

# Offences against the Person: Into the 21st Century

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**Abstract** The Law Commission will shortly begin discussions on reform of the law of non-fatal offences by issuing a scoping paper. This article starts with a review of recent improvements in the ways in which the Commission may get its Bills enacted. It then critiques the principal (to modern eyes) crimes of this kind found in the Offences against the Person Act 1861. Its focus lies on those offences and not the more policy-driven law, for example, on the transmission of HIV/AIDS, sado-masochism, male circumcision, and boxing (all of which are highly important). It concentrates on the Commission's previously expressed concerns that the statute's language is archaic and that the Act fails to provide a hierarchy (a 'ladder') of offences. It concludes with a redraft of the statute and a quote from Henry LJ in *R v Lynsey* that 'Bad laws cost money and clog up the courts with better things to do'.



**Keywords** Non-fatal offences; Occasioning actual bodily harm; Grievous bodily harm; Wounding; *Mens rea*

The Law Commission as it noted in its *Eleventh Programme of Law Reform*<sup>1</sup> has been invited by the Ministry of Justice to carry out a scoping exercise as the first step towards reform of the law of non-fatal non-sexual offences, with work to start in winter 2012 and with the paper to be ready in autumn 2013. The *Programme* itself<sup>2</sup> speaks only of the Offences against the Person Act 1861, but the law is wider covering in particular assault and battery and indeed one problem is knowing the width of 'offences against the person'<sup>3</sup> and no doubt that is why a scoping paper

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1 Law Commission, *Eleventh Programme of Law Reform*, Law Com. No. 330, HC 1407 (19 July 2011), available at [http://lawcommission.justice.gov.uk/docs/lc330\\_eleventh\\_programme.pdf](http://lawcommission.justice.gov.uk/docs/lc330_eleventh_programme.pdf), accessed 30 October 2012. The year 2011 marked the 150th anniversary of the statute and the 25th anniversary of the publication of the excellent article by C. Clarkson and H. Keating, 'Codification: Offences against the Person under the Draft Criminal Code' (1986) 50 JCL 405. For some kind of defence of the current law, see J. Gardner, 'Rationality and the Rule of Law in Offences against the Person' [1994] CLJ 502 (also appears as ch. 2 of J. Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press: Oxford, 2007)).

2 Law Commission, above n. 1 at 18.

3 For example, are assaults on the police covered? This article has already spoken of 'non-fatal non-sexual' offences, but it is by no means unknown for sexual offences to be treated as non-fatal offences. The view is taken that since such offences were recently considered by Parliament in the Sexual Offences Act 2003, they will not be discussed by the Law Commission. As will be seen, that leaves much law to be considered. Similarly, what about consent in the context of non-fatal offences? The classic legal philosophical study is by Paul Roberts in the Law Commission's Consultation Paper No. 139, *Consent in the Criminal Law* (1995). Boundary issues also include domestic violence, and indeed it is arguable that if the law on consent in *R v Brown* [1994] AC 212, HL, the case of the homosexual sado-masochists, is amended, there may be a need for further investigation into what the parties say is consented to, (sexual) violence, but which is in truth a cover for domestic violence. Lawful chastisement is an area where strong feelings are aroused, especially among

is the first stage of reform. This article considers criticisms that may be made of the current law of non-fatal (and non-sexual) offences, but including only those found in the 1861 statute. The particular wording of the 1861 Act is the focus of the inquiry and not the possible defences, which are important in their own right. The focus is on whether the Commission is correct in its criticisms of the 1861 Act or not:

- it is 'outdated. It uses archaic language and follows a Victorian approach of listing separate factual scenarios, many of which are no longer necessary (see for example the section 17 offence of impeding a person endeavouring to save himself from a ship-wreck)'; and
- '[t]he structure of the Act is also unsatisfactory as there is no clear hierarchy of offences and the differences between sections 18, 20 and 47 are not clearly spelt out . . . '.

certain Christian sects, but since this area of law has recently been changed (see the Children Act 2004, s. 58) it may be prudent to avoid considering this topic: to deal with it may distract from the main purpose of the review—revision of non-fatal offences. At the time of writing a second controversial issue is that of male circumcision, which is lawful even if the purpose is to improve sexual pleasure: A. Grubb (ed.), *Principles of Medical Law*, 2nd edn (Oxford University Press: Oxford, 2004) 240. The principal UK commentators are M. Fox and M. Thompson; see, e.g., 'A Covenant with the Status Quo' (2005) 31 *J Med Ethics* 463. See also H. Gilbert, 'Time to Reconsider the Lawfulness of Ritual Male Circumcision' [2007] *EHRLR* 279. The argument is that slicing off perfect human tissue should be unlawful, but cf. T. Elliott, 'Body Dysmorphic Disorder, Radical Surgery and the Limits of Consent' [2009] *Med LR* 140 on, e.g., apotemnophilia (removing healthy limbs). Male circumcision is also in the news because of a ban by a German lower court in Cologne on the practice (which led to a joint Jewish/Muslim protest in Berlin on 9 September 2012) because of the evidence in its favour as a method of preventing the spread of AIDS. Female cutting is unlawful: see, e.g., Female Genital Mutilation Act 2003. The Law Commission would be well advised to stay clear of such topics if it wishes to have its proposals enacted. Another highly controversial aspect is the use of the statute against those who transmit STIs, especially HIV/AIDS. The standard international work is UNAIDS, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper* (2002). See the publications by Matthew Weait, in particular *Intimacy and Responsibility* (Routledge-Cavendish: Abingdon and New York, 2007), for arguments in favour of decriminalising such infecting. There is a hard-hitting book review by U. Schüklenk (2008) 4 *International Journal of Law in Context* 277. A more favourable one is by J. Rollins (2008) 18 *Law and Politics* 598. For other articles, see W. Brown, J. Hanefeld and J. Welsh, 'Criminalising HIV Transmission: Punishment without Protection' (2009) 17 *Reproductive Health Matters* 119 and C. Dodds, A. Bourne and M. Weait, 'Responses to Criminal Prosecutions for HIV Transmission among Gay Men with HIV in England and Wales' (2009) 17 *Reproductive Health Matters* 135. Both contain references which constitute a part bibliography. The controversy is concerned with whether criminalising the transmission of HIV should continue to be regulated by the criminal law or whether the criminal law should be withdrawn in order that public health is prioritised. Schüklenk's most recent article is a joint one with S. Philpott, 'AIDS: The Time for Changes in Law and Policy is Now' (2011) 7 *International Journal of Law in Context* 305. The latest relevant articles are J. Slater, 'HIV, Trust and the Criminal Law' (2011) 75 *JCL* 309 and L. P. Francis and J. G. Francis, 'Criminalizing Health-Related Behaviors Dangerous to Others? Disease Transmission, Transmission-Facilitation, and the Importance of Trust' (2012) 6 *Criminal Law & Philosophy* 47 (the title belies to some degree the content, which is about decriminalisation). The view of the writer is that those seeking to exclude the transmission of sexual diseases from the scope of the criminal law have not proven their point, but the issue like that of consent is highly controversial. The topic is too controversial, however, to be discussed in an article of this type, which is a more general review of the offences. Similarly, with regard to consent noted above in this note and in the text.

