

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ
(LRC 45-1994)

REPORT
ON
NON-FATAL OFFENCES AGAINST THE PERSON

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the *Law Reform Commission Act, 1975* on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

The Hon. Anthony J. Hederman, former Judge of the Supreme Court, President;
John F. Buckley, Esq., B.A., LL.B., Solicitor;
William R. Duncan, Esq., M.A., F.T.C.D., Barrister-at-Law, Professor of Law and Jurisprudence, University of Dublin, Trinity College;
Ms. Maureen Gaffney, B.A., M.A. (Univ. of Chicago), Senior Lecturer in Psychology, University of Dublin, Trinity College;
Simon P. O'Leary, Esq., B.A., Barrister-at-Law.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General forty four Reports containing proposals for the reform of the law. It has also published eleven Working Papers, seven Consultation Papers and Annual Reports. Details will be found on pp.343-347.

Alpha Connelly, B.A., LL.M., D.C.L., is Research Counsellor to the Commission.

Ms. Nuala Egan, B.C.L., LL.M. (Lond.), Mr. Jonathan Newman, LL.B., LL.M. (Cantab.), and Ms. Lia O'Hegarty, B.C.L., LL.M. (Mich.) are Research Assistants.

Further information from:

The Secretary,
The Law Reform Commission,
Ardilaun Centre,
111 St. Stephen's Green,
Dublin 2.
Telephone: 671 5699.
Fax No: 671 5316.

NOTE

This Report was submitted on the 4th February 1994 to the Attorney General, Mr. Harold A. Whelehan, S.C., pursuant to section 4(2)(c) of the *Law Reform Commission Act, 1975*. It embodies the results of an examination into the law concerning Non-Fatal Offences Against The Person carried out by the Commission at the request of the former Attorney General, Mr. John Rogers, S.C., together with the proposals for reform which the Commission was requested to formulate.

While these proposals are being considered in the relevant Government Departments, the Attorney General has requested the Commission to make them available at this stage to the public, in the form of this Report, so as to enable informed comments or suggestions to be made by persons or bodies with special knowledge of the subject.

TABLE OF CONTENTS	PAGES
INTRODUCTION	1
 <i>PART I: THE PRESENT LAW</i>	
CHAPTER 1: CRIMES AGAINST BODILY INTEGRITY AND CRIMES OF ENDANGERMENT	2- 89
The Constitutional Background	2
Statutory Origins	4
Assault And Battery At Common Law (Common Assault)	7
<i>Mens Rea</i>	10
Assault And Threats	11
The Requirement Of Force	14
Wounding And Mayhem	16
Use Of Force In Arrest And Questioning	17
Use Of Force In Theft-Related Offences	17
Lawful Correction/Discipline	20
Spouses	20
Servants, apprentices and mariners	21
Children	22
Prisoners	25
Necessary Defence And The Prevention Of Crime	27
Provocation	31
Negligence	31
Consent	32
Dangerous Exhibitions	45
General And Transferred Intention	47
Omissions And Supervening Fault	48
Statutory Offences Under The 1861 Act:	51
Assault occasioning actual bodily harm (s.47)	51
Unlawful wounding, etc. (s.20)	54
Wounding with intent, etc. (s.18)	58
Sections 21 and 22	60
Poisoning (ss.23, 24 & 25)	61
Offences Relating To Particular Classes Of Persons Or To Particular Circumstances	63
Railway Offences	67

TABLE OF CONTENTS	PAGES
Traps	69
Assault With Intent (s.38) And Other Assaults On Police Officers	70
Offences Against Children	72
Neglect And Ill-treatment Of The Young, The Helpless And The Insane	76
Driving Offences	78
Firearms And Explosives	79
Affray	80
Public Nuisance	82
Breach Of The Peace, Insulting Behaviour And Disorderly Conduct	84
Domestic Violence	87
Genocide	88
 CHAPTER 2: CRIMES AGAINST PERSONAL LIBERTY	 90-113
Introduction	90
False Imprisonment	91
Powers Of Arrest	94
Kidnapping	104
Abduction	107
 PART II: THE LAW IN OTHER JURISDICTIONS	
 CHAPTER 3: CODIFICATION IN THE UNITED KINGDOM	 114-150
The Draft Code	114
The Draft Criminal Law Bill	115
Common Assault, And Threats To Injure	115
A Single Assault Offence	117
Threats	118
Consent	120
Self-Defence	121
Duress	125
<i>Mens Rea</i>	126
Grievous Bodily Harm, Unlawful Wounding And Actual Bodily Harm	126
Causation, Omissions And Duties	128
Poisoning	131
Assaults On Particular Classes Of Persons, Or In Particular Circumstances	132

TABLE OF CONTENTS	PAGES
Children And Servants	135
Offences Of Endangerment	136
Affray, Threats And Harassment	138
Explosives, Firearms And Offensive Weapons	142
Torture	142
Detention And Abduction	145
Unlawful Detention	146
Kidnapping	146
Abduction	147
Aggravated Abduction	148
Child Abduction In Scotland	148
Hostage-taking	149
Detention And Abduction By Omission	150
Alternative Verdicts	150
 CHAPTER 4: CODIFICATION IN CANADA	 151-167
Crimes Against Bodily Integrity	152
Crimes Against Psychological Integrity	160
Crimes Against Personal Liberty	161
Crimes Causing Danger	163
Other Endangerment Offences	165
Omissions	165
Causation	166
 CHAPTER 5: CODIFICATION IN NEW ZEALAND	 168-182
Liability	168
Endangering	169
Assaults And Aggravated Assaults	173
Poisoning Or Infecting	175
Threatening	175
Aggravated Violence	176
Use Of Force	178
Consent	178
Law Enforcement	179
Protection Of Persons And Property	180
Kidnapping And Abduction	181
 CHAPTER 6: THE LAW IN AUSTRALIA	 183-198
Introduction	183

TABLE OF CONTENTS	PAGES
Statutory Innovations	185
(a) Assault	185
(b) Kidnapping	186
(c) Threats	187
(d) Justifiable force	187
Effecting Arrest	188
Preventing The Commission Of A Crime	188
Prevention Of Danger	188
Defence Of Self And Property	189
Domestic Discipline	189
Surgical Operations	190
Death And Injury	190
(a) Omissions and duties	191
(b) Victoria	192
Threats	192
New Offences	192
Proposals For Reform	193
South Australia	193
 CHAPTER 7: CODIFICATION IN THE UNITED STATES	 199-233
Assault, Aggravated Assault And Threats	199
The Model Penal Code	202
Harm And Injury	203
<i>Mens Rea</i>	203
Justification For Use Of Force	206
Domestic Violence	209
Medical Treatment	210
Protection Of Persons Or Property	210
Coercion, Harassment And Threats	212
Offensive Touching	213
Reckless Endangerment	215
Endangering The Welfare Of Children	219
Duty To Rescue And Duty To Notify	220
Kidnapping	221
False Imprisonment	227
Felonious Restraint	228
Custodial Interference	230
Confinement And Obstruction	232
Omissions	232
Causation	233

TABLE OF CONTENTS**PAGES*****PART III: PROPOSALS FOR REFORM***

CHAPTER 8: PRELIMINARY CONSIDERATIONS	234-237
Statistics	237
 CHAPTER 9: DISCUSSION AND PROPOSALS FOR REFORM	 238-329
A. Crimes of violence and endangerment	238
The Commission's Approach	238
The Interests Sought To Be Protected	239
Assault: A Simple Scheme	250
Threats To Kill Or Cause Serious Injury	256
Coercion And Harassment	257
Terroristic Threats	258
Poisoning	259
Strangling And Rendering Unconscious	260
Infecting With Disease	261
Aggravation	263
Consent	268
1. Leaving the present law unchanged	268
2. Withdrawing the criminal sanction from bodily harm that is inflicted consensually	269
3. A specific offence for consensual infliction of bodily harm	269
Contact Sports	272
Medical Treatment	275
Dangerous Exhibitions	279
Provocation	279
Negligence And Constructive Liability	279
Heedlessness	280
Necessary Defence	280
Lawful Correction	284
Whipping	284
Servants, Apprentices And Mariners	284
Correction Of Children	284

TABLE OF CONTENTS	PAGES
Offences Against Children And Servants	289
Unborn Children	291
Endangerment	292
Omissions	298
Public Nuisance	300
Furious Driving	302
Explosives	303
Firearms And Offensive Weapons	304
Affray	304
Torture	311
 B. Crimes against personal liberty	 314
The Commission's Approach	314
Kidnapping	315
False Imprisonment	319
Abduction	320
Hostage-taking	326
Obstruction	329
 CHAPTER 10: SUMMARY OF RECOMENDATIONS	 330-340
 APPENDIX A	 341
List of persons from whom submissions were received	341
 LIST OF COMMISSION PUBLICATIONS	 342-346

INTRODUCTION

- (i) The law relating to offences against the person is among the areas of criminal law which the Attorney General has asked the Commission to examine. The Commission has already reported on dishonesty, receiving stolen goods, rape, malicious damage, child sexual abuse, sexual offences against the mentally handicapped, the confiscation of the proceeds of crime and the indexation of fines.
- (ii) We decided to divide our study of offences against the person into two reports, one on non-fatal offences, the other on criminal homicide, and to deal first with non-fatal offences. We began by preparing a Discussion Paper on non-fatal offences which sets out the existing law mainly to be found in the *Offences Against the Person Act, 1861*, and the difficulties to which it appeared to give rise, examined the law in certain other jurisdictions, set out the policy considerations which appeared to arise and made provisional recommendations for alterations in the law in a number of areas. We also sought views on certain specific questions. This Discussion Paper was circulated among a number of persons and bodies having particular expertise in this area, including judges, barristers, solicitors, academics, the Director of Public Prosecutions' Office, the Department of Justice, the Gardaí and the Irish Medical Association. As a result, the Commission received a number of detailed and helpful commentaries in writing on the Discussion Paper. We are most grateful to all who assisted us. A list of those who sent us submissions is to be found in Appendix A.
- (iii) We have since reviewed the entire subject in the light of these consultations. This Report contains our final recommendations for reform of the law. The Commission takes sole responsibility for these recommendations. In the first part of the Report, we examine the present law, and in the second, the law in some other jurisdictions. The third part contains our proposals for reform.

PART I: THE PRESENT LAW

CHAPTER 1: CRIMES AGAINST BODILY INTEGRITY AND CRIMES OF ENDANGERMENT

The Constitutional Background

1.1 Under Article 40.3.2° of the Constitution, the State is under a duty by its laws to protect as best it may from unjust attack and, in the case of injustice done, to vindicate the person of every citizen. Although this freedom of the person has been held to include freedom from the unlawful application of force or violence,¹ this aspect of security of the person has come to be considered in Irish constitutional law as the separate right to bodily integrity, one of the unenumerated personal rights guaranteed by Article 40.3.1°.² Second only in importance, it appears,³ to the right to life, the right to bodily integrity was first recognised by Kenny J. in *Ryan v Attorney General*:

"I understand the right to bodily integrity to mean that no mutilation of the body or any of its members may be carried out on any citizen under the authority of the law except for the good of the whole body and that no process which is or may, as a matter of probability, be dangerous or harmful to the life or health of the citizens or any of them may be imposed (in the sense of being made compulsory) by an Act of the Oireachtas."⁴

1.2 Perhaps because of its importance, no similar attempt was made by the Supreme Court in that case,⁵ or by any other court since, to delimit the precise scope of the right. However, the Supreme Court went on to recognise that the

1 *Dullaghan v Hillen and King* [1957] Ir. Jur. Rep. 10 (*per Fawsitt J.*).

2 *Ryan v A.G.* [1965] I.R. 294. This approach mirrors the scheme under the European Convention on Human Rights - whereas security of the person is guaranteed under Article 5(1), violence against the person primarily raises issues under Article 3 relating to torture and inhuman or degrading treatment or punishment.

3 *Conroy v A.G.* [1965] I.R. 411 (*per Kenny J.*).

4 *Supra*, n.2 at 313-314.

5 *Supra*, n.2 at 345.

State had "the duty of protecting the citizens from dangers to health in a manner not incompatible or inconsistent with the rights of those citizens as human persons"⁶ and the right to bodily integrity has since been interpreted as incorporating a more specific right not to have one's health exposed to risk or danger by any unjustified act or omission of the State.⁷

1.3 Most of the decided cases have been concerned with the very special circumstances of the treatment of persons in detention, so that it is a matter for speculation as to whether the State might be liable in damages for failure to legislate adequately for the protection of health generally⁸ and, *a fortiori*, as to whether it could be compelled so to legislate.⁹ For the purpose of the criminal law, the State's duty to protect individuals' health¹⁰ is primarily discharged by those laws which exist to protect them against personal violence, notably the *Offences Against the Person Act, 1861*.¹¹ These laws, for the most part, mirror the constitutional interest protected in extending beyond the actual or attempted use of violence to the threat of such violence and to the unjustified creation of risks which threaten such violence. Yet, as will be seen, this is not always the case.

1.4 The freedom of the person from torture,¹² and from inhuman or degrading treatment or punishment,¹³ has also been recognised as being guaranteed under Article 40.3.1° of the Constitution. There is, however, no statutory or common law offence of torture in Ireland. In this connection, although it is not ordinarily the function of the courts to extend the scope of the criminal law, "it may well be that where there is a breach of or interference with a fundamental personal or human right, they may be under a constitutional obligation so to do in order to respect, and, as far as practicable, to defend and vindicate that right."¹⁴

1.5 If such an obligation exists, it would surely apply where persons acting on behalf of the Executive deliberately and consciously violate the constitutional rights of citizens.¹⁵ Where the requisite severity of treatment has been deliberately and consciously administered; therefore, it may be questioned

6 [1965] I.R. 348.

7 For example *McGee v A.G.* [1974] I.R. 284 at 315 (per Walsh J.); *State (C) v Frawley* [1976] I.R. 365; *State (McDonagh) v Frawley* [1978] I.R. 131; *State (Richardson) v Governor of Mountjoy Prison* [1980] I.L.R.M. 82, explained in *State (Cormerford) v Governor of Mountjoy Prison* [1981] I.L.R.M. 86 at 90.

8 See Casey, *Constitutional Law in Ireland* (2nd ed., Sweet & Maxwell, 1992), p.334; Forde, *Constitutional Law of Ireland* (1987), pp.541-542.

9 *Id.* See also *Crowley v Ireland* [1980] I.R. 102 at 108 (per McWilliam J.) and *X and Y v Netherlands*, Series A no. 91, 8 E.H.R.R. 235 at 239-40 for rare examples of such obligation; and Currie, *Positive and Negative Constitutional Rights*, (1986) 53 U. Chicago L. Rev. 864.

10 The existence of a constitutional right has been held to imply a duty in others not to infringe that right, see Hamilton P. in *A.G. (S.P.U.C. (Ireland) Ltd.) v Open Door Counselling Ltd.* [1987] I.L.R.M. 477. This "Drittwirkung" or third party effect of such right is considered by Von Prondzynski: [1979-80] D.U.L.J. 14 at 20-23.

11 24 and 25 Vict. at 386.

12 *People (A.G.) v O'Brien* [1965] I.R. 142 at 150 (per Kingsmill Moore J.); *State (C) v Frawley*, *supra*, n.7; *Murray v Ireland* [1985] I.R. 532 at 542 (per Costello J.).

13 *State (C) v Frawley*, *supra*, n.7.

14 *A.G. (S.P.U.C. (Ireland) Ltd.) v Open Door Counselling Ltd.*, *supra*, n.10, (per Hamilton P.).

15 See, for example the judgment of Finlay C.J. in *State (Trimbole) v Governor of Mountjoy Prison* [1985] I.R. 550.

whether the purpose of such treatment is relevant.¹⁶

1.6 Although Article 38 of the Constitution extends also to the protection of the State's interest in effective criminal processes,¹⁷ such processes must also be compatible with the corresponding rights of the defendant under that Article to be tried in due course of law.¹⁸ Moreover, the importance of the right to bodily integrity does not mean that the traditional standards of proof may be relaxed in proceedings concerned with offences against the person.¹⁹ In this respect, although the basis for and the conduct of a prosecution will enjoy a presumption of constitutionality,²⁰ it is established that the substantive criminal law may also be affected by the right of due process. In addition to requiring the particular offence charged to be clear and accessible,²¹ it may require account to be taken of the existence of duplicating or overlapping offences.²² These considerations must also be borne in mind in looking to the reform of the existing corpus of offences of violence and endangerment.²³

Statutory Origins

1.7 Historically, offences against the person other than homicide were treated by the common law with surprising lenience, especially when compared to the severity of punishment provided for property offences.²⁴

1.8 Originally classified as torts rather than crimes,²⁵ even the most violent attacks on the person, including all attempts to commit murder, were until late in the 17th century treated as misdemeanours punishable by fine and imprisonment only.²⁶

1.9 Certain acts of violence were subsequently made felonies by occasional and limited enactments which tended to look either to the identity of the victim, such as Privy Councillors,²⁷ deerstealers²⁸ and seamen,²⁹ or to the nature of the act, such as maiming or disfiguring,³⁰ and wounding with intent to hinder

16 In *State (C) v Frawley*, *supra*, n.7, Finlay P. had held that the character of 'torture' or 'inhuman and degrading treatment' was to be gathered partly from its purpose. At least in respect of torture, however, this may be now be open to question, see Duffy, Article 3 of the European Convention on Human Rights (1983) I.C.L.Q. 316 at 317-318.

17 *The People v O'Shea* [1982] I.R. 384; *The State (Hayden) v Good* [1972] I.R. 351.

18 *O'Connor v D.P.P.* [1987] I.L.R.M. 723.

19 *Hanrahan v Merck Sharp and Dohme (Ireland) Ltd.* [1988] I.L.R.M. 629 at 634-36.

20 *East Donegal Co-operative Ltd. v A.G.* [1970] I.R. 317; *Eccles v Ireland* [1985] I.R. 545.

21 *King v A.G.* [1981] I.R. 233.

22 *Infra*, Chapter 5.

23 Discussed *infra*.

24 Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (1883), vol. 3, pp.108-112.

25 In tort, assault, battery, infliction of emotional suffering and false imprisonment are the modern elements of the generic writ of trespass to the person, from which the criminal law first derived. The principles applicable in tort remain important for the criminal law, particularly with respect to the definition of the *actus reus*, see the remarks of De Grey C.J. in *Scott v Shepherd* (1773) 2 Wm.B.I. 892 at 899.

26 Stephen, *op cit*, p.109.

27 9 Anne, c.16.

28 9 Geo. 1, c.22.

29 33 Geo. 2, c.67, s.2.

30 22 and 23 Chas. 2, c.1.

the exportation of corn.³¹

1.10 The first general Act providing for the capital punishment of many of the worst forms of bodily violence and attempts to commit murder was passed in 1803.³²

1.11 So far as related to England, this Act, together with the earlier enactments, was repealed and re-enacted with additions in 1828 by 9 *Geo. 4, c.31* and again in 1837 by 7 *Will 4, and 1 Vic c.85*. The effect of these statutes was to convert into capital felonies all desperate attacks upon the person and attempts to commit murder which resulted in actual bodily injury while creating a separate class of non-capital felonies for those offences which involved only an unsuccessful attempt to inflict such injuries.³³ Furthermore, whereas prior to 1828 all common assaults were triable only on indictment, s.27 of the *Act 9 Geo. 4 c.31* provided for the summary trial of common assault on complaint of the party aggrieved, subject to a discretion in the court to proceed by indictment in s.29.³⁴

1.12 These provisions were repealed and re-enacted in an extended form as regards both England and Ireland by the *Offences Against the Person Act, 1861*,³⁵ which provided for a virtual code of crimes of violence. Of its seventy-nine sections, ten deal with murder and manslaughter (which remain defined by common law), five with different attempts to commit murder, and the rest with other violent offences.³⁶ All attempts to murder, whether by the actual or attempted infliction of bodily injury or the administration of poison, were taken out of the list of capital crimes by the 1861 Act; they were then referred to elsewhere in the Act, with such variations and additions as were required by decided cases.³⁷

1.13 By s.16, it is a felony punishable by 10 years penal servitude to "maliciously send, deliver, or utter or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person"

1.14 Sections 17-35 create a series of offences for "acts causing or tending to cause danger to life or bodily harm", including unlawful wounding,³⁸ attempts to choke,³⁹ administering drugs⁴⁰ administering poison so as to endanger

31 11 *Geo. 2, c.22*.

32 43 *Geo. 3, c.58*, known as Lord Ellenborough's Act.

33 Stephen, *op cit*, pp.114-116. In Ireland, a similar consolidating statute was enacted the following year, 10 *Geo. 4, c.34*. For a description of its provisions and the pre-Union Irish statutes which it replaced, see *Oullen's Index to the Irish Statutes 1310-1838* (Dublin, 1939), pp.524-529.

34 Discussed by May L.J. in *R v Harrow J.J., ex parte Osaseri* [1985] 3 All ER 185 at 187.

35 In 1839, an Act was passed "for the better prevention and punishment of assaults in Ireland" providing for an aggravated penalty of hard labour instead of imprisonment on conviction on indictment for any assault committed with batons, sticks, stones or other heavy instruments. On summary conviction, a fine could be ordered to be paid to the injured party. The statute lapsed after 5 years, 2 and 3 *Vic. c.77*.

36 In this respect, s.57 of the 1861 Act is the exception in providing for the offence of bigamy.

37 Sections 11-15, *Offences Against The Person Act, 1861*.

38 S.20.

39 S.21.

life⁴¹ or with intent to injure,⁴² impeding escape from a shipwreck,⁴³ furious driving,⁴⁴ and the endangerment of servants⁴⁵ and children.⁴⁶ Specific offences relating to explosives,⁴⁷ to spring guns and traps⁴⁸ and to railways⁴⁹ are also contained in this part of the Act. One provision, s.18, creates twenty-four separate offences punishable by life imprisonment and forbids any and every combination of four acts with any one of six intentions.

1.15 The part of the 1861 Act dealing with assaults in particular comprises ss.36 to 47 inclusive, the first six of which create offences of assault on particular persons, such as clergymen,⁵⁰ peace officers and seamen,⁵¹ or in particular circumstances, such as with intent to commit a felony or to resist or prevent a lawful arrest.⁵² Sections 42 and 46 effectively re-enacted ss.27 and 29 of the 1828 Act by providing for the summary trial of certain common assaults, on complaint by or on behalf of the party aggrieved, subject to a discretion in the court to proceed by way of indictment. These are procedural provisions only and do not create any new or separate offence.⁵³ This summary power "was intended to be reserved for cases of minor assault of the kind which commonly arise from disputes between neighbours, where the charge is brought by or on behalf of the complainant himself, the police seeing no need to intervene."⁵⁴

1.16 By contrast, s.47 of the 1861 Act, in providing for the trial on indictment of certain classes of assault, had the effect of creating a new statutory offence of "an assault occasioning actual bodily harm" on the one hand and of making statutory and prescribing a penalty for the previously existing common law offence of common assault on the other.⁵⁵

1.17 Writing in 1883, Stephen commented:

"I know of no better illustration in the whole statute book of the way in which every line of it has its own special history than is afforded by these sections

The history of our law upon personal injuries is certainly not creditable to the legislature, and the result at which we have at present arrived is extremely clumsy"⁵⁶

40 S.22.
41 S.23.
42 S.24.
43 S.17.
44 S.35.
45 S.26.
46 S.27.
47 Ss.28, 29 and 30. The making and possession of gunpowder and explosives are governed by ss.64 and 65.
48 S.31.
49 Ss.32, 33 and 34.
50 S.36.
51 S.40.
52 S.38.
53 *R. v Harrow J.J., ex parte Osaseri*, [1985] 3 All ER 185 at 188.
54 *Id.*, at 192 (*per* Nolan J.).
55 *Id.*, at 189; also *State (O) v O'Brien* [1971] I.R. 42 at 50 (*per* Ó Dálaigh J.).
56 *Op cit.*, pp.116-118.

1.18 Writing in 1991, Professor J.C. Smith says the 1861 Act:

"is a rag-bag of offences brought together from a wide variety of sources with no attempt, as the draftsman frankly acknowledged, to introduce consistency as to substance or as to form. It may have been a great step forward in 1861 but its limitations were known then and it is deplorable that so much of it remains the law."⁵⁷

1.19 The 1861 Act remains substantially in force in Ireland today. The 1861 Act also remains substantially in force in England so that, for the first time, the Commission will be making proposals for reform of a branch of the criminal law, not already reformed in England. For this reason and for convenience, we also cite recent English and Commonwealth decisions as part of the statement of current law; however, *we do not assume* that the Irish courts would follow these decisions.

Assault And Battery At Common Law (Common Assault)⁵⁸

1.20 In the 13th century, when every felony was a trespass and every tort a punishable offence, mere bruises which did not break bone or draw blood were insufficient to ground a charge of felony.⁵⁹ Later, by the end of the 17th century, such assaults were offences provided they were done wilfully, in anger or in a hostile manner, such as violently jostling someone out of the way, snatching something from his hand or spitting in his face.⁶⁰ Eventually, the slightest "force" or contact came to constitute an offence if exercised with "hostile" intention and without the victim's consent.⁶¹

1.21 This gradual trivialisation of the concept of common assault may be seen as a recognition of the fundamental principle that every person's body is inviolate and that "[s]ecurity of the person is one of the first conditions of civilized life".⁶² As Blackstone wrote in his *Commentaries*, "the law cannot draw the line between different degrees of violence and, therefore, totally prohibits the first and lowest stage of it, every man's person being sacred and no other having a right to meddle with it in any the slightest manner."⁶³

1.22 In this respect, the offence known to the common law as "common assault" extends beyond the actual infliction of unlawful force on another person (a battery) to any act which causes another person to apprehend the infliction of immediate unlawful force on his person (an assault).⁶⁴ Therefore, "in terms

57 Commentary on *R v Parmenter* [1991] Crim. L.R. 41 at 43.

58 See generally Peter Charleton, *Offences Against the Person* (1992).

59 Stephen, *op cit*, pp.108-109.

60 See 1 Hawk P.C. c.62, s.2; also Holt C.J. in *Cole v Turner* (1704) 6 Mod. Rep. 149, 90 E.R. 958.

61 The development of the law relating to battery was recently traced by the English Court of Appeal in *Wilson v Pringle* [1986] 2 All ER 440. As to the meaning of "hostile intention" and "consent" see *infra*.

62 Per Fawcitt J. in *Dullaghan v Hillen and King* [1957] Ir. Jur. Rep. 10.

63 See 3 B.I. Com. 120.

64 See in *Collins v Wilcock* [1984] 3 All ER 374 at 377 (*per Goff L.J.*).

more easily understood by philologists than ordinary citizens",⁶⁵ assault and battery are two distinct crimes at common law.

1.23 Although the distinction has frequently passed unnoticed, assault originally represented an entirely different concept in the criminal law, where it was restricted to an attempted battery, than it did in the law of torts.⁶⁶ In this respect, it appears that the development of the separate crime of assault is attributable to the gradual recognition of a "tort theory of assault" in the criminal law.⁶⁷

1.24 However, the term "assault" is now, in both ordinary legal usage and in statutes, regularly used to cover both assault and battery. Although the offence of assault *simpliciter* is seldom prosecuted, it is wider than an attempted battery and is therefore itself capable of being attempted.⁶⁸

1.25 It nevertheless remains true that "assaults are sure to attempts allied, and thin partitions do their bounds divide."⁶⁹

1.26 Assault and battery are common law crimes with penalties added by statute.⁷⁰ Under s.42 of the 1861 Act, as amended by s.11 of the *Criminal Justice Act, 1951*, a person convicted on summary trial of either common assault or battery is liable to a fine of £50 and/or six months imprisonment. By s.47 of the Act, the punishment on indictment for a common assault is one year's imprisonment. The mode of prosecution is the exclusive prerogative of the prosecuting authority.⁷¹

1.27 An indictment or information of an "assault and battery" will be valid as referring to a battery only. If the word "assault" stands alone, it will be taken to refer to an assault or a battery or both, though if contrasted with a battery, as in "assault or battery", it will be taken to mean an assault only and the charge will then, "for some baffling reason", be bad for duplicity.⁷² On a charge of common assault triable summarily, it is not necessary to make reference to the 1861 Act.⁷³

65 *Id*; see also the comments of Goddard L.C.J. in *R. v Rolfe* (1952) 36 Cr. App. R. 4.

66 Perkins & Boyce, *Criminal Law* (3rd ed., N.Y., 1982), p.159.

67 *Id*, pp.159-173.

68 See discussion in Smith and Hogan, *Criminal Law* (6th ed., 1988), pp.376 and 379. In some jurisdictions in the U.S., where the "tort theory" of assault has not been accepted, there can be no attempted assault; see for example *In re M.* 9 Cal. 3d 517, 108 Cal. Rptr. 89 (1973).

69 *State v Staggs*, 554 S.W.2d 620, 623 (Tenn. 1977), quoted in Perkins & Boyce, *op cit*, p.168, note 25. In an early North Carolina case, *State v Davis*, 23 N.C. 125, 127 (1840), it was held that where an unequivocal purpose of violence is accompanied by any act which, if not stopped or diverted, will be followed by personal injury, the battery is attempted.

70 See Griew, *Common Assault and the Statute Book* [1983] Crim. L.R. 710.

71 *State (Clancy) v Wine* [1980] I.R. 228; also *R v Harrow J.J., ex parte Osaseri*, [1985] 3 All ER 185 at 190.

72 Williams, *Textbook of Criminal Law* (2nd ed., 1983), p.173 note 12, referring to *Jones v Sherwood* [1942] 1 K.B. 127. In *D.P.P. v Taylor and Little* [1992] 1 All E.R. 299 it was held that assault and battery had been separate statutory offences since the 1861 Act was enacted. Where there was actual as well as apprehended unlawful force, the charge should be assault by beating rather than assault and battery since the latter form was duplicitous in that it alleged two different offences. See commentary in [1991] Crim. L.R. 904.

73 *The State (Quinn) v Mangan* [1945] I.R. 532 (Supreme Court).

1.28 In the case of summary trial, the complaint must generally be made by or on behalf of the party aggrieved, except in the case of youth, age or infirmity, when a third party, with a protective motive, may institute summary proceedings without the express authorization of the party aggrieved. Moreover, where the victim, from fear or any other motive, refuses or declines to prefer a complaint, and where it is in the public interest that a complaint should be preferred, a common informer - which includes a member of the Garda Síochána- may prefer the complaint under s.42 by virtue of the provisions of s.11 of the 1951 Act.

1.29 A common informer may initiate and conduct a summary prosecution to its conclusion.⁷⁴ In the case of an indictable offence, he may initiate and conduct the proceedings in the District Court up to the receiving of information and the making of an order returning the accused for trial, at which point the D.P.P. assumes the conduct of the prosecution.⁷⁵ A common informer does not need to be an eyewitness to the incident which he prosecutes.⁷⁶ If a member of the Garda Síochána wishes to bring proceedings in his own name, he must, by virtue of s.9 of the *Criminal Law (Administration) Act, 1924*, do so as a common informer. The frequency with which such proceedings are brought in the District Court by Gardaí was the subject of criticism by Griffin J in *The People v Roddy*, who considered it more desirable that all prosecutions be brought in the name of the D.P.P.⁷⁷

1.30 Section 46 of the 1861 Act directs that where a Justice finds the assault or battery to have been accompanied by any attempt to commit felony or is of opinion that the same is, from any other cause, a fit subject for trial on indictment, he shall deal with the case in all respects as if he had no authority finally to hear the case; also, a Justice shall not determine any case of assault or battery which involves a question of title to any lands, tenements or hereditaments or as to any bankruptcy or insolvency, or any execution of a legal process.

1.31 Section 46 does not impose a duty on a District Justice to enter into a preliminary examination before proceeding to hear a summary charge under s.42 of the Act, but if, during the hearing, he reaches any such determination as set out in s.46, he must abstain from adjudicating on that charge.⁷⁸

1.32 The question of title must relate to real property and not to chattels.⁷⁹ Jurisdiction will not be ousted where the claim to title is vague and improbable

74 The right to prosecute is largely determined by Article 30.3 of the Constitution and by s.9 of the *Criminal Law (Administration) Act, 1924*, as to the effect of which see *Wedlock v Osmond & Son (Dublin) Ltd.* [1935] I.R. 820 at 842-843, and *The People v Roddy* [1977] I.R. 177.

75 *State (Ennis) v D.J. Farrell* [1966] I.R. 107; *A.G. v Thompson*, 70 I.L.T.R. 161.

76 *McCormack v Carroll* 45 I.L.T.R. 7; *R. (Wilbond) v Armagh J.J.* [1918] I.R. 347.

77 *Supra*, n.74, at 190.

78 *State (Clancy) v Wine* [1980] I.R. 228; *O'Neill v D.P.P.* [1989] I.L.R.M. 882; *R. v Blyth Valley Magistrates' Courts* [1988] Crim. L.R. 381. It appears that a magistrate does not act judicially where prior to the trial and in the absence of the defendant he inspects the wounds of the person alleged to be assaulted; see *Byrne v Hebden* [1913] St. R. Qd. 233; 7 Q.J.P.R. 112.

79 *White v Fox* (1880) 44 J.P. 618.

and not substantially supported by evidence;⁸⁰ also, the title in issue must relate to the accused himself and not to a third party.⁸¹ The Justice must determine from the evidence before him or her whether or not a *bona fide* question of title has arisen.⁸²

1.33 Before 1951, the adjudication in criminal proceedings of a complaint of common assault or battery was a bar to civil proceedings.⁸³ Section 11(4) of the *Criminal Justice Act, 1951*, now provides that such adjudication shall not affect any civil remedy that the complainant may have against the defendant in respect of the subject matter of the complaint.

1.34 For minor assaults, the civil remedy is often more satisfactory than a prosecution. Even so, the notions of assault and battery are important in that they enter into the definition of more serious crimes.

Mens Rea

1.35 The *mens rea* of common assault is hostile or unlawful intention, or recklessness, though hostile in this connection no longer means angry or revengeful, or rude, or insolent.⁸⁴ Instead, it denotes any intentional act done without lawful excuse.⁸⁵

1.36 In England, recklessness now clearly suffices for battery,⁸⁶ (and hence for assault), though there was disagreement among commentators as to whether such recklessness is subjective or objective.⁸⁷ The disagreement was resolved in favour of subjective recklessness in *R. v Spratt*.⁸⁸ In Northern Ireland, the test of such recklessness for the purposes of assault has been held to be a subjective one.⁸⁹ This approach is consistent with the general approach of Irish courts to the question of recklessness and, further, with an isolated dictum of Henchy J. in *The People v Murray*,⁹⁰ approving a subjective standard of recklessness in relation to common assault. For the purposes of assault *simpliciter*, it appears that it will be enough if the actor knows he is doing something from which the apprehension of immediate, unlawful force is likely to

80 *Watkins v Major* (1875) L.R. 10 C.P. 662.

81 *Cornwell v Sanders*, 32 L.J. 6.

82 *Id.*

83 By s.45 of the *Offences Against the Person Act, 1861*.

84 See discussion of Goff L.J. in *Collins v Wilcock* [1984] 3 All ER 374 at 378.

85 *Wilson v Pringle*, *supra*, n.61; *R. v Boughey* (1986) 20 A. Crim. R. 156 (High Court of Australia).

86 *R. v Venna* [1976] Q.B. 421. In *R. v Mansfield J.J., ex P. Sharkey* [1985] 1 All ER 193 at 203 Lane L.C.J., stated *obiter* that the *mens rea* of assault was recklessness or intention.

87 Smith and Hogan, *op cit*, p.379, prefer a subjective test, whereas an objective approach is favoured by Clarkson and Keating, *Criminal Law: Texts and Materials* (1984), p.453. In *D.P.P. v K.* [1990] 1 All ER 331, an objective test of recklessness was applied by a Divisional Court. For criticism, see Bennett, *Assault - a Harsh Lesson* (1990) 140 N.L.J. 588 and commentary in (1990) Crim. L.R. 322.

88 [1991] 2 All ER 210.

89 *Knox v Sec. of State* [1980] N.I. 87 (Q.B.D.) (*per* O'Donnell L.J.). In Australia, subjective recklessness also suffices, see *Vallance v The Queen* (1961) 108 C.L.R. 56; *MacPherson v Brown* (1975) 12 S.A.S.R. 184.

90 [1977] I.R. 360 at 403, citing the English authority of *R. v Venna*, *supra* n.86. See also *R. v Faulkner* (1877) 13 Cox 550; *The People v Douglas and Hayes* [1985] I.L.R.M. 25; *The People v Hayes*, unreported, Court of Criminal Appeal, 9 June 1986; *Agra Trading Ltd. v Waterford County Council* [1985] I.L.R.M. 249. For comment, see McAleese [1981] D.U.L.J. 29 and Lynn [1985] D.U.L.J. 73.

arise and is reckless as to whether such force may be apprehended.⁹¹ In this respect, the person performing the act must have the capacity to appreciate and foresee the consequences of the act:

"The fact that the risk of some damage would have been obvious to anyone in his right mind is not conclusive proof of the defendant's knowledge, but it may well be, and in many cases will be, a matter which will drive the jury to the conclusion that the defendant himself must have appreciated the risk."⁹²

1.37 A common assault cannot be committed by omission.⁹³ It may nevertheless be a battery where the defendant inadvertently applies force to P and then wilfully refuses to withdraw it, the whole action being treated as a continuous act so as to bring about a coincidence of the *mens rea* and the *actus reus*.⁹⁴ By analogy, there may be an assault where the defendant inadvertently causes P to apprehend immediate violence and then wilfully declines to withdraw the threat.

Assault And Threats

1.38 Any act done in such circumstances as suggest an intention, coupled with an actual or apparent present ability to apply actual force to the person of another will amount to an assault provided that such other person is caused to believe that the force is about to be applied.⁹⁵ Assault is the only crime at common law in which the harm consists merely in creating fear or apprehension in the mind of the victim.⁹⁶ In this respect the victim need not be placed in "fear" in the sense of being frightened, nor apprehend a severe or aggressive attack; he is assaulted if he is caused to apprehend the immediate application of that degree of physical force necessary to constitute a battery, which, as noted above, may amount to nothing more than an intentional touch *in invitum*.⁹⁷

1.39 Although both offences are usually committed in rapid succession, the expected blow following immediately upon the threat to inflict it, there may be an assault where D never intends to carry out the threat,⁹⁸ or has no ability to inflict the contact which he has induced the victim to expect, as where the

91 Glanville Williams, *Textbook of Criminal Law* (2nd ed., 1983), p.173.

92 *R. v Stephenson* [1979] 3 W.L.R. 193 at 200 (per Geoffrey Lane L.J.), cited with approval in *Knox v Sec. of State*, *supra*, n.89.

93 *Fagan v M.P.C.* [1968] 3 All E.R. 442.

94 *Id.*

95 It is an essential ingredient of a common assault based on threats of violence that the threats should have created a fear of violence in that other person's mind; see *R. v McNamara* [1954] A.L.J.R. 291. In New Zealand, however, provided the threatener has the present ability to effect his purpose, the threat need not necessarily be communicated to the victim for the purposes of statutory assault; see *R. v Kerr* [1988] 1 N.Z.L.R. 270.

96 The offence of striking, or attempting to strike, or offering violence to a superior officer under s.132 of the *Defence Act, 1954*, does not extend to the protection of such sensibilities.

97 Though merely inviting another to touch you cannot amount to an assault; see *Fairclough v Whipp* (1951) 35 Cr. App. R. 138; *R. v Burrows* [1952] 1 All E.R. 58.

