terminate the lawful arrest of himself or a third person" (taken from cl. 8 of the Law Commission's proposals: see n.2 above).