It would be surprising if the Law Commission's review did not also investigate the offences of assault and battery, but there is no reference to them in the *Programme*. To keep this article within manageable proportions those crimes are not discussed, though it should be stated that 'assault' in law does not bear its meaning in ordinary language and to 'batter' means to beat up in common-or-garden English, but a mere touching a hem suffices in law: the language of law and of common parlance should, it is suggested, not be so far apart. For similar reasons the issues of consent (for example, how can one justify boxing not being a crime?) and the transmission of diseases (for example, what is the best way of preventing the transmission of HIV/AIDS?) are dealt with only in a quite summary fashion. All of these topics are independently and together well worthy of study.

### **The Law Commission and Acts of Parliament**

The Commission's potential to get its Bills and proposals enacted has increased substantially since the publication of the *Tenth Programme of Law Reform 2008*. The Law Commission Act 2009 obliges the Lord Chancellor to lay before Parliament an annual report which shows the extent to which the Commission's recommendations have been implemented over the previous year and that report must include any plans for implementation and reasons why any such recommendations have not been implemented.<sup>4</sup> A second method of increasing the strike rate of Commission's proposals also found in the Law Commission Act 2009 is that the statute gives legislative endorsement to a Protocol<sup>5</sup> which sets out the agreement that the joint aims of the Commission and the Lord Chancellor are to create law which is 'fair, modern, simple and accessible'<sup>6</sup> and that they are agreed that the pace of law reform must be stepped up. Included in the Protocol are provisions detailing the relationship between the Commission and the sponsoring government department. The department must provide an undertaking that there is a

4 The first such report was published in 2011: Ministry of Justice, *Report on the Implementation of Law Commission Proposals*, HC 719 (January 2011). The current Lord Chancellor and Secretary of State for Justice is Chris Grayling (from 4 September 2012). The previous incumbent was Kenneth Clarke. The Law Commission's *Annual Report 2010–11*, Law Com. Report No. 328 and HC 1068 (2011) 2, pointedly refers to the 'deep regret of the Commission' that certain proposals are not being taken forward and to the extreme concern over how long it takes governments to respond to the proposals. It adds: '... the Government response when it does come often contains very little explanation of the decision not to implement our reports. A significant amount of work goes into each project, both by the Commission itself and more importantly by the many consultees, who devote time and trouble voluntarily to assist us in our work. If reports are to be rejected, at the very least there should be a detailed and reasoned explanation'. In a private discussion with the subject associations (Association of Law Teachers, Socio-Legal Studies Association, Society of Legal Scholars) in March 2012 the Commission emphasised that only ideas for reform with strong backing from the relevant government department stood any chance of being enacted and that impact assessments of proposals were virtually a *sine qua non*.

5 *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission*, Law Com. No. 321, HC 499 (March 2010), available at [http://law.commission.justice.gov.uk/docs/lc321\\_Protocol.pdf](http://law.commission.justice.gov.uk/docs/lc321_Protocol.pdf), accessed 30 October 2012.

6 Law Commission, above n. 1 at para. 1.7.

serious intention to enact any proposals. A third way of streamlining the procedure for enacting the Commission's proposals is the House of Lords' new method of handling the Commission's Bills which are technical and not politically controversial. The Second Reading is taken off the floor of the House.<sup>7</sup> There is therefore a greater chance of getting the Commission's forthcoming proposals on to the statute book than occurred the last time.<sup>8</sup>

## **Offences against the Person Act 1861: general criticisms**

Using the Law Commission's comments extracted in the bullet points above, one can readily comprehend how the members can call the statute 'outdated'. The language is not one expressed in modern terms. For example, as is well known, 'maliciously' does not mean maliciously, spitefully, with ill will; instead it signifies 'intentionally or recklessly': *R v Cunningham*.<sup>9</sup> The Commission mentions the s. 17 offence of impeding a person endeavouring to escape a shipwreck as one which is no longer necessary.<sup>10</sup> Another illustration is the use in the original statute of penalties no longer used such as penal servitude and the original Act had whipping and hard labour as possible sanctions; for example, in s. 29, the crime of 'causing gunpowder to explode, or sending to any person an explosive substance, or throwing corrosive fluid on a person, with intent to do grievous bodily harm' had alternatively a maximum sentence of penal servitude for life with a minimum term of three years, or imprisonment for two years, with or without hard labour and with or without solitary confinement and (if the prisoner were male under 16)

7 See Procedure Committee, *Second Report of 2010–11*, HL Paper 30, building on that Committee's *First Report of 2007–8*, HL Paper 63. The new procedure has led to two statutes so far: the Perpetuities and Accumulations Act 2009 and the Third Parties (Rights against Insurers) Act 2010.

8 See Law Commission, *Legislating the Criminal Code—Offences against the Person and General Principles*, Law Com. Report No. 218 (1993). The Home Office issued a Consultation Document, *Violence: Reforming the Offences against the Person Act 1861* in 1998. Both contained draft Bills. Nothing came of these ventures.

9 [1957] 2 QB 396, CCA. See also *R v Brady* [2006] EWCA Crim 2413. There is an argument put by e.g. W. Wilson, *Criminal Law: Doctrine and Theory*, 4th edn (Pearson Education: Harlow, 2011) 290, that in respect of the transmission of sexual diseases that only intent and not wilful blindness or reckless knowledge suffices, but there is no case law in support and it would *pace* these authors be difficult to spell out such a parliamentary intention.

10 Cf. Gardner, 'Rationality and the Rule of Law in Offences against the Person', above n. 1. His argument very much simplified is based around the need for offences to be spelt out with regard to their moral connotations: the gist of each crime should differ from the gist of another. For this reason one may wish to keep assaults on the police as a separate offence from assaults on others. Similarly a separate offence of assault on clergy may be needed. It may also be argued that ss 21–22 of the Act (attempting to choke, etc. in order to commit any indictable offence and using chloroform, etc. to commit any indictable offence respectively) are both needed in the modern world: is there sufficient difference in terms of the manner in which the offence is to be committed (hands or stupefying drugs) to support a different moral nub for the offences? That is debatable, and this is the debate which the Law Commission needs to undertake. One criticism made by John Gardner and others of the Law Commission's and Home Office's reports from the 1990s (see above n. 8) is that they are phrased in morally neutral terminology. For a recent student critique of Gardner, see A. Eriera, 'Offences against the Person: Offending Rationality' (2007) 3 Cambridge Student LR 22.

with or without whipping. These punishments should make us reflect on the era from which these offences come: if the punishments are so out of date, surely the crimes must be too?

The other criticisms by the Commission (noted in the second bullet point above) are that there is no clear hierarchy of offences across ss 18, 20 and 47 and that the differences among them are not spelt out. Some troubling points are immediately evident, for example, the maximum penalty for both ss 20 and 47 is five years despite the difference on the face of the provisions as to the gravity of the *actus reus*. This is anomalous, and it is surprising that Parliament in the dozens of sentencing and criminal justice statutes over the past 40 and more years has not rectified this anomaly. The *mens rea* in ss 20 and 47 is not spelt out in their statutory wording, but the former, as we shall see, is of a higher level than that in s. 47. In both respects therefore s. 20 is a more serious crime, yet the maximum punishment is the same. Among the differences not clearly spelt out is whether there is a distinction between causing grievous bodily harm (GBH) in s. 18 and inflicting it in s. 20.