98 *Logdon v D.P.P.* [1976] Crim. L.R. 121.

defendant points an unloaded or imitation gun at P.⁹⁹ But if P knows that the gun is unloaded or an imitation, then there is no assault. Similarly, there will be no assault if it is obvious to P that the defendant is unable to carry out his threat, as where the defendant is out of striking distance or shooting range of P and does not advance in a threatening manner towards him.¹⁰⁰ A threat by a person holding a knife in his hand to stab another person if he comes any closer is also an assault.¹⁰¹

1.40 Simply stated, the reasonableness of the apprehension of immediate bodily harm is dependent upon the existence of an apparent present ability to inflict such harm.¹⁰²

1.41 It is clear that a threat to inflict harm at some time in the future cannot amount to an assault - an apprehension of immediate personal violence is essential. Although the requirement of immediacy has in some cases been interpreted widely,¹⁰³ the law relating to threats and menaces is, for the most part, "a thing of shreds and patches",¹⁰⁴ particularly in view of the traditional rule that words alone, unaccompanied by menacing gestures,¹⁰⁵ cannot constitute an assault. This rule, which appears from both Irish and English authority to be absolute,¹⁰⁶ has been the subject of much criticism¹⁰⁷ - what if the threat is made from behind the victim,¹⁰⁸ or in a dark alleyway, or over the telephone?

1.42 In this connection, it may be noted that s.16 of the 1861 Act does little to remedy the defects in the common law in that it extends only to written threats to kill. In the absence of an assault, therefore, a threat to kneecap or to cut off somebody's fingers or to pull out their fingernails may be made with impunity. The same may be said of an unwritten threat to kill, or even, it appears, of a written threat to kill a foetus.¹⁰⁹

99 *Id*; *R. v St George*, 9 C. & P. 483; *R. v Everingham* (1949) 66 W.N. (N.S.W.) 122; *Brady v Schatzel* (1911) Q.S.R. 206 (Queensland Sup. Ct.).

100 *Stephens v Myers*, 4 C. & P. 349. But if it is reasonable for the defendant to believe that he is within striking distance, there may be an assault; see *Grimes v State* 99 Miss. 232, 545o 839.

101 *Police v Greaves* [1964] N.Z.L.R. 295.

102 *U.S. v Johnson*, 637 F. ed. 1224 at 1242 (9th Cir. 1980).

103 For example, *Logdon v D.P.P.*, *supra*, n.98. The widening of the scope of immediacy in certain cases has resulted from the insistence that "infliction" of grievous bodily harm within the meaning of s.20 of the 1861 Act necessarily implies an assault, for example *R. v Martin* (1881) 8 Q.B.D. 54 C.C.R. where the defendant caused a panic in a theatre; *R. v Halliday* (1869) 61 L.T. 701, where the defendant so frightened P that she jumped through a window. The House of Lords has recently resolved the matter by deciding that "inflict" does not, after all, imply assault; *Wilson* [1984] A.C. 242 at 260.

104 Williams, *op cit*, p.209. As regards that part of the patchwork which made up the "blackmail" offences under ss.29-31 of the *Larceny Act, 1916*, see the Commissions's *Report on Dishonesty*, p.297 *et seq*.

105 A menacing gesture in itself may amount to an assault where it is sufficient to produce alarm, as by jumping over a shop counter, *Atkinson v H.M. Advocate*, 1987 S.C.C.R. 534.

106 *Meade and Bell* (1823) 1 Lew. C.C. 184 (*per Holroyd J.*); *Dullaghan v Hillen and King* [1957] Ir. Jur. Rep. 10.

107 For example, Williams, *Assault and Words* [1957] Crim. L. Rev. 219.

108 In *Fogdon v Wade* [1945] N.Z.L.R. 724, it was held to be an assault where the defendant walked up close behind a girl and made an indecent suggestion.

109 In *R. v Tail* [1989] Crim. L.R. 834, the English C.A. held that a foetus *in utero* was not a person within the meaning of s.16, this being in accordance with the established meaning of a "person in being" for the purposes of the law of murder. Had the threat been directed to the child if and when it was born alive, the offence would have been made out; see *R. v Shephard* [1919] 2 K.B. 125. As to the possible effect on this rule of Article 40.3.3^o of the Constitution, see *infra*, Chapter 7.

1.43 A better view in respect of verbal threats may be that they constitute an assault where the threatened force is sufficiently imminent.¹¹⁰ In *Wilson*, Goddard L.C.J. stated obiter: "He called out 'Get out the knives' which itself would be an assault ...",¹¹¹ which *dictum* is supported by civil law cases holding that a conditional threat will suffice for an assault.¹¹² In *Read v Coker*, the defendant and others surrounded P, a trespasser, and, rolling up their shirt sleeves, threatened to "break his neck" if he did not leave the premises. P sued successfully for assault. Commenting on this case, Glanville Williams has said:

"Symbolic gestures of this kind [tucking up their shirt sleeves] are logically the same as the utterance of words, for words are symbols. There would be no sense in attaching legal significance to the one that is not attached to the other. Perhaps the reason for the common statement that assault cannot be by words is the fear that people would prosecute in trivial cases. The fear would be met if the notion of psychic assault were limited to threats that would make a reasonable person apprehend immediate hurt."¹¹³

1.44 This view is supported by a recent decision of the New South Wales Court of Criminal Appeal,¹¹⁴ in which it was held, following a decision on the civil side,¹¹⁵ that threats of violence made over the telephone are not properly categorised as mere words, and that whether the violence offered by such threats is sufficiently immediate depends on the circumstances. In another case,¹¹⁶ the Supreme Court of South Australia held that an assault was committed where the defendant threatened a woman to whom he had given a lift with future physical harm. During the course of argument, the Court had asked counsel to assume that the defendant was threatening the victim as he was stalking her in a remote scrub area in circumstances where both knew that he could carry out his threat at any time he wished:

"One analogy is that she was in the captive position of a mouse to which a playful cat poses a continuing threat of injury or death at a time to be decided by the cat. There was no escape, no reasonable possibility of a *novus actus interveniens* to break the causal link between the threat and the expected infliction of harm."¹¹⁷

1.45 In cases of conditional threats, the requirement of immediacy is satisfied by the threat of force to follow immediately upon disobedience, provided that such obedience is required then and there as to amount to a fetter on the victim's

110 See Clarkson and Keating, *op cit*, p.450.

111 [1955] 1 All E.R. 744 at 745.

112 *Ansell v Thomas* [1974] Crim. L.R. 31; *Read v Coker* (1853) 13 C.B. 850.

113 *Op cit*, p.176. A threat to do any grievous bodily harm, whether verbal or written, is a crime known to the law of Scotland, see *Miller* (1862) 4 Irvine 238. A threat of lesser violence may also be criminal where accompanied by a criminal intent, *Kenny v H.M. Advocate*, 1951 J.C. 104.

114 *R. v Knight* (1988) 35 A. Crim. R. 314.

115 *Barton v Armstrong* [1969] 2 N.S.W.L.R. 451.

116 *Zanker v Vantzokas* (1988) 34 A. Crim. R. 11.

117 *Id.* at 16. The Court also relied on *Barton v Armstrong*, *supra*, n.115, and the Canadian case of *Bruce v Dyer* (1986) 58 D.L.R. (2d) 211.

present freedom, as where the defendant says "Be quiet or I'll blow your brains out" or simply "Your money or your life".¹¹⁸ It is no answer to a charge of assault in such a case that the victim could avoid the threatened harm by complying with the unlawful command,¹¹⁹ nor that he did in fact avoid it.¹²⁰ Where, however, the condition is one which the threatener has a right to impose, and the degree of violence threatened on the fulfilment of that condition would be lawful for the purposes of self-defence or otherwise, there will be no assault.¹²¹

1.46 By contrast, words may operate to negative an assault, as where the defendant laid his hand on his sword, saying "If it were not assize-time, I would not take such language from you".¹²² However, reassuring words may be so wholly outweighed by the menace of the act that they will not operate to negative the assault, as where the defendant held a shovel over his wife's head and said: "If it were not for the policeman outside I would split your head open".¹²³

The Requirement Of Force

1.47 In contrast to assault, in battery the appreciation of the victim that the act is about to take place, or even that it is already taking place, is irrelevant.¹²⁴ All that is required is some degree of unlawful "force" applied to the body of the victim. For this purpose, the person of the victim includes the clothes he is wearing.¹²⁵ So cutting a person's clothes will be a battery, even where the victim is unable to feel the impact.¹²⁶

1.48 As a matter of law, therefore, the slightest touching of another is a battery if it is unlawful, and it need not cause any bodily harm or even pain and it need not leave any mark or visible injury, such as bruising, scratching or bleeding.¹²⁷ So it is a battery to kiss a woman against her will, or to lay hands upon her for this purpose.¹²⁸ But it is no battery for a man to kiss an intimate friend when he has reason to believe that this will be agreeable to her.¹²⁹

1.49 Previously, an injury had to be direct and forcible before it came within the old writ of trespass, and this limitation still affects the law relating to battery - in general, the force must be applied "directly" to the person of the victim, though some degree of delayed or indirect action is tolerated. So poisoning a person's food or drink will not amount to a battery where the poison is taken by the

118 Williams, *op cit*, pp.175-176; *Police v Greaves* [1964] N.Z.L.R. 295.
 119 *People v Henry*, 356 Ill. 141, 190 N.E. 361 (1934).
 120 *State v Myerfield*, 61 N.C. 108 (1867).
 121 *Rozsa v Samuels* [1969] S.A.S.R. 205; *Hairston v The State* (1877) 54 Miss. 689; and Williams, *Assault and Words* [1957] L. Rev. 219.
 122 *Tuberville v Savage* (1669) 1 Mod. Rep. 3.
 123 *Light* (1857) D. and B. 332, 27 L.J.M.C. 1.
 124 So a battery may be committed against a sleeping or unconscious person; see *H.M. Advocate v Logan*, 1936 J.C. 100; *Sweeney v X.*, 1982 S.C.C.R. 509.
 125 *Day* (1845) 1 Cox C.C. 207.
 126 *Thomas* (1985) 81 Cr. App. Rep. 331 at 334.
 127 *People v McEvoy*, 33 Ill App. 3d 300, 337 (1975); *State v Gordon* 120 Ariz. 172, 584 P. 2d 1163, 1165 (1978).
 128 *Moreland v State*, 125 Ark. 24, 188 S.W. 1 (1916).
 129 *Weaver v State*, 66 Tex., Cr. 366, 146 S.W. 927 (1912).

victim's own hand.¹³⁰ But a battery may be committed by the direct application of light, heat, electricity, gas or odour or any other substance or thing if applied in such a degree as to cause injury or personal discomfort to the victim,¹³¹ and clearly also by the use of any weapon or instrument against him¹³² or striking him by throwing a projectile or spitting at him.¹³³ The application of force to the person of another by some substance which the aggressor puts in motion may also constitute a battery.¹³⁴

1.50 The requirement that the force be direct is also satisfied where D sets a dog on a person,¹³⁵ or strikes a horse to make it throw its rider,¹³⁶ or upsets a chair on which another person is sitting.¹³⁷ However, where the defendant engineers the downfall of P by making use of the latter's momentum, as where he digs a pit for another to fall into, or stretches a wire to bring down a motor-cyclist, or derails a train by interfering with the tracks, the injury will be too indirect for a battery, though such acts may amount to other offences.¹³⁸ In *D.P.P. v K.*,¹³⁹ however, an English Divisional Court recently held that an assault was committed by a schoolboy who had poured sulphuric acid into a hot air drier in respect of the next user of the machine "just as truly ... as if he had himself switched the machine on". For this proposition Parker L.J. relied upon a lone *dictum* of Stephen J. in *R. v Clarence*:

"If a man laid a trap for another into which he fell after an interval, the man who laid it would during the interval be guilty of an attempt to assault, and of an actual assault as soon as the man fell in."¹⁴⁰

Although this reasoning applies to the causing of grievous bodily harm under s.18 of the 1861 Act,¹⁴¹ and has been approved in relation to the "infliction" of such harm under s.20,¹⁴² it has never, apart from Stephen's *dictum* in *Clarence*, been accepted for the purposes of common assault. In consequence, the decision in *D.P.P. v K.* may be questioned on this point.

1.51 Mere passive obstruction does not constitute a battery, though taking active steps to block or obstruct another may do so.¹⁴³ In addition, if an act which is unlawful in itself results in non-fatal harm to the person of another, the elements of the offence must nevertheless be proved. In other words, the

130 *R. v Clarence* (1888) 22 Q.B.D. 23 at 42.

131 *Russell on Crime* (12th ed., 1964), pp.652-653, citing s.245 of the Queensland Criminal Code 1899.

132 *Fagan v M.P.C.* [1968] 3 All E.R. 442.

133 *R. v Cotesworth*, 6 Mod. 172, 87 Eng. Rep. 926 (1705); *U.S. v Masel*, 563 F. 2d 322 at 324 (7th Cir. 1977).

134 *State v Hefner*, 199 N.C. 778, 780, 155 S.E. 879, 881 (1930).

135 Gordon, *Criminal Law* (2nd ed., 1978), p.185.

136 *R. v Keay* (1837) 1 Swin. 543.

137 Williams, *op cit*, p.179.

138 If grievous bodily harm results, s.18 of the 1961 Act will apply. Wilful obstruction of the highway at common law and railway interference under s.32 of the 1861 Act would also cover some such situations.

139 [1990] 1 All ER 331. See Bennett, *Assault - a harsh lesson* [1990] 140 N.L.J. 588.

140 *Clarence*, *supra*, n.130 at 45.

141 See below.

142 See below.

143 *Innes v Wylie*, 174 E.R. 800 at 803 (*per* Denman L.J.). But mere passive obstruction may amount to a false imprisonment, *infra*, Chapter 2.

doctrine of constructive liability as applied to manslaughter¹⁴⁴ does not apply to assaults¹⁴⁵ and other non-fatal offences against the person.¹⁴⁶

Wounding And Mayhem

1.52 Where the offence is of battery by wounding, it is established that the continuity of the entire skin must be broken, ie, not merely the cuticle or upper skin, though a division of the internal skin, for example within the cheek or lip, will also suffice.¹⁴⁷ So where a pellet fired by an air pistol hit P in the eye but caused only an internal rupturing of blood vessels and not a break in the skin, there was no wound.¹⁴⁸ Similarly, where P's collarbone was broken, it was held that there was no wound if his skin was intact. There was a wound, however, where the lining membrane of the urethra ruptured and bled, evidence being given that the membrane is precisely the same in character as that which lines the cheek.¹⁴⁹ A "wound" includes incised wounds, punctured wounds, lacerated wounds, contused wounds and gunshot wounds.¹⁵⁰

1.53 At common law, there is no distinction in gravity between a wounding and non-wounding battery, both being misdemeanours. The distinction is important, however, with respect to the statutory offences of wounding with intent and unlawful wounding under ss.18 and 20 of the 1861 Act. Originally introduced to obviate difficulties which arose in the construction of the words "cuts" and "stab" in previous enactments, it is now immaterial by what means the wound is given, and the means need not be stated in the indictment.¹⁵¹

1.54 Mayhem, or the maiming of persons, was probably at one time a felony at common law, though it appears to have been considered in later times, with the possible exception of castration, as a misdemeanour. Defined as the malicious infliction of a bodily hurt whereby a man is rendered less able in fighting to defend himself or to annoy his adversary,¹⁵² mayhem is no longer laid in indictments at common law, but under the statutory provisions considered below.¹⁵³ The original rationale for the offence was that such injuries would weaken the military capacity of the realm, and this is preserved in respect of persons subject to military law by the offence of malingering or maiming in s.143 of the *Defence Act, 1954*.

144 See generally, Williams, *op cit*, chapter 10, para. 5.

145 In the United States, however, most jurisdictions have extended the doctrine also to assaults: for example, *King v State* 157 Tenn. 635, 17 S.W.2d 904 (1928); *Lane v State* 65 Okl. Cr. 192, 84 P. 2d, 807 (1938).

146 The decision of the English Court of Appeal in *R. v Cato* [1976] 1 W.L.R. 110 may be regarded as contrary to principle in this respect; see *Wells*, 39 M.L.R. 474.

147 *People (Attorney General) v Messitt* [1974] I.R. 406. See also *Vallance* (1961) 108 C.L.R. 56; *Waters* [1979] 1 N.Z.L.R. 375; *Devine* [1982] 8 A. Crim. R. 45.

148 *C. (a Minor) v Eisenhower* [1984] Q.B. 331.

149 *Waltham* (1849) 3 Cox C.C. 442.

150 Archbold, *Pleading, Evidence and Practice in Criminal Cases* (43rd ed., 1988), pp.20-140.

151 *Russell on Crime, op cit*, p.621.

152 *Id*, pp.624-626.

153 *Infra*, p.55 *et seq*.

Use Of Force In Arrest And Questioning

1.55 No battery is committed by a Garda or any other person who uses such force as is reasonably necessary to effect a lawful arrest or to ensure that the arrest is maintained.¹⁵⁴ Whether the force used is reasonably necessary depends on whether the means adopted are such that a reasonable person placed as the arrestee is placed would not consider the use of force to be disproportionate to the evil sought to be prevented.¹⁵⁵

1.56 In order to make a valid arrest, the arrestee should touch the offender's body or otherwise restrain his liberty, so that a technical battery may even be required. Provided there is touching, it is not necessary that the offender be physically restrained.¹⁵⁶ However, such a restraint will not arise from the mere pronouncing of words of arrest without either a formal touching of a person sought to be arrested or a submission or acquiescence by him evidenced by words or conduct.¹⁵⁷

1.57 However, the Gardaí have no general power, independent of statute, to detain people for questioning, there being no intermediate period between liberty and arrest.¹⁵⁸ In consequence, although a person may be willing to answer questions from a Garda, he cannot be required to stop and listen, and the slightest laying of hands upon him without his consent will constitute a battery.¹⁵⁹

1.58 It is established that merely pulling away from someone, even where that person seeks to arrest you lawfully, will not in itself constitute a battery, though it may be the distinct offence of escape.¹⁶⁰

Use Of Force In Theft-Related Offences

1.59 Pulling an article from another's grasp is not a battery, even though it is with intent to steal.¹⁶¹ But to pull or strike the victim would be; and it appears that even a pulling of the article would be an assault if this involves injury or pain to the victim, as where an earring is ripped from the lobe of the ear.¹⁶²

1.60 Under s.23 of the *Larceny Act, 1916*, as inserted by s.5 of the *Criminal Law (Jurisdiction) Act, 1976*, a person is guilty of the separate statutory offence of robbery 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

154 *Dowman v Ireland* [1986] I.L.R.M. 117 (High Court) (*per* Barron J.), citing *Kentlin v Gardiner* [1966] 3 All E.R. 931 and *Pedro v Diss* [1981] 2 All E.R. 59.

155 A.G. for Northern Ireland's Reference 1977 [1977] A.C. 105 at 137-38 (*per* Diplock L.J.).

156 *Nicholl v Darley* (1828) 2 Y. and J. 399.

157 *R. v Jones, ex parte Moore* [1965] Crim. L.R. 222; *Alderson v Booth* [1969] 2 Q.B. 216; *Police v Thomson* [1969] N.Z.L.R. 513.

158 *Dunne v Clinton* [1930] I.R. 260.

159 *Collins v Wilcock* [1984] 3 All ER 374, discussed by the English Court of Appeal in *Wilson v Pringle* [1986] 2 All ER 440.

160 *Sherriff* [1969] Crim. L.R. 260.

161 *Ansell v Thomas* [1974] Crim. L.R. 31.

162 *Williams, op cit*, p.177.

there subjected to force. A person guilty of robbery, or of an assault with intent to rob, is liable on conviction on indictment to imprisonment for life.¹⁶³

1.61 It may be noted in this connection that s.5 of the 1976 Act, in substituting a new s.23 in the *Larceny Act, 1916*, had the effect of raising the maximum penalty for assault with intent to rob from 5 years penal servitude to life.

1.62 For the purposes of classification, an assault with intent to rob is treated as an offence against the person, and may be distinguished in this respect from robbery, which is treated as an offence against property.¹⁶⁴

1.63 With respect to the offence of assault with intent to rob, it is difficult to see how, in practice, a reckless assault will suffice, because if the assault was not intended, it cannot be said to have been committed with the intention of committing robbery. This intention may, of course, be inferred from the circumstances attending the assault, as well as from the defendant's conduct. In this respect, no actual demand of money, etc., is necessary to support the indictment.¹⁶⁵

1.64 A further theft-related offence which may but does not necessarily involve the actual, attempted or intended use of violence is that of burglary, provided for in s.23a of the *Larceny Act, 1916*, as inserted by s.6 of the *Criminal Law (Jurisdiction) Act, 1976*. This provides as follows:

"23a.-(1) A person is guilty of burglary if-

- (a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subs.(2); or
- (b) having entered any building or part of a building as a trespasser, he steals or attempts to steal anything in the building or that part of it, or inflicts or attempts to inflict on any person therein any grievous bodily harm.

(2) The offences referred to in subs.(1)(a) are offences of stealing anything in the building or part of a building in question, of inflicting on any person therein any grievous bodily harm or raping any woman therein and of doing unlawful damage to the building or anything therein.

(3) References in subss.(1) and (2) to a building shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle

¹⁶³ For a discussion of "force" in robbery, see the Commission's *Report on Dishonesty*, p.121.

¹⁶⁴ See this Commission's examination of robbery in the context of dishonesty, *op cit*, pp.402-403. The English Law Commission includes assault with intent to rob in its Draft Criminal Code under the chapter on offences against the person; Law Com. No. 177, s.78.

¹⁶⁵ *R. v Trusty and Howard* (1783) 1 East P.C. 418; *R. v Sharwin* (1785) 1 East P.C. 421.

or vessel at times when the person having a habitation in it is not there as well as at times when he is there.

(4) A person guilty of burglary shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years."

1.65 Under s.23b of the 1916 Act, as inserted by s.7 of the 1976 Act, a person commits the separate offence of aggravated burglary, punishable by life imprisonment, if he commits any burglary and at the time has with him any firearm or imitation firearm, any weapon of offence or any explosive.¹⁶⁶

1.66 Replacing the pre-existing offences relating to breaking and entering with intent to commit a felony, the above provisions were designed to bring the law into correspondence with that in England and Northern Ireland.¹⁶⁷ In this respect, one commentator has noted¹⁶⁸ that the omission of the word 'offence' from subs.1(b) of s.23a appears to be the result of a duplication of a legislative oversight in the equivalent English provision, in that a trespasser who may have a defence to a charge of inflicting grievous bodily harm could nevertheless, on a strict reading of the subsection, be convicted of burglary. This is to be contrasted with the position of the accused charged with burglary by entry with intent under subs.1(a), who would, on English authority,¹⁶⁹ be acquitted if he believed in the existence of facts which would justify the infliction of grievous bodily harm.

1.67 The English Court of Appeal has held that the words "grievous bodily harm" should bear the same meaning in burglary as under s.20 of the 1861 Act,¹⁷⁰ and that as under s.20, "inflicting" is wider than assault, an accused charged with entering and inflicting cannot, in the absence of an appropriate indictment,¹⁷¹ be convicted of assault occasioning bodily harm under s.47 of the 1861 Act.¹⁷² However, where an offence such as murder or administering poison under s.23 of the 1861 Act includes the infliction of grievous bodily harm under s.20 as a lesser offence, it may form the subject of an indictment for burglary.¹⁷³

1.68 Finally, in relation to sexual assaults, it may be noted that subs.2(2) of s.23a is narrowly drafted in confining the requisite ulterior intent to the rape of "any woman".¹⁷⁴

166 These terms are defined in paras. 23b(1)(a)-(c). For the law relating to firearms, explosives and offensive weapons, see below.

167 For a review of the law, generally, see McCutcheon, *The Larceny Act, 1916*, (1988).

168 McCutcheon, *op cit*, p.83, note 12, citing Smith, *The Law of Theft* (1984), para. 359.

169 *R. v Gladstone Williams* (1984) 78 Cr. App. R. 276; [1987] 3 All ER 411.

170 *R. v Jenkins* [1983] 1 All ER 1000: See *People (A.G.) v Messitt* [1974] I.R. 406.

171 *McCready* [1978] 3 All ER 987.

172 *R. v Jenkins, supra*, n.170, corresponding to the law under s.20 of the 1861 Act, as settled in *R. v Wilson* [1983] 1 All ER 983 and [1983] 3 All ER 448.

173 McCutcheon, *op cit*, p.83.

174 See this Commission's *Report on Rape* (LRC 24-1988), as to the suggested expansion of the scope of rape and the creation of offences of sexual assault and aggravated sexual assault.

Lawful Correction/Discipline

Spouses

1.69 References may be found to the ancient authority of a husband to chastise his wife with a "whip or rattan no bigger than [his] thumb in order to enforce the salutary restraints of domestic discipline".¹⁷⁵ A husband was therefore not liable for a battery on his wife, even if they were living apart,¹⁷⁶ unless he acted with extreme cruelty or inflicted permanent injury.¹⁷⁷ Even then, it appears that he could plead in mitigation that he was provoked to chastise her because of her "bad behaviour".¹⁷⁸ These rules were doubted in Blackstone's time,¹⁷⁹ and "the courts have [since] advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife under any circumstances".¹⁸⁰

1.70 In some early cases it was held that a husband, in order to prevent his wife from eloping, could legally confine her within his own dwelling.¹⁸¹ However, all such conceptions of a husband's rights were swept away by the English Court of Appeal in 1891, when it was held that, even in order to enforce a decree of restitution of conjugal rights, a husband could not keep his wife in confinement.¹⁸² Accordingly, "[t]he notion that a husband can, without incurring punishment, treat his wife, whether she be a separated wife or otherwise, with any kind of hostile force is obsolete".¹⁸³

1.71 At common law, although spouses were generally not competent to testify against each other in criminal trials, a spouse was nevertheless competent, though not compellable, to give evidence on behalf of the prosecution in any case involving violence against his or her person by the other spouse.¹⁸⁴ Section 4 of the *Criminal Justice (Evidence) Act, 1924*, gave statutory expression to this and other exceptions¹⁸⁵ and, in addition, provided for such competence in respect of a scheduled list of offences.¹⁸⁶ In our *Report on Competence and Compellability of Spouses as Witnesses*,¹⁸⁷ we recommended that spouses should be competent, though not compellable, witnesses against each other in all criminal proceedings.

175 *Bradley v State*, 1 Miss. 156, 157 (1824); see *Bradley v His Wife*, 1 Keb. 637, 83 Eng. Rep. 1157 (1663).

176 *State v Black*, 60 N.C. 262.

177 *State v Pettie*, 80 N.C. 367.

178 *Robbins v State*, 20 Ala. 36.

179 1 B.I. Comm. 444-45.

180 *State v Oliver* 70 N.C. 60 (1874); see also *Johnson v Johnson*, 201 Ala. 41, 44 (917); *Bailey v People*, 54 Colo. 337, 130 p.832 (1913).

181 For example *Re Cochrane* (1840) 8 Dowl. 630.

182 *R. v Jackson* [1891] 1 Q.B. 871, discussed by the English Court of Appeal in *Reid* [1972] 2 All ER 1350.

183 *Reid*, *supra*, at 1353 (*per* Cairns L.J.). *The Family Law Act, 1988*, abolished the action for the restitution of conjugal rights.

184 These common law exceptions are considered by Walsh J. in *People (D.P.P.) v T.*, C.C.A., unreported, 27 July 1988, at 28-29 and 31-32 of the judgment of the Court.

185 S.4(2).

186 S.4(1). The scheduled offences are s.2 of the *Vagrancy (Ireland) Act, 1847*; *Offences Against the Person Act, 1861*, ss.48, 52, 53 and 54, so far as unrepealed, and s.55; *Married Woman's Property Act, 1882*, ss.12 and 16; and the whole of the *Prevention of Cruelty to Children Act, 1904*.

187 LRC 13-1985. See also Jackson, *The Competence and Compellability of Spouses as Witnesses* (1986) 8 D.U.L.J. (ns.) 46.

1.72 It was subsequently held in *D.P.P. v T.*,¹⁸⁸ that the common law rule which precluded a person from testifying against a spouse charged with a sexual offence against his or her child had not survived the enactment of the Constitution. Clearly, this decision would extend also to cases of non-sexual child abuse by either parent, though whether it would extend to abuse of children outside the family is open to question.

The matter was finally dealt with, quite comprehensively, in the *Criminal Evidence Act, 1992*. Section 21 provides that a spouse of an accused shall be a competent witness in all criminal proceedings (except while being a co-accused). Section 22 goes further and provides for a spouse being a compellable witness (not being a co-accused) in an offence which:

- "(a) involves violence, or the threat of violence, to -
 - (i) the spouse,
 - (ii) a child of the spouse or of the accused, or
 - (iii) any person who was at the material time under the age of 17 years,
- (b) is a sexual offence alleged to have been committed in relation to a person referred to in subparagraph (ii) or (iii) of paragraph (a), or
- (c) consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a) or (b)."

Servants, apprentices and mariners

1.73 The common law also authorised a master to inflict moderate and reasonable physical chastisement on his apprentice.¹⁸⁹ True apprenticeship, however, was a special relation, so that an employer had no authority, in the absence of parental delegation, to administer corporal punishment to an ordinary servant on the grounds that he was a minor, no matter how flagrant his breach of duty.¹⁹⁰ In addition, the master or officer in command of a ship or a voyage was justified in punishing delinquent mariners with such force, administered with due moderation, as he reasonably believed necessary for the preservation of order and discipline, or for the safety of the vessel, or persons or property on board.¹⁹¹ All these formerly recognised rights, however, "may be assumed to have fallen into desuetude"¹⁹², and have properly been described as obsolete.¹⁹³

¹⁸⁸ *Supra*, n.184.

¹⁸⁹ 1 B.L. Comm. 428. *R. v Mawgridge* (1706) 17 St. I.R. 57.

¹⁹⁰ *Tinkle v Dunivant*, 84 Tenn. 503 (1886); *Cook v Cook*, 232 Mo. App. 994, 996, 124 S.W.2d 675, 676 (1939).

¹⁹¹ See *The "Agincourt"* (1824) 166 E.R. 96 at 97 (*per* Lord Stowell), and the "*Lowther Castle*" (1885) 166 E.R. 137; *Lamb v Burnett* (1851) 148 E.R. 1430; *Hook v Cunard Steamship Co. Ltd.* [1953] 1 All E.R. 1021. See also s.44 of the Canadian Criminal Code; ss.281 and 258 respectively, of the Queensland and Western Australia Codes.

¹⁹² 11 Halsbury's Laws of England, (4th ed., 1976), p.647.

¹⁹³ *Smith and Hogan* (6th ed.), *op cit*, p.386.

Children

1.74 The common law nevertheless continues to recognise the right of a parent or person *in loco parentis* to inflict moderate and reasonable physical chastisement on a child.¹⁹⁴ This parental power, deriving from the concept of *patria potestas* in Roman law¹⁹⁵, is expressly preserved by s.37 of the *Children Act, 1908*, which provides:

"Nothing in the Part of this Act [relating to the prevention of cruelty to children and young persons] shall be construed to take away or affect the right of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer punishment to such child or young person".¹⁹⁶

1.75 Whether the person has the lawful control or charge of a child is a matter of fact for the jury¹⁹⁷ - in general, the right of chastisement extends only in relation to unemancipated minors.¹⁹⁸ It has been held to extend to the case of an adopted child,¹⁹⁹ whether adopted formally or informally²⁰⁰ and to a stepchild.²⁰¹ The right to chastise has been deemed to lie in a guardian who retains control of his ward,²⁰² and to a common law spouse in respect of the other spouse's child.²⁰³ It has been held not to extend, however, to a hospital counsellor in respect of a retarded adult.²⁰⁴

1.76 The motive for, and the duration and force of the punishment, as well as the choice of instrument, must be objectively reasonable, not only reasonable in the parent's opinion.²⁰⁵ Punishment cannot therefore be administered "for the gratification of passion or rage ... or with an instrument unfitted for the purpose".²⁰⁶ However, it appears that where the chastisement is moderate, the courts will not inquire very closely into the validity of a parent's motives, and that where it is immoderate, such motives are irrelevant.²⁰⁷

1.77 The question whether the parent's conduct has gone beyond reasonable physical chastisement is a matter for the jury, provided there is evidence fit for

194 *Id.*, *Halliwel v Cresswell* (1878) 38 L.T. 176; *State v Fischer*, 245 Iowa 170, 60 N.W.2d 105 (1953); ss.280 and 257, respectively, of the Queensland and Western Australia Codes; s.50 of the Tasmanian Code; s.59 of the *New Zealand Crimes Act, 1961*.

195 See *Black's Law Dictionary* (5th ed., 1979), p.1014.

196 For a discussion of cruelty and other offences against children, see below.

197 *R. v Cox* [1898] 1 Q.B. 179.

198 *McGregor v State*, 4 Tex. App. 599.

199 *State v Koonse*, 123 Mo. App. 655, 101 S.W. 139 (1907).

200 *State v Gillett*, 56 Iowa 459, 9 N.W. 362 (1881).

201 *Gorman v State*, 42 Tex. 221.

202 *Eitel v State*, 78 Tex. Crim. 552, 182 S.W. 318.

203 *R. v Bedelph* [1891] 4 A. Crim. R. 192 (Tasmanian Court of Criminal Court).

204 *R. v Ogg-Moss* (1981), 24 C.R. (3d) 264 (Ontario C.A.). See also *Skinner v Robertson*, 1980 S.L.T. 43, as to the importance in this connection that a mentally handicapped person understand normal principles of right and wrong; see *Norman v Smith*, 1983 S.C.C.R. 100, as to the use of excessive force in restraining unruly patients.

205 See Law Reform Commission of Canada, W.P. 38, *Assault* (1984), Appendix, at pp.58-59.

206 *Per Cockburn L.J.* in *R. v Hopley* (1860) 2 F. & F. 202 at 206.

207 *Smith and Hogan, op cit*, p.386.

them to consider,²⁰⁸ though they may be instructed that a parent is not required precisely or neatly to weigh the amount of force used by way of correction.²⁰⁹

1.78 Moreover, the chastiser must intend, or be reckless as to whether he inflicts the degree of harm actually caused, so that he will not be criminally liable where the harm results from some fact unknown to him, such as the exceptional vulnerability of the child or a dangerous defect in the implement used.²¹⁰ The child must, however, be old enough to appreciate the nature of the correction,²¹¹ so that the parental authority over infants, at least where under twelve months, does not extend to physical hurt.²¹²

1.79 At common law, schoolteachers are in the same position as parents with regard to the conduct of a child at or on the way to or from school.²¹³ Yet the source of the teacher's authority to use reasonable force by way of correction is unclear: whereas in early English authority²¹⁴ and more recent Canadian decisions²¹⁵ it is said to originate in a delegation of parental authority, it may now, since the advent of compulsory education, be more accurately based, as in Scotland²¹⁶ and the United States,²¹⁷ on the teacher's quasi-public authority *qua* teacher to enforce discipline and maintain order in the school.²¹⁸ In the latter case, such authority cannot be withdrawn by the parent, and in some cases may be broader than the authority of the parent.²¹⁹

1.80 In this respect, it may be noted that s.37 of the 1908 Act, set out above, is merely declaratory of the common law and does not create a statutory right in teachers similar to that obtaining, for example, in New Zealand²²⁰ and Australia.²²¹ On the contrary, the Department of Education, by means of

208 *R. v Rahman* (1985) 81 Cr. App. R. 34. The insufficiency of evidence in cases of child abuse is a perennial problem for prosecutors, for example in *A.G.L. v H.M. Advocate*, 1988 S.C.C.R. 62, it was held that it was not enough to establish that mutilations had occurred at a time when the child victims were living with the defendants - it was important to lead evidence from which the jury could infer that they had the relevant opportunity at the relevant times.

209 *R. v Terry* [1955] V.L.R. 114. In the United States, the test of unreasonableness is not found in an error of judgment as to the force to be used, but in the substitution of a malicious desire to inflict pain in place of a genuine effort to correct the child by proper means. If a chastiser acts in good faith, the punishment will be unlawful only if permanent injury results, or if it amounts to cruelty, see *Wharton's Criminal Law*, (6), 1, pp.310-311 (14th ed., 1978 and Supplement, 1983).

210 See Commentary to *R. v Smith* [1985] Crim. L.R. pp.42-43.

211 *R. v Griffing* (1869) 11 Cox 402.

212 *R. v Miller* (1951) V.L.R. 346, (1951) A.L.R. 749 (Vic. Sup. Ct. F.C.).

213 *Cleary v Booth* [1893] 1 Q.B. 465; *Baker v Downey City Board of Education* 307 F. Supp. 517. The out-of-school conduct must have a direct and immediate effect on the discipline or general welfare of the school, see *Shanley v Northeast Independent School Dist.* 462 F. 2d 960, and cannot extend to conduct occurring after pupils arrive home from school, *Jones v Day*, 127 Miss. 136, 18 A.L.R. 645. The right has been held to extend to a defendant school busdriver; *R. v Trynchy*, (1970) 73 W.W.R.165.

214 *Cleary v Booth*, *supra*; *Mansell v Griffin* [1908] 1 K.B. 947.

215 *R. v Corkum* [1937] 1 D.L.R. 79; *R. v Trynchy*, *supra*, n.213.

216 *Brown v Hilson*, 1824 J.C. 1; *Gray v Hawthorn*, 1964 J.C. 69.

217 *State v Mizner*, 45 Iowa 248 (1876); *McShane v Paton*, 1922 J.C. 26.

218 See Street, *The Law of Torts* (4th ed., 1968) 87, Stroud, *The Teacher's Privilege to Use Corporal Punishment*, (1978) 11 Ind. L. Rev. 349, 353, links the power to a delegation of state police power to school officials.

219 *Baker v Owen*, 395 F. Supp. 294, *aff'd*, 423 U.S. 907, 98 S. Ct. 210.

220 *Crimes Act, 1961*, s.59.

221 Ss.280, 257 and 50, respectively, of the Queensland, Western Australia and Tasmania Codes.

Department circular letters,²²² has sought to prohibit the practice of corporal punishment in Irish schools. There is, however, no law providing for such abolition, and such circulars, though they may be evidence of a breach of duty in civil law,²²³ do not have the effect of bringing such conduct within the ambit of the criminal law.²²⁴

1.81 Article 3 of the European Convention on Human Rights provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Clearly, some forms of corporal punishment will be in violation of this article by virtue of their severity.²²⁵ In *Campbell and Cosans v U.K.*,²²⁶ it was argued that the practice of corporal punishment in Scottish schools in itself gave rise to such a violation, though this claim was declared inadmissible since the child in question had not actually been punished. The Court nevertheless held that to expose children to corporal punishment against the wishes of their parents violated the parents' rights to ensure that the education and teaching of their children is in conformity with their philosophical and religious convictions, contrary to Article 2 of the First Protocol to the Convention.²²⁷

1.82 As regards the right of parents, etc., to chastise their children, it appears that whereas the courts were originally prepared to accept quite severe punishment of children,²²⁸ the standard of reasonableness now adopted by the courts would clearly be higher than that giving rise to a breach of Article 3 of the Convention (on the improbable assumption that the Convention could be said to give rise to State responsibility for failing to criminalise such conduct).²²⁹

1.83 As noted above, the right is limited to the punishment of unemancipated children above the age of infancy not resulting in permanent injury,²³⁰ the reasonableness of which is to be judged according to the customs of contemporary Irish society.²³¹

222 Department of Education; Primary Branch, circular 9/82; Post Primary Branch, Circular M5/82.

223 See *Michael Browne & Others v An Bord Pleanála*, Irish Times, 2 October 1989, p.17.

224 *King v Nichols* (1939) 33 Q.J.P. 171, in which it was held that in using reasonable force by way of correction within s.280 of the Queensland Code, the fact that the headmaster was in breach of a departmental regulation did not bring him within the ambit of the criminal law. See also *Carberry v Yates* (1935) 69 I.L.T.R. 86. See generally, Hogan, *The Legal Status of Administrative Rules and Circulars* (1987) 22 Ir. Jur. (ns.) 194 at 200-201.

225 See *Tyrer v U.K.*, Judgment of the European Court of Human Rights, 25 April 1978, 2 E.H.R.R.1; and, generally, *Pogany* (1982) 132 N.L.J. 344.

226 4 E.H.R.R. 293 (29 January 1982).

227 This protocol has been in force in respect of Ireland since 3 September 1953. Following the judgment of the Court, the British Parliament enacted s.48 of the *Education (No.2) Act, 1986*, and s.48A of the *Education (Scotland) Act, 1980*, which provides that while in any other proceedings a teacher cannot rely on his 'right' to administer corporal punishment, the administration of such punishment within the limits of lawful chastisement will not amount to an offence.

228 See Howard, *Criminal Law* (3rd ed., Sydney, 1977), p.145; *Boyd v State*, 88 Ala. 169, 172 (1890); but see *R. v Bedelph* [1981] 4 A. Crim. R. 192.

229 See for example, *X. v United Kingdom*, Application No. 9348/81, decision of the European Commission of Human Rights, 28 February 1983, in Petzold, *The European Convention on Human Rights* (5th ed., 1984), p.67.

230 *Supra*, page 24. The means of correction must also be adapted to the age and sex of the child and the effects that may result from it: see *R. v Baptiste & Baptiste* (1980) 61 C.C.C. 2d 438.

231 It appears from English, Scottish, and Canadian authority that no allowance will be made for the more severe customary punishment of immigrant children: see *R. v Derriviere* (1969) 53 Cr. App. R. 637; Gordon, *Criminal Law* (2nd ed.), p.827; *R. v Sarwer - Foner*, 12 January 1979, Ont. Prov. Ct. (Fam. Div.), unreported. In Scotland, however, the requirement, of 'evil intent' applies also to cases of corporal punishment: see *Guest v Annan*, 988 S.C.C.R. 275.

1.84 In this respect, it appears that temporary pain and discolouration of the flesh will not be excessive²³² where the punishment takes place for corrective purposes²³³ and at the first reasonable opportunity.²³⁴ Whereas punishment inflicted by blows to the head is *prima facie* unreasonable, slaps on the face not likely to cause injury may nevertheless be reasonable.²³⁵ It is not within the bounds of parental authority for a father to point a loaded pistol at his son to frighten him.²³⁶

1.85 Those in charge of trains, boats, stadia, theatres, and similar places, while without authority to punish members of the public for misbehaviour, may, on American authority at least, use reasonable and moderate force to expel a person who refuses to pay his fare or admission,²³⁷ or is guilty of serious misconduct after he has paid. But such a person will be guilty of assault and battery if he does so improperly as by ejecting a passenger from a moving train.²³⁸

Prisoners

1.86 Breaches of prison discipline, including any assault or attempted assault,²³⁹ are not punishable by whipping or any other form of corporal punishment,²⁴⁰ nor by the use of irons or mechanical restraints,²⁴¹ which may only be used in case of urgent necessity and when necessary for the purposes of restraint.²⁴² The State's duty not to expose the health of prisoners to risk or danger²⁴³ has nevertheless been considered in connection with punishments for certain breaches of prison discipline which may result in what Rule 69 describes as "close confinement" for up to 3 days and, in the case of prisoners serving a sentence of penal servitude, "separate confinement" for up to 28 days.²⁴⁴

1.87 Punishment for breaches of prison discipline are to be distinguished, however, from the execution of a sentence in pursuance of a court order. A small number of statutes still authorise a sentence of whipping for adult males,²⁴⁵ and provision is made in Rules 72 and 73 of the Rules for the Government of Prisons 1947 for the manner in which such punishment is to be

232 *Campeas v Tiking* (1951) 14 C.R. 202; *Byrne v Hebden* (1913) Q.S.R. 233 (Queensland Sup. Ct.).

233 *R. v Kanhai* (1981) 124 D.L.R. (3d) 85.

234 *R. v Haberstack* (1970) 1 C.C.C. (2d) 433.

235 *White v Weller* (1959) Q.D.R. 192 (Queensland Sup. Ct.).

236 *R. v Hamilton* (1891) 12 L.R. (N.S.W.) 111 (N.S.W. Sup. Ct.).

237 *Carpenter v Washington & G. Ry. Co.*, U.S. 474, 7 S. Ct. 1002 (1887); *Griego v Wilson*, 91 N.M. 74, 570 P. 2d 612 (1977).

238 *State v Kinney*, 34 Minn. 311, 25 N.W. 705 (1885).

239 These are set out in *Rule 68 of the Rules for the Government of Prisons 1947* (Statutory Rules and Orders 1947, No. 320).

240 By virtue of Rule 72(1), below.

241 Rule 74.

242 Rule 75. Rules 75-78 provide for safeguards in respect of such restraints.

243 For example, Finlay P. in *State (C) v Frawley* [1976] I.R. 365 at 372.

244 These cases have been concerned with unlawful restrictions on the right to liberty, contrary to Article 40.4.1⁰ of the Constitution, rather than with the right to bodily integrity. Nevertheless, it is clear that severe ill-treatment of a prisoner may entitle him or her to an order of *habeas corpus*; see, generally, Kelly, *The Irish Constitution* (2nd ed., 1984), p.491 *et seq.*, and *Supplement* (1987) p.157 *et seq.*

245 Ryan & Magee, *The Irish Criminal Process* (Mercier, 1983), p.401. In England, all power to pass a sentence of whipping was abolished by s.2 of the *Criminal Justice Act, 1948*.

inflicted:

"72.-(1) Corporal punishment shall not be inflicted on any prisoner save in pursuance of a Court Order.

(2) All corporal punishment shall be attended by the Governor and Medical Officer.

(3) The medical officer shall, immediately before the punishment is inflicted, examine the prisoner and satisfy himself that he is in a fit condition of health to undergo the punishment, and shall make such recommendations for preventing injury to the prisoner's health as he may deem necessary and the Governor shall carry such recommendation into account.

(4) At any time the infliction of the punishment has commenced, the medical officer may, if he deems it necessary in order to prevent injury to the prisoner's health, recommend that no further punishment be inflicted and the Governor shall thereupon remit the remainder of the punishment.

73. The Governor shall enter in his journal the hour at which the punishment was inflicted, the number of strokes or lashes given and any order which he or the medical officer may have given on the occasion."

1.88 In practice, the corporal punishment of prisoners is obsolete,²⁴⁶ and even the possibility is more academic than real because most of the statutes authorising such punishment, including the relevant provisions of the *Offences Against the Person Act, 1861*,²⁴⁷ limit such a sentence to males below the age of 16,²⁴⁸ and because children, i.e. those below the age of 15, cannot be sent to prison.²⁴⁹ Moreover, although it may well be that the safeguards in Rules 72 and 73 satisfy the duty of the State not to expose the health of prisoners to risk or danger, whipping constitutes degrading treatment or punishment within the meaning of Article 3 of the European Convention on Human Rights.²⁵⁰ Freedom from such punishment or treatment forms part of the unspecified personal rights guaranteed by Article 40.3.1 of the Constitution which are not dependent on the continuation of a prisoner's liberty and which are not restricted in reasonable consequence of the State's power to imprison.²⁵¹

246 Ryan & Magee, *op cit*, p.401.

247 Ss.16, 28, 29, 30, 32, 56, and 64. Under s.70, the Court may sentence the offender to be once privately whipped, and the number of strokes and the instrument used must be specified by the Court in the sentence.

248 O'Connor, *The Irish Justice of the Peace* (1915), Part II, pp.6, 122, refers to the 'numerous' statutes which authorise the whipping of males under 16, at pp.6 and 122.

249 S.9 of the *Summary Jurisdiction over Children (Ireland) Act, 1884*, as amended by s.128(1) of the *Children Act, 1908*, and as re-amended by s.28 of the *Children Act, 1941*, defines a child as a person who, in the opinion of the Court before whom he is brought, is under the age of 15.

250 *Tyrer v U.K.*, *supra*, n.225. In *The State (Richardson) v Gov. of Mountjoy Prison*, unreported, High Court (Barrington J.), 28 March 1980, it was stated that the Prison Rules are to be read in the light of the Constitution.

251 *State (C) v Frawley*, *supra*, n.243; *Murray v Ireland* [1985] I.R. 532 at 542 (*per Costello J.*).

1.89 The constitutional validity of s.4(1)(d) of the *Summary Jurisdiction over Children (Ireland) Act, 1884*, may be questioned on the same grounds. This provides for an alternative sentence of whipping in respect of any male child between the ages of 7 and 15²⁵² charged before a court of summary jurisdiction with any indictable offence other than homicide. Where the parent or guardian of such child has not objected to the charge being dealt with summarily, "the Court may, instead of any other punishment, adjudge the child to be, as soon as practicable, privately whipped with not more than six strokes of a birch rod by a constable, in the presence of an inspector or other officer of police of higher rank than a constable, and also in the presence, if he desires to be present, of the parent or guardian of the child".²⁵³

Necessary Defence And The Prevention Of Crime

1.90 The use of reasonable force is lawful for the necessary defence of self or others or of property.²⁵⁴ Although some authorities suggest that there must be "some special nexus or relationship between the person relying on the doctrine to justify what he did in aid of another, and that other",²⁵⁵ in Ireland it has been held that such distinctions are obsolete and that everyone has the right to defend any other by reasonable force against unlawful force.²⁵⁶

1.91 The principles applicable are the same whether the plea be made on grounds of necessary defence or on grounds of prevention of crime, the underlying justification being based on the broader right, if not the duty, to prevent a breach of the peace or the commission of an unlawful act.²⁵⁷ So the position appears to be the same where a person acts in defence of property, whether his own or that of another, which another seeks to steal, destroy or damage.²⁵⁸ A trespasser may be removed by the exercise of reasonable force only after he has been requested to leave and has refused to do so.²⁵⁹

1.92 However, in the case of a burglar or a trespasser who seeks to forcibly dispossess a person of his house, such force may be used immediately.²⁶⁰ The same principles apply to trespass to goods.²⁶¹ Where a person unlawfully in possession of another's property (real or personal) refuses to return such property when requested to do so, reasonable force may again be used in order

252 S.4(5) of the 1884 Act limits the punishment to male children over the age of 17.
 253 S.5(1) of the 1884 Act, which provided for the whipping of young persons, i.e. those between 15 and 17, was repealed by the *Children Act, 1908*.
 254 *People (A.G.) v Keatley* [1954] I.R. 12 at 17 (per Maguire C.J.).
 255 *Devlin v Armstrong* [1972] N.J. 13 at 35-36; *R. v Rose* (1884) 15 Cox 540.
 256 *Keatley, supra*, n.254. In *R. v Spartels* (1953) A.L.R. 554, a similar approach was adopted by the Supreme Court of Victoria.
 257 *R. v Spartels, supra*, see also Edmund-Davies J. in *R. v Duffy* [1967] 1 Q.B. 63.
 258 *Bird v Jones* (1845) 7 Q.B. 742; see Kenny, *Outlines of the Criminal Law* (17th ed., 1966), pp.207-208, and McMahon & Binchy, *Irish Law of Torts* (2nd ed., 1990), pp.426-427.
 259 *Weaver v Bush* (1798) 8 T.R. 78; see also, s.6(a) of the *Prohibition of Forcible Entry and Occupation Act, 1971*.
 260 *Green v Goddard*, 2 Salk, 641, 91 E.R. 540 (1798); *R. v Hussey* (1924) 18 Cr. App. R. 160; and, generally, *Russell on Crime*, pp.682-83.
 261 *Harvey v Mayne*, I.R. 6 C.L. 417 at 419 (Common Pleas (per Morris J.), 1872).

to repossess it.²⁶²

1.93 Whether the use of force was necessary and whether no more force was used than was reasonable to repel the attack are questions of fact to be determined by the jury, the burden remaining at all times on the prosecution to prove that the force was lawful.²⁶³ In this connection, there is no absolute duty to retreat, and the failure to do so will only be one element to be taken into account in considering whether the accused's conduct was reasonable.²⁶⁴ Furthermore, a person about to be attacked does not have to wait for the assailant to strike the first blow or fire the first shot - circumstances may justify a pre-emptive strike. In this case, however, the anticipated attack must be imminent.²⁶⁵ In addition, a person is justified in taking preparatory measures to ward off or prevent an anticipated attack, and the fact that such measures may in themselves be unlawful does not thereby make his object unlawful.²⁶⁶

1.94 A person cannot invoke the defence, however, if he has deliberately provoked the attack with a view to using force to resist or terminate it. In *R. v Browne*, Lowry L.C.J. said:

"The need to act must not have been created by the conduct of the accused in the immediate context of the incident which was likely or intended to give rise to that view".²⁶⁷

1.95 That part of the *dictum* which suggests that a person may not act in self-defence because his conduct was likely, or even foreseen to be likely, to give rise to that need may have gone too far, however, and has been criticised as infringing the important principle of freedom of action in *Beatty v Gillbanks*.²⁶⁸ In that case, Field J. rejected the proposition that a man may be punished for acts lawfully done because he knows that in so doing he may induce another to act unlawfully.²⁶⁹ As pointed out by Fitzgerald J. in *Humphries v O'Connor*,²⁷⁰ the law would be supplanted by the power of the mob if it were otherwise.

1.96 The better view, therefore, is as expressed in *R. v Field*,²⁷¹ that a person is not deprived of his right to self-defence because he goes to a place where he may lawfully go, or does anything which he may lawfully do, in the

262 *Id*; the unlawful possession must be such as would ground an action in trespass, *Holmes v Bagge*, 1 E. & B. 782, 118 E.R. 629 (1853).

263 *People v Dwyer* [1972] I.R. 416; *R. v Lobell* [1957] 1 Q.B. 547 at 551.

264 *Dwyer, supra*; *Bird* [1985] 2 All ER 513; *Whyte* [1987] 3 All ER 418 at 419. In the case of defence of one's home, such a failure to retreat is irrelevant: see *R. v Hussey, supra*, n.260.

265 *R. v Chisam* (1963) 47 Cr. App. R. 130.

266 *Attorney-General's Reference (No. 2 of 1983)* [1984] 2 W.L.R. 465.

267 [1973] N.I. 96 at 107.

268 (1882) 9 Q.B.D. 308; see *Codification of the Criminal Law. A Report to the Law Commission* (Law Com No.143), para. 13.53.

269 Doubts have nevertheless been expressed as to the correctness of the principle on the grounds that in the criminal law generally, it is open to the tribunal of fact to infer that the defendant has intended a result where he foresees that it is virtually certain to result from his behaviour: see *O'Kelly v Harvey* (1883) 14 L.R. Ir. 105; *Goodall v Te Koot* (1890) 9 N.Z.L.R. 26; *R. v Londonderry J.J.* (1891) 28 L.R. Ir. 440.

270 (1864) 17 Ir. C.L.R. 1.

271 [1972] Crim. L.R. 435.

knowledge that he is likely to be attacked. From the point of view of public order, the practical conclusion to be drawn from this is that where a danger arises that the lawful exercise of rights may result in a breach of the peace, the proper remedy is the presence of police in sufficient numbers to preserve the peace, and not the legal condemnation of those exercising their rights.²⁷²

1.97 The force used must be proportionate to the harm sought to be prevented.²⁷³ So the use of lethal force in defence of property or in response to a common assault will be unlawful. (One consequence of this rule is that one may have to sacrifice a legally recognised interest where the force required to protect it is excessive.) In addition, the justification covers only such force as is used in sheer self defence, so that blows struck in revenge will be unlawful.²⁷⁴ Nevertheless, where the force is excessive, the case is not necessarily to be treated as if all the force used had been illegal: for example, the evidence, considered as a whole, may establish that a charge of "wounding with intent to do grievous bodily harm" should be reduced to one of unlawful wounding.²⁷⁵ Furthermore, in Ireland it has been held, following previous Australian authority,²⁷⁶ that at least with respect to "violent and felonious attacks", where self-defence fails as a ground for acquittal on a charge of murder because the force used went beyond what was reasonable in the light of the circumstances but was no more than the accused honestly believed to be necessary in the circumstances, he is guilty of manslaughter and not of murder.²⁷⁷

1.98 In England, this approach has been rejected, so that there is no intermediate stage between acquittal and murder.²⁷⁸ This lack of flexibility to some extent explains why there has been a recent erosion in the requirement of proportionality, following a *dictum* of Lord Morris in *Palmer v R.*:

"A person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."²⁷⁹

1.99 Although the proportionality requirement has always been interpreted

272 *R. v Londonderry J.J.*, *supra*, n.269 at 450 (*per* O'Brien J.); *Verrall v Great Yarmouth B.C.*, [1981] Q.B. 202 (*per* Denning M.R.).

273 *Dwyer*, *supra*, n.263; *R. v McKay* [1957] V.R. 560 (Supreme Court of Victoria).

274 *R. v Driscoll* (1841) C. & M. 214; *R. v Bird* (1985) 18 Cr. App. R. 110, 114.

275 *Prevention of Offences Act, 1851*, s.5.

276 *Howe* (1958) 100 C.L.R. 448, now overruled by the Australian High Court in *Zekevic v D.P.P. (Vic.)* [1987] 81 A.L.J. 375.

277 *Dwyer*, *supra*, n.263; *People (A.G.) v Commare* (C.C.A. No. 67 of 1974), *Frewen*, Vol. 1, 400.

278 *McInnes* [1971] 3 All ER 295. The Criminal Law Revision Committee in its *Report on Offences Against the Person*, para. 228, has recommended that the *Howe* principle be adopted, and this has been accepted by the Law Commission in s.59 of its Draft Criminal Code, Law Com. No. 177 (1989).

279 [1971] 1 All ER 1077 at 1088 (Privy Council), adopted by the C.A. in *R. v Shannon* [1980] 71 Cr. App. R. 192. See *R. v Whyte* [1987] 3 All ER 416 for its application to wounding.

widely to allow for the heat of the moment,²⁸⁰ it is not easy to see how "what the defendant thought" could be evidence of what it was reasonable for him to do.

1.100 By contrast, it is now established that where the defendant is labouring under a mistake as to the facts he is to be judged according to that mistaken view, irrespective of whether the mistake was reasonable or not.²⁸¹ In this respect, the reasonableness or unreasonableness of the defendant's belief is only material to the question of whether that belief was held by him at all. It is then for the jury to decide whether the defendant's reaction to the real or imaginary threat was a reasonable one.²⁸²

1.101 There may, however, be an exception to this principle. Where a Garda is acting lawfully in the execution of his duty, the defendant's belief in the unlawfulness of the police action, whether reasonable or not, may not be a justification for any force used against the Garda in the absence of any imminent threat of injury. This rule appears from the decision of the English Court of Appeal in *R. v Fennell*,²⁸³ which upheld the conviction of a man for assaulting a police officer who was attempting to arrest his son, notwithstanding any honest and reasonable belief on his part that the arrest was unlawful:

"The law jealously scrutinises all claims to justify the use of force and will not readily recognise new ones. Where a person honestly and reasonably believes that he or his child is in imminent danger of injury, it would be unjust if he were deprived of the right to use reasonable force by way of defence merely because he had made some genuine mistake of fact. On the other hand, if the child is in police custody and not in imminent danger of injury, there is no urgency of the kind which requires an immediate decision, and a father who forcibly releases the child does so at his peril".²⁸⁴

1.102 The decision is based on the policy that other remedies are available to secure the release of a person from allegedly unlawful police custody. In consequence, it does not extend to cases where the defendant is unaware that the "victim" is a member of the Gardaí,²⁸⁵ nor to cases where the arrest is in fact unlawful.²⁸⁶

280 Because "detached reflection cannot be demanded in the presence of an uplifted knife", per Holmes J. in *Brown v United States* (1921) 256 U.S. 335. This was perhaps overstated by McDonald J.A. in *R. v Wiggs* (1931) 44 B.C.R. 384, when he stated that the law "makes allowances for human passions aroused in a father by a vicious attack on a defenceless boy and permits him to use such a degree of force as may reasonably prevent its repetition.

281 *R. v Williams* [1987] 3 All E.R. 411; *R. v Helmhout* (1980) 1 A. Crim. R. 464 (Federal Court of Australia); *R. v Bozikis* (1981) 5 A. Crim. R. 58 (Victoria C.C.A.).

282 *R. v Williams*, *supra*.

283 [1970] 3 All ER 215. See also *R. v Ball* [1989] Crim. L.R. 579 and comment, pp.80-81.

284 At 217 (per Widgery L.J.).

285 Archbold, *op cit*, pp.20-27.

286 *E.G.R. v Osten*, High Court, Wellington, 27 October 1987, discussed by Brookbanks, *Self Defence in New Zealand* [1989] N.Z.L.R. 258, 261.

1.103 However, where the jury is further satisfied that the mistake has been caused by voluntarily induced intoxication, "reason recoils", in England at least, from the application of this rule to the defendant's drunken mistake as to the facts, whether or not the offence is one of so-called specific intent or basic intent.²⁸⁷ In Australia, however, intoxication remains relevant to the issue of proof beyond reasonable doubt of the requisite intent where the accused pleads self-defence.²⁸⁸

1.104 A final question arises as to whether the defendant may rely on a defence of necessary defence or the prevention of crime, or on any other justification or excuse, where at the time of acting he does not know of, or believe in, the circumstances of justification or excuse but finds *ex post facto* that, had he but known of them, such circumstances did exist. In *Dadson*,²⁸⁹ where the defendant, a constable, shot and wounded a thief without knowing whether he was a felon, this question was answered in the negative by the Court for Crown Cases Reserved, and the rule that the defendant must actually know of or believe in circumstances of justification or excuse has since become known as the "*Dadson principle*".

Provocation

1.105 The defence of provocation is limited to the law of homicide, where it operates to mitigate the rigour of the mandatory life sentence for murder by reducing the charge or conviction to voluntary manslaughter.²⁹⁰ In all other offences, provocation is a matter of mitigation to be considered by the judge in his or her discretion after conviction.²⁹¹ As a matter of law, therefore, "[n]o conduct or words, no matter how offensive or exasperating, are sufficient to justify a battery"²⁹² or, *a fortiori*, any other offence against the person resulting in non-fatal injury.²⁹³

Negligence

1.106 There is no general offence of negligently causing injury to the person of another.²⁹⁴ At common law, manslaughter is almost the sole offence of negligence, requiring death to result from a very high degree of negligence.²⁹⁵

287 *H. v O'Grady* [1987] 3 All E.R. 420.

288 *R. v Helmhout*, *supra*, n.281; *R. v O'Connor* (1980) 4 A. Crim. R. 348.

289 (1850) 4 Cox C.C. 358. See Hogan, *The Dadson Principle* [1989] Crim. L. Rev. 679; Sullivan, *Bad Thoughts and Bad Act* [1990] Crim. L. Rev. 559.

290 *People v McEoin* [1978] I.R. 27; see *McAleese* [1978] D.U.L.J. 53.

291 According to Williams, *op cit*, p.524, there are no limiting rules in the exercise of such discretion, and account will be taken of circumstances of provocation even in respect of a person who is drunk.

292 *People v Martinez*, 3 Cal. App. 3d 886, 889; 83 Cal. Rptr. 914, 915 (1970).

293 For example, wounding with intent to do grievous bodily harm: see *R. v Helmhout*, *supra*, n.281 (Supreme Court of the Australian Capital Territory).

294 See discussion in Williams, *op cit*, pp.223-224. In most jurisdictions in the U.S., a battery may also be committed negligently, the standard being the same as applicable to manslaughter, for example *Commonwealth v Welansky*, 316 Mass. 383, 55 N.E. 2d 902 at 912 (1944). In practice, however, the distinction between such negligence and *Venna* recklessness may be more semantic than real, as it must amount to wanton disregard of the rights of others: see, for example, *Woodward v State*, 164 Miss., 468, 475, 144 So. 895 (1932).

295 *People (A.G.) v Dunleavy* [1948] I.R. 95; *Andrews v D.P.P.* [1937] A.C. 576.

By statute, the most conspicuous such offence is that of driving without due care and attention under s.52 of the *Road Traffic Act, 1961*, as amended, a summary offence irrespective of any resulting bodily injury.²⁹⁶ There are, in addition, a number of offences 'seeping into the statute book',²⁹⁷ mostly concerned with failure to comply with safety standards in industrial legislation, which are aimed at those who negligently create a risk of injury in particular circumstances.²⁹⁸

1.107 In jurisdictions which have provided for offences of causing bodily injury by a negligent act, the criminal standard of negligence appropriate to manslaughter has been applied in the absence of any express words or legislative intention which would justify reading into such offences any lower standard of negligence.²⁹⁹

Consent

1.108 In addition to the above special instances where the control or constraint is lawful, a broader exception exists which allows for the exigencies of everyday life.

"Generally speaking, consent is a defence to a battery; and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact. So nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is (within reason) slapped Although such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life In each case, the test must be whether the physical contact so persisted in has in the circumstances gone beyond generally acceptable standards of conduct; and the answer to that question will depend on

296 See below. In some common law countries, an offence of unlawful injury, i.e. resulting from an unlawful act or from criminal negligence, has been created by statute, for example *New Zealand Crimes Act, 1961*.

297 Williams, *op cit*, p.223.

298 For example, under the *Safety, Health and Welfare at Work Act, 1989*.

299 See *R. v D.* (1984) 14 A. Crim. R. 198 (New South Wales Court of Criminal Appeal).

the facts of the particular case".³⁰⁰

1.109 So, for example, a touch to engage a person's attention is to be distinguished from contact amounting to a restraint on that person.³⁰¹

1.110 For both assault and battery, absence of consent is a definitional element in the offence which, in consequence, falls to be proven by the prosecution.³⁰² In this respect, it appears that the answer to a vexatious criminal charge for a non-hostile, minor touching would be reasonable mistake of fact.³⁰³ But the consent must be given freely (i.e. without force, fear or fraud), and by a sane and sober person, so situated as to be able to form a reasonable opinion upon the matter to which consent is given. In this respect, there is no age or degree of mental affliction which as a matter of law precludes a person from consenting to the application of force to his body. Ability to consent is a matter of fact, depending on the capacity of the individual.

1.111 While it is clear that a consent may be invalid by reason of lack of age³⁰⁴ or infirmity³⁰⁵ it is also evident that the question of mental capacity to understand the nature of the act is closely linked to the degree of harm to which a person has allegedly given his consent.³⁰⁶ So 10-13 year-old boys may be held to have consented to the touching of their legs or arms, but not of their genitals.³⁰⁷ In *Donovan*, where the defendant, for his sexual gratification, beat a 17 year-old girl in circumstances of indecency thereby causing her a relatively slight degree of harm, Swift J. stated:

"No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer. There are, however, many acts in themselves harmless and

300 *Collins v Wilcock* [1984] 3 All ER 374 at 377-378 (per Goff L.J.). This "general exception" approach was questioned by the Court of Appeal in *Wilson v Pringle* [1986] 2 All ER 440 at 447, the court preferring to look to the doctrine of implied consent, as applied in the older cases: see, for example, *Coward v Baddeley* (1859) 4 H. & N. 478. In *Wilson v Pringle*, Croom-Johnson L.J. reverted to the test of whether such contact could be said to be hostile, this being a question of fact for the jury. The "general exception" approach nevertheless remains a more workable standard: see *T. v T.* [1988] 1 All ER 613 at 625 (per Wood J.). In *F. v West Berkshire Health Authority* [1989] 2 All ER 545, Lord Goff (as Goff L.J. had become) reasserted the approach he had favoured in *Collins v Wilcock*. He doubted whether the hostility test suggested in *Wilson v Pringle* was correct, commenting:

"A prank that gets out of hand, an over-friendly slap on the back, surgical treatment by a surgeon who mistakenly thinks that the patient has consented to it, all these things may transcend the bounds of lawfulness, without being characterised as hostile. Indeed, the suggested qualification is difficult to reconcile with the principle that any touching of another's body is, in the absence of lawful excuse, capable of amounting to a battery and a trespass ...".

301 See Parke B. in *Rawlings v Till* (1837) 3 M. & W. 28 at 29, 150 E.R. 1042, distinguishing *Wiffin v Kincard* (1807) 2 Bos. and P.N.R. 471, 127 E.R. 713.

302 *R. v Donovan* [1934] 2 K.B. 498, following *May* [1912] 3 K.B. 572.

303 *Russell on Crime*, p.657.

304 *Burrell v Harmer* [1967] Crim. L. Rev. 169. See discussion on "indecent assault with consent" in the Commission's *Report on Child Sexual Abuse* (LRC 32-1990), para. 4.16.

305 *State v Marks*, 178 N.C. 730, 101 S.E. 24 (1919).

306 See discussion in Clarkson and Keating, *op cit*, pp.225-232.

307 *R. v Sutton* [1977] 1 W.L.R. 1086.

lawful which become unlawful only if they are done without the consent of the person affected. What is, in one case, an innocent act of familiarity or affection, may in another, be an assault, for no other reason than that, in the one case there is consent, and in the other consent is absent. As a general rule, although it is a rule to which there are well-established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence and when such an act is proved, consent is immaterial For this purpose we think that 'bodily harm' has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient or trifling."³⁰⁸

1.112 This rule forms part of a broader principle that whether consent will constitute a defence is ultimately a question of public policy that involves balancing the seriousness of the harm inflicted against the social utility or acceptability of the defendant's conduct.³⁰⁹ So in *Donovan*, P's consent to a "slight tap" would have been operative notwithstanding the defendant's evil motives. But it was clearly those motives which rendered unlawful a degree of force which in other circumstances might have been permissible. In *Coney*, Stephen J. held that consent will not operate to negative an offence "if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured."³¹⁰

1.113 This means that most fights, whether in public and amounting to a breach of the peace or in private, will be unlawful regardless of consent, whereas blows struck in horseplay or in properly conducted games and sports and not likely or intended to cause bodily harm will not amount to a battery.³¹¹ This rule was formerly understood as providing that nobody had the right to consent to bodily harm in such a manner as to amount to a breach of the peace, or in a prize fight or other exhibition calculated to collect together disorderly persons.³¹² An unlawful contest, as opposed to a lawful game, included both struggles in anger³¹³ and any contest, whether commenced in anger or not, in which the lives or health of the contestants were endangered, for example, contests with deadly weapons or those intended to be continued until one of the contestants is disabled or exhausted.³¹⁴

308 *Supra*, n.302, at 510. This definition of 'actual bodily harm' no longer applies to the statutory offence of assault occasioning such harm in s.47 of the 1861 Act: see below paragraph 1.152 *et seq.*

309 In *II Halsbury's Laws of England*, (4th ed.), para. 23, n.9, it is suggested that consent will not be a defence if it "is unacceptable according to prevailing moral and social standards or is inimical to the public interest".

310 (1882) 8 Q.B.D. 534 at 549.

311 *Attorney General's Reference (No. 6 of 1980)* [1981] 2 All E.R. 1058 at 1059; *Bruce* (1847) 2 Cox C.C. 262. "Rough and disciplined sport or play" appears in Swift J.'s list of exceptions in *Donovan*, *supra*, n.302,... but not in Lord Lane's list in the *A.G.'s Reference*. This latter list, however, was not intended to be exhaustive, and the exception of consent to rough play was subsequently upheld by the English Court of Appeal in *R. v Jones* (1986) 83 Cr. App. R. 375.

312 Stephen's *Digest of Criminal Law*, (9th ed.), 258.

313 *Caniff* (1840) 9 C. & P. 359.

314 *Coney*, *supra*, n.310; *Young* (1886) 10 Cox C.C. 371; *Orton* (1878) 14 Cox C.C. 226.

1.114 Commenting on the decision in *Attorney General's Reference No.6 of 1980*,³¹⁵ in which the Court of Appeal endorsed the rule in *Donovan* relating to actual bodily harm and specifically embraced the vitiation of consent on grounds of policy, Williams has written:

"This wide doctrine of vitiation of consent on grounds of policy is a judicial invention for putting the law of assault to a purpose for which it was not intended. It turns an offence designed for the prevention of aggression into one that gives a judge and jury discretion to punish people for what they deem to be improper. Since this was an Attorney-General's reference and no defendant was before the court, the court did not find it necessary to pretend that it was merely stating the existing law. The precedents directly in point were of a low order of authority, while other cases indicated that the law was narrower.

The only relevant English case cited in the judgment was a nineteenth century decision on prize fights; such fights involved a considerable risk of death or grievous bodily harm and presented a much more serious social problem than a fist fight between two disputing teenagers (which was the occasion of the particular reference).

The attitude of the court was that it could nullify a person's consent in any case where the public interest did not require that consent should be a defence, and, in the opinion of the court, 'it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason.'

These are wide words, but if the decision is read as being confined to the subject of unregulated fights the policy is understandable ... [However], Lord Lane C.J., after the sentence just quoted, added:

'Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases.'

Apart from chastisement or correction, the legality of the items in this list will normally depend upon consent, which is allowed to operate in these cases. Although the list is presented as a statement of matters to which the court's outlawing of bodily injury will not extend, there is the disturbing thought that in fact the list may operate to extend that pronouncement. Were it not for the list of 'apparent exceptions' the

decision might have been regarded as confined to injuries inflicted in fights. But the 'apparent exceptions' seem to imply that the judges have empowered themselves to declare that the occasioning of any injury, even by consent, is unlawful except to the extent that they are prepared to accept 'apparent exceptions' in the public interest; and 'in the public interest' simply means that the judges approve of the activity. Traditionally they approve of boxing; presumably this is 'needed in the public interest' (Why is it needed? Is not the point rather that there is no public interest against it? - though serious doubts are now felt on the subject of head injuries in this sport). According to the dictum, the courts are even prepared to countenance 'dangerous exhibitions'. No qualification about reasonableness appears here, but it would be unwise to rely on the omission; a judge could always defeat the argument by pointing out that Lord Lane was merely endorsing the 'accepted legality' of such exhibitions, and did not say how far the 'accepted legality' went. But why are dangerous exhibitions needed in the public interest?

Lord Lane expressly reserved the right of judges (with the assistance, of course, of juries) to pronounce upon what are and what are not 'properly conducted games and sports', and even upon what are and what are not 'reasonable surgical interferences.' Does this mean that the propriety of medical operations performed by members of a highly responsible profession with the full consent of the patient are subject to the scrutiny of judge and jury?

There may be some looseness in the drafting of Lord Lane's list; but what seems to emerge is that in the matter of bodily injuries, widely interpreted, three judges sitting in the Court of Appeal have now legislated judicial paternalism to the full extent The court did not utter a word in support of the idea that people have the right to do what they like with their own bodies, so long as they do not harm others.³¹⁶

1.115 Strong words. In *R. v Boyea*, a judgment delivered in January 1992, the Court of Appeal took the view that in deciding whether an injury is "transient or trifling", in the *Donovan* terminology, "the Court must take account of the fact that social attitudes have changed, particularly in the field of sexual relations between adults". As a generality, the level of vigour in sexual congress which was generally acceptable, and therefore the voluntarily accepted risk of incurring some injury, was probably higher now than in 1934. It followed that the phrase "transient or trifling" must be understood in the light of conditions in 1992 rather than those of nearly 60 years ago.³¹⁷

However in *R. v Brown*³¹⁸ a judgment delivered the following week, a

316 *Op cit*, pp.583-584.

317 [1992] Crim. L.R. 574 at 575.

318 [1992] 2 All ER 552.

differently composed Court of Appeal held that the satisfying of sado-masochistic libido was not excused by the fact that consent was given. The harm inflicted in that case was decidedly unpleasant to read about but was inflicted by consent, caused no permanent injury or even temporary infection and there was no evidence of medical attention being required or sought. Nonetheless the harm was held to be neither transient or trifling.

The application of this rule to contact sports, and in particular to boxing, does present some conceptual difficulty. While consent will not have been extended to off-the-ball and dangerous play,³¹⁹ the condition that the force is not likely or intended to cause bodily harm is inconsistent with the accepted rules of many sports.³²⁰ Yet, as was observed in *R. v Bradshaw*,³²¹ "no rules or practice of any game whatever can make lawful that which is unlawful by the law of the land."

1.116 A better view may be that sport serves a valid social purpose and that injuries sustained therein are part of the general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life;³²² or, in the case of serious injury, that the justification of misadventure (accident) will apply.³²³

1.117 Whichever view is adopted, it is nevertheless clear that prosecutions for sporting violence, in Ireland as elsewhere, are on the increase, and that courts have been prepared to impose increasingly heavy custodial sentences for assaults committed in the course of contact sports.³²⁴

1.118 In Canada, there is now a substantial body of such reported cases,³²⁵ from which it emerges that if the contact is unintentional, instinctive or reasonably incidental to the game, it will be held to fall within the bounds of consent,³²⁶ but if it is found to be calculated, overly violent or unrelated to the immediate course of ongoing play, it will constitute an assault.³²⁷ Where the means of defence used is not disproportionate to the severity of such an assault,

319 *Billingham* [1978] Crim. L. Rev. 553.

320 See O'Donnell, *Dangerous Play - Legal Penalties?* [1987] I.L.T.S.J. 66. In *Pallante v Stadiums Pty. Ltd. (No. 1)* [1976] V.R. 331, the Supreme Court of Victoria had difficulty in formulating any precise legal rule as to the lawfulness of boxing matches, and reluctantly concluded that this was a matter for the jury.

321 (1878) 14 Cox C.C. 83, 84.

322 *Id.*

323 It is a complete defence that the alleged battery was the result of misadventure: see discussion in *Stanley v Powell* [1891] 1 Q.B. 86.

324 See O'Donnell, *op cit*; Grayson, *Sport and the Law* (Butterworths, 1988) and *Keeping Sport Alive* [1990] 140 N.L.J. 12, who traces a development from suspended sentences to custodial sentences of 18 months for field violence; also L.R.C.C., W.P. 38, *Assault*, pp.30-36.

325 Outlined by the L.R.C.C., W.P. 38, *op cit*, pp.33-35.

326 *R. v Henderson* [1978] 5 W.W.R.119; *R. v Lecuyer* (1978) 11 A.R. 239; *R. v Williams* (1977) 35 C.C.C. (2d) 103; *R. v St. Croix* (1979) 47 C.C.C. (2d.) 122. It appears from these cases that professionally trained and professionally employed players consent to more assaultive type behaviour than amateurs do.

327 *R. v Cote* (1981) 22 C.R. (3d) 97; *R. v Gray* [1981] 6 W.W.R.654; *R. v Watson* (1976) 26 C.C.C. (2d) 150; *R. v Maloney* (1976) 28 C.C.C. (2d) 323. In *R. v Green* (1971) 2 C.C.C. (2d) 442, the judge found it difficult to imagine a circumstance where an offence of common assault, as opposed to one of causing bodily harm, could stand in relation to hockey, having regard to the permissiveness of the game and the risks that the players willingly undertake.

a plea of self-defence will be valid.³²⁸

1.119 Consensual fights have also been the subject of recent examination by Canadian courts, where consent has been held to be operative in fist fights, as opposed to those involving weapons, notwithstanding that the blows may have been struck in anger and were intended to cause bodily harm.³²⁹ A judgment of Laycraft C.J.A. for the Alberta Court of Appeal is instructive in this respect:

"If anger, or the intention to do corporal hurt or to truly injure or to cause actual bodily harm is to trigger the intervention of public policy and so nullify consent, it is difficult to imagine the case in which there would be no such intervention. School boys in disagreement, with or without boxing-gloves, intend and strive mightily to injure or cause bodily harm; they are certainly angry. Even professional boxers fighting for money may not be able to resist the onset of a certain cholera. The contestants in fights in hockey or football also meet all the criteria. The friendly fight is a rare phenomenon.