The Act, both as enacted and after 150 years of amendments, covers many crimes which are no longer seen as non-fatal offences such as bigamy (s. 57) and it used to cover rape (s. 48) and sodomy and bestiality (s. 61: the two are called the 'abominable crime of buggery') as well as assault with intent to commit buggery and assault of a male person (s. 62: the side note called this offence 'attempt to commit an unnatural offence'). Since sexual offences are no longer found in the Offences against the Person Act 1861, and since they have recently been revised, the scoping paper should not be directed at such crimes. However, the mention of the 'abominable crime of buggery' and 'unnatural' offences reminds us how far English law has moved in the last 150 years and how the authors of the paper will need to update not just the terminology, but the rationale of the offences to make them appropriate to modern *mores*.

### *Offences against the Person Act 1861, s. 18*

This section as amended reads:

Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person . . . with intent to do some grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . .

The first omission signified by '. . .' is the result of the Criminal Law Act 1967, Sched. 3, Part III; the second is the result of the Statute Law Revision (No. 2) Act 1893; the third is the result of the Statute Law Revision Act 1892 and the 1893 statute just mentioned. The reference to penal servitude in this and the sections cited below is retained despite the abolition of that sentence by the Criminal Justice Act 1948 because that statute provides in s. 1(1) that Acts of Parliament conferring powers on courts to pass a sentence of penal servitude is to be construed as powers to award a sentence of imprisonment but the Act does not

substitute the word 'imprisonment' for the term 'penal servitude' in such statutes. This substitution is not observed by all, for example, student textbooks and statute books. A new draft would simply substitute the modern penalty.

*Offences against the Person Act 1861, s. 20*

Section 20 as amended reads:

Whoever shall unlawfully and maliciously wound or inflict upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and being convicted thereof shall be liable . . . to be kept in penal servitude [for a term not exceeding five years].

The omission is the result of the 1892 Act mentioned above.

*Offences against the Person Act 1861, s. 47*

Section 47 as amended reads:

Whosoever shall be convicted upon indictment of any assault occasioning actual bodily harm shall be liable . . . to be kept in penal servitude . . . [for a term not exceeding five years].

The first omission is the result of the 1892 Act; the later one stems from both the Criminal Justice Act 1988, ss 123(6) and 170 and Sched. 8, para. 16 and the Criminal Justice Act 1948, s. 1(2). In the 1861 statute the s. 47 offence is placed in the Part called 'Assaults', whereas both ss 18 and 20 are found under 'Acts causing or tending to cause danger to life or bodily harm'. Famously 'assaults' includes s. 36, the crime of 'obstructing or assaulting a clergyman or other minister in the discharge of his duties', but also 'assaults with intent to obstruct the sale of grain or its free passage' (s. 39) and 'assaults on seamen etc.' (s. 40). Originally it also included an offence aimed at trade unions, 'assaults arising from a combination' to raise wages (s. 41), reminding us of the era of the Combination Acts 1824–25 and the then criminal illegality of trade unions' aims. The Part of the Act where ss 18 and 20 are found includes 'exposing children whereby life endangered' (s. 27) and 'setting spring guns etc. with intent to inflict grievous bodily harm' (s. 31) as well as the better known offences of poisoning found in ss 23 and 24.

*Criticisms of ss 18, 20 and 47: actus reus*

This section is divided into *actus reus* and *mens rea* elements. First, let us investigate the *actus reus*.

*(a) 'Grievous' (ss 18 and 20)*

'Grievous' is no longer a word in modern usage and there has been debate for over 50 years as to how it should be rephrased for the jury. The House of Lords in *DPP v Smith*<sup>11</sup> held that it meant 'really serious'. It was thought by some that that definition meant that there were three classes of harm: very serious, serious, and non-serious. However, later Court of Appeal cases, especially *R v Janjua*,<sup>12</sup> have declared that there

<sup>11</sup> [1961] AC 290, HL.

<sup>12</sup> [1999] 1 Cr App R 91.

are only two categories of harm, serious and non-serious. The adjective 'really' in *DPP v Smith* simply emphasises that harm must be 'serious' as distinguished from 'non-serious'. Certainly the harm need not be 'life-threatening, dangerous or permanent' and the harm need not require medical treatment: *R v Bollom*.<sup>13</sup> Moreover, as *Bollom* demonstrates, what is grievous harm to one person, such as a baby, need not be grievous harm to another, such as an adult.

*(b) 'Bodily' (ss 18, 20 and 47)*

There is House of Lords' authority that the term 'bodily harm' across the three offences 'needs no explanation': *DPP v Smith*.<sup>14</sup> This term, however, is now most definitely not one to be kept. The House of Lords in *R v Ireland; Burstow*<sup>15</sup> in the late 1990s ruled that 'bodily' included psychological harm. They said that the 1861 Act was 'ever speaking'; that is, its language has to be read in light of modern circumstances and was not frozen in time to 1861. One can inflict or cause psychiatric harm within these three sections despite the draftsman's use of 'bodily' and despite the fact that, it seems, the draftsman would have scorned 'bodily' harm covering psychiatric injury. The term 'bodily' therefore no longer represents the width of the law: it is misleading to modern juries who would use a dictionary, ordinary language, definition and would gloss the term as 'relating to the body' and exclude matters relating to the mind. Just possibly a juror using an ordinary language definition as laid down in *DPP v Smith* might think that 'bodily' harm required the harm to be visible, to be on the surface of the body, but as one can see from cases on broken bones, there is no such requirement.

The psychiatric harm must be a recognised psychological condition: *R v Dhaliwal*<sup>16</sup> a case also known as *D*. Current law demands expert evidence to assist the jury in deciding whether there is a psychiatric harm (*Ireland; Burstow* above, approving *R v Chan-Fook*<sup>17</sup>). And even though there is evidence of psychological harm, expert evidence is needed to determine causation: *R v Morris*.<sup>18</sup>

*(c) 'Harm' (ss 18, 20 and 47)*

There is some support for changing 'harm' to 'injury', because the latter term covers both physical and psychological harm,<sup>19</sup> but arguably this is not so. It was judicially stated in *DPP v Smith* that 'harm' has a wider meaning than 'injury' and covers 'hurt' as well as 'damage'. Whether

13 [2004] 2 Cr App R 50.

14 [1961] AC 290 at 334, HL.

15 [1998] AC 147, HL.

16 [2006] EWCA Crim 1139, [2006] 2 Cr App R 348, a case also known as *D*.

17 [1994] 2 All ER 552, CA, a decision predating *Ireland; Burstow* and one on s. 47, but approved by their Lordships. This law has resonances with the definition of the defence of diminished responsibility in s. 2(1) of the Homicide Act 1957 after the revisions made by the Coroners and Justice Act 2009. For a discussion of the policy behind drawing the line between recognised psychiatric harm (criminal) and mere emotional harm (not criminal), see J. E. Stannard, 'Sticks, Stones and Words: Emotional Harm and English Criminal Law' (2010) 74 JCL 533.

18 [1998] 1 Cr App R 386.