Moreover, the expressed tests do not, in my respectful opinion, focus on one of the elements which should even more quickly induce the public policy of the law to nullify consent. Challengers are often bullies - those who have the assurance derived from training or experience or size or skill or physical condition on their part, or lack of these attributes in their opponent, that any harm which may result will not befall them. To speak of 'consent' or 'a fair fight' in such cases does not relate to the real world. In some such cases the facts may justify a charge under one of the criminal negligence sections.

In the fist fight, once consent is truly established, it seems to be impossible to administer a test based on anger or the intention to cause injury or bodily harm. Indeed, that emotion or intention may even change in the course of the contest. I remain firm in the view I expressed in *Carriere* that the law can and should intervene to nullify consent when weapons are involved. I am, however, unable, as perhaps were the codifiers of our criminal law, to formulate or administer a test for the weaponless fighters based on anger or intent to do bodily harm."³³⁰

1.120 It nevertheless remains clear that consent is no defence to offences occasioning more serious degrees of injury, such as maiming and causing grievous

328 *R. v Maki* (1971) 1 C.C.C. (2d) 333.

329 *R. v Bergner* (1987) 36 C.C.C. (3d) 25; *R. v Carriere* (1987) 56 C.R. (3d) 257; *R. v Jobidon* (1987) 59 C.R. (3d) 203. See also the discussion in *Carriere* of the earlier cases of *R. v Mactavish* (1972) 8 C.C.C. (2d) 206, *R. v Dix* (1972) 10 C.C.C. (2d) 324 and *R. v Abraham* (1974) 30 C.C.C. (2d) 332, which looked to the question of whether the accused's acts exceeded the scope of the comment.

330 *R. v Bergner*, *supra*, at 31-32. By contrast, at least one Australian jurisdiction has embraced the approach taken in *A.G.'s Reference (No. 6 of 1980)*, *R. v Raabe* (1985) 14 A. Crim. R. 381 (C.C.A., Queensland). This decision has been criticised by Devereux, *Consent as a Defence to Assaults occasioning Bodily Harm - The Queensland Dilemma*, 14 v Qd. L.J. 151, who concludes that the defence of consensual fight is preferable.

bodily harm.³³¹ As regard offences of endangerment, particular statutory prohibitions and provisions for minors aside,³³² there is uncertainty as to when the law will deny a person's right to consent to be placed in situations of peril.³³³ Contests with deadly weapons or contests intended to be continued until one of the contestants is disabled or exhausted would be excluded,³³⁴ though, as Williams points out,³³⁵ the category of "dangerous exhibitions" which cannot be consented to is unclear. In *Cato*,³³⁶ it was held on a charge under s.23 of the 1861 Act that a person cannot consent to the direct administration of a harmful substance, even where the defendant has not foreseen that harm may result. This decision, however, is open to criticism,³³⁷ and it appears that the issue of consent to such harm is more rationally dealt with by providing for specific offences prohibiting the particular conduct in question or for offences of negligence.³³⁸

1.121 In the case of a surgical operation carried out by a competent surgeon, however great the risk, the patient's consent will be a full justification for what would otherwise constitute an aggravated battery or a maiming.³³⁹ The purpose of the operation must, however, be recognised as valid by the law.³⁴⁰ In England, sterilisation, so-called sex-change operations and transplant operations are all now regarded as lawful.³⁴¹ Transplants save lives, vasectomy and sterilisation are regarded as an acceptable method of contraception, sex changes may be considered psychologically beneficial, as may cosmetic surgery, and male circumcision may be upheld "on the grounds of toleration".³⁴² On the other hand, it appears that the practice of female circumcision would not be

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- 331 See Swift J. in *Donovan*, *supra* n.302. Nor, it appears, may a person consent to any assault that may result in a breach of the peace: see *Commonwealth v Colberg*, 119 Mass. 350 (1876).
- 332 *Children's Dangerous Performances Act*, 1879 (42 & 43 Vic., c.34), ss.3 and 4; *Dangerous Performances Act*, 1897 (60 & 61 Vic. c.52), D.2; *Employment of Children Act*, 1903 (3 Edw. 7, c.45).
- 333 See Williams, *op cit*, pp.591-593 for a summary of the considerations which arise in this area.
- 334 *Coney* (1882) 8 Q.B.D. 534; *Young* (1886) 10 Cox C.C. 371; *Orton* (1878) 14 Cox C.C. 226. In *McLeod* (1915) 34 N.Z.L.R. 430, the use of a lethal weapon in a feat of shooting skill was enough to bring the resulting injury within a statutory provision of unlawful injury, though the *mens rea* for this offence was equivalent to that required for manslaughter. Williams, *op cit*, p.592, suggests that the common law rules on consent have no application to feats of skill or endurance.
- 335 See below.
- 336 [1976] 1 W.L.R. 110.
- 337 See Williams, *op cit*, pp.214-216; Wells, 39 M.L.R. 474; Campbell [1977] 11 Melbourne U.L. Rev. 134.
- 338 See Criminal Law Revision Committee, Fourteenth Report, *Offences Against the Person* (H.M.S.O. 1980), Cmnd. 7844, para. 190.
- 339 In his book, *Law, Ethics and Medicine* (1984) pp.30-31, Professor Skegg takes a different view, on the grounds that the "ordinary and natural meaning" of bodily harm scarcely includes medical procedures carried out for the benefit of the body as a whole, whether the benefit is physical or psychological. However, it seems clear that the English courts, at least, still regard a surgical procedure as "harm" which would amount to an offence, *inter alia*, under the 1861 Act but for the patient's consent thereto: see Kennedy and Grubb, *Medical Law* (Butterworths, 1989), pp.119-122 and 124-126.
- 340 In *Bravery v Bravery* [1954] 3 All E.R. 59 at 67-68, Denning L.J. suggested that a voluntary vasectomy for contraceptive purposes was unlawful. Changes in legislation, as well as of public attitudes, have encouraged commentators to agree that *Bravery* no longer represents the law in England, if, indeed, it ever did so: see, for example, Kennedy & Grubb, *op cit*, pp.572-573. A blanket ban on sterilisation in Irish law would be likely to raise constitutional issues: cf *McGee v A.G.* [1974] I.R. 284 and *Norris v A.G.* [1984] I.R. 38. Having regard to the marital basis of the right recognised in *McGee*, an interesting question arises on the civil side as to whether the consent of the other spouse should also be obtained: see *Ponter v Ponter* (1975) 342 A. 2d 574.
- 341 *Id.* See also Williams, *op cit*, pp.589-91, and, more generally, Cooney (1989) 11 D.U.L.J. 56.
- 342 Williams, *Consent and Public Policy* [1962] Crim. L. Rev. 156; Mason and McCall Smith, *Law and Medical Ethics*, ch. 4.

regarded as lawful, having no basis whatsoever in any religion³⁴³ and being entirely detrimental to a woman's health and comfort.³⁴⁴ Again, in England, the *Prohibition of Female Circumcision Act, 1985*, creates a specific offence for performing such operations,³⁴⁵ though it has been forcefully argued that the practice is already contrary to the criminal law irrespective of consent or of who performs the operation.³⁴⁶ Particular problems arise in this area with respect to issues of "informed consent" and to the question of what legal rules allow a casualty surgeon to perform an urgent operation on an unconscious patient who is brought into hospital or on a patient who is permanently unable to consent in circumstances where there is no one in a position so to consent.³⁴⁷

1.122 The issue of "informed consent" to a medical procedure, as it has come to be understood in the law of negligence, is only of limited relevance to the law of trespass to the person.³⁴⁸ Where a patient consents in broad terms to the general nature and quality of a proposed procedure, such consent will not be ineffective merely because it was obtained without disclosure of associated risks and possible alternative treatments. The Supreme Court has recently affirmed this approach. In *Walsh v Family Planning Services Ltd.*,³⁴⁹ it held that where a doctor has failed to give adequate warning to his patient as to the risks attendant upon a surgical procedure or other treatment, the proper cause of action in the event of damage ensuing is a claim for damages in negligence. A claim for assault should, the Court stated, be limited to cases where there is no consent to the particular treatment (and where it is feasible to look for such consent) or where an apparent consent has been vitiated by fraud or deception. In reaching this conclusion the Court endorsed and adopted the *dicta* of the Canadian Supreme Court in *Reibl v Hughes*.³⁵⁰ That negligence is the appropriate action in such cases is supported by further Canadian authority that an honest belief in the effectiveness of a particular treatment no matter how unorthodox, will, if administered in good faith, afford a defence in negating the *mens rea* of an offence of intention or recklessness.³⁵¹

1.123 Citing the Draft Criminal Code proposed in England in 1880, the Indian Penal Code, and the Criminal Codes of Canada, New Zealand, Queensland,

343 "Female Circumcision, Excision and Infibulation: the facts and proposals for change", Minority Rights Group Report No. 47, 7.

344 *Id.*, pp.6-8. See also Baroness Cox, H.L. Deb. Vol. 441, col. 682.

345 S.1(1). S.2(1) provides for certain limited exceptions for therapeutic procedures carried out by registered medical practitioners and registered midwives.

346 See MacKay, *Is Female Circumcision Unlawful?* [1983] Crim. L.R. 717, and the comments of Lord Hailsham, H.L. Deb., Vol. 441 col. 673, 676-677.

347 *T. v T.*, [1988] 1 All ER 613 (Family Division).

348 For a discussion of informed consent and the law of negligence in Australia, England and North America, see Appendix 1 to the joint Report on Informed decisions about Medical Procedures of the Law Reform Commissions of Victoria (Report 24), Australia (Report 50) and New South Wales (Report 62), June 1989, pp.33-44. For an exhaustive examination of legal consent to medical procedures, cf Kennedy & Grubb, *Medical Law* (Butterworths, 1989), pp.171-367.

349 [1992] I.R. 496.

350 *Reibl v Hughes* (1980) 114 D.L.R. (3d) 1 at 10-11. See also *Chatterton v Gerson* [1981] 1 All E.R. 257, and generally, Keown [1989] H.L.R. 790.

351 *R. v Daigle* (1987) 39 C.C.C. (3d) 542 (Quebec C.A.). A South Australian case does, however, suggest that there may be circumstances in which failure to disclose attendant risks does not preclude the granting of an "informed consent" as a result of which a claim for negligence lies, but does, in fact, negative the reality of the consent: therefore if no consent is given, the action lies in assault: see *D. v S.*, (1981) 93 L.S. (S.A.) J.S. 405.

Western Australia and Northern Nigeria, *Russell on Crime* points out that "the trend of legal opinion is in favour of the proposition that no criminal responsibility should be incurred by a surgeon who, with proper care and skill, and for the physical benefit of a sick person, performs on him a surgical operation even without his consent."³⁵² Be that as it may, the common law contains no such rule, as is evident from the recent case of *T. v T.*,³⁵³ a declaratory proceeding necessitated by the admitted lack of clarity in the law. In this case, Wood J. held that, in circumstances where the patient is permanently unable to consent and no other person is in a position so to consent, a doctor is justified in taking such steps as good medical practice "demands", i.e., when there are really no two views as to what course of action is in the best interests of the patient.³⁵⁴ The test adopted by Wood J. in this case is clearly analogous to the doctrine of necessity, which may also be the most appropriate conceptual and legal justification for emergency operations.³⁵⁵

1.124 This approach is supported by proceedings brought under the traditional *parens patriae* jurisdiction of the courts, which may be seen in Ireland as part of the State's duty to protect the individual's right to bodily integrity.³⁵⁶ Although such issues have not yet arisen before Irish courts, the relevant authorities have been surveyed by the Supreme Court of Canada in *Re Eve*.³⁵⁷ There it was held that the courts could not consent to the sterilisation of a mentally retarded woman who had extreme difficulty in communicating with others in order to save her from possible pregnancy and from parental obligations she was allegedly incapable of fulfilling. According to La Forest J.:

"The importance of maintaining the physical integrity of a human being ranks in our scale of values, particularly as it affects the privilege of giving life. I cannot agree that a court can deprive a woman of that privilege for purely social or nontherapeutic purposes without her consent. The fact that others may suffer inconvenience or hardship from failure to do so cannot be taken into account. The ... *parens patriae* jurisdiction exists for the benefit of those who cannot help themselves, not to relieve those who may have the burden of caring for them".³⁵⁸

1.125 Nevertheless, where the sterilisation or other medical treatment has been

352 P.680 note 18.

353 *Supra*, n.347

354 *Id.*, at 621 and 625.

355 See Skegg, *A Justification for Medical Procedures Performed without Consent*, (1974) 90 L.Q.R. 512; Bates, *Consenting to the Necessary* (1972) 46 A.L.J. 73. The Supreme Court of Canada has recognised a common law defence of necessity: see *Morgentaler v The Queen* (1975) 53 D.L.R. (3d) 161; *Parke et al v The Queen* (1984) 13 D.L.R. (4th) 1. In England, an analogous defence of 'duress of circumstances' has been held to apply to reckless driving and other road traffic offences: *Buckoke v G.L.C.* [1971] Ch.655; *Johnson v Phillips* [1976] 1 W.L.R. 65; *Woods v Richards* [1977] R.T.R. 201; and *R. v Conway*, *The Times*, 29 July 1988 (C.A.). See also Scarman L.J. in *Gillick*, *infra*.

356 See Casey, *Constitutional Law in Ireland*, p.335, and Cooney, *Sterilisation and the Mentally Handicapped* [1987] 11 D.U.L.J. 56 at 63-64. The jurisdiction derives from that of the High Court under Article 34 and from the duty of the courts to protect the rights of the individual under Article 40.3. See the decision of the Supreme Court in *In Re an Application by the Midland Health Board* [1988] I.L.R.M. 251, which applied this reasoning to justify the extension of wardship to a person of unsound mind even though he or she has no property.

357 (1986) 31 D.L.R. (4th) 1.

358 *Id.*, at 34.

shown to be necessitated by the best interests of the ward herself, leave to perform it will be granted.³⁵⁹ This appears from English authority to be the case whether the treatment is therapeutic, i.e. for the treatment of some malfunction or disease, or not, the primary and paramount question in all cases being whether it is for the welfare and benefit of the individual in question.³⁶⁰ This would apply equally where parents, on religious or other grounds, refuse to sanction a blood transfusion or other procedure necessary to save a child's life.³⁶¹

1.126 The related question, as to the age at which a minor can give a valid consent to medical treatment, is open to question. In *The People (A.G.) v Edge*,³⁶² the Supreme Court applied the common law "age of discretion", as traditionally accepted by the courts by analogy with the Abduction Acts,³⁶³ to the law of kidnapping. However, such an approach to the modern law governing parental rights and a child's capacity to consent has been rejected by the House of Lords in respect of both kidnapping³⁶⁴ and medical treatment.³⁶⁵ In the *Gillick* case, the majority of the House of Lords held that parental rights are recognised by the law only in so far as they are needed for the protection of a child and that, if and when a child achieves a sufficient understanding and intelligence to enable him or her to appreciate fully what is proposed, they must yield to the child's right to make his or her own decisions:

"It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law. Until the child achieves the capacity to consent, the parental right to make the decision continues save only in exceptional circumstance. Emergency, parental neglect, abandonment of the child or inability to find the parent are examples of exceptional situations justifying the doctor proceeding to treat the child without parental knowledge and consent; but there will arise, no doubt, other exceptional situations in which it will be reasonable for the doctor to proceed without the parent's consent."³⁶⁶

1.127 The same approach to the issue has been adopted by the High Court of Ontario in a decision relied upon by the Court in the *Gillick* case.³⁶⁷

359 *T. v T.* *supra*, n.347; *Re B. (a minor)* [1987] 2 All E.R. 206 (H.L.); *In Re F.* [1989] 2 W.L.R. 1025. (Mental patient: sterilisation - although here the decision was based on medical necessity, the *parens patriae* jurisdiction in respect of adult persons having been abolished in England). For an examination of comparative decisions on the sterilisation of mentally handicapped persons, see Cooney, *op cit*, and generally, Law Reform Commission of Canada, *Sterilisation* (1979).

360 *Re B. (a minor)*, *supra*, at 219, in which the House of Lords rejected the Canadian Supreme Court's distinction between therapeutic and non-therapeutic treatment in *Re Eve*. The reasoning of the House of Lords on this point has been criticised by Cooney, *op cit*, who argues that an Irish court faced with an application for non-voluntary sterilisation would do better to adopt the criteria laid down by the Supreme Court of Washington in *In re Guardianship of Hayes* (1980) 608 P. 2d 635.

361 See Casey, *op cit*, p.335.

362 [1943] I.R. 126.

363 The first being the Act 4 & 5 Ph. & M. c.8 (1557).

364 *R. v D.* [1984] 2 All ER 449. The approach of the House of Lords to the kidnapping of minors in this case appears to be conceptually flawed: see below.

365 *Gillick v West Norfolk Area Health Authority* [1985] 3 All E.R. 402.

366 *Id.*, at 423-424 (*per* Lord Scarman). For an example of parental consent, see *S. v McC.*; *W. v W.* [1972] A.C. 24.

367 *Johnson v Wellesley Hospital* (1970) 17 D.L.R. (3d) 139.

Nevertheless, it should be noted that these decisions are as concerned with the proper exercise of medical advice and treatment as they are with the capacity of a minor to consent to bodily interference. In this respect, they may be seen as no more than an application of the principle that whether a minor has the capacity to consent will depend, in addition to age, upon the nature and quality of the act and the relation between the parties.³⁶⁸

1.128 In this connection, it has been argued that the nature and consequences of certain medical procedures, such as sterilisation, are such that they should not be left entirely to the judgment of the family of a minor and to the medical profession alone.³⁶⁹ As in the case of mentally handicapped persons, to quote Templeman L.J. in *In Re B.*, "[n]o one has suggested a more satisfactory tribunal [than the High Court] or a more satisfactory method of reaching a decision which vitally concerns an individual but also involves principles of law, ethics and medical practice [than the *parens patriae* jurisdiction]."³⁷⁰ Although no such application has yet to be adjudicated upon in Irish law, Cooney has advocated the adoption of a judicial or legislative rule that no person under 16 should be sterilised without the authorisation of the High Court or unless the operation is of strict or urgent necessity in order to preserve the health of the child.³⁷¹ He also proposes detailed procedures and safeguards for obtaining the free and informed consent of a competent but mentally handicapped person to any such operation.³⁷² For other persons over 16, such consent could be required to be given in writing.³⁷³

1.129 "[T]he proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word and without qualification. It is too short to be true as a mathematical formula is true".³⁷⁴ The fraud must relate to the fundamental nature of the act or to the identity of the deceiver. Accordingly, where D1, a doctor, by falsely pretending that D2 was a medical student, obtained P's consent to D2's presence at a vaginal examination of P, there was no assault because the fraud was not as to the nature and quality of what was to be done.³⁷⁵ In the leading case of *Clarence*,³⁷⁶ where a woman consented to intercourse with her husband in circumstances where she would not have consented had she been aware of the venereal disease from which he was suffering, the Court for Crown Cases Reserved held that he had not thereby assaulted his wife, and could not, therefore, be convicted under either s.20 or s.47

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Id.

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See generally, Cooney, *op cit.*, and the discussion of the *parens patriae* jurisdiction of the courts above.

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[1988] A.C. 199 at 206, cited with approval by Griffiths L.J. in *In Re F.* [1989] 2 W.L.R. 1025 at 1079. See also *In Re D. (A Minor) (Wardship: Sterilisation)* [1976] Fam. 185, discussed by Cooney, *op cit.*, pp.65-66. In England, however, there is uncertainty as to the legal basis of the court's powers to make orders in this area, the *parens patriae* jurisdiction having been abrogated in respect of adult persons of unsound mind by the *Mental Health Act, 1959*, and the revocation in 1960 of the warrant from the Crown delegating such powers to the courts. For criticism, see Grubb and Pearl [1987] C.L.J. 439 at 481-82; [1989] C.L.J. 380; Cooney, *op cit.*, at 72-73; and Shaw, *Sterilisation of Mentally Handicapped People: Judges Rule OK?* [1990] M.L.R. 91.

371

Op cit.

372

Id.

373

Id.

374

R. v Clarence 22 Q.B.D. 23 at 43 (*per* Stephen J.).

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Bolduc and Bird (1967) 63 D.L.R. (2d) 82 (Supreme Court of Canada, Spence J. dissenting).

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(1888) 22 Q.B.D. 23 (C.C.R.).

of the 1861 Act. This was in spite of the fact that the court was clearly of the opinion that her consent had been fraudulently induced, though nevertheless real in criminal law.³⁷⁷ Similar reasoning has been applied by the High Court of Australia in respect of intercourse consented to after a false ceremony of marriage.³⁷⁸

1.130 Clearly, where a woman cannot be said to have fully consented to intercourse, the defendant, acting with the requisite *mens rea*, may be convicted of rape and, it appears, of indecent assault or assault occasioning actual bodily harm for the resulting infection.³⁷⁹ At least in respect of venereal disease, however, the ruling in *Clarence* that infection arising from otherwise lawful contact cannot give rise to a battery may be open to question. In particular, it appears from *Donovan*³⁸⁰ that the consent of the victim to bodily contact which (a) risks injury and (b) meets with social disapproval (such as intercourse with a partner known to suffer from VD) is irrelevant. In consequence, as argued by Lynch,³⁸¹ such contact, even when consented to, will constitute an assault and, depending on the seriousness of the resulting infection, give rise to liability under s.20 or s.47 of the 1861 Act. Either way, the law in this area is particularly confused at the moment.

1.131 It is interesting to note in this connection that the contrary view, that such cases do not give rise to an assault, is supported by civil law cases in which the policy considerations for denying a tortious remedy were based on 19th century views of sexual morality which would not, it is submitted, hold weight today.³⁸²

1.132 Submission is not consent. Whereas it used to be thought, by analogy with the law of duress, that consent would only be vitiated by threats of violence either to the victim or to a close relative,³⁸³ it now appears that any threat will suffice provided it is sufficient to overcome the will of a reasonably firm person³⁸⁴ and provided the victim does submit, i.e. the threat is a *sine qua non* of his decision to acquiesce.³⁸⁵ The answer to the first part of this will to some extent depend on the relationship between the gravity of the threat and the act to which P is asked to submit.³⁸⁶ It may also be implied from the relationship between the parties, as where the defendant is a schoolmaster and P is a 13 year-old pupil.³⁸⁷

377 *Id.*, at 27, 43-45, 55 and 59.

378 *Papadimitropoulos v R.* (1957) C.L.R. 249.

379 *R. v Bennett* (1866) 4 F. & F. 1105; *R. v Sinclair* (1867) 13 Cox C.C. 28.

380 *R. v Donovan* [1934] 2 K.B. 498.

381 *Criminal Liability for Transmitting Disease* [1978] Crim. L. Rev. 612.

382 For example, *Hegarty v Shine*, 4 L.R. Ir. 289 (Court of Appeal, 1878). See discussion in McMahon & Binchy, *A Casebook on the Irish Law of Torts* (1983) pp.135-141 and the Moot judgment of Lord Brandon on civil liability for communication of AIDS summarised in (1988) I.L.S.I. Gazette 145.

383 For example, *Latter v Braddell* (1881) 50 L.J.Q.B. 448. But see the dissenting opinion of Lopes J, which is now a more accurate statement of the law.

384 Smith & Hogan, *op cit*, p.382.

385 See the discussion of Dunn L.J. in *R. v Olugboja* [1981] 3 All ER 443, and the decision of the Court of Appeal in *R. v Valderrama-Vega* [1985] Crim. L. Rev. 220.

386 Smith & Hogan, *op cit*, p.382.

387 *Nichol* (1807) Russ. and Ry. 130.

1.133 But an unfounded belief in P's consent is a defence, whether the belief is based on reasonable grounds or not, provided only that it is honestly held. As Lane L.C.J. has stated in this connection:

"The mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more".³⁸⁸

Dangerous Exhibitions

1.134 Although the courts may nullify consent to the intentional infliction of bodily harm, it does not follow that the general criminal law dictates what dangers may be lawfully encountered in behaviour that is unaggressive and not intended to harm, i.e., where D's only purpose is to do something which he knows to involve the risk of hurt to another and where that other consents to run the risk. The current position at common law and the policy considerations which arise in this area are examined by Williams:

"The law relating to dangerous feats and performances, such as the climbing of vertical surfaces and brief defiance of the law of gravity on the flying trapeze or hang-glider, is obscure. Certainly no crime is committed if the whole affair is reasonable? Granted the power of the courts to nullify consent to hurts intentionally inflicted, it does not follow that the general criminal law dictates what dangers may be lawfully encountered in behaviour that is not only unaggressive but not intended to harm. One way of settling many problems is by pointing out that there is not, and never has been, any crime of self-manslaughter. Suicide has always meant intentional suicide: in effect (though not in legal theory) self-murder. For no purpose is it a crime for a person to kill himself negligently. Anyone who incites or helps him cannot be guilty of manslaughter as a perpetrator, because he is not the perpetrator; and he cannot be guilty as accessory, because of the absence of the crime

Apart from these technical arguments, it would be unfortunate if the accessory to *de facto* self-manslaughter could be convicted, because it would mean that people who help mountaineers and others to fit out foolhardy expeditions might be convicted of manslaughter if a member of the party dies. There has never been any such prosecution, and it would be undesirable to have a rule of law making the prosecution possible.

The foregoing reasoning helps the defendant only when he does not do the act that kills. If he does, he must find his defence along some other

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In *Williams* (1983) [1987] 3 All ER 411 at 414, approved by the Privy Council in *Beckford v R.* [1987] 3 All ER 425 at 431. This is consistent with the approach of Irish Courts: see *People v Dwyer*, [1972] I.R. 416; *People v McEoin*, [1978] I.R. 27.

line. One solution would be to seize upon the only fully liberal phrase in the judgment in *Attorney-General's Reference*, permitting 'dangerous exhibitions.' It has already been noticed that the liberality may be illusory, because of Lord Lane's reference to 'accepted legality'. But if dangerous exhibitions are truly allowed, then dangerous feats not intended as exhibitions must presumably be allowed as well. In other words, 'assumption of risk' must be a defence to a manslaughter charge in these cases. Alternatively, it is always possible for the court to regard the value of the activity, taken in conjunction with the voluntariness of participation as excluding a finding of negligence.

The proper rule would be that the common law has no application to feats of skill or endurance. There have always been people who have taken a pleasure in such things; and a few would count the preservation of life as the worthiest way of living. 'Surely', said RLS, 'the love of living is stronger in an Alpine climber roping over a peril, or a hunter riding merrily at a stiff fence, than in a creature who lives upon a diet and walks a measured distance in the interest of his constitution'. Activities like these are valued not only because they present difficulties to be overcome but often, paradoxically, because of the danger. Motorcycle racing is a conspicuous example. It attracts participants and spectators precisely because of the risks - even though the organisers take great pains to minimise them. The same is true of those who climb down dark holes, or who make free-fall parachute descents. Some psychiatrists see therapeutic value in exhilarating hazards for people suffering from neurotic ills. The soundest policy for the criminal courts would be to dissociate themselves from these questions, by holding that the consent of a person to run the risk of death, otherwise than in combats, is a defence to a charge of manslaughter. Unless the law abrogates control over this area, the courts will be faced with the invidious task of deciding between the risks that people may and may not legitimately run in respect of their own bodies.

The proposition should be accepted not only for open-air sports but for cinema 'stuntmen' and circus entertainers. Risks are taken every day in these performances, and sometimes accidents happen, but the police rightly take no notice.

A rare example of a prosecution is the New Zealand case of *McLeod*. McLeod was an expert marksman who, in the course of a performance of his skill, invited a member of the audience to hold a cigarette in his mouth which was to act as a target. The invitation was accepted, and McLeod aimed at the cigarette ash with the object of knocking it away. No injury would have occurred but for the fact that the voluntary assistant moved his head just before the defendant fired, which caused the bullet to enter his cheek. It was held by the Court of Appeal, on the construction of a section of the New Zealand Code, that if the assistant had died it would have been manslaughter, since 'a lethal weapon was

used and in risky circumstances'. It may be doubted whether the fact that a potentially lethal weapon was used was itself sufficient to carry the decision, for it was not used with the intention of causing injury. Moreover, if some element of risk in the performance was enough to make it illegal at common law, many other exhibitions and feats of endurance would come under the same condemnation."³⁸⁹

1.135 At common law, therefore a person may validly consent to run the risk of being seriously injured or killed, so that the lawfulness of particular dangerous exhibitions is a matter for statutory regulation. For example, *The Employment of Children Act, 1903*, and the *Children's Dangerous Performances Act, 1879*, as amended by the *Dangerous Performances Act, 1897*, contain prohibitions in respect of performances and occupations likely to be injurious to the life, limb, health or education of children. Moreover, the *Safety, Health and Welfare at Work Act, 1989*, now makes extensive provision for the duties of employers and self-employed persons in respect of risks to the health of their employees and to other persons who may be affected by their undertakings.

1.136 Finally, it may be noted that consensual and self-directed negligence has not been entirely excluded from penal restraint - for example, the 1989 Act imposes duties on employees to take care even of themselves; drivers of motor cycles and their passengers must wear safety helmets; and the wearing of seat belts is compulsory in the front seats of vehicles.

General And Transferred Intention

1.137 If the defendant shoots at a group of persons and does not aim at anyone in particular, he is still liable on the basis that an intention to injure anyone in range is always, in logic and in law, an intention to injure the particular person who is injured.³⁸⁸ The most obvious example in this connection is the person who places a bomb in a public place. This is known as the doctrine of general malice, or general intention.

1.138 Up to recently, however, this principle did not operate where no individual was actually endangered. So a shot fired into an empty room where the defendant believed the victim to be could not be charged as a shooting at the victim, though cannon-shot fired into a ship, and wounding the victim, could be so charged in that every part of the ship could be penetrated by the cannon-shot, thereby endangering every person on it.³⁸⁹ However, s.8 of the *Firearms and Offensive Weapons Act, 1990*, makes it an indictable offence for a person to discharge a firearm being reckless as to whether any person is injured or not, whether or not such injury is caused.

³⁸⁸ *Op cit*, chapter 25, para. 20.

³⁸⁸ For example, *R. v Fretwell* (1864) L. & C. 443, a case of shooting with intent to do grievous bodily harm. For a recent case, on the civil side, see *Livingstone v Ministry of Defence* [1984] N.I. 356.

³⁸⁹ See Gurney B. in *R. v Lovell* (1839) 2 M. & Rob. 39; *A.G. v Cunningham* [1932] I.R. 28.

1.139 More problematically, where D1 intends to injure V1, but misses and injures V2 instead, in circumstances where he was unaware of the threat to V2,³⁹⁰ he will nevertheless be liable for an intentional injury to V2 under the doctrine of "transferred malice". The doctrine is a general one which appears to stand out as an exception to the principle that a person should not be convicted of an offence unless he brought about the prescribed harm either intentionally or recklessly, for it results in criminal liability for consequences which would in ordinary language be described as accidental.³⁹¹ The leading illustration is *Latimer*,³⁹² where the defendant swung his belt at a man with whom he was quarrelling and the belt hit the face of a woman instead.

1.140 At common law, the doctrine applies whenever a statute permits it by its wording, provided that the defendant has the *mens rea* and commits the *actus reus* appropriate to the crime charged, even though they may exist in respect of different persons.

1.141 In consequence, it applies not only to common assault, but also to assaults committed under ss.47, 20, 21, 22, 23, 18 and 38 of the 1861 Act, where the inclusion of the two words "any person" in relation to the mental element of the offence clearly allows for its application.³⁹³ By contrast, administering poison to any person "with intent to injure, aggrieve or annoy such person" precludes its application to s.24. The doctrine may equally operate where there is an absence of intention, as where the defendant uses force in lawful self-defence and accidentally kills an innocent bystander.³⁹⁴

1.142 However, intention can be transferred only within the same crime. So in *Pembliton*,³⁹⁵ the defendant was not guilty of malicious damage where he threw a large stone, intending to hit a group of people, and broke a window. Nor, it appears, will it apply where an intended physical injury to V1 causes fright and consequent injury to V2.³⁹⁶

Omissions And Supervening Fault

1.143 In general, criminal liability for omissions will arise only where the omission is expressly designated by the law as an offence or where harm results from an omission to perform a legal duty - the criminal law imposes no general duty to act to save others from death or any kind of physical harm even when this

390 In this respect, the doctrine is to be distinguished from the similar case of mistaken victim: see, for example, *R. v Stoppord* (1870) 11 Cox 643, a case of wounding with intent to do grievous bodily harm.

391 See Ashworth, *Transferred malice and punishment for unforeseen consequences* in Glazebrook (ed.), *Reshaping the Criminal Law* (1978), p.77 *et seq.*

392 (1886) 17 Q.B.D. 369.

393 But the indictment must be appropriately worded to cover the case, for example, of an intention against V1 and a wounding of V2, and not an intention against V2: see *Monger* [1973] Crim. L. Rev. 301.

394 See Archbold, *op cit*, pp.17-19. So a father who accidentally hit a third person while administering reasonable and moderate chastisement to his daughter was not guilty of any battery: see *Turner v State*, 35 Tex., Cr. R. 369, 33 S.W. 972 (1896).

395 (1874) 12 Cox 607.

396 *Towers* (1874) 12 Cox 530.

could be done without any risk or inconvenience.³⁹⁷ Moreover, because assault cannot be committed by omission,³⁹⁸ liability for an omission resulting in injury cannot arise under s.47 of the 1861 Act, nor under any other offence of assault, irrespective of the breach of any duty.

1.144 An omission to perform a legal duty to act which results in death or grievous bodily harm, however, may give rise to liability for murder or manslaughter, or for a charge under s.18 or s.20 of the 1861 Act. Similarly, any offence of "causing" an injury is capable of commission by omission, where it is in breach of a legal duty to act.³⁹⁹ Proof of the commission of any such offence by omission remains, of course, subject to normal considerations of *mens rea* and causation.⁴⁰⁰

1.145 Although some duties are imposed by statute,⁴⁰¹ most derive from common law as a result of either the special relationship between the parties or the nature of the conduct undertaken by the defendant. These include the duty owed by parents to their young children,⁴⁰² or that owed by a doctor or any other person to a helpless and infirm person whom they have voluntarily undertaken to care for⁴⁰³ (members of a household in which a person becomes infirm and helpless may be held to have assumed such a duty).⁴⁰⁴ In addition, there may be a duty under a contract of employment where omission to perform the duty is likely to endanger the lives of others, whether or not they are parties to the contract.⁴⁰⁵

1.146 Moreover, where there is a right and the ability to control the actions of others, there may be a duty to exercise that right in order to prevent the commission of a crime - failure to do so may result in secondary liability where the other is guilty of an offence.⁴⁰⁶ Where such an omission is in breach of a duty of public office, it appears that the holder of that office may be liable as a principal⁴⁰⁷ or, in the case of a Garda, for the common law offence of

397 See generally, Ashworth, *The Scope of Criminal Liability for Omissions* (1989) 105 L.Q.R. 427; Feldbrugge, *Good and Bad Samaritans* (1966) A.J.C.L. 630; Wilson, *The Defence of Others - Criminal Law and the Good Samaritan* (1988) McGill L.J. 757. The classic statement of the common law approach is given by Diplock L.J. in *Miller* [1983] 2 A.C. 161 at 175: "The conduct of the parabolical priest and Levite on the road to Jericho may have been indeed deplorable, but English law has not so far developed to the stage of treating it as criminal".

398 *Fagan v Metropolitan Police Commissioner*, [1968] 3 All E.R. 442.

399 See the Fourteenth Report of the Criminal Law Revision Committee (H.M.S.O. 1980), Cmnd. 7844, para. 253. The view that liability could also not arise for an omission on a charge under s.20 is no longer valid, having regard to the decision of the House of Lords in *Wilson*, [1984] A.C. 242, that "inflict" does not necessarily entail an assault.

400 For an interesting analysis of causation and omissions, see Law Reform Commission of Canada, Working Paper 46 (1985), *Omissions, Negligence and Endangering*, pp.4-7.

401 For example, the duties of drivers and users of vehicles on the occurrence of an accident, as contained in s.106 of the *Road Traffic Act, 1961*, as amended by the Schedule to the 1968 Act and s.3 of the 1984 Act.

402 At common law and under s.12 of the *Children Act, 1908*, discussed below.

403 *R. v Nicholls* (1874) 13 Cox C.C. 75; see *Kenny's Outlines of Criminal Law*, (19th ed., by Turner, 1986), p.124.

404 *R. v Stone and Dobinson* [1977] Q.B. 354. This decision has been described as the high water-mark in the adoption of a "social responsibility" approach, as opposed to the conventional hostility of the common law towards liability for omissions: see Ashworth, *op cit*, p.459, note 98.

405 *R. v Pitwood* (1902) 19 T.L.R. 37.

406 *Rubie v Faulkner* [1940] 1 K.B. 571; *Tuck v Robson* [1970] 1 W.L.R. 741; *DuGros v Lambourne* [1907] 1 K.B. 40.

407 *Curtis* (1885) 15 Cox C.C. 748; *Dyltham* [1979] 3 All ER 641, criticised by Ashworth, *op cit*, pp.455-457.

misconduct in a public office.⁴⁰⁸ In this connection, a person who fails to assist a Garda in law enforcement in circumstances where it is reasonably necessary for the Garda to call for such assistance commits a common law offence unless there was physical impossibility or lawful excuse.⁴⁰⁹ Yet there is no general duty to assist in law enforcement - mere presence at the scene of a crime, such as a prize fight,⁴¹⁰ riot⁴¹¹ or rape,⁴¹² without giving any encouragement to the perpetrators but also without taking any steps to prevent the offence or to call the police, does not attract criminal liability for any resulting injury.⁴¹³

1.147 The existence and scope of the above duties evidently depend on difficult considerations of capacity, liberty and social obligation. Nevertheless, it may be said that the underlying principle is that you have a duty to act for another's benefit whenever, by reason of your express or implied commitment, that other is dependent on you and entitled to rely upon you so to act, i.e. when you are a "guarantor" of that other's safety.⁴¹⁴

1.148 Apart from express offences of omission and offences capable of commission by omission to perform a legal duty, a third situation in which an omission may give rise to criminal liability arises in cases of "pseudo-nonfeasance", that is, not acting within some wider course of acting. In *Miller*,⁴¹⁵ the defendant, having accidentally started a fire, wilfully took no steps to extinguish it when he later discovered what he had done. In affirming his conviction for arson, the House of Lords held that there was:

"no rational ground for excluding from conduct capable of giving rise to criminal liability conduct which consists of failure to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence."⁴¹⁶

1.149 This principle of supervening fault, which is not limited to cases in which the original act is blameworthy,⁴¹⁷ is one of general application to all "result-crimes", and therefore to all offences resulting in injury.⁴¹⁸ It may be seen as an alternative solution to the question of pseudo-nonfeasance to that adopted in

408 *Dytham, supra*. In this case, a police officer was within 30 yards of a man who was being noisily beaten and kicked to death by three others, and made no move to intervene. His conviction was for misconduct of an officer of justice in circumstances "calculated to injure the public interest so as to call for condemnation and punishment".

409 *R. v Brown* (1841) Car. & M. 341, cited by Ashworth, *op cit*, p.454, note 86.

410 *Conney* (1882) Q.B.D. 534. Hawkins J., at 557, stated that "it is no criminal offence to stand by, a mere passive spectator of a crime, even of murder".

411 *Atkinson* (1869) 11 Cox C.C. 332.