19 See Law Commission, *Legislating the Criminal Code—Offences against the Person*, Law Com. Report No. 218 (1993).

this is so is arguable, and for many the two terms cover the same ground. If, however, 'harm' is to be retained or if it is to be replaced by 'injury', a further definition is desirable so that, for example, the boundaries of the term are known by being laid down by statute. It may also be worth stating that no pain need be caused by the harm or injury. If one imagines a gang kicking someone on the floor, perhaps outside a club, then it must be the law that when that person becomes unconscious, the kickers remain punishable. Similarly, it would be worth stating that the harm or injury need not be permanent.

*(d) 'Wound' (ss 18 and 20)*

This term means that the layers of the skin are pierced.<sup>20</sup> Wounding and grievous bodily harm may occur through the same blow (for example, as occurs when I lop off your arm with my chainsaw) but need not. If I leave a drawing pin on your chair and you sit on it, I may have wounded you but I have not caused you *grievous* bodily harm. Therefore, the wound need not be a serious one despite s. 18, especially, and s. 20 being serious offences: the maximum sentence for s. 18 is life imprisonment, the same maximum as for manslaughter, rape and arson. To modern eyes placing a minor wound in the same category as a serious harm looks erroneous. Moreover, minor wounds are in any case caught by s. 47. Similarly, I may cause you such harm without wounding you, as happens when I break your shoulder-bone with a baseball bat. The 19th century rationale behind having a (minor) wound equated with a (major) harm is that in that era even a minor wound could easily become infected with death resulting, but that reasoning need not occur nowadays. There is accordingly no need for both terms to be utilised. 'Harm' or perhaps 'injury' seems to be the appropriate word.

It should be noted that in s. 18 the word 'wound' is preceded by the phrase 'by any means whatsoever'. It is arguable that 'by any means whatsoever wound' is wider than the term 'wound' standing alone in s. 20. This way madness lies! If there is a difference in coverage, then that difference should be abolished.

*(e) 'Actual' (s. 47)*

The difficulty is to understand what 'actual' means in the context of s. 47 for is not all harm actual? It must be used in contradistinction to 'grievous', the term used in ss 18 and 20. 'Actual' harm therefore means harm less than grievous harm. It is read as covering any harm which is more than transient or trivial. Famously *Lynskey LJ* defined it as any

<sup>20</sup> Cf. *C v Eisenhower* [1984] QB 331, DC. See also *Moriarty v Brooks* (1834) 172 ER 1419, Exch Ch. In *R v Waltham* (1849) 3 Cox CC 442, it was held that a breach in the inner skin such as in the cheek, vagina and urethra constitutes a wound for this purpose. This may not be evident even to the sophisticated reader, and the width of the definition must appear on the face of any revised statute. Furthermore, the injuries are to be aggregated so as to constitute serious harm even though each individual injury is not in itself sufficient (*R v Grundy* [1989] Crim LR 502 and *R v Birmingham* [2002] EWCA Crim 2608), and injuries may be serious to one person when there would not be so to another (*R v Bollom* [2003] EWCA Crim 2608, CA: seventeen-month old child). Again this case law should be incorporated into the statute.

hurt or injury calculated to interfere with the health or comfort of the victim,<sup>21</sup> and in this context ‘calculated’ means not ‘intended’ but ‘likely’. Juries may not understand these definitions without instruction and therefore the term ‘actual’ in the statute and its common law definition should be replaced by ones which are clearly understood today. Moreover, a maximum sentence of five years is disproportionate for a crime with as low a level of *actus reus* as interference with the victim’s health or comfort and that lack of proportionality is exacerbated by the ruling in *DPP v Smith*, above, that chopping off hair can constitute actual bodily harm.

(f) ‘Cause’ (s. 18) and ‘inflict’ (s. 20) grievous bodily harm

This is a well-known problem. Section 18 is a more serious offence than is s. 20, as is demonstrated by the mental element (see below), but for a long time it was believed that while ‘cause’ simply incorporated all the usual rules on causation such as ‘but for’ or factual causation, ‘inflict’ had a narrower breadth than did ‘cause’, and this was so despite s. 20 being the less serious offence. One possible outcome was that facts could constitute causing grievous bodily harm (s. 18) but not amount to inflicting such harm (s. 20). The ‘pyramid’ of offences was turned upside down: the lesser offence, s. 20, covered less *actus reus* than did the graver offence, s. 18, whereas in a rational world one would expect the reverse to be true. This state of affairs came about partly because of the majority ruling in *R v Clarence*.<sup>22</sup> A husband infected his wife with gonorrhoea, a venereal disease. He knew he had the STI; she did not. The court held that he was not guilty of *inflicting* grievous bodily harm because the victim had *consented* to the act of sexual intercourse; therefore, there was no assault (in the sense of a battery) and therefore the grievous bodily harm was not *inflicted* for the purposes of s. 20. In respect of s. 18, if charged, the accused would have been the ‘cause’ of the requisite harm, but of course he did not intend grievous bodily harm, as s. 18 requires (in part: the mental element in s. 18 is in fact wider, but this statement is sufficient for present purposes).

An alternative route to the same conclusion in *Clarence* was that taken by Stephen J. Section 20 requires the grievous bodily harm to be inflicted. One inflicts only when one applies force directly, as when one punches or stabs someone. Infecting someone with a disease was not a direct application of force; therefore, the husband was not guilty of inflicting grievous bodily harm contrary to s. 20. By parity of reasoning one does not inflict such harm when one poisons someone. (Note that the s. 47 offence would have been committed on this view because that offence requires a battery or an assault and on Stephen J’s view there was a battery, a touching.) If this law were modern law, then s. 20 would

21 *R v Miller* [1954] 2 QB 282 at 292. See, e.g., *R (on the application of T) v DPP* [2003] EWHC 266 (Admin): momentary loss of consciousness—‘an injurious impairment to the victim’s sensory functions’. Includes harm which is trivial provided it is not also transient. *DPP v Smith* [2006] EWHC 94 (Admin)—cutting off hair: is this really an interference with her health or comfort?

22 (1889) 22 QBD 22.

be narrower than s. 47 and the pyramid of offences would now be the right way round, with the narrow point, the s. 20 offence, at the top and s. 47 would have a wider *actus reus* in this regard. In *R v Dica*<sup>23</sup> the Court of Appeal held that on this point *Clarence* was wrong: one could 'inflict' grievous bodily harm without a battery. *Clarence*'s ruling that there had to be an assault/battery for s. 20 just as there had to be one for s. 47 had been held to be wrong by the House of Lords in *R v Wilson*.<sup>24</sup> Their Lordships held that 'inflict', while it does not require a battery, does require something done, 'which, though it is not in itself a direct application of force to the body of the victim, does directly result in force being applied violently to the body of the victim, so that he suffers grievous bodily harm'. The effect of the law cumulating with *Dica* is that *Clarence* is now wrong. A man who infected his wife with gonorrhoea without intending to cause her grievous bodily harm would be guilty of the s. 20 offence: he infected her, being reckless as to her suffering (grievous) bodily harm.

Some discussion is also needed of the clarification in *Wilson* that 'inflict' does not require a battery or an assault. A stream of cases dating back to the mid-19th century had held that an assault in its wider sense was necessary, but other authorities, while not discussing the issue, were to the contrary.<sup>25</sup> The House of Lords held that despite the fact that s. 20 did not require an assault, nevertheless an accused could be convicted of the s. 47 offence, which does, provided that the evidence supports the conclusion that there was an assault. The reasoning and result are unsatisfactory but the desired outcome could easily be achieved by rewording the crimes (and in this way the 'included' crimes difficulty here outlined would be resolved with no undermining of s. 6(3) of the Criminal Law Act 1967).

Similarly, it was held in *R v Savage; Parmenter*<sup>26</sup> that 'wound' does not require an assault. However, it was said that a wound without an assault would be 'quite extraordinary', a ruling which leaves some obfuscation. Again, any revision should clear up this issue if the word 'wound' is used in the revamp.

The result is that it would seem that 'inflict' requires an act and an omission will not suffice, and that 'inflict' also requires the direct application of force, but 'cause' in s. 18 does not. For example, the following are all covered by both 'inflict' and 'cause': shouting 'fire!' in a theatre which leads to members of the audience being crushed against the panic bars on the doors, and setting a booby trap into which the victim falls, landing on spikes. In both cases the injuries have not been caused by the direct application of force from the accused on the victim but what the

23 [2004] QB 1257, CA.

24 [1984] AC 341. The quote is from *R v Salisbury* [1976] VR 452, 461, which was approved in *Wilson*.

25 In favour were *R v Taylor* (1869) LR 1 CCR 194, *R v Clarence* (1888) 22 QBD 23, *R v Springfield* (1969) 53 Cr App R 608, *R v Snewing* [1972] Crim LR 267, *R v McCready* [1978] 1 WLR 1383 and *R v Beasley* (1981) 73 Cr App R 44. Cases to the contrary were: *R v Halliday* (1869) 61 LT 701, *R v Martin* (1881) 8 QBD 54, *R v Lewis* [1970] Crim LR 530, and *Cartledge v Allen* [1973] Crim LR 530, DC.

26 [1992] 1 AC 699, HL.

accused has done has led to the application of force on the victim. However, leaving poison for the victim to take is not the infliction of harm because no force is applied to the body of the victim, but there is an *actus reus* for the purposes of the s. 18 offence because the accused is the 'cause' of the grievous bodily harm.

On this account, s. 20's *actus reus* is wider than that for assault, battery, and s. 47 (which requires an assault or a battery). Again the pyramid of offences is now looking even less like a pyramid! The *actus reus* in the lesser non-fatal offences is not as wide as that in s. 20, but the *actus reus* of s. 20 is not as wide as s. 18! The pyramid is now inverted.

And what of the latest House of Lords authority? In *Ireland; Burstow*<sup>27</sup> it was said that there was no requirement that what the accused did *results* in the direct application of force, including situations where the accused does not directly apply force to the victim's body. If this is the correct interpretation of this part of the authority, then (a) the two terms 'inflict' in s. 20 and 'cause' in s. 18 cover much of the same area; in other words, the same facts will almost always be both a cause and an infliction. However, (b) there is still a difference because in the example of leaving poison for the victim to take (as distinguished from pouring it down the victim's throat) there is a cause of grievous bodily harm, but not an infliction of it. This is not what the Law Lords said. They seemed to opine that 'cause' and 'inflict' meant the same thing. Lord Steyn said that while 'cause' and 'inflict' are not coterminous, psychiatric injury could be inflicted as a matter of ordinary English usage. Lord Hope opined similarly on the 'psychiatric harm point' but said in relation to 'harm' and 'inflict' that they are synonymous. If the Lords are correct that 'inflict' and 'cause' are now co-extensive, then the pyramid metaphor is partly back in favour: while 'inflict' and 'cause' need not be committed by a battery, the three lesser non-fatal offences must be. Therefore, both of the more serious offences are in this sense wider as to *actus reus* than the three less serious ones, but no longer is the *actus reus* in s. 18, the more serious offence, wider than that in the less serious offence, s. 20, for they are now coextensive.

One more minor point arising from *Ireland; Burstow* is that Lord Hope said that a difference remained. 'Inflict' always meant something detrimental to the victim, whereas 'cause' 'embraces pleasure as well as pain'. This dictum is contrary to *Brown*<sup>28</sup> where the sadists were guilty of inflicting harm on the victims, masochists, despite the latter very much wanting to experience pain. It is suggested that this dictum should be confined to the dustbin of history. Any revision which used the term 'injury' or 'harm' should include a statement that injury or harm includes giving pleasure to the victim.

(g) '*Occasioning*' (s. 47)

There is little doubt that this word means 'causing' and brings with it all the law of causation. It will be recalled that s. 18 uses the term 'cause'

27 [1998] AC 147, HL.

28 [1994] 1 AC 212, HL.

and not just for consistency, but also for the straightforward application of the law on causation, 'occasioning' in any revised version of s. 47 should be replaced by 'causing', which is simply a process of modernisation. Where the actual bodily harm is of the psychiatric variety, expert evidence is needed not just to that the harm is indeed psychiatric harm, but also that that harm was occasioned by the 'assault' of the accused: *Morris*<sup>29</sup> approved in *Dhaliwal*.<sup>30</sup>

*(h) 'Assault' (s. 47)*

Section 47 speaks of an 'assault occasioning actual bodily harm'. In this context 'assault' bears its somewhat old-fashioned meaning of 'assault (also known as a technical or psychic assault) and battery'. It is not restricted to the former sense. However, there is no definitive source for this proposition of law. If this offence is reworded but the term 'assault' is retained, a definition of 'assault' is needed. Certainly it would be absurd if 'assault' were restricted to the narrower sense, psychic assault, because in that event there would never be an assault occasioning actual bodily harm on, for example, a person who is asleep. The best available authority, the *Parmenter* case in the conjoined appeal with *Savage*, involved a young child, and since the House of Lords held that the accused was guilty, it would seem that their Lordships endorsed the view that 'assault' means both psychic assault and physical battery. Such discussion as occurred in *Ireland; Burstow* is to similar effect.

*(i) 'Any person' (s. 18) and 'any other person' (s. 20)*<sup>31</sup>

The issue here is whether a person can be guilty under s. 18 if she seriously self-harms, but cannot be guilty under s. 20 because the harm must be done to another. One can suppose a reason for the distinction: the s. 18 offence covers those who maim themselves in order to escape service in the armed forces in past times (or nowadays to obtain some kind of disability allowance, though this remains unproven), whereas s. 20 does not because although the resulting injuries are the same as in s. 18 the offence is directed at the *reckless* causing of injury. This difference, if there is one, does not reflect well on a modern system of law and should be abolished unless by analogy with 'simple' and 'aggravated' criminal damage it is justifiable to extend the greater offence more widely than the lesser one just as aggravated criminal damage covers damage to one's own property whereas the 'simple' offence does not.

*Criticisms of ss 18, 20 and 47: mens rea*

The second area to discuss is the mental element.

*(a) The various mental elements in s. 18*

While it is conventional to mention only 'with intent to do some grievous bodily harm (GBH)' in s. 18 there are in fact alternatives: 'with intent to resist or prevent the lawful apprehension or detainer of any

29 [1998] 1 Cr App R 386, CA.

30 [2006] EWCA Crim 1139, [2006] 2 Cr App R 348.