412 *Clarkson* [1970] 1 W.L.R. 1402. See also the incidents and comments cited by Wilson, *op cit*, p.806, note 208.

413 For criticism, see Ashworth, *op cit*, Wilson, *op cit*, and Osbeck, *Bad Samaritanism and the Duty to Render Aid: A Proposal* (1985) 19 U. Mich. J.L. Reform 315.

414 L.R.C.C., W.P. 46, *op cit*, p.13, note 35, citing Banditt, *Liability for Failing to Rescue* (1982) 1 Law & Philosophy 391 at 416, and *Lipkin* (1983) 31 U.C.L.A. L. Rev. 252 at 265.

415 [1983] 1 All ER 978 (H.L.).

416 *Id.*, at 981.

417 *Id.*, at 982.

418 *Semble Contra, Wings Ltd. v Ellis* [1985] A.C. 272 and *R. v Ahmad* (1987) 84 Cr. App. R. 64. But see the English Law Commission's examination of these cases in Law Com. No. 177, Vol. 2, para. 8.53.

Fagan,⁴¹⁹ where the defendant, directed by a policeman to park nearer the kerb, accidentally drove his car onto the policeman's toe and then wilfully refused to move. In that case, the defendant was convicted of a battery on the grounds that his behaviour was not to be divided artificially into discrete bits of acting and not acting but rather was to be considered as one continuous course of acting.

1.150 Whereas a high degree of negligence must be established in order to support a conviction for breach of a common law duty resulting in injury,⁴²⁰ the notion of supervening fault may alternatively be seen as a reflection of a policy argument that those doing dangerous acts or those in charge of dangerous things should be liable for mere negligence.⁴²¹ In this respect, the duty of persons doing dangerous acts towards third parties should be distinguished from the reciprocal duties owed by persons engaged in a joint enterprise involving risk or danger, such as seamen going to sea, or mountaineers joined in a single party.⁴²²

Statutory Offences Under The 1861 Act:

Assault occasioning actual bodily harm (s.47)

1.151 As noted above, s.47 of the 1861 Act, in addition to providing for the trial on indictment of common assault, had the effect of creating a new statutory offence of assault occasioning actual bodily harm.⁴²³ This offence is punishable with a maximum penalty on indictment of 5 years imprisonment.⁴²⁴ Being a scheduled offence under the *Criminal Justice Act, 1951*, it may, with the consent of the accused, be dealt with summarily under s.2 of that Act. Until recently, it has been understood that the *mens rea* of the offence is equal to that of common assault, and that once this is proved, the only remaining question is one of causation - did the assault cause the actual bodily harm? It is established that this is an objective question relating to the natural consequences of the defendant's act.⁴²⁵ In *Roberts*, the defendant was convicted under s.47 where he so frightened P that she jumped out of a moving car and suffered injury - only if her act was something that no reasonable man could be expected to foresee would the chain of causation be broken.⁴²⁶ As Glanville Williams points out, this means that s.47 is at best a crime of "half *mens rea*" where the mental

419 *Supra*, n.398.

420 In the *People (A.G.) v Dunleavy* [1948] I.R. 95, the C.C.A. held that for the purposes of manslaughter, the jury must be satisfied that the fatal negligence was of a very high degree, and was such as to involve, in a high degree, the risk or likelihood of substantial personal injury to others. This decision has been followed regularly since, for example, in *A.G. v O'Neill* (1964) Ir. Jur. R. 1, *Bateman* [1925] All E.R. 45; *Andrews v D.P.P.* [1937] 2 All E.R. 552; and, in Australia, *Callaghan* (1952) 87 C.L.R. 115.

421 See ss.155 and 156 of the *New Zealand Crimes Act, 1961*, which specify that such persons are under a duty of "reasonable" care: *Storey* [1931] N.Z.L.R. 417.

422 See L.R.C.C., W.P. 46, *op cit*, p.15.

423 *R. v Harrow J.J., ex parte Osaseri*; and *State (O) v O'Brien* [1971] I.R. 42.

424 By virtue of s.15 of the *Criminal Law (Ireland) Act, 1828*, s.2 of the *Penal Servitude Act* and s.1 of the *Penal Servitude Act, 1891*, when, in any statute in force on 5 August 1891, an offence is punishable with penal servitude, the maximum term is 5 years, unless a particular statute authorises a longer term.

425 *Miller* [1954] 2 Q.B. 282. The same rule applies to aggravated assault in Scotland where the aggravation is by the degree of injury: see *Kerr v H.M. Advocate*, 1986 S.C.C.R. 394.

426 [1971] 56 Cr. App. R. 95.

element does not in any way "match" the element of harm within the *actus reus*.⁴²⁷

1.152 The Supreme Court of Canada has ruled in this connection that there are certain crimes for which, because of the special nature of the stigma and of the penalty attached to a conviction therefor, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime.⁴²⁸ For example, theft requires proof of some dishonesty and murder requires proof beyond reasonable doubt of subjective foreseeability.⁴²⁹ In *R. v Brooks*, it was argued before the British Columbia Court of Appeal that the Canadian statutory equivalent of assault occasioning actual bodily harm was unconstitutional⁴³⁰ in failing to require at least objective foreseeability that harm would occur as a result of an assault. This argument was rejected on the grounds that the offence, punishable by 10 years imprisonment, was not so serious as to attract the particular stigma discussed by the Supreme Court, but was one of many for which the consequences of an unlawful act alone could legitimately affect the degree of culpability, i.e. for which a causal link sufficed.⁴³¹

1.153 In 1991, what the House of Lords subsequently described as a "curious situation" arose when two different divisions of the Court of Appeal reached opposite conclusions on the intent necessary in cases under s.47,⁴³² i.e. as to whether it was necessary to foresee that harm might be caused. Ultimately, the House of Lords held in *R. v Savage, R. v Parmenter*,⁴³³ (heard together and referred to hereinafter as *R. v Savage*) that in a prosecution under s.47, it is sufficient to prove that the defendant committed an assault and that actual bodily harm was occasioned by the assault. This reflects the traditional state of the law in Ireland although Charleton submits that since the decision in *The People (D.P.P.) v Murray*,⁴³⁴

"a requirement of a mental element, in the shape of either intention or recklessness, in respect of each external element of the offence, is to be preferred to the older line of authority While this is presumed in respect of statutory offences the words of a section can make it clear that a particular element requires no corresponding mental element. The words 'assault occasioning actual bodily harm' could be viewed as equivalent to a mere requirement of causation. Two factors are present which influenced the Supreme Court in *Murray*: a difference in the external elements of the offence and a greatly enhanced penalty on the aggravating factor occurring. The contrary argument, that society is

427 *Op cit*, p.192.

428 *R. v Vaillancourt* (1987) 39 C.C.C. (3d) 118, [1987] 2 S.C.R. 636.

429 39 C.C.C. (3d), at 134 (*per* Lamer J.).

430 Having regard to ss.7 and 11 (d) of the Canadian Charter of Rights and Freedoms.

431 (1988) 41 C.C.C. (3d) 157. For an examination of similar developments in the U.S., see Erlinder, *Mens rea, due process and the Supreme Court: Toward a constitutional doctrine of substantive criminal law* (1981) 9 A.J.C.L. 163.

432 *R. v Spratt* [1991] 2 All ER 210; *R. v Savage* [1991] 2 All ER 220.

433 [1991] 4 All ER 698. See Paragraph 9.26 *infra*.

434 [1979] I.R. 360.

entitled to seek retribution in terms of the harm actually caused by the offence without reference to the purpose or foresight of its perpetrator is, it is submitted, overridden by these two elements."⁴³⁵

Charleton acknowledges, in a footnote,⁴³⁶ that it can be argued "that in contrast to ss.18 and 20 of the Act the offence punished in s.47 is an assault and the words of aggravation are stated as a consequence, as opposed to an intent, as in s.18." As Lord Ackner put it in the judgment of the House of Lords in *Savage*,⁴³⁷ "the word(s) 'occasioning' raised solely a question of causation, an objective question which does not involve inquiring into the accused's state of mind."

1.154 "Bodily harm", according to the House of Lords in *D.P.P. v Smith*, "needs no explanation".⁴³⁸ The injury is clearly less than the requirement of grievous bodily harm, and consequently need not be "really serious"⁴³⁹ - all that is required is some non-trivial bodily injury, and it appears that it may now be a misdirection to adopt the old test of "any hurt or injury calculated to interfere with the health or comfort of the prosecutor" referred to above.⁴⁴⁰

1.155 Mental harm, such as a hysterical and nervous condition resulting from the shock of being assaulted, may also constitute "actual bodily harm" within the meaning of s.47. According to Lynskey J. in *Miller*:⁴⁴¹

"There was a time when shock was not regarded as bodily hurt, but the day has gone by when that could be said. It seems to me now that, if a person is caused hurt or injury resulting, not in physical injury, but in an injury to the state of mind for the time being, this is within the definition of 'actual bodily harm'."⁴⁴²

1.156 There has been little case law on the point since, and it therefore appears to have given rise to few difficulties of interpretation in practice.

1.157 A victim's mental suffering may also be an aggravating factor in the determination of the degree of injury.⁴⁴³ But whether the injury is physical or

⁴³⁵ Charleton, *op cit*, pp.207-8. Footnote references omitted.

⁴³⁶ Charleton, *op cit*, p.208, footnote 13.

⁴³⁷ *Supra*, n.433 at 712.

⁴³⁸ [1960] 3 All E.R. 181 at 171.

⁴³⁹ *Id.*

⁴⁴⁰ *D.P.P. v Smith*, *supra*, n.438, was followed with respect to s.18 in *Metharam* [1961] 3 All E.R. 200.

⁴⁴¹ *Miller*, *supra*, n.425.

⁴⁴² Charleton disagrees.

"Arguably this ruling is incorrect. Being thrown to the ground three times would naturally occasion bodily harm in the form of painful bruising and stiffness. The section does however restrict its application to 'bodily' harm. In the absence of physical injury, such as concussion, which may well have been present in the *Miller* case, it is submitted that nervousness or hysteria is not bodily harm. The presence of these symptoms may, however, be evidence of bodily suffering within the definition of the crime."

Charleton, *op cit*, p.206.

⁴⁴³ For example, *Maguire* (1982) 146 J.P.N. 314.

mental, it appears that there is no necessary connection at all between the duration of the injury and the question as to whether it is trifling.⁴⁴⁴

1.158 In *Taylor v Granville*, magistrates were held to be entitled to infer that "bodily harm, however slight" must have resulted from a blow to the face.⁴⁴⁵ Yet in *Christopher Jones*, the court said that to describe minor abrasions and a bruise on the face as actual bodily harm "went to the very margin of what was meant by that term", and that to impose a term of imprisonment in such circumstances was incorrect.⁴⁴⁶

1.159 In this respect, to apply force to another which merely "hurts" in the sense of producing a sensation of pain does not of itself constitute bodily harm:

"It is not legitimate to progress from the evidence that the application of the headlock 'hurt' to the conclusion that there was therefore 'a hurt', in the sense of a wound or an injury, and then to equate that with 'a bodily injury'. A hurt may well constitute a bodily injury, but a person who has been hurt does not necessarily and invariably sustain a bodily injury. Pain is a perception activated by a stimulus which does not necessarily originate in a bodily injury".⁴⁴⁷

1.160 Having regard to the severity of punishment provided for this type of assault, the low requirements of *mens rea* and of the degree of harm in s.47 have been criticised as anomalous.⁴⁴⁸ This is particularly so in that the maximum punishment is the same as that for maliciously inflicting grievous bodily harm contrary to s.20 of the Act (which, at least until recently, has also been held to require proof of an assault), so that a prosecutor can always indict for an offence under s.47, whatever the degree of harm caused, with a lesser degree of proof.

1.161 The two crimes are treated in practice as founding alternative charges, so that if there are counts for both, and the jury convicts on one, it is discharged from giving a verdict on the other. The alternative count may, however, be revived by an appellate court in setting aside the conviction on one count and substituting a conviction on the other.⁴⁴⁹

Unlawful wounding, etc. (s.20)

1.162 Section 20 of the 1861 Act provides for the offence of unlawfully and maliciously wounding or inflicting any grievous bodily harm upon any person, with or without any weapon or instrument. It is triable either way and punishable on indictment with 5 years imprisonment.

444 See *R. v Dixon* (1988) 42 C.C.C. (3d) 318 at 332 (British Columbia Court of Appeal).

445 [1978] Crim. L. Rev. 482.

446 [1981] Crim. L. Rev. 119.

447 *R. v Scotland* (1987) 27 A. Crim. R. 136 at 138 (Supreme Court of Western Australia) (*per Kennedy J.*).

448 See Smith and Hogan, *op cit*, pp.396-397; Clarkson and Keating, *op cit*, p.455; Williams, *op cit*, pp.191-192.

449 Williams, *op cit*, p.186 (note).

1.163 The meaning of "wound" has been outlined above.⁴⁵⁰ "Grievous bodily harm" need not be either permanent or dangerous.⁴⁵¹

1.164 Although the phrase was formerly interpreted to mean any harm which seriously interferes with health or comfort,⁴⁵² it has been held more recently that there is no warrant for giving the words a meaning other than that which they convey in their ordinary and natural sense.⁴⁵³ For this purpose, it is now accepted that any direction to the jury should merely clarify that the standard is one of "really serious" bodily harm.⁴⁵⁴ Clearly, such harm may cover both wounds and other injuries not amounting to a wound.

1.165 The use of the word "inflict" is peculiar to s.20 and has been the subject of considerable interpretation. In one series of cases, it was held or assumed that the words "inflict" and "wound" both implied an assault, so that the direct application of force was a necessary element in the offence.⁴⁵⁵ One consequence of this was that when the defendant was charged with an offence under s.20, he could be convicted on that indictment of common assault, this being an "included offence". In *R. v Taylor*,⁴⁵⁶ such a possibility was expressly upheld by the Court for Crown Cases Reserved.

1.166 A second series of cases ignored the alleged requirement of assault so as to uphold convictions under s.20 where it was very difficult, if not impossible, to discern an assault on the facts.⁴⁵⁷ So a husband who so terrified his wife that she jumped from a window to escape his violence was held to have been rightly convicted of inflicting such injuries.⁴⁵⁸ In 1983, the House of Lords, accepting that these cases were in conflict, followed the Australian case of *Salisbury* where it was said that "inflict", though narrower than "cause" within the meaning of the Australian equivalent of s.18 of the Act, does not, after all, imply an assault.⁴⁵⁹ According to the Supreme Court of Victoria:

"... grievous bodily harm may be inflicted ... either where the accused has directly and violently 'inflicted' it by assaulting the victim, or where the accused has 'inflicted' it by doing something ... which, though it is not 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. Hence, the lesser misdemeanours of

450 *Supra*, page 17.

451 *Ashman* (1858) 1 F. and F. 88.

452 *Miller*, *supra*, n.425.

453 *Smith*, *supra*, n.438.

454 *People (A.G.) v Messitt* [1974] I.R. 406, approving the standard of the House of Lords in *Smith*, *supra*, n.338. The Court of Criminal Appeal had previously adopted the lesser standard of "serious" in *The People (A.G.) v Goulding*, 31 March 1964, 1 *Frewen* 292. The standard of "really serious" has also been endorsed in Australia: see *R. v Weeding* (1959) A.L.R. 749 (Vic. Sup. Ct.); *R. v Rhodes* (1984) 14 A. Crim. R. 124; *R. v Perks* (1985) 20 A. Crim. R. 201.

455 *Clarence* (1888) 22 Q.B.D. 23; *Shewing* [1972] Crim. L.R. 267; *Carpenter*, cited [1983] 1 All E.R. 1004.

456 (1869) L.R. 1 C.C.R. 194.

457 *Halliday* (1869) 61 L.T. 701; *Martin* (1881) 8 Q.B.D. 54; *Lewis* [1970] Crim. L. Rev.; *Mackie* [1973] Crim. L.R. 54; *Boswell* [1973] Crim. L.R. 307.

458 *Halliday*, *supra*.

459 *R. v Wilson, R. v Jenkins*. [1983] 3 All ER 448 at 455.

assault occasioning actual bodily harm and common assault ... are not necessarily included in the misdemeanour of inflicting grievous bodily harm⁴⁶⁰

1.167 Nevertheless where there is no force applied to the body of the victim, as in *Clarence*, where the defendant, knowing that he was suffering from gonorrhoea, had consensual intercourse with his wife and infected her, the injury still cannot be said to have been inflicted.⁴⁶¹

1.168 In Ireland, the question must remain open as to whether a person may be convicted of common assault or of an offence under s.47 in an indictment under s.20 which fails to aver an assault. If the reasoning in *Salisbury* is adopted, the answer would appear to be that such a possibility is excluded.⁴⁶²

1.169 The *mens rea* of s.20 is supplied by the inclusion of the word "maliciously" in the section. It is established that this means intentionally or recklessly, and that reckless is used here in its subjective sense.⁴⁶³ The next question is, what is the harm that must be intended or risked? In *Cunningham*,⁴⁶⁴ where the charge concerned the malicious administering of a noxious thing contrary to s.23 of the Act, the English Court of Criminal Appeal interpreted "malicious" to mean that the defendant had to foresee the particular kind of harm that might be done but nevertheless went on to take the risk of it occurring. In other words, the crime was one where the *mens rea* matched the *actus reus*. Since then, however, this principle has been so whittled away that "Cunningham is well on the way to becoming so 'distinguished' that it never applies".⁴⁶⁵ It now appears that, although actual foresight is required,⁴⁶⁶ foresight of even minor physical harm will suffice for liability.⁴⁶⁷

1.170 The conflict of principle surrounding the interpretation of s.20 was recently addressed by the House of Lords in *R. v Savage*⁴⁶⁸ where it reaffirmed the subjective standard of recklessness in accordance with *Cunningham* but also upheld the rule in *Mowatt*⁴⁶⁹ that foresight of "any physical harm" would equally suffice for a conviction under s.20. In his judgment, Lord Ackner, permitted himself some remarks on the unsatisfactory state of the law:

"The argument that, as ss.20 and 47 have both the same penalty, this somehow supports the proposition that the foreseen consequences must

460 *Reg. v Salisbury* [1976] V.R. 452 at 461.

461 (1888) 22 Q.B.D. 23, though where the injury is "grievous" it may come within s.18, *infra*.

462 In *Wilson*, *supra*, n.459, the House of Lords held that such a conviction was possible, notwithstanding that "inflict" did not imply an assault. However, this was based on s.6(3) of the *Criminal Law Act, 1967*, which abolished the requirement that the lesser offence be an "essential ingredient" of the offence charged. This was recently confirmed in *Savage*, *supra*, n.433.

463 *Cunningham* [1957] 2 Q.B. 396; *Rainbird* [1989] Crim. L. Rev. 505; *Farrell* [1989] Crim. L. Rev. 376.

464 *Supra*.

465 Textbook, (1st ed., 1978) p.175.

466 *Mowatt* [1967] 1 Q.B. 421; *W. (A Minor) v Dolbey* [1983] Crim. L. Rev. 681.

467 *Mowatt*, *supra*; *Grimshaw* [1984] Crim. L. Rev. 108. In *R. v Jones* (1988) 83 Cr. App. R. 375, the C.A. declined to reconsider this point.

468 [1991] 4 All ER 698.

469 *Supra*, n.466.

coincide with the harm actually done, overlooks the oft-repeated statement that this is the irrational result of this piecemeal legislation. The Act 'is a rag-bag of offences brought together from a wide variety of sources with no attempt, as the draftsman frankly acknowledged, to introduce consistency as to substance or as to form' (see Professor J.C. Smith in his commentary on *R. v Parmenter* ([1991] Crim. L.R. 43)).

If s.20 was to be limited to cases where the accused does not desire but does foresee wounding or grievous bodily harm, it would have a very limited scope. The *mens rea* in a s.20 crime is comprised in the word 'maliciously'. As was pointed out by Lord Lane C.J., giving the judgment of the Court of Appeal in *R. v Sullivan* [1981] Crim. L.R. 46, the 'particular kind of harm' in the citation from Professor Kenny was directed to 'harm to the person' as opposed to 'harm to property'. Thus it was not concerned with the degree of the harm foreseen. It is accordingly in my judgment wrong to look upon the decision in *R. v Mowatt* [1967] 3 All E.R. 47, [1968] 1 Q.B. 421 as being in any way inconsistent with the decision in *R. v Cunningham* [1957] 2 All E.R. 412, [1957] 2 Q.B. 396.

My Lords, I am satisfied that the decision in *R. v Mowatt* was correct and that it is quite unnecessary that the accused should either have intended or have foreseen that his unlawful act might cause physical harm of the gravity described in s.20, i.e. a wound or serious physical injury. It is enough that he should have foreseen that some physical harm to some person, albeit of a minor character, might result."

1.171 Having regard to the subjective standard of recklessness generally favoured by Irish Courts,⁴⁷⁰ as well as to the constitutional considerations which might arise in this area,⁴⁷¹ it may be doubted that the rule in *Mowatt* forms part of Irish law. As a matter of principle, it is for the prosecution to prove the mental element in respect of each part of the *actus reus* to which it applies. The point does not appear to have been addressed in any appellate court, and therefore may not be giving rise to difficulties in practice.

1.172 Even so, and in contrast to s.47, an intention to frighten is not in itself enough - it must be proven that D either intended to wound or inflict some physical harm, or was reckless as to whether such harm resulted from his actions.⁴⁷² However, as noted above, if in consequence of a reasonable and well-grounded fear of violence a person sustains grievous bodily harm in escaping from the threatened violence, this will amount to inflicting grievous bodily harm under the section.⁴⁷³

470 See *supra*, n.90.

471 *Supra*, page 4.

472 *Fleck v Hunt* (1979) 70 Cr. App. Rep. 51; *Sullivan* [1981] Crim. L.R. 46.

473 *Martin*, *supra*, n.457; *Halliday*, *supra*, n.457.

Wounding with intent, etc. (s.18)

1.173 The language of s.18 of the 1861 Act, which relates to intentionally caused injuries of a serious nature, is laborious and highly condensed. It creates twenty-four separate offences punishable on indictment only by life imprisonment and forbids any and every combination of four acts (wounding, causing grievous bodily harm, shooting at any person, and trying to fire loaded arms at any person) with any one of six intentions (intent to maim, disfigure, disable, do some other grievous bodily harm, resist lawful apprehension and resist lawful detainer). What shall constitute "loaded arms" within the Act is defined by s.19.

1.174 Two *mens rea* requirements are contained within s.18; the offence must be committed "maliciously" and "with intent". Malice here bears the same meaning as in s.20, so that the defendant must foresee the possibility of some harm. Although it has been suggested that the term adds nothing that is not already present in the requirement of intent,⁴⁷⁴ this will only be the case on a charge of wounding or causing grievous bodily harm with intent to cause such harm. Otherwise, if the defendant has only the ulterior intent and has no state of mind at all in relation to the possibility of harm, he cannot be convicted because he is not malicious.

1.175 As to the requirement of intent, it is clear that recklessness cannot suffice. "Foresight and recklessness are evidence from which intent may be inferred but they cannot be equated either separately or in conjunction with intent to do grievous bodily harm".⁴⁷⁵ As in other cases of malicious intention, such an inference must be founded on a consideration of the relation of the parties, the conduct and declarations of the defendant, and above all, on the nature and extent of the violence and injurious means employed. In looking to the defendant's real intention, it is therefore important to consider the nature of the instrument used, or the quantity and quality of the poison administered, or the part of the body on which the wound is inflicted, though the criminal intent may be clearly inferred from other circumstances.⁴⁷⁶

1.176 An intent to resist lawful apprehension may be negated if the attempted apprehension is believed to be, and is, unlawful. But it is no defence that the defendant believed a lawful apprehension to be unlawful unless he honestly but mistakenly believes in a state of facts such that, if it had existed, the arrest would have been unlawful.⁴⁷⁷

1.177 The intent specified in the indictment must be proved,⁴⁷⁸ though a count is not bad for duplicity because it specifies the ulterior intent in the alternative. But if, for example, the defendant intends to resist lawful

474 *Mowatt, supra*, n.466.

475 *R. v Belfon* [1978] 1 W.L.R. 741 (*per* Wein J. for C.A.). See also *R. v Bryson* [1985] Crim. L. Rev. 669.

476 *Russell on Crime, op cit*, pp.622-23.

477 *Bentley* (1850) 4 Cox C.C. 406; *Gladstone Williams* [1987] 3 All ER 411.

478 See Alderson B. in *R. v Wheeler* (1844) 1 Cox 106. So although it is not necessary to allege an intent to injure any particular person, this must be proved where it is alleged: see *R. v Juzod* (1885) 1 W.N. 163 (N.S.W. Supreme Court); *R. v Cook* (1886) 12 V.L.R. 650 (Victoria Supreme Court).

apprehension and, in order to do so, intends to cause grievous bodily harm, he may be convicted under an indictment charging only the latter intent - it is immaterial which is the principal and which the subordinate intent.⁴⁷⁹

1.178 Shooting wide in order merely to frighten,⁴⁸⁰ or even shooting at a person with intent to frighten,⁴⁸¹ cannot constitute the requisite intent under s.18, though it may amount to an assault or an unlawful wounding or the new offence of reckless discharge of a firearm.⁴⁸² Shooting or attempting to shoot in duels will, however, fall within s.18.⁴⁸³

1.179 Where the accused attacks another intending to cause grievous bodily harm, and death results, the offence may be murder. If, however, death does not result, an intention to cause grievous bodily harm will not support a conviction of attempted murder, for which an actual rather than a notional intent to kill must be established.⁴⁸⁴

1.180 Unlike "inflict" under s.20, "cause" in s.18 has never been held to imply that the injury need be the result of a common assault, or that some force need be applied directly or indirectly to the body of the victim.⁴⁸⁵ Nevertheless, a person charged with an offence under s.18 will usually be charged with a separate count of malicious wounding under s.20.⁴⁸⁶

1.181 It follows that a person charged with causing grievous bodily harm with intent cannot be convicted of assault occasioning actual bodily harm.⁴⁸⁷ Nor can a person charged with attempting to cause grievous bodily harm with intent be convicted of common assault.⁴⁸⁸ In *R. v McReady*,⁴⁸⁹ Lawton L.J. pointed out that grievous bodily harm can be caused without either a wounding or an assault and he expressly approved of the consequent practice which has grown up of including in an indictment particulars of the way in which the grievous bodily harm is alleged to have been caused so as to facilitate conviction for a lesser offence.

1.182 "Wound" and "grievous bodily harm" bear the same meaning as above.⁴⁹⁰ Maiming, disfiguring and disabling are, severally, species of grievous bodily harm, though a maiming, unlike other forms of such harm, must be

479 *Gillow* (1825) 1 Mood C.C. 85; *Nelson* [1961] 2 All E.R. 735.

480 *R. v Hufflett* (1918) 84 J.P. 24.

481 *R. v Dennis* (1905) 69 J.P. 256; *R. v Abraham* (1845) 1 Cox 208.

482 *Supra*, paragraph 1.139.

483 *R. v Douglas* (1841) C. & M. 193.

484 *Whybrow* (1951) 35 Cr. App. R. 141; *Grimwood* [1962] 2 Q.B. 621; *Murphy* [1969] N.Z.L.R. 959; *D.P.P. v Douglas and Hayes* [1985] I.L.R.M. 25.

485 The sole question is therefore one of causation: see Clarkson & Keating, *op cit*, pp.326-349, for a discussion of the policy issues relating to causation and criminal liability.

486 See Ryan and Magee, *op cit*, p.389, although it follows from s.5 of the *Prevention of Offences Act, 1851*, that a separate count under s.20 is not strictly necessary.

487 *Austin* (1973) 58 Cr. App. R. 163.

488 *Lambert* (1977) 65 Cr. App. R. 12.

489 [1978] 3 All ER 967 at 970-71.

490 *In re "wound"* see *supra*, page 17. See page 60 for a description of "grievous bodily harm".

permanent.⁴⁹¹ To "maim" within the section is to permanently injure any part of a person's body whereby one is rendered less able, in fighting, to defend oneself or annoy one's adversary;⁴⁹² to "disfigure" is to do some external injury which detracts from personal appearance;⁴⁹³ and to "disable" is to do something which creates a disability and not merely an injury.⁴⁹⁴

Sections 21 and 22

1.183 By ss.21 and 22 of the 1861 Act, two further offences punishable by life imprisonment are created. Both require an ulterior intent to commit, or to assist in the commission of, an indictable offence, intent here bearing the same meaning as above.

1.184 Section 21 provides as follows:

"Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other Person, or shall, by any Means calculated to choke, suffocate, or strangle, attempt to render any other Person insensible, unconscious, or incapable of Resistance, with Intent in any of such Cases thereby to enable himself or any other Person to commit, or with Intent in any of such Cases thereby to assist any other Person in committing, any indictable Offence, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life, or for any Term not less than Three Years, - or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour."

1.185 Section 22 provides:

"Whosoever shall unlawfully apply or administer to or cause to be taken by, or attempt to apply or administer to or attempt to cause to be administered to or taken by, any Person, any Chloroform, Laudanum, or other stupefying or overpowering Drug, Matter, or Thing, with Intent in any of such Cases thereby to enable himself or any other Person to commit, or with Intent in any of such Cases thereby to assist any other Person in committing, any indictable Offence, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any other Term not less than Three Years, - or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour."

1.186 In *R. v Page*, the English Court of Appeal held that a jury had been properly directed, on the particular facts, that if they acquitted the defendant of

491 *People (A.G.) v Messitt*, *supra*, n.454.

492 *Foley v Dublin Corporation* [1939] I.R. 518.

493 *Russell on Crime*, p.627. This need not be permanent: see *R. v Rapena* [1989] N.Z. Recent Law.

494 *R. v Boyce*, 1 Mood 29.

administering chloroform with intent to steal contrary to s.22, they could convict the defendant of common assault in the alternative.⁴⁹⁵

1.187 If the drug is not named in the indictment, evidence must be given to show that it was of a stupefying or overpowering nature, calculated to aid the offender in the commission of an indictable offence.⁴⁹⁶

1.188 It may be noted that s.3(3) of the *Criminal Law Amendment Act, 1885*, as amended by s.8 of the *Criminal Law Amendment Act, 1935*, provides for an identical offence to s.22 relating particularly to the offence of unlawful carnal connection with any woman or girl.

Poisoning (ss.23, 24 & 25)

1.189 Sections 23 and 24 of the 1861 Act create offences, punishable with ten and five years imprisonment respectively, with a similar *actus reus*. In each case, the definition includes the words - "... unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing"

1.190 But under s.23, the *actus reus* includes a further element - "... so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm"

1.191 Under s.23 the only *mens rea* required is intention or recklessness as to the administration of a noxious thing.⁴⁹⁷ Section 24 requires an ulterior intent:

"with intent to injure, aggrieve or annoy such person".

1.192 A poison is "administered" by the defendant if it is left by him for P who takes it up and consumes it.⁴⁹⁸ To leave the poison, intending it to be taken, is an attempt. Although it has been held that to squirt fluid at another is not to "administer" it,⁴⁹⁹ it now appears that such conduct includes contact which, not being the application of direct physical force, nevertheless brings the noxious thing into contact with the victim's body, as by spraying C.S. gas into the victim's face, notwithstanding that the same conduct might be prosecuted as an assault.⁵⁰⁰

1.193 In *R. v Marcus*, a case under s.24, it was held by the English Court of Appeal that for a substance to be "noxious", it is not necessary that the substance be injurious to bodily health; "by 'noxious' is meant something different in quality

495 [1971] Crim. L. Rev. 713.

496 Archbold, *op cit*, pp.20-152.

497 *Cunningham* [1957] 2 All E.R. 412, [1957] 2 Q.B. 396.

498 *Dale* (1852) 6 Cox C.C. 14; but it appears that it is not administered until it is taken into the stomach: see *Harley* (183) 4 C. and P. 369 (*per Parke J.*).

499 *Dones* [1987] Crim. L. Rev. 682.

500 *R. v Gillard* [1988] Crim. L. Rev. 531.

from and of less importance than poison or other destructive things".⁵⁰¹ The Court held that "noxious" extends to any substance which is injurious, hurtful, harmful or even unwholesome, so that an offence will be committed where the defendant puts an objectionable thing into an article of food or drink with intent to annoy any person who might consume it. The jury has to consider the evidence as to what was administered both in quality and quantity and to decide as a question of fact and degree in all the circumstances whether that thing was "noxious".

1.194 So a substance which may be harmless in small quantities may yet be noxious in the quantity administered. And while sleeping tablets may cause no more than sedation, they might be a danger to a person doing such normal but potentially hazardous acts as driving a car or crossing the street.⁵⁰²

1.195 Even so, administering a substance in such a small quantity as to be incapable of doing any mischief, although administered with the requisite intent, will not give rise to liability under this section.⁵⁰³ The requirement of intent in s.24 is important here in allowing a distinction to be drawn between substances administered for a benevolent purpose, such as giving a stimulant to a child to enable the child to stay awake to enjoy a fireworks display, and those administered for a malevolent purpose, such as giving a child a drug so as to render the child susceptible to sexual offences.⁵⁰⁴

1.196 In this respect, in each case it is necessary to look not just at the defendant's intention as regards the immediate effect of the noxious thing upon that person, but at the whole object of the accused. If the defendant's intention is that the victim should, as a result of taking the noxious thing, suffer injury to person or property, then that will be enough, irrespective of any intention that the noxious thing should itself injure the victim.⁵⁰⁵

1.197 The contrast between "so as thereby to" in s.23 and "with intent to" in s.24 suggests that no *mens rea* is required for the second part of the *actus reus* in s.23. While it appears that the defendant must have foreseen that the substance might cause injury to someone, no foresight of danger to life or the infliction of grievous bodily harm is required.⁵⁰⁶ In *Cato*, the requirement of malice in s.23 was satisfied by the deliberate injection of heroin into P's body. It was no answer that P was experienced in taking heroin and had a high tolerance, heroin being inherently noxious in that "it is liable to cause injury in common use"; nor was P's consent a defence.⁵⁰⁷

1.198 The decision in *Cato* is open to criticism in not requiring any foresight

501 [1981] 2 All ER 833.

502 *Id.* at 837-838.

503 *R. v. Hennah* (1877) 13 Cox 547 (*per* Cockburn C.J.).

504 See examples discussed in *Hill* (1986) 83 Cr. App. Rep. 386.

505 *Id.*

506 *Cunningham*, *supra*, n.497.

507 [1976] 1 All ER 260.

of danger to life or the infliction of harm.

1.199 Nevertheless, because the interpretation of "noxious" in s.24 includes a consideration of whether the substance was administered with intent to "injure, aggrieve or annoy", it is arguable that in s.23 the word must be read in the light of the fact that the substance must have been intended to endanger life or to inflict grievous bodily harm, or that there was at least recklessness in that regard.⁵⁰⁸

1.200 By s.25, a person charged under s.23 (a felony) may be convicted of an offence under s.24 (a misdemeanour).

Offences Relating To Particular Classes Of Persons Or To Particular Circumstances

1.201 Sections 36 to 41 of the 1861 Act create offences of assault on particular persons or in particular circumstances.

1.202 Section 36 makes it an offence to obstruct or assault a clergyman or other minister in the discharge of his duties in any place of divine worship or burial place or on his way to that place. The offence is triable either way and is punishable with a maximum penalty on indictment of 2 years imprisonment. Section 37 makes it an offence to assault a magistrate or other person lawfully authorised in the duty of preserving any vessel in distress or any wreck. This offence is triable on indictment only and is punishable with a maximum penalty of seven years penal servitude. By s.39, it is a summary offence punishable with a maximum penalty of 3 months imprisonment to assault any person with intent to obstruct the purchase, sale or other disposal of grain, flour, meal, malt or potatoes, or their free passage from any place. By s.40, it is also a summary offence punishable by 3 months imprisonment to assault any seaman, keelman or caster working at his lawful trade, business or occupation, or to hinder or prevent him from doing so. Section 41 makes it an offence to assault any person in pursuance of any unlawful conspiracy respecting any trade or business. The offence is triable either way and is punishable with a maximum penalty on indictment of 2 years imprisonment.⁵⁰⁹

1.203 By s.17 of the 1861 Act, it is a felony punishable with a maximum penalty on indictment only of penal servitude for life to impede or prevent any person endeavouring to save himself or herself or another from shipwreck.

1.204 Two further summary offences which may be mentioned in this connection are contained in the *Conspiracy and Protection of Property Act, 1875*.

508 Smith and Hogan, *op cit*, p.404. The wilful and reckless administration of a dangerous substance to another causing injury or death is a crime at common law in Scotland: see, for example, *H.M. Advocate v Brown and Lawson* (1842) 1 Brown 415. It is, moreover, an offence to intentionally or recklessly cause real injury by any means: see *Khalil v H.M. Advocate*, 1984 S.L.T. 137.

509 At common law, assault was also formerly aggravated if committed within the King's houses or palaces, or in the superior and inferior courts. Whereas the former was repealed in 1828 (9 Geo. 4, c.31 s.1) the last prosecution for the latter, according to *Russell on Crime*, p.886, was in 1799.

By virtue of s.9 of that Act, the accused has a right to elect to be tried on indictment on a charge of either offence. The first, an offence of quasi-negligent endangerment, is contained in s.5 and provides as follows:

"Where any person wilfully and maliciously breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property whether real or personal to destruction or serious injury, he shall on conviction thereof by a court of summary jurisdiction, or on indictment as herein-after mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour".

1.205 The second, an offence of coercion, is contained in s.7:

"Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,⁵¹⁰-

1. Uses violence to or intimidates such other person or his wife or children, or injures his property; or,
2. Persistently follows such other person about from place to place; or,
3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,
4. Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or,
5. Follows such other person with two or more other persons in a disorderly manner in or through any street or road,

shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this

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S.7 was recently invoked to challenge the legality of an arrest on the grounds that it had followed a period of unlawful surveillance by the police, contrary to the 1875 Act: see *Kane v Governor of Mountjoy Prison* [1988] I.R. 757 at 768. The argument was not addressed by either the High Court or the Supreme Court in that case: see *Humphreys* [1989] 11 D.U.L.J. 143 at 144.

section".

1.206 The 1875 Act was passed following the report of a Royal Commission which set out to redress the imbalance between the demands of trade unionists on the one hand and the hostility of the courts to their aims and methods on the other.⁵¹¹ Section 5 of the Act essentially creates an offence of negligent endangerment for what is otherwise a lawful act: i.e. the termination of a contract of employment. Although it is now never prosecuted, it could apply in theory, for example, to strikes by firemen or by hospital staff or even, conceivably, by industrial cleaners. The most important provision of the 1875 Act, however, is s.7.