31 Note that in *Wilson*, above n. 9 at 284, the word 'other' is missing.

person'; and it must not be forgotten that the section includes the term 'maliciously', which is discussed in the next section of this article except for one point which must be mentioned now. When the charge is one of 'maliciously' causing GBH with intent to do some GBH, 'maliciously' is subsumed within 'with intent to do some GBH'; however, when the charge relates to 'wound . . . with intent to do some GBH' or to 'with intent to resist arrest . . . detainer', than 'maliciously' has a role to play. The problem is to state what it does mean. First, if as in the charge of 'wound . . . with intent to do some GBH' (and the other charges except for 'GBH with intent to do some GBH' are to be read similarly), 'maliciously' was superfluous as it is in 'GBH with intent to do some GBH', then one would be guilty of wounding with intent to cause some GBH when one accidentally wounds intending to cause GBH. For a serious crime, as s. 18 is, this cannot be right. Since in s. 20 'maliciously' is interpreted as 'intending or being reckless as to any harm, not necessarily GBH', the same term in s. 18 one may expect would mean 'intending or being reckless as to GBH'. However, case law is lacking. Any updating of s. 18 requires the mental element to be thought out and fully set out. Such authority as there is is unhelpful. In *R v Mowatt*<sup>32</sup> Diplock LJ said that "'maliciously" adds nothing" and while he was correct with regard to the charge of 'GBH with intent to do some GBH', he was not with regard to the other possible s. 18 charges. Other authorities hold that 'maliciously' contains the subjective definition of recklessness but do not treat of this specific issue.

One effect of the mental element in s. 18 is this. A person pushes a drawing pin into a constable's arm with intent to resist arrest; she has caused a wound with intent to resist lawful apprehension (assuming that the arrest is lawful, which may on the facts be moot); therefore, she is guilty of an offence for which the maximum penalty is life imprisonment. Yet the same crime and the same maximum cover the intentional lopping off of someone's arm with a chainsaw. The criticism to raise at this juncture is that of fair labelling: the two scenarios would seem to be so far apart that to call both the same crime appears almost perverse.

In s. 18 another point about the *mens rea* should be noted. There is no reference to intent to wound. The mental element relates only to the intention to cause grievous bodily harm or to resist apprehension (etc.). Therefore, s. 18 could be reworded as:

- wound with intent to do some grievous bodily harm (etc.); and
- cause grievous bodily harm with intent to do some grievous bodily harm (etc.).

Finally in respect of the fault element in s. 18 is the relationship to the part concerning 'with intent to resist . . . the lawful apprehension or detainer'. If the accused believes the arrest to be unlawful whereas it is in fact lawful and in an attempt to escape wounds or commits GBH, she is guilty under s. 18 because her mistake is one as to law. A quite recent case is *R v Lee*.<sup>33</sup> The accused pushed the arresting officer to the ground

<sup>32</sup> [1968] 1 QB 421, CA.

<sup>33</sup> [2000] Crim LR 991.

where he cut his knee. The officer had reasonable grounds for suspecting that the accused had committed an arrestable offence. The latter was guilty of wounding with intent to resist apprehension because his error was as to the officer's powers of arrest, a mistake of law. However, if the accused is mistaken as to a fact, then he is not guilty, as occurs when he believes that the arresting officer is not a police officer. If the arrest part of s. 18 is to be retained, there needs to be a subsection dealing with this matter. It is better to spell out such issues on the face of the statute so that the reader has the law in one place.

*(b) Offences against the Person Act 1861, s. 20*

The *mens rea* on the face of s. 20 does not express what it actually is. The sole explicit term relating to the *mens rea* is 'maliciously', which as stated above does not bear its modern meaning, but instead is brought up to date as 'intentionally or recklessly'. However, even when one substitutes that phrase for 'maliciously', that still does not inform the reader what the mental element is. One may have thought that the crime could be rephrased as either 'wound with intent to wound or being reckless as to wounding' or 'grievous bodily harm with intent to inflict grievous bodily harm or being reckless as to whether grievous bodily harm is inflicted'. In fact, as the House of Lords demonstrated in *Savage*,<sup>34</sup> the crime is comprised of four 'sub-crimes', all of which have reference to bodily harm but not to wounding as part of the mental element:

- wounding with intent to cause any harm;
- wounding being reckless as to any harm;
- grievous bodily harm with intent to cause any harm; and
- grievous bodily harm being reckless as to any harm.

It is impossible to extrapolate these four sub-crimes from the section as currently written. They also breach the principle of correspondence; in partial support of such constructive crime or crime of 'half *mens rea*' is the idea of social protection—a person who indulges in risky activity should be taken as responsible where the injury which results is more serious than that which was foreseen. A similar argument may be mounted in respect of the intent to cause GBH's being sufficient malice aforethought for the purposes of murder.

The reference to 'any harm' in the bullet points is also impossible to deduce from s. 20 as written. This rewriting is also occasioned by *Savage*, which approved earlier authority that there is no requirement for intention or recklessness as to *grievous* bodily harm.

Furthermore, it is by no means unknown for trial judges to misstate the definition of recklessness in s. 20. On occasion they have been known to phrase the definition in objective terms, perhaps misled by the judgment of Diplock LJ in *R v Mowatt*.<sup>35</sup> The now classic case of the

34 [1992] 1 AC 699, HL.

35 [1968] 1 QB 421, CA.

wrong direction is *DPP v K*,<sup>36</sup> which the Court of Appeal swiftly and correctly overruled in *R v Spratt*.<sup>37</sup>

*(c) Offences against the Person Act 1861, s. 47*

While there is a brief reference in s. 20 on its face to the *mens rea*, there is none such in s. 47. The mental element of the offence of occasioning actual bodily harm is read as being the *mens rea* of either assault or battery (for discussion of these offences, see below). The effect is that there are again four sub-crimes:

- occasioning actual bodily harm, intending to assault;
- occasioning actual bodily harm, being reckless as to an assault;
- occasioning actual bodily harm, intending to batter; and
- occasioning actual bodily harm, being reckless as to a battery.

As in s. 20 it is impossible to deduce these four mental states from the offence as written. There is nevertheless sometimes confusion even at the level of the House of Lords. In *Savage*<sup>38</sup> Lord Ackner described the *mens rea* of s. 47 differently at two places in his speech, once exclusively in terms of an assault and once exclusively in terms of a battery!

*(d) The constructive nature of the mens rea in ss 20 and 47*

The *actus reus* and *mens rea* in ss 20 and 47 do not correspond.<sup>39</sup> They are not like say criminal damage where in s. 1(1) of the Criminal Damage Act 1971 part of the *actus reus* is ‘damages’ and the mental element is ‘intending to . . . damage . . . or being reckless as to . . .’ damage. The *actus reus* and *mens rea* are aligned. In s. 20 that is not so: the *actus reus* is that of wounding or inflicting grievous bodily harm, but the *mens rea* is intention or recklessness as to any harm, grievous or not. The *actus reus*, it may be said, exceeds the *mens rea*. The same is true of s. 47. The *actus reus* is occasioning actual bodily harm but the *mens rea* is intention or recklessness as to an assault or battery: *Savage*<sup>40</sup> overruling *Spratt*.<sup>41</sup> As Lord Ackner said, ‘The verdict of assault occasioning actual bodily harm may be returned upon proof of an assault together with proof that actual bodily harm was occasioned by the assault’. Here ‘assault’ means ‘assault in the senses of a technical or psychic assault or battery’. Again, the *actus reus* exceeds the *mens rea*. Of course, this is not uncommon in English criminal law, as may be demonstrated by murder: the *actus reus* includes

36 [1990] 1 All ER 331, DC.

37 [1990] 1 WLR 1073, CA.

38 [1992] 1 AC 699, HL.

39 See A. Ashworth, quondam Law Commissioner on the Criminal Law team, *Principles of Criminal Law*, 6th edn (Oxford University Press; Oxford, 2009) 76–7 (‘The Principle of Correspondence’) and 77–8 (‘Constructive Liability’, not it should be noted the ‘Principle of Constructive Liability’). For a virtually unknown student comment, see D. J. J. Bright, ‘Why the Criminal Law Principle of Correspondence Should Prevail over the Pragmatism of Constructed Liability’ (2011) 2 KSLR 43.

40 [1992] 1 AC 699, HL.

41 [1990] 1 WLR 1073, CA.

causing death, but for the *mens rea* it is sufficient if the accused intends (merely) grievous bodily harm. There is no requirement that the accused must intend to *cause death*. An article on non-fatal offences is not the place for a debate of the merits of the correspondence principle against what may be called the constructive 'principle'.

*(e) Intent, recklessness, and negligence*

It seems to be accepted that intent in s. 18 bears its normal criminal law meaning of direct intent, i.e. aim, purpose; and depending on the jury intent may be found from a consequence being foreseen by the accused as virtually certain and when that consequence is indeed virtually certain. Now is not the place for a critique of the definition of 'intent' in criminal law, and a scoping paper on non-fatal offences may well not be the right place to consider the issue, which relates to criminal law as a whole (in particular, murder) and not just to non-fatal offences, but the criticism that it is impossible to 'find' one state of mind, intent, from another, foresight, even of a virtual certainty, is well made, as is the one which inquires why when undertaking that 'finding' exercise, the jury has to consider not just the accused's state of mind, but also whether in fact the harm or other consequence was virtually certain to occur, something it does not have to do when determining any other state of mind including direct intent itself. Nevertheless, a definition in an interpretation section would ease the making of instructions to the jury.

'Recklessness' currently bears one definition in criminal law. This simplification and indeed amelioration of the law over the past decade is to be commended, and it would be good to have this definition confirmed in an interpretation section. To have had this single definition throughout the last 20 years of the 20th century would have prevented first instance judges directing juries incorrectly that the objective definition applied, even though at all times the subjective one was to be used with regard to non-fatal offences.

Negligence is more difficult than recklessness. As is well known, English criminal law rarely imposes liability for negligence with regard to major offences. There is, however, one serious common law offence, manslaughter by gross negligence, where negligence liability occurs. The problem is this: the same facts may constitute gross negligence manslaughter when the victim dies, but does not constitute any non-fatal offence if the victim survives. For example, a showman fails to tighten a bolt with the result that the victim is thrown off a fairground attraction. If she dies, a gross negligence manslaughter charge is a possibility; however, if she survives, there is no 'gross negligence non-fatal offence'. The difference may be purely fortuitous—perhaps a paramedic is at the fair and saves the victim's life through efficacious action; the result is that no non-fatal offence has occurred (though a health and safety offence may have, but that does not correspond with what has happened to the victim). The Law Commission should grasp the nettle and attempt to demonstrate on a principled basis whether or not there is a distinction between the results on the victim which led to being guilty

of a major offence in one scenario and not guilty of any non-fatal offence in the other.

## **Consent**

This is a highly contentious area. Criticism focuses on *Brown*<sup>42</sup> and on whether the line was correctly drawn in that case between offences to which one could consent and ones to which the victim could not consent. One argument is that a statutory reversal of *Brown* would render the position of battered people worse than it now is because the abuser could say that the victim consented to a higher degree of harm than under the current law, and it would be one word against another. A further aspect of current law is whether or not the exceptions to *Brown* are acceptable in the modern world. For example, the Law Commission did not attempt to reform the list of exceptions in the mid-1990s when it last looked at this area, part of its reasoning being that Parliament had refused to change the law, sometimes more than once. The principal example here is boxing.<sup>43</sup> This topic would seem to be ripe for reform along with several martial arts. Why should an accused have a defence to grievous bodily harm contrary to s. 18 of the 1861 statute when all along the aim of that accused was to cause such harm? Circumcision of babies and young boys and chastisement of children, it must be said, do not fit happily under the heading of consent, where they are often discussed: there is no true consent.

## **Is the Law Commission right in its criticisms?**

Does the 1861 Act use archaic language? The answer is that indeed it does.

Does it deal separately with individual factual scenarios rather than put together factual scenarios which are equivalent? To some degree this is true as is demonstrated by the various offences of impeding certain persons in the execution of their duty. This splitting of fact scenarios where none would take place today is partly a reaction to Victorian and pre-Victorian scenarios and as is well known—the 1861 Act was a

42 [1994] 1 AC 212, HL. The most recent consideration of BDSM activities is A. Houlihan, 'When "No" means "Yes" and "Yes" means Harm: HIV Risk, Consent and Sadomasochism Case Law' (2011) 20 *Law and Sexuality: A Review of Lesbian, Gay, Bisexual and Transsexual Legal Issues* 31.

43 See especially J. Anderson, *The Legality of Boxing: A Punch Drunk Love?* (Routledge: Abingdon and New York, 2007), and subsequent articles by him. This book replaces the excellent Gunn and Ormerod article of the same name (1995) 15 LS 181 (also published as a Research Paper from the School of Law, University of Nottingham) as the main source. See also M. Gunn and D. Ormerod, 'Despite the Law—Prize-Fighting and Professional Boxing' in S. Greenfield and G. Osborn (eds), *Law and Sport in Contemporary Society* (Cass: London, 2000), and D. Ormerod and M. Gunn, 'Consent—A Second Bash' [1996] Crim LR 694. For an overview, see P. Roberts, 'The Philosophical Foundations of Consent in the Criminal Law' (1997) 17 OJLS 389, another excellent article. The latest article is J. Tolmie, 'Consent to Harmful Assaults: The Case for Moving Away from Category Based Decision Making' [2012] Crim LR 656. For an Irish approach, which also sets out the Irish revised statute, see B. Foley, 'Boxing, the Common Law and the Non-Fatal Offences against the Person Act 1997' (2002) 12 ICLJ 15.

consolidating one and no attempt was made to put the offences into a hierarchy of seriousness with differing penalties dependent on the gravity of the offence. Another explanation is that the distinctions among the crimes were founded on the morality of the age: it was a serious offence to obstruct a clergyman in the execution of his duty. There is little need for such precision. However, the principal offences, ss 18, 20, and 47, do not demonstrate such over-precision; they could be the starting point for revision of non-fatal offences.

Is there no hierarchy of offences across ss 18, 20, and 47? However, some kind of 'ladder' or pyramid of offences can be seen across ss 18, 20, and 47, but as is shown above, the ladder or pyramid is a broken one. Nevertheless, these sections do provide inspiration for a new approach.

Are the differences among those three sections not clearly spelt out? The response must be a resounding affirmation, and in respect of both the *actus reus* and *mens rea* as well as the penalty.