1.207 All of the offences created by s.7 are governed by the opening phrase, which requires that the defendant should act with a view to compel. It is this element which, it has been held,⁵¹² is the unifying feature of the various offences, so that the section as a whole does not offend against the rule against duplicity.⁵¹³ It requires more than an intention to persuade - there must be an element of compulsion or force in the defendant's mind. However, it has been held that the words "with a view to" refer to purpose rather than motive,⁵¹⁴ so that it is no defence that a person sought to improve working conditions if the method of accomplishing that objective involved the wrongful compulsion of another.⁵¹⁵ In this respect, it is also immaterial that the compulsion is ineffective.⁵¹⁶

1.208 In *Lyons v Wilkins*,⁵¹⁷ it was held that harassing one person with a view to compelling another was within the mischief of the section. On a somewhat forced reading of the provision, it was held by the Court of Appeal that the words "such other person" could be read to refer to "any other person", a decision which although followed since,⁵¹⁸ has often been criticised as wrongly decided.⁵¹⁹

1.209 There is also some uncertainty as to whether the conduct complained of must be independently unlawful, i.e. tortious, or whether it is sufficient that the conduct falls within one of the species referred to in the remainder of s.7 and that it has no lawful justification.⁵²⁰ In the latter case, merely attending at a picket might be caught if mere presence in large numbers could be said to

511 C.1157 (1875), headed by Sir Alexander Cockburn C.J.; the Report is published in *Sessional Papers*, vol. 30.
512 *State (Hardy) v O'Flynn* [1948] I.R. 343.
513 *Id*; *A.G. v O'Brien* (1936) 70 I.L.T.R. 101; *Wilson v Renton* (1909) 47 S.L.R. 209.
514 *Lyons v Wilkins* (1899) 1 Ch. 255 at 270.
515 *Allied Amusements v Reaney* (1936) 3 W.W.R.129.
516 *Agnew v Munro* (1891) 28 S.L.R. 335.
517 *Supra*, n.514.
518 For example, *Charnock v Court* [1899] 2 Ch. 35.
519 For example Bennion [1985] Crim. L. Rev. 65 at 67; Citrine's *Trade Union Law* (3rd ed., 1967), p.537.
520 *Lyons v Wilkins*, *supra*, n.514, suggests that the second view represents the law, whereas *WardLock and Co. Ltd. v The Operative Printers' Society* (1906) 22 T.L.R. 327 prefers the former view (both decisions of the English C.A.). In this connection, it should be borne in mind that some forms of watching and besetting will also be unlawful at common law as constituting the tort of nuisance: see, for example, *Hubbard v Pitt* [1976] Q.B. 142; *Thomas v N.U.M.* [1986] Ch. 20.

amount to intimidation.⁵²¹

1.210 Although violence and intimidation are juxtaposed in s.7(1), the courts originally held that intimidation requires an element or threat of personal violence.⁵²² So it was not intimidation to threaten to deprive a workman of his livelihood⁵²³ or to black an employer's business.⁵²⁴ In *Rookes v Barnard*,⁵²⁵ however, the House of Lords held that the tort of intimidation extended also to threatened breaches of contract, and it has since been held in at least one criminal case that the offence under s.7 is not confined to the use or threat of violence.⁵²⁶ Clearly, to intimidate another is to cause that other to fear, and this can be done by means other than an explicit threat.⁵²⁷ In this respect, although it has been seen that the intimidation need not be shown to have actually coerced the victim, there must be evidence that the victim of it was actually put in fear.⁵²⁸

1.211 The use or threat of violence is not a constituent of the offence of persistent following in subs.(2), which may be contrasted with the offence in subs.(5), which requires disorderly conduct and more than one person. In one case,⁵²⁹ the element of persistence was held to be satisfied where the defendant silently followed a fellow worker through streets, on one occasion overtaking him.

1.212 The scope of the watching or besetting *actus reus* in subs.(4) "is of the highest possible importance, because by this [question] the long struggle which has been going on between trade unions and employers and workmen is brought exactly to the point".⁵³⁰ Were it is not for the exemption conferred in s.2(1) of the *Trade Disputes Act, 1906*, peaceful picketing by even a few persons would be an offence⁵³¹ - watching, a question for the jury or District Justice,⁵³² may involve little more than attending the place of the picket, even if it is interpreted to mean persistent watching.⁵³³ Besetting, meaning to hem in, surround or occupy a place, is similar to watching and has been held to apply also to strikers occupying their own place of work who prevent entry to would-be workers.⁵³⁴

Peaceful picketing and secondary picketing in Ireland is now governed by s.11 of the *Industrial Relations Act, 1990*. Subsections (1) and (2) of s.11 provide:

521 In this connection, see the remarks of Woods J. in *Bansall* [1985] Crim. L. Rev. 150 and of Lane L.J., in a different context, in *R. v Mansfield J.J., ex parte Sharkey* [1985] 1 All ER 193.

522 See Cane J. in *Gibson v Lawson* [1891] 2 Q.B. 545 at 550; cf. *Judge v Bennett* (1877) 52 J.P. 257.

523 *Gibson v Lawson*, *supra*.

524 *Curran v Treleaven* [1891] 2 Q.B. 560.

525 [1964] A.C. 1129.

526 *Jones* (1974) 59 Cr. App. R. 120.

527 For example, by gestures, *Kennedy v Cowie* [1891] 1 Q.B. 771; or from the circumstances as a whole, *R. v Corr* [1974] N.I. 147.

528 *McCarthy* [1903] 2 I.R. 146. As O'Brien L.C.J. acknowledges in this case, the scope of the offence is thereby somewhat narrowed in practice as persons may refuse to testify, or may assert that they were not in fact put in fear.

529 *Smith v Thomasson* (1891) 16 Cox C.C. 740.

530 *Lyons v Wilkins*, *supra*, n.514, at 827 (*per* Kay L.J.).

531 *Lyons v Wilkins*, *supra*, n.514.

532 *A.G. v O'Brien*, *supra*, n.513.

533 See Paines B. in *Wall* (1907) 21 Cox C.C. 401.

534 *Galt v Philp* [1984] I.R.L.R. 156.

(1) It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union in contemplation or furtherance of a trade dispute, to attend at, or where that is not practicable, at the approaches to, a place where their employer works or carries on business, if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working.

(2) It shall be lawful for one or more persons acting on their own behalf or on behalf of a trade union in contemplation or furtherance of a trade dispute, to attend at, or where that is not practicable, at the approaches to, a place where an employer who is not a party to the trade dispute works or carries on business if, but only if, it is reasonable for those who are so attending to believe at the commencement of their attendance and throughout the continuance of their attendance that that employer has directly assisted their employer who is a party to the trade dispute for the purpose of frustrating the strike or other industrial action, provided that such attendance is merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working.

1.213 Section 7 of the 1875 Act remains important, notwithstanding the low penalty provided for it, in that it is the only provision in our criminal law specifically directed against unlawful picketing.⁵³⁵ More significantly, it is the only offence of coercion provided for in Irish law, and subs.(1) in particular may be prosecuted in serious cases of intimidation. Section 7 is a scheduled offence for the purposes of the powers of extended arrest conferred on Gardai by s.30 of the *Offences Against the State Act, 1939*.⁵³⁶

1.214 Although s.7(1) is used as a general offence of intimidation, it is part of a single, more humble provision originally designed to prevent specific acts of coercion in the course of trade disputes.⁵³⁷ It carries a very low penalty and in these circumstances its scheduling for the purposes of s.30 of the 1939 Act, though understandable, is anomalous.

Railway Offences

1.215 Three sections of the 1861 Act concern offences committed on the railway. Section 32 provides:

"Whosoever shall unlawfully and maliciously put or throw upon or across

535 See generally, Kerr and Whyte, *Irish Trade Union Law* (Abingdon, 1985), p.289 *et seq.* The inadequacy of the penalty no doubt prompted the prosecutor in *Jones* (1974) 59 Cr. App. R. 120 to bring a charge of conspiracy to intimidate, the maximum penalty being at large. Sentences of 3 years and 2 years imprisonment were imposed. These provoked a bitter reaction which resulted in part in the penalty for conspiracy being limited in the *Criminal Law Act, 1977*, to that available on the substantive charge: see Smith, *Offences against Public Order* (1987), p.213, note 18.

536 S.I. Nos. 142 and 282 of 1972.

537 *Supra*, page 71 *et seq.*

any Railway any Wood, Stone, or other Matter of Thing, or shall unlawfully and maliciously take up, remove, or displace any Rail, Sleeper, or other Matter of Thing belonging to any Railway, or shall unlawfully and maliciously turn, move, or divert any Points or other Machinery belonging to any Railway, or shall unlawfully and maliciously make or show, hide or remove, any Signal or Light, upon or near to any Railway, or shall unlawfully maliciously do or cause to be done any other Matter or Thing, with Intent, in any of the Cases aforesaid, to endanger the Safety of any Person travelling or being upon such Railway, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Three Years, - or to be imprisoned for any Term not exceeding Two Years, "

1.216 Section 33 provides:

"Whosoever shall unlawfully and maliciously throw, or cause to fall or strike, at, against, into, or upon any Engine, Tender, Carriage, or Truck used upon any Railway, any Wood, Stone, or other Matter or Thing, with Intent to injure or endanger the Safety of any Person being in or upon such Engine, Tender, Carriage, or Truck, or in or upon any other Engine, Tender, Carriage, or Truck or any Train of which such first-mentioned Engine, Tender, Carriage, or Truck shall form Part, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Three Years, - or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour."

1.217 Section 34 provides:

"Whosoever, by any unlawful Act, or by any wilful Omission or Neglect, shall endanger or cause to be endangered the Safety of any Person conveyed or being in or upon a Railway, or shall aid or assist therein, shall be guilty of a Misdemeanour, and being convicted thereof shall be liable, at the Discretion of the Court, to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour."

1.218 Sections 32 and 33 are narrowly defined in that they require an intent to endanger the safety of persons using the railway.⁵³⁸ In many cases conduct coming within these sections will also constitute an attempt to commit an offence under the *Malicious Damage Act, 1861*,⁵³⁹ or another provision of the *Offences Against the Person Act, 1861*. Nevertheless, the specificity of these offences

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See *R. v Sanderson* (1859) 1 F. & F. 598; *R. v Rooke* (1858) 1 F. & F. 107, interpreting previous enactments. Ss.35-38, of this Commission's *Report on Malicious Damage* (LRC 26-1988) for a review of the law in this area and, generally, *Russell on Crime*, chapter 36.

makes them potentially useful, albeit with respect to rail transport only.⁵⁴⁰ An acquittal on an indictment framed under s.32 or s.33 is no bar to a subsequent indictment on the same facts for the lesser offence under s.34.⁵⁴¹ In this connection, throwing a stone at engines or carriages may be an offence within s.34,⁵⁴² and where such an act is done purposely, the intention of the accused is not the question, but rather the likely effect on the safety of persons on the railway.⁵⁴³

1.219 Potential danger or a lowering of standards of safety which would lead to the endangering of the safety of a passenger is sufficient to constitute an offence under s.32 and proof of actual danger is not required.⁵⁴⁴

Traps

1.220 Section 31 of the 1861 Act provides as follows:

"Whosoever shall set or place, or cause to be set or placed, any Spring Gun, Man Trap, or other Engine calculated to destroy Human Life or inflict grievous bodily Harm, with the Intent that the same or whereby the same may destroy or inflict grievous bodily Harm upon a Trespasser or other Person coming in contact therewith, shall be guilty of a Misdemeanour, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for the Term of Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour; and whosoever shall knowingly and wilfully permit any such Spring Gun, Man Trap, or other Engine which may have been set or placed in any Place then being in or afterwards coming into his Possession or Occupation by some other Person to continue so set or placed, shall be deemed to have set and placed such Gun, Trap, or Engine with such Intent as aforesaid: Provided that nothing in this Section contained shall extend to make it illegal to set or place any Gin or Trap such as may have been or may be usually set or placed with the Intent of destroying Vermin: Provided also, that nothing in this Section shall be deemed to make it unlawful to set or place or cause to be set or placed, or to be continued set or placed, from Sunset to Sunrise, any Spring Gun, Man Trap, or other Engine which shall be set or placed, or caused or continued to be set or placed, in a Dwelling House, for the Protection thereof."

1.221 The section applies only to traps capable of inflicting, or set with an intention to inflict, grievous bodily harm on a human being. Such an intention

540 The English Law Commission's Draft Criminal Code extends the simplified offence of 'endangering traffic' to any conveyance constructed or adapted for the carriage of persons by land, water or air, Law Com. No. 177, vol. 1, s.88.

541 *R. v Gilmore*, (1882) 15 Cox C.C. 85.

542 *R. v Bowray* (1846) 10 Jur. 211, interpreting a previous enactment.

543 *Id.*; also *R. v Holroyd* (1841) 2 M. & Rob. 339.

544 *R. v Pearce* [1867] 1 Q.B. 150.

may be inferred from the circumstances, as where a spring-gun allegedly set to alarm is found to be loaded.⁵⁴⁵ Nevertheless, the section does not create absolute liability where a spring-gun is found to be loaded, but puts the burden of proof on the defence to establish absence of intention or guilty knowledge.⁵⁴⁶ Causing death by engines set in contravention of this has been held to be manslaughter.⁵⁴⁷

1.222 The High Court of Australia has held, in relation to an almost identical provision in the Queensland Criminal Code, that the likelihood of someone coming into contact with the instrument is immaterial to the question whether the instrument has been set in a manner "whereby the same may destroy or inflict grievous bodily harm on a trespasser or other person coming in contact therewith". The question is rather whether, if a person did come into contact with the instrument, the place and manner of its setting made it likely that the person would be killed or subjected to grievous bodily harm.⁵⁴⁸

1.223 In *R. v Munks*, the appellant arranged electric wires so that they would administer a possibly fatal shock to any intruder into his house. The Court of Appeal overturned his conviction under s.31 on the grounds that an "engine" meant a mechanical contrivance and therefore did not include the wires arranged by the appellant.⁵⁴⁹

1.224 It may be noted that a person does not commit an offence under this section by placing man traps in a dwelling-house between sunset and sunrise for the protection of the house irrespective of the degree of injury that may be caused as a result.

Assault With Intent (s.38) And Other Assaults On Police Officers

1.225 By s.38 of the 1861 Act, "whosoever shall assault any person with intent to commit felony, or shall assault, resist, or wilfully obstruct a peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence, shall be guilty of a misdemeanour..." and be liable to imprisonment for any term not exceeding two years. An offence under s.38, being a scheduled offence under the *Criminal Justice Act, 1951*, may be tried summarily with the consent of the D.P.P.⁵⁵⁰

1.226 A summary procedure for an assault on a constable acting in the execution of his duty is provided for by s.12 of the *Prevention of Crimes Act, 1871*.⁵⁵¹ A person convicted under this section is liable to a fine not exceeding

⁵⁴⁵ *R. v Smith & York* (1902), cited in Archbold, *op cit*, pp.20-167.

⁵⁴⁶ *R. v Bavastock* [1954] Crim. L. Rev. 625.

⁵⁴⁷ *R. v Heaton* (1896) 60 J.P. 508.

⁵⁴⁸ *Hogarth v The Queen* [1966] A.L.R. 377, approving *R. v Williams* [1958] Q.S.R. 185 (Queensland C.C.A.) in relation to s.327 of the Queensland Criminal Code.

⁵⁴⁹ [1964] 1 Q.B. 304.

⁵⁵⁰ S.2(2) of the 1951 Act, as amended by s.19 of the *Criminal Procedure Act, 1967*.

⁵⁵¹ 34 and 35 Vic., c.112.

£20 or to imprisonment for a term not exceeding 6 months, or, in the case of a previous conviction for a similar assault within 2 years, 9 months. Where the assault is of a trivial character, it may also be prosecuted under s.42 of the Act. Furthermore, under s.9 of the *Dublin Police Act, 1836*,⁵⁵² any person who assaults or resists any person belonging to the Dublin Metropolitan Police force in the execution of his duty or who aids or incites any person so to assault or resist, is guilty of an offence and liable to a fine not exceeding £5.

1.227 In its *Report on Offences under the Dublin Police Acts and Related Offences* the Commission has already set out its examination of these provisions in so far as they provide for assaulting, resisting or obstructing police officers in the execution of their duty.⁵⁵³ While the Commission there considered that any thorough review of the need for a specific offence of assault on a policeman should be undertaken as part of a report on offences against the person in general, it nevertheless assumed the continued need for such a specific offence in the interim. It was accordingly recommended that there should be a new offence of assaulting a peace officer⁵⁵⁴ in the execution of his or her duty,⁵⁵⁵ triable either way and punishable on conviction on indictment by two years imprisonment and/or a fine.

1.228 Because resistance to or obstruction of a "peace officer" in the execution of his or her duty would, in the great majority of cases, not be likely to be as serious a form of conduct as assaulting the officer, it was recommended that these be the subject of a separate offence, triable summarily only and punishable by three months imprisonment and/or a fine of £200, being less than the maximum penalty on summary conviction for assaulting a "peace officer" (six months and/or a fine of £500).

1.229 It was recommended that these offences replace all three existing offences outlined above.

1.230 In its Report, the Commission did not examine the remaining offences within s.38 of assault with intent to commit felony and assault with intent to resist

⁵⁵² 6 and 7 Will 4, c.28.

⁵⁵³ LRC 14-1985, pp.8-14.

⁵⁵⁴ It was recommended that the term peace officer, in addition to members of the Garda Síochána, should be defined to include prison officer, members of the Defence Forces, sheriffs and traffic wardens. The words "peace officer in the execution of his duty" have been held to include the sheriff or his officers when concerned in executing civil process, and the bailiffs of county courts. The words are not restricted to arrests for crime and are wide enough to cover acts relating to civil proceedings, for example, the service of summonses and revenue proceedings: see *Russell on Crime*, p.689.

⁵⁵⁵ The *mens rea* of knowledge or recklessness would extend to the fact that the person assaulted was a peace officer and that the officer was acting in the execution of his or her duty, though there would be an evidential burden on the defendant to show that he or she believed the peace officer not to be so acting. The expression "in the execution of his duty" includes all cases in which the officer at common law or by statute is lawfully seeking to make an arrest without warrant or with a warrant regular on the face of it, or to prevent the commission of crimes or breaches of the peace, or to execute a search warrant lawfully issued, or is lawfully detaining a prisoner or conveying a prisoner before a judicial officer, or is using reasonable precautions to prevent escape, or in searching a person who is conducting himself or herself with violence, to see if he or she has weapons, or a person arrested on suspicion of larceny or unlawful possession: see *Russell on Crime*, pp.688-689. In *D.P.P. v Murray* [1977] I.R. 360, a prosecution for capital murder of a Garda, it was held by the Supreme Court that recklessness as to whether the victim was a Garda, the accused having averred to that possibility, being the relevant *mens rea* for the s.38 offence, was sufficient *mens rea* for capital murder.

or prevent the lawful apprehension or detainer of the assailant or another for any offence. Both offences may be committed on any person, and are not limited to peace officers or persons acting in aid of such officers, and both may result in a conviction for common assault in the event that the necessary intent is not proved.

1.231 As noted above,⁵⁵⁶ the effect of s.46 of the 1861 Act is to exclude the possibility of summary trial for any assault where the assault is found to have been accompanied by an attempt to commit felony. Because an attempt consists of an act done by the accused with a specific intent to commit a particular crime,⁵⁵⁷ this would appear to cover all assaults with intent to commit felony, so that this offence is effectively triable on indictment only.

Offences Against Children

1.232 Section 27 of the 1861 Act provides that whosoever shall unlawfully abandon or expose any child being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanour and shall be liable to five years penal servitude.

1.233 The words "abandon" and "expose" include a wilful omission to take charge of the child on the part of the person legally bound to do so, and any mode of dealing with it calculated to leave it exposed to risk without protection. A father who knowingly left his child outside his house after it had been left there by his wife, from whom he was separated, was guilty of "abandonment".⁵⁵⁸ However, a transfer of the child to some reputable person to look after it does not come within the section even if the parent intended to get rid of the child.⁵⁵⁹ There must be an intention to leave the child to itself without some proper person to guard it or there must be some fraud or trick played upon the person who assumes custody.⁵⁶⁰

1.234 The "exposure" need not consist of the physical placing of the child somewhere with intent to injure it; a father who needlessly compelled his children to trek with him on a long journey during an inclement night was held to have been rightly convicted of cruelty for such exposure.⁵⁶¹ In a case where a child was packed in a hamper, labelled "with care" and directed to the lodgings of the

556 *Supra*, page 10.

557 *People (A.G.) v Thornton* [1952] I.R. 91.

558 *R. v White* (1870) L.R. 1 C.C.R. 311.

559 *R. v Russell* [1916] N.Z.L.R. 343. "The surrender of a child to an adopted parent as an act of prudence or necessity under the pressure of present inability to maintain it, and if done in the interests of the child, cannot be regarded as an abandonment or desertion, or even as unmindfulness of parental duty", *per* Fitzgibbon L.J. in *Re O'Hare*, (1900) 2 I.R. 244. See also *Re Mitchell*, 42 Sc. L.R. 439.

560 *R. v Russell*, *supra*; *Kalloo v R.* [1964] 60 W.W.R. 802 speaks of abandoning as "giving up all concern in"; *R. v Boulden*, 41 Cr. App. R. 105, as leaving a child to its fate.

561 *R. v Williams* (1910) 26 T.L.R. 290. Yet it appears, that, although there is some authority, for the proposition that an exposure to the inclemency of the weather may amount to an assault, this is only so where the person suffers a hurt or injury as a result of such exposure: see *R. v Renshaw* (1847) 2 Cox 285 (*per* Parke B.), referred to in *Russell on Crime*, p.899.

father, delivery being effected in less than an hour, a conviction was upheld, notwithstanding that the child's subsequent death was not attributable to the conduct of the accused, on the grounds that its life had thereby been endangered.⁵⁶²

1.235 Section 27, apart from the fact of providing a heavier penalty for the abandonment or exposure of a child under two years, is effectively duplicated in s.12 of the *Children Act, 1908*, as amended by s.4 of the *Children Act, 1957*. This provides for the misdemeanour of cruelty whereby any person over the age of 17 years, who has the custody, charge or care of any child or young person,⁵⁶³ wilfully assaults, ill-treats, neglects, abandons or exposes such child or young person, or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause such child or young person unnecessary suffering or injury to his or her health (including injury to or loss of sight, hearing, limb or organ of the body, and any mental derangement). Conviction on indictment carries a penalty of £100 fine or 2 years imprisonment, whereas summary conviction carries a penalty of £25 fine or 6 months imprisonment. In *R. (Clarke) v Co. Louth J.J.*, it was held that s.12 gives no right to the accused to elect in which way the charge is to be tried.⁵⁶⁴

1.236 The term "custody" applies to the parent or legal guardian and to any person who is by law liable to maintain the child.⁵⁶⁵ Whether a person has the charge of the child is a matter of fact for the jury.⁵⁶⁶ "Wilfully" means that the act is done deliberately and intentionally, not by accident or inadvertently, but so that the mind of the actor goes with the act,⁵⁶⁷ and the words "wilfully assaults" are governed by the later words "in a manner likely to cause him unnecessary suffering or injury to health".⁵⁶⁸

1.237 Similarly, wilful neglect means deliberate and not merely inadvertent neglect.⁵⁶⁹ In *R. v Sheppard*,⁵⁷⁰ however, the House of Lords held that the judicial explanation of "wilfully" in relation to the doing of a positive act is not wholly apt in relation to a failure to act at all. In the latter context, "wilfully" means either deliberately failing to act, knowing that there is some risk that the child's health may thereby suffer, or failing to act as a result of indifference to the child's health.⁵⁷¹

1.238 Omission on the part of a father to pay any part of his earnings towards

⁵⁶² *R. v Falkingham* (1870) L.R. 1 C.C.R. 222.

⁵⁶³ Section 91 of the 1908 Act, as amended by s.28 of the *Children Act, 1941* defines a 'child' as any person who in the opinion of the court before whom it is brought is under 15 years, and a 'young person' as any person who in such opinion is between 15 and 17.

⁵⁶⁴ 46 I.L.T.R. 188.

⁵⁶⁵ This does not include a putative father: see *Butler v Gregory* (1902) 18 T.L.R. 370.

⁵⁶⁶ *R. v Cox* [1898] 1 Q.B. 179.

⁵⁶⁷ *R. v Senior* [1899] 1 Q.B. 283 at 290, followed in *R. v Walker* (1934) 24 Cr. App. R. 117.

⁵⁶⁸ *R. v Hatton* [1925] 2 K.B. 322.

⁵⁶⁹ *R. v Downes* 1 Q.B.D. 25; *R. v Lowe* [1973] 1 Q.B. 702.

⁵⁷⁰ [1980] 3 All ER 899.

⁵⁷¹ So, in *A.G. v O'Keeffe* 81 I.L.T.R. 3, the convictions of a child's parents were reversed on the grounds that they had failed to carry out exercises prescribed by a doctor for their child out of optimism rather than wilfulness.

the support of his child may constitute wilful neglect whether he is living with his wife and child⁵⁷² or apart from them.⁵⁷³ Deliberate omission to supply medical or surgical aid,⁵⁷⁴ including a refusal to allow a child to undergo an operation,⁵⁷⁵ may also constitute such neglect.

1.239 In addition to such wilful conduct, however, the assault, etc., must be done in a manner likely to cause unnecessary suffering or injury to the health of the child. In consequence, there must be something more than a mere common assault,⁵⁷⁶ or a slight fright or some small mental anxiety.⁵⁷⁷ Nevertheless, direct proof that the neglect, ill-treatment, etc. resulted in, or was likely to cause unnecessary suffering or injury is not required, but may be inferred from the evidence of such ill-treatment or neglect, etc.⁵⁷⁸

1.240 Section 12 of the 1908 Act provides further that for the purposes of the section a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected a child if he or she fails to provide adequate food, clothing, medical aid or lodging or fails to take steps to procure the same.⁵⁷⁹ Moreover, a person may be convicted of cruelty notwithstanding that actual suffering or injury to health, or the likelihood of such suffering or injury to health, was obviated by the action of another person, or that the child or young person has died.⁵⁸⁰ Being knowingly interested, directly or indirectly, in any sum of money that is to accrue or be paid in the event of the death of a child or young person is an aggravation of this offence.⁵⁸¹ A person having the custody, charge or care of a child or young person may be found guilty of cruelty upon any trial for manslaughter.⁵⁸²

1.241 It has been held that the words "wilfully assaults, ill-treats, neglects, abandons or exposes" in the equivalent English provision⁵⁸³ do not create five mutually exclusive offences, so that an indictment for ill-treating a child will be made out even though the same conduct may come within another of these words.⁵⁸⁴ The logic of this reasoning has been questioned in subsequent cases, however, on the grounds that neglect and ill-treatment cannot sensibly be equated where there is no evidence of ill-treatment though there is of neglect,⁵⁸⁵ and the better view would appear to be that such charges should be the subject of separate counts in the indictment.⁵⁸⁶

572 *Cole v Pendleton* (1896) 60 J.P. 359.

573 *R. v O'Connor* [1908] 2 K.B. 28.

574 For example, *R. v Watson & Watson* (1959) 43 Cr. App. R. 111.

575 *Oakley v Jackson* [1914] 1 K.B. 216.

576 *R. v Hatton*, *supra*, n.568.

577 *R. v Whibley* [1938] 3 All E.R. 777.

578 *Cole v Pendleton*, *supra*, n.572; *R. v Newington*, C.A., 23 February 1990, *The Independent*, 21 March 1990.

579 Subs.2.

580 Subs.3.

581 Subs.3.

582 Subs.4.

583 S.1(1) of the *Children and Young Person Act, 1933* (c.12).

584 *R. v Hayles* [1969] 1 Q.B. 364.

585 *R. v Beard* (1937) 85 Cr. App. R. 395 (C.A.); *R. v Newington*, C.A., *supra*, n.578.

586 *Newington*, *supra*, and Gunn., *Comment* [1990] Crim. L. Rev. 595-97.

1.242 Section 19 of the 1908 Act provides for a power of arrest without warrant in respect of any offence involving bodily injury to a child or young person, including any offence under ss.27, 42, 55, and 56 of the 1861 Act:

- "(a) where the name and residence of a person who commits such an offence within view of the Garda are unknown to the Garda and cannot be ascertained by him; or
- (b) where the Garda has reasonable grounds for believing that a person he suspects of having committed such an offence will abscond, or if the name and address of such person are unknown to and cannot be ascertained by the Garda."

1.243 By s.15 of the 1908 Act, it is a separate summary offence punishable by a £10 fine for a person having the custody, charge or care of a child under the age of 7 years to allow that child to be in any room containing an open fire grate not sufficiently protected to guard against the risk of the child being burnt or scalded, without taking reasonable precautions against that risk, and by reason thereof the child is killed or suffers serious injury.

1.244 Section 3 of the *Children's Dangerous Performances Act, 1879*, provides for a summary offence of endangerment punishable by a fine of £10 where any person including a parent or guardian causes a male under 16 years or a female under 18 years of age to take part in any public exhibition or performance whereby the life or limbs of such child shall be endangered. It is for the person charged to prove that the child is not of the age alleged.⁵⁸⁷ Moreover, where actual bodily harm occurs to the child as a result of an accident in the course of such a performance, s.3 of the Act also purports to enable the employer of the child so injured to be charged with assault.⁵⁸⁸ By s.2 of the *Dangerous Performances Act, 1897*, however, no prosecution may be brought under the 1879 Act where no actual bodily harm occurs without the consent in writing of the Superintendent of the District or, in the case of the Dublin Metropolitan Area, of the Commissioner.

1.245 In addition, the *Employment of Children Act, 1903*, and the *Prevention of Cruelty to Children Act, 1904*, provide for a number of offences relating to the hazardous employment of boys under 14 years and girls under 16 years of age. By s.5(1) of the 1903 Act, it is an offence punishable by a fine of £2 to employ any child under 14, *inter alia*, in any occupation likely to be injurious to his life, limb, health or education, such as the lifting or carrying of heavy weights, regard being had to the physical condition of the child.⁵⁸⁹ Provision is also made for the liability of other employees and agents of the employer⁵⁹⁰ as well as for the

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S.4.

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Though the practical benefit of this provision may be doubted in that the elements of assault must nevertheless be proved.

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S.3 of the 1903 Act, as amended by s.8 of the *Conditions of Employment Act, 1936*, sets out the elements of these offences, and also prohibits the employment of any child under the age of 11 in street trading.

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S.8(1).

liability of parents and guardians, who may in addition be guilty if they have habitually failed to exercise due care in preventing such employment.⁵⁹¹ On the other hand, the 1904 Act is principally concerned with the unlawful employment of boys under 14 and girls under 16 years of age in licenced premises or for public entertainment at night and with the unlawful training of such children as acrobats, contortionists and other circus performers.⁵⁹² For the purposes of both Acts, it is for the defendant to show that the child was above the age alleged.⁵⁹³

Neglect And Ill-treatment Of The Young, The Helpless And The Insane

1.246 In addition to the above statutory offences relating to the neglect of children, it is a misdemeanour at common law to refuse or neglect to provide sufficient food or other necessities of life for any person such as a child, apprentice or servant, who is unable to provide for and take care of himself or herself, whom the party is obliged by duty or contract to provide for, so as thereby seriously to injure health, or endanger life.⁵⁹⁴ "Neglect" in this respect does not correspond to any state of mind, but rather denotes the objective fact of failure to perform a duty.

1.247 It appears that this obligation is limited to cases where the person neglected is of tender years or helpless or so dominated by the parent or employer as to be unable to care for himself or herself.⁵⁹⁵ It has been extended to cases where an aged or sick person under the care or control of another is neglected so as to cause death or injury to health.⁵⁹⁶ It has been held not to extend, however, to a duty to force-feed a conscious prison inmate on hunger strike.⁵⁹⁷ In all these cases, it must be both alleged and proved that the victim's health has been seriously injured.⁵⁹⁸

1.248 At common law a parent is also bound to provide medical attendance for his child,⁵⁹⁹ and a master bound to provide such attendance for his apprentice.⁶⁰⁰ But the obligation is said not to extend to servants.⁶⁰¹

1.249 The expression "necessaries of life" clearly includes food and drink,

591 S.5(2).

592 S.2, which provides for a penalty of a fine of £25 or 3 months imprisonment.

593 S.17 of the 1904 Act. The spouse of an accused is now a compellable witness in any case of violence to a child of either spouse, pursuant to s.22 *Criminal Evidence Act, 1992*.

594 *Russell on Crime*, p.696, citing *R. v Friend* (1802) R. & R. 20. See s.151 of the *New Zealand Crimes Act, 1961*, providing for a maximum penalty of 7 years for the equivalent offence. It appears that the origins of this duty may be traced to the *Poor Relief Act, 1601*, 43 Eliz c.2: see *R. v Hall* (1941) 56 B.C.R. 308.

595 For example, in *R. v Smith* (1865) L. & C. 607, it was held that no such obligation existed in respect of a servant of full age. If a parent cannot himself support a child of tender years, the obligation extends to endeavouring to obtain the means of support from the responsible local authority: see *R. v Mabbett* (1851) 5 Cox 339.

596 *R. v Instan* [1893] 1 Q.B. 450. In *R. v Watson* (1936) 50 B.C.R. 531, the defendant's conviction for omission to discharge his duty was quashed where too much weight had been given to the fact that he had been drinking and it had not been shown that there was a failure to provide proper treatment.

597 *A.G.B.C. v Astaforoff* (1983) 47 B.C.L.R. 217 (Supreme Court of Canada).

598 *R. v Phillpot* (1853) Dears 179.

599 *R. v Senior* [1899] 1 Q.B. 283.

600 *R. v Smith* (1837) 8 C. & P. 160.

601 *Id.*

adequate clothing, services and the provision of medical care and hospital treatment.⁶⁰² In this last connection, it appears from New Zealand authority that a person's life is 'endangered' as soon as the disease has reached a stage at which it can be said that there is a reasonable probability that death will ensue unless medical attention is obtained.⁶⁰³ Although mere negligence is insufficient,⁶⁰⁴ it is not necessary to show that the omission or neglect of duty was wilful in the sense of being deliberate or intentional. What must be proved is that the accused was indifferent to an obvious risk of injury to health or that he or she actually foresaw the risk of injury and determined to take that risk.⁶⁰⁵ In this respect, the *mens rea* is more accurately described as reckless rather than wicked,⁶⁰⁶ and once established, criminal responsibility follows unless there is "lawful excuse" for the accused's omission or neglect of duty.⁶⁰⁷

1.250 It is established that a religious belief that resort to medical treatment or drugs is sinful does not provide such "lawful excuse".⁶⁰⁸ Whether one person has charge of another is a question of fact, except where the law imposes such charge.⁶⁰⁹ So a husband and wife can both have the charge of their child at the same time,⁶¹⁰ this being presumed where they are living together,⁶¹¹ and the one will not be excused of the other's neglect if he or she knew of it and nevertheless permitted the other to continue in that course.⁶¹² It also appears that a court will not confine its inquiry within narrow limits by focusing on events close to the date of the complaint. The court will rather focus on all aspects of the continuing state of guardianship, etc., over the alleged period of neglect.⁶¹³

1.251 As with children, in the case of apprentices and servants, the common law is supplemented by statute. Section 26 of the 1861 Act makes it an offence to wilfully neglect or to do any bodily harm to apprentices or servants such that their lives are endangered or that their health is likely to be permanently injured. It is triable either way and is punishable with a maximum penalty on indictment of 5 years penal servitude. It appears that liability as a master or mistress under this section arises by contract,⁶¹⁴ the enactment containing no words making it necessary to prove that the apprentice was of tender years or under the dominion or control of his master or mistress. By s.73 of the 1861 Act, guardians of the poor may be required to prosecute offenders under this section, though this does not exclude prosecution by other persons.⁶¹⁵

602 See Carrow and Caldwell, *Criminal Law in New Zealand* (6th ed., Butterworths, 1981), p.130.

603 *R. v Moore* [1954] N.Z.L.R. 893.

604 *R. v Nicholls* (1874) 13 Cox C.C. 75.

605 *R. v Stone & Dobinson* [1977] 2 All ER 341; *R. v Senior* [1899] 1 Q.B. 283, explained by the House of Lords in *R. v Sheppard & Sheppard* [1980] 3 All ER 889 to the effect that "indifference" means such unawareness as arises when the defendant does not care whether the child's health was at risk or not.

606 *R. v Bonnyman* (1942) 28 Cr. App. R. 131; also *R. v Burney* [1958] N.Z.L.R. 745.

607 *R. v Burney*, *supra*.

608 *R. v Senior*, *supra*, n.589.

609 *R. v MacDonald & MacDonald* [1904] St. R. Qd. 151, [1904] Q.W.N. 50.

610 *Id.*; *R. v Smith & Smith* [1908] Q.W.N. 13.

611 *R. v Watson & Watson* (1959) 43 Cr. App. R. 11.

612 *R. v Bubb & Hook* (1850) 4 Cox C.C. 455; see also, *R. v Gibbons & Proctor* (1918) 13 Cr. App. R. 134.

613 *Whale v Tonkins* (1983) 12 A. Crim. R. 103 (N.S.W.C.A.).

614 *Russell on Crime*, p.697, note 12.

615 *Caswell v Morgan* (1859) 28 L.J.M.C. 208.

1.252 Section 6 of the *Conspiracy and Protection of Property Act, 1875*, provides for a summary offence in virtually identical terms to this provision, punishable on conviction by a fine of £20 or 6 months imprisonment.⁶¹⁶ By virtue of s.9 of this Act, the accused has a right to elect to be tried on indictment on such a charge.

1.253 The ill-treatment of a lunatic by a person having duties towards him by status or contract falls at common law within the rule as to sick or helpless persons.⁶¹⁷ In consequence, to justify a conviction for neglect of a person of unsound mind, it must be proved that the victim was under the control and care of the defendant, that the neglect occurred while the care and control continued, that it was of a character to produce serious injury to the health of the victim, and that it in fact caused such injury.⁶¹⁸ Criminal liability for the ill-treatment of such persons, however, is now governed by s.253 of the *Mental Treatment Act, 1945*, which provides as follows:

"Where the person in charge of a mental institution or a person employed therein ill-treats or wilfully neglects a patient in the institution, or a person having charge, whether by reason of any contract or of any tie of relationship, marriage, or otherwise, of a person of unsound mind ill-treats or wilfully neglects such person of unsound mind, he shall be guilty of an offence under this section and shall be liable, on summary conviction thereof, to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding six months or, at the discretion of the Court, to both such fine and such imprisonment, or on conviction thereof on indictment, to a fine not exceeding two hundred pounds or, at the discretion of the Court, to imprisonment for a term not exceeding two years or to both such fine and such imprisonment".

1.254 By virtue of s.35 of the *Mental Treatment Act, 1961*, a reference to "ill-treats" in this section is construed as including a reference to striking or otherwise assaulting.⁶¹⁹ As in the case of cruelty, mere negligence will not support a charge under this section.⁶²⁰ Nor is this an offence for which vicarious liability is implicitly imposed by the section.⁶²¹

Driving Offences

1.255 Section 35 of the 1861 Act provides that, whosoever, having the charge of any carriage or vehicle, shall, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm

616 Unlike the 1861 Act, the 1875 extends to serious, not just permanent, injury, and neglect to provide medical aid is expressly included.

617 *Russell on Crime*, p.703, citing *R. v Much Cowarne* (1831) 2 B. & Ad. 861 and *R. v Friend*, *supra*, n.594.

618 *Id.*

619 Under s.140 of the *Defence Act, 1954*, it is also an offence for an officer subject to military law to strike or otherwise ill-treat any member of the Defence Forces who by reason of rank or appointment is subordinate to him.

620 *R. v Walker* [1958] N.Z.L.R. 810, interpreting a similar provision on New Zealand law.

621 *Id.*; see also *Hall* (1919) 14 Cr. App. R. 58, 122 L.T. 31.

to any person whatsoever, shall be guilty of a misdemeanour and liable to imprisonment for two years.

1.256 Section 35 was the first statutory provision to deal with what is now extensively regulated by the law relating to dangerous and careless driving contained in the *Road Traffic Acts, 1961-1984*. Having regard to those Acts, it has been observed that the force of s.35 of the 1861 Act is largely spent.⁶²² Section 53(5) of the *1961 Road Traffic Act* specifically provides that, in reference to the same occurrence, a person shall not be liable to be charged under s.35 of the 1861 Act and s.53 of the 1961 Act, which provides for the offence of dangerous driving. Dangerous driving which results in death or serious bodily harm is punishable on conviction on indictment, *inter alia*, by mandatory disqualification and a £3,000 fine or five years penal servitude. In other cases, it is triable either way and punishable, *inter alia*, by £1,000 fine or six months imprisonment, irrespective of any bodily injury.

1.257 Dangerous driving under s.53 of the 1961 Act constitutes driving in a manner (including speed) which a reasonably prudent man having knowledge of all the circumstances proved in court would clearly recognise as involving unjustifiably definite risk of harm to the public.⁶²³ Wanton or furious driving or racing, or other wilful misconduct or wilful neglect under s.35 of the 1861 Act clearly comes within this standard of care,⁶²⁴ though not within the lower standard of driving "without due care and attention" in the lesser offence of careless driving under s.50 of the *Road Traffic Act, 1968*, a summary offence punishable, *inter alia*, by £350 fine and/or three months imprisonment, irrespective of any bodily injury.⁶²⁵

1.258 Section 35 of the 1861 Act applies to all carriages and vehicles, as well as to bicycles.⁶²⁶ Similarly, the offences of dangerous and careless driving are not confined to mechanically propelled vehicles. However, unlike the modern offences, s.35 is not restricted in its application to acts done on a public road or in a public place.⁶²⁷ Moreover, apart from the fact that s.53 of the 1961 Act is aggravated where death or serious bodily harm results, s.35 differs from the other offences in requiring some element of bodily harm for its commission.

Firearms And Explosives

1.259 In this Paper we do not propose to deal with offences relating to firearms or explosives. These form distinct codes in their own right, are revised

622 Pierse, *Road Traffic Law in the Republic of Ireland* (1989), p.151. A rare example of a recent reported case of a prosecution under s.35 is *R. v Austin* [1981] R.T.R. 10.

623 *People v Quinlan* (1982) Circuit Court (*per* Barra O'Briain J.), (1982) I.L.T.S.J. 123, (1983) I.L.T.S.J. 219.

624 In *R. v Barnard* [1958] Tas. S.R. 19, the Tasmanian Supreme Court held that 'wanton driving' means driving recklessly and that for practical purposes, this imported the same degree of negligence as manslaughter. Where death resulted from such driving, the proper charge was therefore unlawful homicide.

625 See Pierse, *op cit*, pp.151-170.

626 *R. v Parker* (1895) 59 J.P. 793. In *A.G. v Joyce*, 90 I.L.T.R. 47, failure to have a light on a horse-drawn vehicle at night was held to be evidence upon which a jury could find 'wilful neglect' within the meaning of s.35. This appears to be the only reported Irish case on the provision.

627 *R. v Cooke* [1971] Crim. L. Rev. 44.

regularly and are scheduled under the *Offences Against the State Act*. The law relating to offensive weapons was addressed in the Commission's Report on *Vagrancy and Related Offences*.⁶²⁸

Affray

1.260 It has been seen that any act which causes another person to apprehend the infliction of immediate unlawful force on his or her person constitutes an assault at common law. Where such force is in fact applied, it is a battery, whether or not the victim has been put in fear of any violence. A related offence is that of affray (from the French *effrayer*, to frighten), which is typically charged in cases of pitched street battles between rival gangs, group attacks of vengeance on individuals, and spontaneous pub and club brawls. It is a misdemeanour at common law triable on indictment only and punishable with life imprisonment. Historically classified together with riot, rout and unlawful assembly as an offence against public order,⁶²⁹ the justification for the offence of affray rested in the public fear that fighting in public was apt to arouse. By the middle of the nineteenth century, the offence had fallen into desuetude,⁶³⁰ but it has been "dusted off and refurbished by prosecutors and judges in our own time",⁶³¹ with the result that it now constitutes a form of aggravated assault involving such a degree of violence that persons of reasonably firm character are likely to be terrified.⁶³²

1.261 In Ireland, the offence has recently been charged, for example, in cases of rival gang fights in Dublin and pitched family feuds in Donegal, though there is no indication as to whether affray will be judicially extended as it was in England, prior to its replacement in England by a new offence of affray, in 1986.⁶³³ There it was held that there was no need for a fight -in the sense of two willing participants attacking one another -actually to take place as part of the offence; where one person was attacking another and the public fear was sufficiently aroused, it should not be a defence for the attacker to assert that his victim did not resist or that he was acting in self-defence.⁶³⁴ It was also held that the offence need not take place in public, on the grounds that bystanders might become just as terrified in private as they would in public.⁶³⁵

1.262 Finally, it was held that where the offence occurred in public, it was unnecessary to prove either that a bystander was actually terrified, or even present, or even likely to be present because, by definition, a public place was

628 LRC 17-1985, chapter 13, pp.75-81.

629 Affray nevertheless differs from other offences against public order in specifically requiring violence against the person.

630 See, Brownlie, *The Renovation of Affray* [1965] Crim. L. Rev. 479. In Ireland, a reported prosecution for affray is *O'Neill* (1871) 1 R. 6 C.L. 1, in which it was held that an indictment which fails to aver that the affray occurred in a public place will be bad.

Williams, *op cit*, p.205.

632 Williams, *op cit*, p.206 offers this definition, and classifies affray as an offence against the person.

633 See generally, Smith, *Offences against Public Order* (Sweet and Maxwell, 1987), chapter 5.

634 *Scarrow* (1968) 52 Cr. App. R. 591; *Summers* (1972) 56 Crim. App. R. 604; confirmed by the House of Lords in *Taylor v D.P.P.* [1973] A.C. 964.

635 *Kane* [1965] 1 All E.R. 705; *Button and Swain* [1966] A.C. 591.

one where the public was likely to be.⁶³⁶ Section 3 of the English *Public Order Act, 1986*, completes the march of logic, with the result that if a person assaults another in private and uses violence of such a degree that other members of the household would be frightened if they were there, he is technically guilty of the new statutory offence of affray.⁶³⁷

1.263 Although the characteristic case of an affray involves fighting in public, there may be an affray where there is no actual violence applied to the person of another provided that there is such display of force as terrifies a person of reasonably firm character. All recent reported cases appear to have involved actual fighting or violence⁶³⁸ and, although the element of display of force is accepted as part of the law,⁶³⁹ precisely what this connotes is unclear: the brandishing of "dangerous and unusual weapons" is sufficient,⁶⁴⁰ but not "mere words, unaccompanied by the brandishing of a weapon or actual violence".⁶⁴¹ A gang walking around in public brandishing bicycle chains but without threatening violence to any person will therefore commit an affray. Yet a mere altercation using threatening language cannot give rise to an affray.

1.264 The charge of affray is a useful alternative to any offence against the person in cases of group fighting in which one or more of the participants is injured, in that the prosecutor does not have to charge named persons with assaults on other named persons (or persons unknown). If injury has actually been caused, it is not necessary to show that a particular defendant caused it.⁶⁴²

1.265 In addition, affray requires a less exacting standard of *mens rea* than is required for offences against the person - it is sufficient for the prosecutor to prove that the defendant participated in an act of fighting, or that he communicated an intention to do so. Evidence that the defendant was suffering from injuries, or that his clothes were torn, would be evidence of such participation. However, mere presence at the scene of disorder is insufficient to establish liability and remains no more than evidence of encouragement,⁶⁴³ even when it is accompanied by a secret intention to help one of the participants

636 *Attorney General's Reference (No. 3 of 1983)* [1985] 1 Q.B. 242, and commentary by Prof. J.C. Smith in [1985] Crim. L. Rev. 207; see, also, Smith, *The Metamorphosis of Affray* (1986) 136 N.L.J. 521. This extension of the law may be in conflict with the approach of the Court of Criminal Appeal in *A.G. v Cunningham* [1932] I.R. 28, in which it was held that an act must be such as to cause reasonable alarm and apprehension to members of the public in the vicinity of such act in order to constitute a breach of the peace.

637 See Smith, *op cit*, pp.86-7.

638 See the English Law Commission's *Report on Offences relating to Public Order* (Law Com. No.123, 1983), para. 3.13.

639 *R. v Sharp and Johnson* [1957] 1 Q.B. 552 at 559.

640 *Taylor v D.P.P.* [1973] A.C. 964 at 987 (*per* Lord Hallsham). The common law offence of 'going armed to terrify the Queen's subjects', although sometimes regarded as an aspect of affray, has also been viewed as an independent misdemeanour: see Brownlie [1965] Crim. L. Rev. 480.

641 *Taylor v D.P.P.*, *supra*.

642 See, for example, *R. v Annakin and Others* (1987) 37 A. Crim R. 131 (New South Wales Court of Criminal Appeal); as to the law of evidence, see Sidhu [1976] Crim. L. Rev. 378 - a person is not to be regarded as an 'accomplice' for the purposes of the law of corroboration, even though he may technically be guilty of the same offence of affray. On the difficulties which may arise in proving a 'joint enterprise' in relation to other offences, see Griew, *It Must Have Been One of Them* [1989] Crim. L. Rev. 129; Williams, *Which of You Did It?* (1989) 52 M.L. Rev. 179.

643 *Coney* (1882) 8 Q.B.D. 534.

in an affray if necessary.⁶⁴⁴ So long as the defendant does not communicate his intention, he commits no offence, affray being subject to the ordinary principles of complicity.⁶⁴⁵ A plea of self-defence or defence of others is also open to any accused charged with affray.⁶⁴⁶

1.266 A further procedural advantage for the prosecutor is that a series of assaults committed at different places and over a period of time may be included in the one charge of affray as a continuing offence.⁶⁴⁷ However, where there is a clear break between one attack and another so that the participants can no longer be said to be using or threatening violence towards another person, the offence is complete and a single indictment for affray in respect of both attacks will, in consequence, be bad for duplicity.⁶⁴⁸

Public Nuisance

1.267 In addition to the inchoate offences of incitement, conspiracy and attempt, and to specific crimes of endangerment relating to dangerous things, dangerous activities and dangerous weapons,⁶⁴⁹ the criminal law prohibits acts causing mere risk of harm through the common law offence of public nuisance.

1.268 A nuisance at common law is anything which "works hurt, inconvenience or damage"⁶⁵⁰ and a public nuisance is one, according to *Russell on Crime*,⁶⁵¹ which "materially affects the public and is a substantial annoyance" to all citizens. It can be committed either by "doing something which tends to the annoyance of the public", such as obstructing a highway, or by "neglecting to do a thing which the common good requires", such as failing to bury a corpse.

1.269 Essentially, a public nuisance is one so widespread or indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own to put a stop to it - it should be the responsibility of the community at large.⁶⁵² In this respect, "an isolated act may amount to a public nuisance if it is done under such circumstances that the public right to condemn it should be vindicated."⁶⁵³

1.270 Some commentators and Codes define the offence of common nuisance more narrowly in requiring the act or omission to be itself "not warranted by law".⁶⁵⁴ Yet whichever definition is adopted, the essence of the offence is its

644 *Allan* [1965] 1 Q.B. 130.

645 *Summers, supra*, n.634.

646 *R. v Honeysett* (1988) 34 A. Crim. R. 277 (New South Wales Court of Criminal Appeal).

647 *Woodrow* (1959) 43 Cr. App. R. 105.

648 For example, *John Jones* (1974) 59 Cr. App. R. 120.

649 There is no general offence of endangerment known to the common law: see, for example, *R. v Scharf* (1988) 42 C.C.C. (3d) 378 (Manitoba Court of Appeal). In Scotland, however, there is an offence of "recklessly endangering the lieges": see, for example, *Smith and McNeill* (1842) 1 Brown 240.

650 *Russell on Crime*, p.1387.

651 *Id.*

652 *Attorney General v P.Y.A. Quarries, Ltd.* [1957] 1 All E.R. 894 at 902 (*per* Denning L.J.).

653 *Id.*

654 *Stephen, A Digest of the Criminal Law*, (4th ed., 1877), p.108. Section 176(2) of the Canadian Criminal Code provides that the common nuisance may be by an unlawful act or a failure to discharge a legal duty.

secondary harm, that is, its effect on the public. Injury to specific individuals is neither necessary nor sufficient. It is the danger or substantial annoyance to society in general that is the kernel of the crime.⁶⁵⁵

1.271 The catalogue of common law offences relating to conduct which harms or tends to harm the public interest coming within the category of common nuisance was stated by MacDermott L.C.J. in a Northern Ireland Case,⁶⁵⁶ adopting the classification of Archbold, as follows:

- "(a) acts which interfere with comfort, enjoyment or health;
- (b) acts dangerous to public safety;
- (c) act injurious to public morals; and
- (d) unlawful treatment of dead bodies."⁶⁵⁷

1.272 Having regard to the obvious overlap with offences against the person, and with other modern statutory provisions and regulations, it may be argued that the rationale for the retention of such an offence is now largely spent.⁶⁵⁸ Although it appears that the point has not specifically been addressed by an Irish Court,⁶⁵⁹ it may also be argued that the offence is unconstitutional for overbreadth and vagueness.⁶⁶⁰ If this is not the case, however, it seems that the existence of similar or even identical statutory provisions does not in any way affect the legality of an indictment for an offence which remains known to the common law.⁶⁶¹

1.273 In addition to cases relating to the obstruction of a highway,⁶⁶² the offence has recently been prosecuted in England in such diverse cases as securing the release of a mental patient,⁶⁶³ making obscene⁶⁶⁴ or hoax⁶⁶⁵ telephone calls and brothel keeping.⁶⁶⁶ In the criminal law at least, there are nevertheless a number of minor safeguards - the nuisance must be actual as opposed to

655 See the analysis of the Canadian Law Reform Commission in its Working Paper 46, *Omissions, Negligence and Endangering* (1985) pp.32-33.

656 *R. v Bailey* [1956] N.I. 15.

657 Archbold, *op cit.* p.1390.

658 A convincing argument to this effect is made by Spencer, *Public Nuisance - A Critical Examination* [1989] C.L.J. 55, who concludes that the introduction of an offence of reckless endangerment would cover such residual conduct as usefully remains within the ambit of the common law offence.

659 In *D.P.P. (Vizzard) v Carew* [1981] I.L.R.M. 91, Hamilton J. accepted that the related offence of effecting a public mischief was known to the common law, though no constitutional considerations were addressed. For criticism, see McAleese (1982) 4 D.U.L.J. (N.S.) 110 and O'Malley, *Common Law Crimes and the Principle of Legality*, (1989) I.L.T.S.J. 243.

660 See O'Malley, *op cit.*

661 *Semle*, Hamilton J. in *D.P.P. (Vizzard) v Carew*, *supra*, n.659. But see *infra*, Chapter 5, for the position in respect of overlapping statutes in the U.S.

662 *Clark (No. 2)* [1984] Q.B. 315. For a review of the statutory provisions relating to obstruction of the highway, cf. this Commission's *Report on Offences under the Dublin Police Acts and Related Offences* (LRC 14-1985), chapter 4.

663 *Soul* (1980) 70 Cr. App. R. 295.

664 *Norbury* [1978] Crim. L. Rev. 435.

665 *Madden* [1975] 3 All ER 155.

666 *Tan.* [1984] Q.B. 1053.

potential;⁶⁶⁷ it must be substantial⁶⁶⁸ and must affect a considerable number of persons in order to be truly public;⁶⁶⁹ it must be unreasonable, and a conviction will be quashed if the jury are not given an opportunity to say whether it is unreasonable;⁶⁷⁰ and the whole is subject to the application of the *de minimis* principle.⁶⁷¹

1.274 In addition, although the older cases suggest that it is not necessary to establish that it was the defendant's object to create a nuisance,⁶⁷² it appears that wilfulness is the required *mens rea* for proceedings on indictment.⁶⁷³ Finally, although in theory the offence is punishable with imprisonment for life, in practice the maximum rarely exceeds 2 years imprisonment.⁶⁷⁴

Breach Of The Peace, Insulting Behaviour And Disorderly Conduct

1.275 Despite the decision in *A.G. v Cunningham*,⁶⁷⁵ breach of the peace is not treated as an offence in Ireland. As in England it is a "traditional legal expression and ... a ground of arrest, though it is not the name of an offence".⁶⁷⁶ The reference to breach of the peace in Article 15.13 of the Constitution is in the context of arrest. The concept remains important for the purposes of common law powers of arrest without warrant.⁶⁷⁷ Following such arrest, or following a conviction or otherwise, a court has the power to bind a person over to keep the peace or to be of good behaviour, or both, i.e. to enter into a recognisance to that effect.⁶⁷⁸

1.276 The expression "breach of the peace" is somewhat elusive.⁶⁷⁹ It has been held to encompass not only riot, unlawful assembly and fighting, but also a unilateral battery where the victim does not retaliate.⁶⁸⁰ It is not said, however, to be occasioned by mere verbal quarrels or insults unless there is an accompanying threat of personal harm. In *Howell*,⁶⁸¹ Watkins L.J., for the English Court of Appeal, said that a breach of the peace occurs "whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, an unlawful assembly or other disturbance," and this now appears to be the accepted definition of the term.⁶⁸²

667 *Bartholemew* [1908] 1 K.B. 554; *Dymond v Pearce* [1972] 1 All ER 1142.

668 *Train* (1862) 3 F. and F. 22, 176 E.R. 11.

669 *Madden, supra*, n.665.

670 *Clark (No. 2), supra*, n.662.

671 *Ward* (1836) 111 E.R. 832.

672 *Moore* (1832) 110 E.R. 68.

673 *Walker v Horner* (1875) 1 Q.B.D. 46 (*per* Cockburn C.J.).

674 *Morris* [1951] 1 K.B. 394; *Higgins* [1952] 1 K.B. 7.

675 *A.G. v Cunningham* [1932] I.R. 28 at 33, (C.C.A.).

676 *Williams, op cit*, p.487.

677 Considered in Chapter 2, *infra*.

678 For a recent examination and a comparative analysis of such powers, see Law Com. W.P.No.103, *Binding Over: The Issues* (1987), and Morgan [1988] Crim. L. Rev. 355.

679 See *Williams, Arrest for Breach of the Peace* [1954] Crim. L.R. 578.

680 *Lewis v Arnold*, 4 C. & P. 354.

681 [1981] 3 All ER 383 at 389.

682 *Infra*.

1.277 More recently, the same court has held that a common law breach of the peace can occur on private premises even if the only persons likely to be affected by the breach are inside the premises and no member of the public outside the premises is involved.⁶⁸³ It may be questioned whether this decision extends beyond the issue of common law powers of arrest.⁶⁸⁴

1.278 There are, in addition, a number of existing statutory offences relating to insulting behaviour and disorderly conduct. Section 14(13) of the *Dublin Police Act, 1842*, provides that every person who within the limit of the metropolitan district in any thoroughfare or public place shall use any threatening, abusive, or insulting words or behaviour, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, shall be guilty of an offence and liable to a fine not exceeding £2. Section 8 of the *Summary Jurisdiction (Ireland) Amendment Act, 1871*, provides that any person who within the limits of the police district of Dublin metropolis shall in any theatre or other place of public amusement be guilty of offensive or riotous behaviour, to the disturbance or annoyance of any persons present, shall on conviction be liable to a fine not exceeding £2 or to imprisonment for any period not exceeding one month. Also, s.1 of the *Public Meeting Act, 1908*, provides that any person who, at a lawful public meeting, acts in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called together, or who incites others to do so, shall be guilty of an offence and be subject to a fine of £5 or one month's imprisonment.

1.279 In its *Report on Offences under the Dublin Police Acts and Related Offences*,⁶⁸⁵ the Commission has already examined the law relating to insulting behaviour and disorderly conduct with a view to its reform, and has recommended that the common law offence of breach of the peace be abolished and that the statutory offences set out above be repealed and replaced by the following summary offences:

- using or engaging in any threatening, abusive or insulting words or behaviour, or distributing or displaying any writing, sign or visible representation which is threatening, abusive or insulting, in a public place and with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned - punishable by a fine of £400 and/or six months imprisonment;
- engaging in any shouting, singing or boisterous conduct in circumstances likely to cause annoyance to other persons in the neighbourhood, either a) in a public place between the hours of 10p.m. on one day and 7a.m.

683 *McConnell v Chief Constable of the Greater Manchester Police* [1990] 1 All ER 423: see also *Thomas v Sawkins* [1935] 2 K.B. 249.

684 In *A.G. v Cunningham*, *supra*, n.675, the Court of Criminal Appeal reversed the defendant's conviction on the grounds that the indictment did not aver and the jury did not consider whether his conduct in fact caused reasonable alarm and apprehension to members of the public. He was nevertheless bound over to enter into security to keep the peace.

685 LRC 14-1985, chapter 7, p.45 *et seq.*

on the next day or b) at any other time, having been warned by a member of the Garda Síochána to desist - punishable by a fine not exceeding £500; and

acting in a disorderly manner at a public meeting for the purpose of preventing the transaction of the business of the meeting - punishable by a fine of £100 and/or one month's imprisonment.⁶⁸⁶

1.280 Whereas these offences are essentially concerned with the preservation of public order, the first offence in particular, because it prohibits certain classes of threatening, abusive or insulting words or behaviour, must also be borne in mind in the context of the possible reform of the offence of common assault.

1.281 In addition to the offences considered in that Report, a number of other offences which are of relevance to the offences considered in this Report should be noted. Firstly, there are a number of offences relating to disorderly conduct and non-payment of fares on trains and buses provided for in specific railways legislation⁶⁸⁷ and in the *Road Traffic (Public Service Vehicles) Regulations 1963*.⁶⁸⁸ Section 15 of the *Dublin Police Act, 1842*, provides for an offence of engaging in violent behaviour in a Garda station, and at common law a person may be bound over to keep the peace for making use of violent threats such as to put a person in fear and dread of bodily harm and injury.⁶⁸⁹

1.282 A specific offence relating to disorderly conduct in any place of religious worship, including the molesting or vexing of any preacher, is also provided for by s.2 of the *Ecclesiastical Courts Jurisdiction Act, 1860*.⁶⁹⁰

1.283 Under s.13(1) of the *Post Office Amendment Act, 1951*, as amended by the *Postal and Telecommunications Services Act, 1983*, it is an offence for a person to

- "(a) send, by means of the telecommunications system operated by Bord Telecom Eireann, any message or other matter which is grossly offensive or of an indecent, obscene or menacing character, whether addressed to an operator or any other person, or
- (b) send by those means, for the purpose of causing annoyance, inconvenience or needless anxiety to another, a message which he knows to be false or persistently makes use of those means for that purpose."

⁶⁸⁶ *Id*, pp.49-51.

⁶⁸⁷ These include obstructing a railway employee, trespass on a railway and stone throwing (*Railway Regulation Act, 1840*, s.16, *Bye Law of the C.I.E. Bye Laws (Confirmation) Order 1984*) as well as failure to produce a ticket, pay the fare or to get off the train (*Railway Clause Consolidation Act, 1845*, and *Regulation of Railways Acts, 1840-1899*).

⁶⁸⁸ Articles 5, 17 and 48.

⁶⁸⁹ See *Garda Síochána Summons Manual*, p.8.

⁶⁹⁰ Punishable by a fine of £5 or 2 months imprisonment.

1.284 It is punishable on summary conviction by a fine of £800 and/or 12 months imprisonment, and on indictment by a fine of £50,000 and/or 5 years imprisonment.

1.285 Finally, under s.3 of the Tumultuous Risings (Ireland) Act, 1831, it is an offence to print, write, post, publish, circulate, send or deliver, or cause or procure to be printed, etc, any notice, letter or message, *inter alia*, which threatens any violence or injury to the person of another. Although this offence forms part of a series of statutes designed to quell political rebellion in Ireland,⁶⁹¹ it continues to be prosecuted as an offence "which should properly find place in any code of criminal law",⁶⁹² and has been held by a majority of the Supreme Court not to require evidence of a disturbed state in the district in which the offence has been committed.⁶⁹³ The offence, punishable by death under a previous statute, is punishable by transportation for 7 years or imprisonment for 3 years, and for a male "to be once, twice or thrice publicly or privately whipped if the court shall think fit in addition to such imprisonment".

Domestic Violence

1.286 The law relating to protection and barring orders, as provided for in the *Family Law (Protection of Spouses and Children) Act, 1981*,⁶⁹⁴ and to the emergency and non-emergency procedures for the protection of children from domestic violence, as provided for in the *Children Act, 1908*,⁶⁹⁵ and as contemplated at that time in the *Child Care Bill 1988*, has been examined by the Commission in the context of child sexual abuse.⁶⁹⁶ At the same time, many other civil and evidentiary aspects of child abuse were examined, and in our *Report on Child Sexual Abuse* we have made a series of recommendations for the reform of this area of the law.⁶⁹⁷

1.287 The arguments leading to our fundamental recommendations on the civil and evidentiary aspects of child sexual abuse apply with equal force to non-sexual child abuse. In consequence, whereas we do not propose to repeat our examination of those issues in the present context, our recommendations, where applicable, will be revived in Part III of this Report.⁶⁹⁸

1.288 On the other hand, whereas the Commission is mindful that the serious social and legal issues raised by domestic violence cannot be addressed solely by reference to the criminal law, we consider that the related questions of civil law, such as the possible extension of the scope of protection and barring orders,⁶⁹⁹

⁶⁹¹ Known as the "Whiteboy Acts" 1776-1831.

⁶⁹² *Per* Walsh J. in *The State (O'Connor) v O'Caomhnaigh* [1963] I.R. 112 at 149.

⁶⁹³ *Id.*

⁶⁹⁴ Originally provided for by s.22 of the *Family Law (Maintenance of Spouses and Children) Act, 1976*.

⁶⁹⁵ As amended by the *Children Acts, 1934 and 1941*, and the *Children (Amendment) Acts, 1949 and 1957*.

⁶⁹⁶ *Consultation Paper on Child Sexual Abuse* (August 1989), chapters 1 and 2.

⁶⁹⁷ LRC 32-1990.

⁶⁹⁸ *Infra*, Chapter 7.

⁶⁹⁹ Although the recommendations made in our *Report on Child Sexual Abuse* would overcome many of the difficulties in this area, such orders would still not extend, for example, to the protection of cohabitants.

more properly fall for examination in the context of family law.

Genocide

1.289 Although genocide, a crime under international law,⁷⁰⁰ is usually associated with acts of mass murder committed against a particular racial or ethnic group, it extends also to certain acts committed against such groups which do not result in death. In domestic law, the *Genocide Act, 1973*, which gives effect to the provisions of the *Convention on the Prevention and Punishment of the Crime of Genocide 1948*,⁷⁰¹ defines genocide as any of the following acts committed, in time of peace or in time of war, with intent to destroy, in whole or in part, a national, ethnic, racial or religious group:

- "(a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
or
- (e) Forcibly transferring children of the group to another group."⁷⁰²

1.290 Genocide, or any attempt, conspiracy or incitement to commit genocide, is an offence triable on indictment only before the Central Criminal Court and only by or with the consent of the Attorney General.⁷⁰³ Whereas any such offence resulting in the death of any person is punishable by a mandatory sentence of life imprisonment,⁷⁰⁴ the maximum penalty for non-fatal acts of genocide is 14 years imprisonment.⁷⁰⁵ By ss.169 and 192 of the *Defence Act, 1954*, as amended by ss.4 and 5 of the 1973 Act, genocide is also a crime within the scope and jurisdiction of military courts martial. Any person charged with an offence of genocide may not be admitted to bail except by order of the High Court.⁷⁰⁶

700 See U.N.G.A. Resolution 96(1) of 11 December 1948 and Article 1 of the *Convention on the Prevention and Punishment of the Crime of Genocide 1948*. The Convention is declaratory of international law, cf *Reservations to the Genocide Convention Case* (I.C.J. Reports 1951, p.23).

701 U.N. Treaty Series, vol. 78, p.277, adopted by the General Assembly on 9 December 1948 and entered into force on 12 January 1961.

702 S.2, corresponding to Article II of the Convention.

703 The obligation to provide effective penalties for persons guilty of these offences, as well as of any complicity in acts of genocide, derives from Articles III and V of the Convention. In domestic law such complicity is covered by the law as to accessories and abettors.

704 S.2(2)(a).

705 S.2(2)(b).

706 S.7, amending s.29 of the *Criminal Procedure Act, 1967*.

1.291 In addition, genocide is an extraditable offence in any form, and cannot be regarded as a political offence or an offence connected with a political offence under the *Extradition Act, 1965*, nor as an offence regarded as a criminal matter of a political character for the purposes of s.24 of the *Extradition Act, 1870*, or s.5 of the *Extradition Act, 1873*.⁷⁰⁷ Nor is there any exemption from the provisions of these statutes on the grounds that, under the law in force at the time when and the place where it is alleged that the act had been committed, the person accused or convicted could not have been punished therefore.⁷⁰⁸

707 S.3(1).
708 S.3(2).

CHAPTER 2: CRIMES AGAINST PERSONAL LIBERTY

Introduction

2.1 The guarantee in Article 40.4.1° of the Constitution that "no person shall be deprived of his liberty save in accordance with the law" is one aspect of the freedom of the person.¹

2.2 "Freedom of the person includes immunity, not only from the actual application of force, but from every kind of detention and restraint not authorised by the law. The infliction of such restraint is the worry of false imprisonment, which though generally coupled with assault, is nevertheless a distinct wrong".² As with assault and battery, false imprisonment derives from the former writ of criminal trespass to the person.

"False imprisonment is the unlawful and total restraint of the personal liberty of another whether by constraining him or compelling him to go to a particular place or confining him in a prison or police station or private place or by detaining him against his will in a public place. The essential element in the offence is the unlawful detention of the person, or the unlawful restraint on his liberty. The fact that a person is not actually aware that he is being imprisoned does not amount to evidence that he is not imprisoned, it being possible for a person to be imprisoned in law, without his being conscious of the fact and appreciating the position in which he is placed, laying hands upon the person of the party imprisoned not being essential. There may be an effectual imprisonment without the party's freedom of motion in all directions. In effect, imprisonment is a total restraint of the liberty of

¹ See Article 40.3.2° of the Constitution, and dictum of Gavan Duffy J. in *State (Burke) v Lennon* [1940] I.R. 136 at 154 to the effect that internment without trial constitutes an unjust attack on the person.

² *Per* Fawcitt J. in *Dullaghan v Hillen and King* [1957] Ir. Jur. Rep. 10.

the person. The offence is committed by mere detention without violence."³

2.3 Kidnapping, which consists in the taking or carrying away of one person by another by force or fraud without the consent of the person so taken or carried away and without lawful excuse, is an aggravated species of false imprisonment, the nature of which is also an attack on, and infringement of, the personal liberty of the individual.⁴ The term "kidnapping" is not a distinct *nomen juris* known to the common law,⁵ and is often used loosely to describe events which might be the subject of various charges, such as false imprisonment, child stealing or abduction. On the other hand, "kidnapping beyond the seas", i.e. where the taking or carrying away is from within the country to another jurisdiction, has been a specific and recognised offence since the seventeenth century.⁶

2.4 Consent is no defence to a charge of false imprisonment or kidnapping where the victim is a boy under 14 years or a girl under 16 years.⁷ Both offences are now, by virtue of s.11 of the *Criminal Law Act, 1976*, felonies punishable on conviction on indictment by imprisonment for life.⁸

2.5 Although it appears that there is some evidence that there may originally have been a third offence against liberty at common law, namely abduction,⁹ the remaining offences of unlawful detention are now governed by statute.

2.6 Section 56 of the *Offences Against the Person Act, 1861*, makes it a felony punishable by 7 years penal servitude to abduct a child under 14, male or female, by force or fraud. This offence, known as child stealing, is committed irrespective of the consent of the child where there is an absence of consent on the part of the parent or lawful guardian. Sections 53 to 55 of the 1861 Act, together with ss.7 and 8 of the *Criminal Law Amendment Act, 1885*, as amended, create a number of statutory offences relating to the abduction and unlawful detention of women.

False Imprisonment

2.7 False imprisonment, like assault and battery, has been an indictable misdemeanour from the earliest times.¹⁰ Although some of the older authorities

3 *Id.*

4 See discussion of the House of Lords in *R. v D.* [1984] 2 All ER 449.

5 *People (A.G.) v Edge* [1943] L.R. 115 at 126; *R. v Hale* [1974] 1 All ER 1167.

6 *R. v D.*, *supra*, n.4, at 451; Gavan Duffy J. in *People v Edge*, *supra*, at 170.

7 *People v Edge*, n.5.

8 A related offence, also made felony by s.11 of the *Criminal Law Act, 1976*, is provided for by s.10 of the *Criminal Law (Jurisdiction) Act, 1976*, which makes it an offence punishable on conviction on indictment by imprisonment for fifteen years for a person, "by force or threat thereof, or by any other form of intimidation", *inter alia*, to seize control of any vehicle, ship or aircraft.

9 Napier, *Detention Offences at Common Law*, in *Reshaping the Criminal Law*, ed. Glazebrook (London, 1978), p.190, at note 3. The word "abduction", meaning taking or drawing away, was employed by Blackstone in his definition of kidnapping, and could logically have included that field as well, 4 Bl. Comm. 219.

10 See Kenny, *Outlines of the Criminal Law* (19th ed., 1966), 222.

speak of it as a species of constructive assault or as necessarily including an assault,¹¹ this is clearly not the case, it being both a distinct crime and a tort at common law. The civil remedy, which differs from the crime in some respects, is the more commonly invoked. Another effective remedy in this connection (where the imprisonment is a continuing one) is an application for a writ of *habeas corpus*, in that any person who impedes the process of *habeas corpus* can be committed to prison for contempt of court.¹²

2.8 In the criminal law, false imprisonment "consists in the unlawful and intentional or reckless restraint of a victim's freedom of movement from a particular place".¹³ In this respect, the victim's freedom of movement must be limited in all directions so as to be confined within fixed bounds.¹⁴ So it is not an imprisonment wrongfully to prevent the victim from going in a particular direction if he is free to go in others. "A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be movable or fixed, but a boundary it must have"¹⁵ In other words, the restraint must be total. But the victim is not required to take an unreasonable risk¹⁶ or to undergo some major humiliation¹⁷ in order to avoid an obstacle created by the defendant's action.

2.9 The "imprisonment" may consist in confining the victim in a prison,¹⁸ a house¹⁹ or building,²⁰ a vehicle²¹ or room²² or any other space. In this respect, the detention need not be physical or accompanied by violence - it may be psychological in the sense that the victim goes along with the wishes of the defendant, fearing that force will be used to confine him if he does not, as where a person is arrested without actually being touched by the arrestor.²³ Beyond such cases of arrest, the test for such psychological imprisonment would appear to be whether the victim succumbed to such domination as to amount to a total restraint on his liberty.²⁴

2.10 There is little authority on the question of how large the area of confinement may be. It has been suggested that it would be tortious to confine a person in a large country estate or the Isle of Man.²⁵ But it is clear that a person may be imprisoned without being aware of the fact, as where a child or a sleeping, drunk or mentally handicapped person is confined without his

11 For example, *R. v Linsberg* (1905) 69 J.P. 107; *Pocock v Moore* (1825) Ry. and M. 321.
12 Now guaranteed in Article 40.4.2^o-5^o of the Constitution: see generally, Kelly, *The Irish Constitution* (2nd ed., 1984), pp.543-557.
13 *R. v Rahman* (1885) 81 Cr. App. Rep. 349 at 353.
14 *Id.*
15 *Bird v Jones* (1845) 7 Q.B. 742 (*per* Coleridge J.).
16 Such as the risk of injuring himself: *Sayers v Harlow U.D.C.* [1958] 1 W.L.R. 623.
17 Such as walking naked in the street: *Salmond on the Law of Torts* (17th ed., by R.F.V. Heuston, 1977), p.125.
18 *Slevin v Manders*, I.R. 2 C.L. 659 (Exch., 1868); *Mahony v Lynch*, 10 I.L.T.S.J. 91 (1876).
19 *Warnerv Riddiford* (1858) 4 C.B. (N.S.) 180.
20 *Kuchenmeister v Home Office* [1958] 1 All E.R. 485 (an airport).
21 *Burton v Davies* [1953] Q.S.R. 26; see *Walsh v Pender* 62 I.L.T.R. 8.
22 *Sayers v Harlow U.D.C.*, *supra*, n.16, (a lavatory).
23 See McMahon and Binchy, *Irish Law of Torts*, (2nd ed., 1990), pp.410-411.
24 *Id.* at p.411, discussing *Phillips v B.N. Ry. Co. Ltd.* 4 N.I.J.R. 154.
25 Street, *The Law of Torts* (8th ed., 1988), p.28.

knowledge.²⁶

2.11 Furthermore, a person who helps to continue an unlawful detention may be guilty of false imprisonment although he may not have been responsible for the original detention, as where a person in charge of another in lawful custody fails to set him free when the latter becomes entitled to be discharged.²⁷ In this respect, it appears that in criminal law, if not in tort,²⁸ a false imprisonment may be committed by omission provided there is the requisite *mens rea*, as where the defendant fails to release a person where he is under a duty to do so.²⁹ Nor is it material in the criminal law that the imprisonment was not "directly" caused by the defendant, as where he digs a pit into which P falls and is trapped.³⁰ By contrast, where the defendant is initially responsible for a false imprisonment, his liability ceases on the intervention of some judicial act authorising the detention,³¹ or on any other event which breaks the chain of causation.³²

2.12 A false imprisonment can be committed through an innocent agent, as where a policeman takes the victim into custody at the direction or request of the defendant;³³ but merely to give information to the police, in consequence of which it is decided to arrest the victim, will not be actionable even in tort.³⁴ Where the defendant deliberately supplies false information, however, it may be that he will be criminally liable in false imprisonment as well as in nuisance.³⁵ In *Dillon v Dunne's Stores (George's Street) Ltd.*, the Supreme Court held that a shop proprietor who employed members of the Garda Síochána in their spare time as store detectives was relieved of liability for false imprisonment where they were alleged to have been over-zealous in attempting to abstract confessions from shop assistants suspected of pilfering, since the proprietor's conduct fell "short of authorising or agreeing to falsely imprison".³⁶

2.13 A parent or person in *loco parentis* may exercise restraint over a child so long as such restraint remains within the bounds of reasonable parental discipline and is not in contravention of a court order.³⁷ A parent would very seldom be guilty of false imprisonment in relation to his or her own child, however, as the duration and circumstances of such restraints are usually well within the realms of reasonable parental discipline.³⁸

26 *Dullaghan v Hillen and King*, *supra*, n.2. The English authorities on this question are in conflict: see Smith and Hogan, *Criminal Law* (6th ed., 1988), p.407.

27 *Mee v Cruickshank*, 88 L.T. 708 (1902); *Peacock and Hoskyn v Musgrave and Porter* [1958] Crim. L. Rev. 414.

28 See McMahon and Binchy, *op cit*, pp.412-414.

29 See Smith and Hogan, *op cit*, pp.408-409.

30 See *Clarence* (1888) 22 Q.B.D. 23 at 36 (*per Wills J.*).

31 *Lock v Ashton* (1848) 12 Q.B. 871. See *Marrinan v Vibart* [1962] 3 All E.R. 380.

32 *Harnett v Bond* [1925] A.C. 689.

33 *Gosden v Elphick and Bennett* (1849) 4 Exch. 445.

34 *Id.*

35 See Smith and Hogan, *op cit*, p.408.

36 Unreported, Supreme Court, 20 December 1988 (131/5/8-1984): see McMahon and Binchy, *A Casebook on the Irish Law of Torts* (1983), p.128.

37 *R. v Rahman* (1985) 81 Cr. App. R. 349 (C.A.).