## **The redraft**

The revision must take into account modern methodologies including fair labelling and the principle of correspondence. A possible redraft is to have three offences of harm, and it must be remembered that assault and battery are not part of this rewrite.

- 1 an offence of very serious harm;
- 2 an offence of serious but not very serious harm; and
- 3 an offence of harm, which is not serious harm.

In all cases the fault element would be intention or recklessness as to the harm caused. This rewrite is in line with the Law Commission's draft Offences against the Person Bill found in its 1993 Report.<sup>44</sup> For example, cl. 3 would replace s. 47 with a crime of intentionally or recklessly causing injury. Those accused would, unlike now, not be liable unless they foresaw that they might cause injury. There would be no requirement that the injury is caused in any specific manner (the current law requires that the actual bodily harm is caused by an assault or battery (see above)). The maximum sentence would be five years, as s. 47 is, but the mental element would correspond to the *actus reus*. One point about the Law Commission's draft Bill is that 'injury' 'does not include anything caused by disease . . .'. This exclusion needs revisiting in light of the debate mentioned in the footnotes about the transmission of diseases, especially, in the modern era, HIV.

The maximum penalties must also be in line with maxima for other crimes, for example, is the severest non-fatal offence the same as the worst instance of manslaughter or of rape, both of which have a maximum of life imprisonment? There has been much debate about whether rape varies, but the recently released guidance by the Crown

<sup>44</sup> See Law Commission, above n. 19.

Prosecution Service is to the effect that 'rape is rape'.<sup>45</sup> For example, date rape is to be treated as rape, and there is no difference between rape of a man and rape of a woman. Leaving this debate within the crime of rape aside it is debatable that the worst non-fatal offence, which borders on death, is more serious than most rapes, but since it will be very rare indeed for someone to be given the maximum, the argument should perhaps revolve around the starting point for the sentence. And in respect of manslaughter the victim is by definition dead, a worse outcome many would say than the most serious non-fatal injury. The three redrafted offences might have maxima of 14, 10 and 5 years: the first is a reduction from the maximum for s. 18 (life), the second is an increase from the five years at present available for s. 20; and the last is the same as the current s. 47, but does emphasise that the replacements for ss 20 and 47 have, as they should, different maxima.

This redraft is well in line with previous 20th century redrafts. The Fourteenth Report of the Criminal Law Revision Committee, *Offences against the Person*<sup>46</sup> proposed replacing s. 18 with intentionally causing serious injury, s. 20 with recklessly causing serious injury, and s. 47 with intentionally or recklessly causing injury. The Criminal Code team adopted these recommendations as part of their remit to include reform proposals in *Codification of the Criminal Law: A Report to the Law Commission*.<sup>47</sup> The Law Commission adopted these proposals in the draft Criminal Code, 1989, but switched 'injury' for 'personal harm' for the reason noted above—the term 'injury' covers causing psychiatric harm whereas 'harm' does not though, as said, this is debatable. The Law Commission in its Report No. 218, *Legislating the Criminal Code—Offences against the Person and General Principles*<sup>48</sup> proposed the following:

- Intentionally causing serious injury with a maximum sentence of life.
- Recklessly causing serious injury: five years.
- Intentionally or recklessly causing injury: three years.

These proposals were taken up by the Home Office in its Consultation Document *Violence—Reforming the Offences against the Person Act 1861* (1998). The Document contains a draft Offences against the Person Bill. The first three clauses are for our purposes the important ones:

cl. 1(1) 'A person is guilty of an offence if he intentionally causes serious injury to another . . .'

cl. 2(1) 'A person is guilty of an offence if he recklessly causes serious injury to another . . .'

cl. 3(1) 'A person is guilty of an offence if he intentionally or recklessly causes injury to another . . .'

By cl. 15 'injury' is defined to include 'mental injury', but it excludes physical injury caused by disease except in relation to cl. 1 (i.e. the

45 See CPS Policy for Prosecuting Cases of Rape para. 9.3, available at <http://www.cps.gov.uk/publications/prosecution/rape.html>, accessed 30 October 2012.

46 Cmnd 7844 (1980).

47 Law Com. Report No. 147.

48 Cmnd 2370.

intentional spreading of serious diseases would be criminal, but not the reckless spreading of serious diseases and not the spreading of diseases which are not serious whether intentionally or recklessly). This part of the drafting will need addressing if the Law Commission determines that the reckless spreading of serious diseases such as HIV should remain criminal. However, the draft is a great improvement on current law. A suggestion by the author would be to split cl. 3 into two offences: intentional injury and reckless injury (or possibly to amalgamate cll. 1 and 2 to produce a crime of intentionally and recklessly causing serious injury). No doubt the gist of the offences would come under attack from academics like John Gardner for not truly reflecting the moral basis behind criminal law and those such as Matthew Weait who wish to see the transmission of HIV decriminalised, but the fourfold scheme is attractive. If one dislikes leaving ordinary English words such as 'serious' to the jury, then it would be an idea to give examples such as occur in the CPS's Charging Standards, while remembering that what is not serious to one person (a strapping 25-year-old) may be serious to another (a baby or an elderly person).<sup>49</sup> Intention and recklessness would bear their ordinary criminal law meaning. This is not the place to discuss those two fault elements, and it would be absurd if they were to bear a different definition in non-fatal offences than they do in fatal offences. The writer has used the following simple illustration to demonstrate that in the area of corporate criminal liability that it is absurd to have two different rules of attribution as we now have for corporate manslaughter and corporate injuries contrary to s. 20 of the 1861 Act, but it may be used here too.

The accused intentionally injures two people with the same blow. One dies; one survives but only through the fortuitous intervention of a passing paramedic. It would be absurd to have a different definition of intention for the homicide from that for the non-fatal injury.

## **The end result**

... is not earth shattering and can be derived without reading the above if one is attuned to the current modes of drafting. The 1861 Act should be abolished and in place of ss 18, 20, and 47 the following crimes are proposed:

- Intentionally causing serious injury (or harm).
- Recklessly causing serious injury (or harm).
- Intentionally causing injury (or harm).
- Recklessly causing injury (or harm).

<sup>49</sup> CPS Charging Standards, [http://www.cps.gov.uk/legal/l\\_l\\_to\\_o/offences\\_against\\_the\\_person/](http://www.cps.gov.uk/legal/l_l_to_o/offences_against_the_person/), accessed 30 October 2012. The author has been a long-term aficionado of something similar in respect of attempts, the (US) Model Penal Code's list of examples of what is proximate enough to constitute an attempt. Think of the time and expense such a list would save (and it might have prevented decisions like *R v Geddes* [1996] Crim LR 894). See Law Commission, *Conspiracy and Attempt*, Law Com. Report No. 318 (2009) for its rejection of a list of examples in a revised offence of attempt.

If one has read the above article, the same outcome is demonstrated. And 'something better change', to quote *The Stranglers*.<sup>50</sup> 'Most, if not all, practitioners and commentators agree that the law concerning non-fatal offences . . . is in urgent need of comprehensive reform to simplify it, rationalise it, and make it trap-free . . . [B]ad laws cost money and clog up courts with better things to do.'<sup>51</sup>

50 'No More Heroes', 1977.

51 *R v Lynsey* [1995] 2 Cr App R 667, *per* Henry LJ. There are, famously, no votes in law reform.