38 *Id.*

2.14 The principle relating to the use of force for self-defence or the defence of others applies also to a person who is or believes himself or herself to be falsely imprisoned or who is being threatened with false imprisonment.³⁹ In consequence, such a person is entitled to use such force as is necessary to effect their release provided that no more force was used than was reasonable in the circumstances as the person believed them to be.⁴⁰ In this respect, the word "release" means effective release, so that the person may continue to use such force in order to avoid a real or imaginary threat of imminent recapture.⁴¹

2.15 However, the question of the lawfulness of the restraint most commonly arises in connection with the exercise of powers of arrest. If such powers are exceeded, there is a false imprisonment:

"The general rule of law as to actions of trespass against persons having a limited authority is plain and clear. If they do any act beyond the limit of their authority... they thereby subject themselves to an action of trespass, but if the act be within the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not liable to such action".⁴²

Powers Of Arrest

2.16 Arrest has been described as:

"a step in the criminal process; the apprehending or restraining of a person in order that he may be forthcoming to answer an alleged or suspected crime, made in the lawful exercise of an asserted authority, with the intention to bring the person within the criminal process, this intention being communicated to the person by words or conduct together with the reasons for the arrest".⁴³

2.17 In Walsh J.'s words, arrest is "simply a process of ensuring the attendance at court of the person so arrested".⁴⁴ A provision to this effect is contained in s.26 of the *Criminal Justice Act, 1984*, which requires that every person who is arrested, either with or without a warrant, be brought "as soon as practicable" before a District Justice (now Judge) or formerly, before a peace commissioner.⁴⁵ Where there is no arrest, an accused person will have been brought to court by way of summons, the summons procedure being used for

39 In *Morgan v Colman* [1981] 4 A. Crim. R. 324, the issue is extensively examined by the Supreme Court of South Australia.

40 Subject to the principle in *R. v Fennell*, [1970] 3 All ER 215, where the arrest is in fact lawful and the defendant knows that the person against whom he uses such force is a member of the Garda Síochána.

41 *Morgan v Colman*, *supra*, n.39.

42 *Doswell v Impey*, 1 B. and C. 163, quoted with approval in *Dullaghan v Hillen and King*, *supra*, n.2.

43 Kidstone, *A Maze in Law!* [1978] Crim. L. Rev. 332 at 336. For a general review of powers of arrest in Irish Law, see Ryan and Magee, *The Irish Criminal Process*, chapter 5. And for the law in Northern Ireland, see Leigh, *Powers of Arrest and Detention*, (1989) 40 N.I.L.Q. 363.

44 *People v Shaw* [1982] I.R. 1 at 29.

45 The office of peace commissioner was created in Ireland by s.4 of the *District Justices (Temporary Provisions) Act, 1923*.

most summary offences and sometimes for less serious indictable offences.

2.18 A formal arrest normally involves the actual seizure or touching of a person's body accompanied by a form of words which indicate to that person that he is under restraint.⁴⁶ There may be an arrest by words alone, but only where the person arrested submits to the fact of restraint.⁴⁷ No specific verbal formula need be employed so long as it is made clear that the person arrested is compelled to accompany the person effecting the arrest.⁴⁸

2.19 In this connection, the distinction between a command, amounting to an imprisonment, and a request, not doing so, is a difficult one. It appears that it is enough that the defendant orders P to accompany him to another place and P goes because he feels constrained to do so.⁴⁹ On the other hand:

"If a person under suspicion voluntarily agrees to go to a police station to be questioned, his liberty is not interfered with, as he can change his mind at any time. If, having been examined, he is asked and voluntarily agrees to remain in the barracks until some investigation is made, he is still a free subject, and can leave at any time."⁵⁰

2.20 This is the case even where the person would have been arrested in the event that he had not voluntarily agreed to go to the police station.⁵¹ However, where a person is in fact detained, he is imprisoned, whether or not he is aware of the restraint and whether or not he tries to exercise his right to leave. Where there has been no formal arrest, he is entitled to use reasonable force in exercising that right.⁵² By contrast, where he is not physically detained and he does not realise that he is under constraint, there is no imprisonment.⁵³

2.21 There is no common law power to arrest without warrant for a misdemeanour, so that in such cases a member of the Garda Síochána must possess a valid arrest warrant.⁵⁴ Warrants may issue even though there exists a common law or statutory power of arrest without a warrant,⁵⁵ though in practice, because of the extensive powers of arrest without warrant now conferred by statute,⁵⁶ it will only be in exceptional cases that Gardaí will seek a warrant in order to arrest someone. Moreover, a warrant ought to issue only if a summons is likely to prove ineffective in securing the attendance of the accused

46 For a review of the law on the act of arrest, see Williams, *Requisites of a Valid Arrest* [1954] Crim. L. Rev. 6.

47 *Alderson v Booth* [1969] 2 Q.B. 216.

48 *Id.*; *Campbell v Tormey* [1969] 1 All E.R. 961. It appears from these cases that excessive courtesy may prove the undoing of a person making an arrest.

49 Smith and Hogan, *op cit.*, p.406.

50 *Dunne v Clinton* [1930] I.R. 386 at 372 (*per* Hanna J.), cited with approval by O'Higgins C.J. in *The People v Walsh* [1980] I.R. 294 at 302.

51 *Campbell v Tormey*, *supra*, n.48.

52 *R. v Inwood* [1973] 2 All ER 647.

53 *Alderson v Booth*, *supra*, n.47.

54 For the rules governing the issue and contents of warrants of arrest, see District Court Rules, 1948; also Woods, *District Court Guide*, vol. 1, pp.48-49.

55 District Court Rules, 1948, r.36.

56 See Ryan and Magee, *op cit.*, Appendix G, p.525 *et seq* for an extensive outline of these powers.

in court.⁵⁷

"The nature of the warrant procedure is to transfer the discretion from the police officer to the magistrate, and to confer on the police officer, in return for this judicial control, a measure of protection in the execution of the warrant."⁵⁸

2.22 In consequence, Gardaí properly executing warrants are protected by statute from any prosecution or civil action when any irregularity or want of jurisdiction may occur in the issue of the warrant,⁵⁹ or for anything done in obedience to the warrant, unless inspection of the warrant has been refused to the person arrested for a period of six days after a demand has been made in writing for a perusal of the warrant.⁶⁰ When a warrant is issued, but it is used merely as a summons, and no arrest is made on it, and the party goes voluntarily before the court, this is not an imprisonment.⁶¹

2.23 The common law powers were usually divided into cases where a Garda is under a legal obligation to arrest and those where he has a discretionary power: a Garda was said to be bound to arrest any person whom he saw committing treason or felony, or inflicting a dangerous wound, or any person directly charged with a felony by another with reasonable grounds adduced in support of the charge, or any person committing a breach of the peace within his view if he cannot otherwise prevent such a breach.⁶² Contrary to what is sometimes asserted in this context, it is not an offence for a Garda to *fail* to arrest, for example, a person who commits larceny in his view. It is preferable to state that a Garda "has power to arrest" or "may arrest" in the circumstances outlined above.⁶³ In many cases where the suspect is known to the Garda, it is preferable for the Garda to postpone arrest and charge until the investigation is complete, the proofs are in order and all necessary directions have been obtained from the Director of Public Prosecutions. As arrest can only be for the purpose of charge and remands have to be obtained while the case is prepared, much expense and valuable Garda and court time can be saved by postponing charging (or commencement by summons) until the case is ready to proceed. Apart altogether from the disturbance and upset caused to the accused, it is demoralising for the State to have to withdraw a prosecution after a precipitate charge.⁶⁴

2.24 A member of the Gardaí has power to arrest any person whom he or she reasonably suspects of having committed treason or felony or of having inflicted

57 *O'Brien v Brabner*, 49 J.P. 227; see also Woods, *op cit*, p.46.

58 Thomas, *The Execution of Warrants of Arrest*, Part I [1962] Crim. L. Rev. 520 at 520.

59 *Constabulary (Ireland) Act, 1836*, s.50.

60 *Public Officers Protection (Ireland) Act, 1803*, s.8.

61 *Arrowsmith v Le Mesurier* (1806) 2 B. and P. (N.R.) 211.

62 Any person of full age is also under a duty to effect an arrest if treason or a felony is committed in his presence, though there are no reported Irish cases where a person has been prosecuted for such a breach of duty and it is now more in the nature of a power of arrest.

63 Glanville Williams in [1954] Crim. L. Rev. 408.

64 We are pleased to note that in the recent (6th) edition of the Garda Síochána Guide, pp.94-5 and footnote 14, the Glanville Williams view on the "obligation" to arrest is preferred.

a dangerous wound, or any person whom he sees threatening to commit treason, felony or a breach of the peace. With respect to threatened breaches of the peace, it appears that the person whose liberty is affected need not have been the one likely to disturb the peace provided that the arrest was effected in order to avoid a breach of the peace arising from that person's otherwise lawful act.⁶⁵

2.25 As we have seen, the exact meaning of the expression "breach of the peace" is elusive;⁶⁶ it encompasses not only riot, unlawful assembly and fighting but also a unilateral battery where the victim does not retaliate.⁶⁷ It is not, however, occasioned by mere verbal quarrels or insults unless there is an accompanying threat of personal harm. Although an arrest effected immediately after a breach of the peace is permissible, any greater delay will mean that an arrest may only be effected by warrant.⁶⁸

2.26 In *Howell*,⁶⁹ it was said that a breach of the peace occurs "whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, an unlawful assembly or other disturbance". It is clear from this that prevention of a breach of the peace is a wider concept than the prevention of crime.

2.27 The courts have, however, made it clear that there is no general power of "protective custody" in Irish law. In *Connors v Pearson*,⁷⁰ it was held that, apart from explicit statutory authority, the police have no power to hold potential witnesses in custody against their will so as to safeguard them against apprehended violence and intimidation. It would seem that, both under Article 5(1) of the *European Convention on Human Rights* and Article 40.4.1° of the Constitution, detention on those grounds is now not permitted even if authorised by statute.⁷¹

2.28 In *People v O'Callaghan*,⁷² the Supreme Court held that persons accused of crimes cannot be refused their constitutional right to bail because they would be in personal danger if they were released. On the other hand, "if a Court were properly led to the conclusion that the accused would not properly stand his trial because he would be prevented by violence or threats of violence from doing so rather than by his own wish ... the court should exercise its discretion against granting bail",⁷³ this being an application of the fundamental

65 *Humphries v Connor*, 17 I.C.L.R. 1 (Q.B. 1864); *O'Kelly v Harvey*, 14 L.R. Ir. 105 (C.A., 1883), discussed in McMahon and Binchy, *op cit*, p.425.

66 See Williams, *Arrest for Breach of the Peace* [1954] Crim. L. Rev. 578.

67 *Lewis v Arnold*, 4 C. and P. 354.

68 *Id.*

69 (1981) 73 Cr. App. R. 31 (C.A.).

70 [1921] 2 I.R. 51 (C.A.).

71 See Forde, *Constitutional Law of Ireland* (1987), p.301; Article 5(1)(e) of the Convention and certain provisions of domestic law nevertheless recognise the necessity for preventive detention of persons of unsound mind who may be a danger to themselves or others. (*Mental Treatment Act, 1945*, s.165) or of persons who are a probable source of infection with an infectious disease (*Health Act, 1947*, s.38(1)).

72 [1966] I.R. 501 at 515. Followed in *Ryan v D.P.P.* [1989] I.R. 399.

73 *Application of Dolan*, High Court, unreported, 5 November 1973, at p.2.

criterion of "the probability of the applicant evading justice" in refusing bail.⁷⁴ Be that as it may, "a bail motion cannot be used as a vehicle to import into the law the concept of protective custody for an unwilling recipient",⁷⁵ so that to refuse bail on the grounds of the prospect of a speedy trial or the likelihood that the applicant will commit further offences while released on bail constitutes "a form of preventive justice which has no place in our legal system".⁷⁶

2.29 Unlike a member of the Garda Síochána, a private person, though entitled to use reasonable force to prevent the commission of a felony or to arrest a person reasonably suspected of having committed a felony, will be liable in false imprisonment (and/or battery) to the arrested party if it transpires that no felony was in fact committed, although the subsequent acquittal of the person arrested is of no consequence in this respect.⁷⁷

2.30 Alternatively, a private person may direct a Garda to effect the arrest. In such a case, although the person directing the arrest will be liable if no felony has in fact occurred, no similar liability will attach to the police officer.⁷⁸

2.31 With respect to statutory powers of arrest, the power may be conferred on any person, it may be restricted to certain specified persons, or it may be confined to members of the Garda. Usually the wording of the statute indicates that a person may be arrested on a reasonable suspicion of having committed the offence or where the person is found committing the offence, though in some instances there may be a statutory power of arrest where a person is suspected of being about to commit a specified offence. There may also be a power of arrest contingent upon the failure of a person to do something, for example to produce a licence or other authorisation for a particular activity. Where the power is conditional on the offender being found committing the offence, the observed commission of the crime and the pursuit and arrest of the offender must be capable of being regarded as one continuous transaction.⁷⁹

2.32 The scope of statutory powers of arrest can only properly be determined by an examination of the language used in each specific provision. In *Barry v Midland Ry. Co.*,⁸⁰ George J. was of the opinion that such powers must be strictly construed in favour of liberty, a view which must now be enforced by constitutional considerations.⁸¹ In relation to statutory powers of arrest, Ryan and Magee have commented:

"The statutes which authorise arrest without warrant span a period of over 150 years and the different forms of drafting contained in them mean that there now exist what Glanville Williams has referred to as

74 [1966] I.R. at 513 (*per* Walsh J.).

75 *Id.*, at 515.

76 *Id.*

77 *Watters v W.H. Smith & Son, Ltd.* [1914] 1 K.B. 595.

78 *Christie v Leachinsky* [1947] A.C. 573 at 596-7 (*per* Lord du Parcq).

79 *R. v Jones* [1970] 1 All ER 209.

80 (1867) 1 I.R.C.L. 130 at 141.

81 See *infra*.

‘extraordinary traps which Parliament has designed for the police and others who try to promote the ends of criminal justice’.⁸²

2.33 The question of reasonable suspicion is a matter of law, not of fact. If there are not reasonable grounds, the Garda will be liable for making an illegal arrest. This has been held to mean evidence on which a "reasonable and discreet man" would act, and it imports an objective test.⁸³

2.34 Factors to be considered in formulating reasonable suspicion would be the amount of information available, the source of such information, and whether such source was creditable. A Garda may rely on hearsay information if he takes reasonable steps to satisfy himself of its probable truth.⁸⁴ It is not necessary to take all the steps open to him to verify the accuracy of such information provided the facts brought to his notice furnish reasonable and probable cause for believing the arrestee to be guilty of the crime for which he was arrested.⁸⁵ Once there is what appears to be reasonable suspicion against a particular individual, a police officer may arrest but as arrest is for the purpose of charge, a Garda should hold off arresting until he is satisfied he has a case against the accused.⁸⁶ The fact that the arrested person is released without being charged or, having being charged, is later acquitted of the crime does not necessarily mean that the suspicion which formed the basis for the arrest was unreasonable. Reasonable suspicion may be based on facts and information which may not be admissible in evidence or, even if admissible, may not form part of a *prima facie* case; for example, the furnishing of a false alibi may form grounds for reasonable suspicion but such alibi may not be admissible in evidence. Knowledge that a warrant had been issued for the arrest of a person for felony was held to constitute a sufficient ground for reasonable suspicion that the felony had been committed by him.⁸⁷

2.35 It has been held that an arrest is unlawful if the person arrested is not informed forthwith of the charge, unless he or she otherwise knows the reasons for their arrest.⁸⁸

2.36 As noted above, there is no intermediate stage between liberty and arrest, and hence no power of detention for questioning known at the common

82 *Op cit*, pp.98-99, referring to Williams, *The Interpretation of Statutory Powers of Arrest without Warrant*, [1958] Crim. L. Rev. 73.
83 Hogan and Walker, *Political Violence and the Law in Ireland* (1989), p.203, note 60.
84 *McArdle v Egan* (1933) 150 L.T. 412.
85 *Id*, *Lister v Perryman* (1870) L.R. 4 H.L. 512.
86 *McArdle v Egan*, *supra*, n.84.
87 *Creagh v Gamble* (1888) 24 L.R. Ir. 458.
88 For example *People v Shaw* [1982] I.R. 1 at 29.

law.⁸⁹

"No person may be arrested (with or without a warrant) for the purpose of interrogation or the securing of evidence from that person. If there exists a practice of arresting persons for the purpose of 'assisting the police in their inquiries', it is unlawful (T)here is no such procedure permitted by law as 'holding for questioning' or detaining on any pretext except pursuant to a court order or for the purpose of charging and bringing the person detained before the court. Any other purpose is unknown to the law and constitutes a flagrant and unwarranted interference with the liberty of citizens."⁹⁰

2.37 There are, however, two statutory powers of "extended arrest" currently in force in Ireland.⁹¹ Section 4(2) of the *Criminal Justice Act, 1984*, empowers a member of the Garda Síochána to arrest without warrant a person whom he or she reasonably suspects of having committed an offence carrying a penalty of five years imprisonment or more for first offenders, or of having attempted to commit such an offence,⁹² and the person so arrested may be taken to and detained in a Garda station for a period of six hours⁹³ if the member in charge of that station has at the time reasonable grounds for believing that the person's detention is necessary for the proper investigation of the offence. A Garda Superintendent may extend this period of detention for a further six hours where he or she has reasonable grounds for believing that such further detention is necessary.⁹⁴ Where, however, at any time during the detention there are no longer any reasonable grounds for suspecting that the person held committed the offence in question, he or she must be released from custody.⁹⁵ Sections 4(8) and 5 of the 1984 Act provide for safeguards relating to medical attention and to access to a solicitor while detained under s.4. In addition, the *Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987* prescribe the detailed procedures to be followed in the case of arrested persons generally,⁹⁶ and it has recently been held that an accused in

89 *Supra*, text accompanying n.152, chapter 1. This common law rule has been emphatically restated in a number of recent cases: see *The People (D.P.P.) v O'Loughlin* [1979] I.R. 85; *The People (D.P.P.) v Walsh* [1980] I.R. 294; *The People (D.P.P.) v Higgins*, Supreme Court, 22 November 1985. This view of arrest is not, however, shared by the House of Lords: see *Holgate-Mohammed v Duke* [1984] A.C. 437, where Lord Diplock said that arrest for the purpose of questioning the suspect or seeking further evidence with his assistance in order to dispel or confirm the reasonable suspicion was well established 'as one of the primary purposes of detention upon arrest'. This view of arrest now has statutory force in England and Wales by s.37 of the *Police and Criminal Evidence Act, 1984*.

90 *People v Shaw*, *supra*, n.88, at 29, quoting from *People v Walsh*, *supra* (per Walsh J.).

91 Additional emergency powers of extended arrest not currently in force are contained in s.2 of the *Emergency Powers Act, 1976*, (seven days) and the *Offences against the State (Amendment) Act, 1940*, (internment). The Constitutionality of these measures was upheld by the Supreme Court in *Re Article 26 and the Emergency Powers Bill 1976* [1977] I.R. 159, and by the former Supreme Court in *Re Article 26 and the Offences against the State (Amendment) Bill 1940* [1940] I.R. 470, respectively.

92 S.4(1).

93 S.4(3)(a).

94 S.4(3)(b).

95 S.4(4).

96 SI No.119 of 198.

custody has a constitutional right of access to a solicitor.⁹⁷

2.38 The undoubtedly more important statutory power of extended arrest is contained in s.30 of the *Offences Against the State Act, 1939*, which permits such arrest for up to forty-eight hours in respect of any offence committed under the *Offences Against the State Acts, 1939-1985* and in addition, in respect of certain "scheduled offences" under Part V of the 1939 Act.⁹⁸ Section 36(1) of that Act provides that whenever - while Part V is in force - the government is satisfied that the ordinary courts are inadequate to secure the "effective administration of justice and the preservation of public peace and order" in relation to "offences of any particular class or kind or under any particular enactment", the Government may declare by order that such offences shall be scheduled offences.⁹⁹

2.39 Persons suspected of having committed or of being about to commit such offences, which include all offences under the *Malicious Damage Act, 1861*, the *Explosives Substances Act, 1883*, as amended,¹⁰⁰ the *Firearms Acts, 1925-71*, as amended, and under s.7 of the *Conspiracy and Protection of Property Act, 1875*, may be

"... removed to and detained in custody in a Garda Síochána station, a prison or some other convenient place for a period of twenty-four hours from the time of his arrest and may, if an officer of the Garda Síochána not below the rank of Chief Superintendent so directs, be so detained for a further period of twenty-four hours".¹⁰¹

2.40 While the term "some other convenient place" has been held to mean a convenient building of some kind,¹⁰² it is also established that the Gardaí may remove the suspect from one place to another for the purpose of assisting in the investigation, provided that such removal is not *mala fide* or "done for the purpose of harassment or of isolating him from assistance or access to which he would be properly entitled".¹⁰³ Such removal extends to cases where the detainee consents to accompanying investigating police officers by car in order to identify persons or places connected with the commission of the offence, and where such an interruption of the unlawful detention is unwarranted, this does

97 *D.P.P. v Healy* (Supreme Court), Irish Times, 6 December 1989. However, the issue as to whether the defendant's detention under s.4 of the 1984 Act is unlawful is not relevant to the jurisdiction of the District Court at the remand stage. *Keating v Gov. of Mountjoy Prison* (High Court, Barrington J., 1 May 1989) noted in the Irish Times, 11 September 1989.

98 See generally, Hogan and Walker, *op cit*, pp.192-209.

99 The scope of this provision is so wide as to effectively negate the possibility of successfully challenging the validity of a scheduling order: see the decision of the Supreme Court in *The People (D.P.P.) v Quilligan* [1987] I.L.R.M. 606, esp. at 629-30 (*per* Henchy J.).

100 It has been held that the subsequent amendments to these Acts by the *Criminal Law (Jurisdiction) Act, 1976*, have not retrospectively affected the validity of the *Offences against the State (Scheduled Offences) Order, 1972*: see *The State (Daly) v Delap*, High Court, 30 June 1980 (*per* Finlay P.), approved by McCarthy J. in *The People (D.P.P.) v Tuite*, 2 Frewen 175.

101 S.30(3).

102 *The People (D.P.P.) v Farrell* [1978] I.R. 13 (C.C.A.).

103 *Id.*, *State (Walsh) v Maguire* [1979] I.R. 372.

not of itself invalidate the resumed detention under the original warrant.¹⁰⁴ The object of the powers given by s.30 is not to permit the arrest of persons for the purpose of interrogating them:

"Rather it is for the purpose of investigating the commission or suspected commission of a crime by the person already arrested and to enable that investigation to be carried on without the possibility of obstruction or other interference which might occur if the suspected person were not under arrest".¹⁰⁵

2.41 Nevertheless, although the 1939 Act has been described as a "legislative intervention designed to secure and make more effective the rights guaranteed by the Constitution",¹⁰⁶ it is recognised that s.30 makes considerable inroads into the common law rule that no person may be arrested for purposes of interrogation and that it must, in consequence, be strictly construed.¹⁰⁷ The powers conferred by s.30 are subject to judicial review, and any infringement of a detainee's constitutional rights will result in the detention becoming unlawful.¹⁰⁸

2.42 As with arrest generally, the person arrested must be told of which scheduled offence he or she is suspected unless the person has actual or constructive knowledge of the reasons for the arrest. In this respect, although the Garda effecting the arrest must specify the scheduled offence of which the accused is suspected, technical precision is not required.¹⁰⁹ Yet because of the minor nature of many of the offences scheduled under Part V of the 1939 Act, particularly under the *Criminal Damage Act, 1991*, and because the courts have refused to look to the dominant or primary motive for an arrest under s.30 so long as the arresting Garda has a *bona fide* intention of investigating the particular scheduled offence,¹¹⁰ s.30 can be effectively used to investigate a wide range of non-scheduled offences, such as murder and robbery. The result is that s.30 has been widely invoked by the police as a means of detaining persons charged with serious crime, including crimes which are not subversive in character. In this connection, Hogan and Walker have written:

"... the number of persons arrested under s.30 shot up from a mere 229 in 1972 (when the latest proclamation bringing Part V of the 1939 Act into force was made) to 2,216 in 1984. This increasing use of s.30 ... reflects the fact that many traditional police practices (such as 'holding for questioning' and 'inviting' suspects to accompany them to a Garda station) came under increased judicial scrutiny during this period. Once

104 *People (D.P.P.) v Kelly* [1983] I.R. 1.

105 *The People (D.P.P.) v Quilligan*, *supra*, n.99, at 824 (*per* Walsh J.).

106 *Id.*, at 821.

107 See cases cited *supra*, n.89.

108 *The State (Trimbole) v Governor of Mountjoy Prison* [1985] I.R. 550.

109 *The People (D.P.P.) v Byrne*, Supreme Court, 3 April 1977.

110 For example, *The People (D.P.P.) v Walsh* [1988] I.L.R.M. 137; *Quilligan*, *supra*, n.99; *The People (D.P.P.) v Howley*, C.C.A., 4 March 1988, and Supreme Court, 29 July 1988. For criticism, see Hogan and Walker, *op cit*, pp.vii-viii and 185-8.

it had been judicially established that the practice of 'holding for questioning' was unlawful, that the Gardai were under an obligation to warn suspects who had not been placed under arrest that they were at all times free to leave, and that persons arrested at common law must be charged and brought before a District Court or Peace Commissioner within a reasonable time, the temptation to rely on s.30 in all serious cases increased. In addition, the courts had made it perfectly clear that evidence obtained as a result of an unlawful arrest - whether by way of 'holding for questioning' or failure to charge the accused within a reasonable time - would be excluded, absent exceptional circumstances".¹¹¹

2.43 The requisite suspicion under s.30, with respect to both the original arrest¹¹² and the extension order,¹¹³ must be one "which is *bona fide* held and not unreasonable". The requirement of reasonableness in this context is administrative law reasonableness as generally applied in the review of other discretionary powers, which means that the power must not only be exercised in good faith, but also "that the opinion or other subjective conclusion set out as a precondition for the valid exercise of the power must be reached by a route that does not make the exercise unlawful - such as by misinterpreting the law, or by misapplying it through taking into consideration irrelevant matters of fact, or through ignoring relevant matters".¹¹⁴ As Irish courts now insist on the existence of objective evidence to justify the exercise of discretionary powers, the difference between this test and that of "reasonable suspicion" in the context of arrest at common law may not be very great.¹¹⁵

2.44 Clearly, as with such arrest, the arresting officer need not have acted on the basis of first-hand information in relation to the offence in question.¹¹⁶ However, although as a general rule police communications are not privileged from disclosure on "class" grounds,¹¹⁷ the courts have shown a greater willingness to grant privilege in respect of sources of information grounding the reasonable suspicion under s.30.¹¹⁸

2.45 It appears that a person arrested at common law may be subsequently arrested under s.30, and by analogy under any other statutory power, without being formally released prior to such arrest.¹¹⁹ Equally, there is no bar to the re-arrest at common law of a person who has just been released from detention under s.30, provided that the offence is a different one in each case.¹²⁰ By

111 *Op cit*, p.194, footnotes omitted.

112 *Quilligan*, *supra*, n.99, at 622 (*per* Walsh J.).

113 *The People (D.P.P.) v Eccles*, C.C.A., 10 February 1986, *per* Hederman J. at 35; *The People (D.P.P.) v Byrne*, *supra*, n.109.

114 *The State (Lynch) v Cooney* [1982] I.R.337 at 380-1 (*per* Henchy J.).

115 Hogan and Walker, *op cit*, p.203.

116 *The People (D.P.P.) v McCaffrey* [1986] I.L.R.M. 687; *McKee v Chief Constable for Northern Ireland* [1984] 1 W.L.R. 1358.

117 *D.P.P. (Hanley) v Holly* [1984] I.L.R.M. 149.

118 For example, *D.P.P. v Connolly* [1985] I.L.T. 83; *Eccles*, *supra*, n.113.

119 *The People (D.P.P.) v Kehoe* [1985] I.R. 444.

120 For example, *The People (D.P.P.) v Pringle*, 2 Frewen 57.

s.10(3) of the *Criminal Justice Act, 1984*, a person released following his arrest under s.30 may not be re-arrested under s.4 of the 1984 Act.

"However, the 1984 Act is curiously silent about the case of a person released following an arrest under s.4. May that person be arrested under s.30? It would surely be anomalous if this were permitted, yet s.4(10) declares that nothing in that section 'shall affect the operation of s.30 of the Act of 1939'. It would be odd if this proviso were to be construed so as to permit the converse of that which is specifically prohibited by s.10(3), and perhaps the better construction of this saving clause is to say that s.4 is not intended to prejudice the independent operation of s.30 of the 1939 Act."¹²¹

Kidnapping

2.46 The common law misdemeanour of kidnapping is the most aggravated species of false imprisonment.¹²² Its history, however, is quite distinct from that of false imprisonment, the term itself dating from the seventeenth century practice of recruiting labour for the colonies by force or guile.¹²³ By the 1770s, it appears that this offence had become superfluous and that it then entered a long period of legal oblivion until its revival earlier this century.¹²⁴ It is now, by virtue of s.27 of the *Criminal Law Act, 1976*, a felony punishable on conviction on indictment by imprisonment for life.

2.47 Although the term has always enjoyed popular usage, and notwithstanding that it is now a felony by statute, kidnapping is not a distinct *nomen juris* of the common law¹²⁵ and the substance of the crime continues to elude meaningful definition both in Ireland and in other common law jurisdictions.¹²⁶ While a New Hampshire decision¹²⁷ as early as 1837 held that transportation out of the country was no longer a prerequisite to the crime, it was not until 1937 that the English Court of Criminal Appeal held that such foreign transportation was not required.¹²⁸ In Ireland, too, this limitation appears to have been abandoned,¹²⁹ though false imprisonment, being also a felony punishable by life imprisonment, is usually charged in cases where the victim has been taken or carried away.

2.48 The modern elements of the offence in English law were recently

121 Hogan and Walker, *op cit*, p.209.

122 *East's Pleas of the Crown* I, p.429, approved by the English C.A. in *R. v Field* [1872] 2 All ER 1350 at 1351 and *R. v Welland* [1978] 3 All ER 181 at 183.

123 The word is a compound of "nap", meaning to nab or snatch, and "kid", which originally meant any indentured servant brought to the American colonies, including but not limited to children: see Napier, *Detention offences at Common Law*, in *Reshaping the Criminal Law*, Glazebrook (ed.), (London, 1978), pp.194-7. In *R. v Coath* (1871) 2 Q.S.C.R. 178, the history of such slavery is reviewed by the Supreme Court of Queensland.

124 Napier, *op cit*, at pp.195-6.

125 *Supra*, page 91.

126 See Diamond, *Kidnapping: A Modern Definition* (1985) 13 Am. J. Crim. Law 1.

127 *State v Rollins*, 8 N.H. 550 (1837).

128 *R. v Nodder*, unreported, cited by Napier, *op cit*, p.196, note 57.

129 *People (A.G.) v Edge* [1943] I.R. 115 at 126.

delimited by the House of Lords in *R. v D.*:

"First, the nature of the offence is an attack on, and infringement of, the personal liberty of an individual. Second, the offence contains four ingredients as follows: (1) the taking or carrying away of one person by another, (2) by force or by fraud, (3) without the consent of the person so taken or carried away and (4) without lawful excuse. Third, ... the offence of kidnapping was categorised by the common law as a misdemeanour only. Fourth, despite that, kidnapping was always regarded, by reason of its nature, as a grave and (to use the language of an earlier age) heinous offence. Fifth, in earlier days the offence contained a further ingredient, namely that the taking or carrying away should be from a place within the jurisdiction to another place outside it; this further ingredient has, however, long been obsolete and forms no necessary part of the offence today. Sixth, the offence was in former days described not merely as taking or carrying away a person but further or alternatively as secreting him; this element of secretion has, however, also become obsolete, so that, although it may be present in a particular case, it adds nothing to the basic ingredient of taking or carrying away."¹³⁰

2.49 The Court of Appeal in that case had held that, as with the statutory offence of child stealing,¹³¹ kidnapping did not apply to the taking of unmarried children by parents or guardians, the proper proceeding in such cases being by way of contempt of court.¹³² This decision was reversed by the House of Lords, who held that a parent could be convicted of kidnapping his or her own child, even in the absence of a court order.¹³³ In all cases, it was the consent of the person taken which was relevant. In the case of a young child, lacking the understanding or intelligence to give consent, the absence of consent was a necessary inference. In the case of an older child, it was a question of fact for the jury whether the child had sufficient understanding and, if so, whether there was consent. Lord Brandon thought that a jury would usually find that a child under 14 lacked sufficient understanding to give a valid consent.¹³⁴

2.50 In Ireland, although there is no authority on the question of whether a parent can be convicted of kidnapping his or her own child, it has been held by the Supreme Court that, in relation to offences of kidnapping children, the relevant consent depends, as a matter of law, on the age of the child.¹³⁵ In the case of a girl under 16 or a boy under 14, the relevant consent is that of the parent or other lawful guardian of the child: in other cases, it is the consent of

130 [1984] 2 All ER 449 at 453 (per Lord Brandon, with whom the other Lords agreed).

131 *Infra*.

132 Because parents (apart from the natural father of a child) now have equal rights with respect to their children, most cases of parental kidnap will be contrary to a court order awarding sole custody to one parent. Even where there is no court order, the use of the criminal law in this area is generally inappropriate, see *infra*, chapter 7.

133 Lord Bridge found it unnecessary for the purposes of the appeal to go further than the case where a parent acted in contravention of a court order: *R. v D.*, *supra* n.130, at 450.

134 *Id.*, at 457.

135 *The People (A.G.) v Edge* [1943] I.R. 115 at 126.

the child himself which is material.¹³⁶ Accordingly, on the facts of the case then before it, the Supreme Court held that the defendant could not be convicted of kidnapping a boy of 14½ who had voluntarily gone away with him. Although, as Gavan Duffy J. recognised in that case, the rigid legal fiction of the age of discretion is not without its difficulties in this area,¹³⁷ the approach of the Supreme Court to the issue of consent is more consistent with principle than that of the House of Lords. According to Williams:

"In relation to adults (call it adult-kidnap), kidnapping is generally a kind of false imprisonment (except that it can be effected by deception), and is a crime protecting the liberty of the adults kidnapped, not the rights of their relatives Again, the kidnapping of adults must be by force (or the threat of force) or fraud, applied in each case to the kidnapped adult, since force is taken to negative consent in fact, and fraud may impair consent so seriously that it is disregarded for the purpose of the offence. There is no such requirement for the kidnapping of infants, or indeed of older children who are in the care of their parents or guardians. The explanation is simple. Force or fraud need not be shown for child-kidnap because (1) the child's consent, *de jure* or *de facto*, is irrelevant, and (2) if the child is carried off without the parent's knowledge the parent does not consent, whether force (or fraud) has been used against him or not. The rationale of the crime is the protection of parental rights, not the protection of the liberty of the child."¹³⁸

In cases of the taking of children by parents, whether or not it is accepted that such action may disclose an offence of kidnapping in addition to a contempt of court, the question will be the same: whether the parent has gone beyond what is reasonable in the exercise of parental authority.¹³⁹

2.51 Where the victim is not the defendant's child and the defendant is not acting in pursuance of any statutory authority or power of arrest, "lawful excuse" is likely to be narrowly confined. Clearly, a husband may now be guilty of kidnapping his wife.¹⁴⁰ In *Henman*, the defendant was guilty of attempted kidnapping where he tried to take by force an acquaintance he believed to be in moral and spiritual danger from a religious sect to which she belonged - the law would not recognise as a lawful excuse the conduct of anyone kidnapping another unless it could properly be said that there had arisen a necessity, recognised by

136 *Id.*, explained by the House of Lords in *R. v D.*, *supra*, n.130, at 455.

137 [1943] I.R. 115 at 171.

138 *Can Babies be Kidnapped?* [1989] Crim. L.R. 473 at 473-4. On this analysis, East's description of kidnapping as an aggravated false imprisonment is true only for adults: Williams, *The Kidnapping of Children* (1984) N.L.J. 278.

139 The onus is on the prosecution to prove that the defendant was not acting within those bounds. On a charge of kidnapping, however, the issue may be one of "lawful excuse", thereby placing an evidential burden on the defendant: see the majority of the H.L. in *R. v D.*, *supra*, n.130. Lord Bridge preferred to say simply that no offence was committed in such circumstances.

140 See the review of authority on this question by Cairns L.J. in *R. v Reid*, *supra*, n.122; see also, the decision of the N.S.W. Supreme Court in *R. v C.* [1981] 3 A. Crim. R. 146.

the law as such, causing the would-be kidnapper to act in that way.¹⁴¹

2.52 The offence of kidnapping, in England in any event, is complete when the victim is deprived of liberty and carried away from the place where he or she wishes to remain, irrespective of where the kidnapper wishes to bring the person¹⁴² - it is not a continuing offence involving the concealment of the person seized.¹⁴³ In *Wellard*, it was held that although there may be circumstances in which the movement would not be sufficient to amount to a carrying away, the movement of the victim for no less than 100 yards and putting her in a car was sufficient evidence that she had been carried away.¹⁴⁴ Clearly, the carrying away need not be literal: "you can carry a person away by putting a gun to his back and commanding him to walk. And since the requirement of carrying away is distinct from the requirement of force or fraud ..., there is no reason why one cannot 'carry away' a child by persuasion".¹⁴⁵

2.53 Every kidnapping is also a false imprisonment,¹⁴⁶ and where D has carried away P by force or fraud (or, in the case of child-kidnap, without the consent of his or her parents), D may be convicted of both offences.¹⁴⁷ However, an indictment for kidnapping, without reference to the carrying away of the victim by such force or fraud or absence of consent, will be quashed as not disclosing an offence known to the law.¹⁴⁸

Abduction

2.54 It has been seen that no offence will be committed at common law where a boy over 14 or a girl over 16 voluntarily goes away with somebody without the consent of his or her parents or lawful guardian.¹⁴⁹ Where he or she does not go voluntarily, there may be both a false imprisonment and a kidnapping. Furthermore, even where such child consents there may be a contempt of court where he or she is taken away in breach of a custody order. To take away a girl under 16 or a boy under 14 without the consent of his or her parents is a kidnapping.¹⁵⁰

2.55 Superimposed on these common law rules are a series of statutory offences relating to the abduction of minors and women, most of which are designed to safeguard the right of custody possessed by a parent or guardian, though some protect against the unlawful enticement of a female for sexual

141 [1987] Crim. L. Rev. 333.

142 *Wellard*, *supra*, n.122.

143 *Reid*, *supra*, n.122.

144 *Supra*, n.122.

145 *Williams*, *op cit*, p.478.

146 Because it includes a deprivation of liberty, though the converse is not true, as where the defendant turns the key locking P in a room.

147 *Brown* [1985] Crim. L. Rev. 398, where the English C.A. upheld a sentence of 5 years imprisonment concurrent on both counts.

148 *The People (A.G.) v Edge*, *supra*, n.135; *R. v Hale* [1974] 1 All ER 1107.

149 On the civil side, the court is bound to give effect to the wishes of a boy over 14 or a girl over 16 in *habeas corpus* proceedings: see *The State (Meagan) v Meagan* [1942] I.R. 180.

150 *The People v Edge*, *supra*, n.135.

purposes. In consequence, the offences are unaffected by the fact that a court cannot grant a writ of habeas corpus in the case of a boy over 14 or a girl over 16 unless he or she is detained against his or her own will.¹⁵¹ By s.56 of the *Offences Against the Person Act, 1861*, it is an offence, known as child-stealing, to abduct a child under 14, male or female, by force or fraud:

"Whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away, or detain, any child under the age of fourteen years, with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child or the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong, and whosoever shall, with such intent, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained, as in this section before mentioned shall be guilty of a felony ..." and liable to seven years imprisonment.

2.56 The force or fraud may be against either the child or the parent,¹⁵² but it must be against one or the other; so, once again, where the child is induced to go voluntarily with the abductor, no fraud being used against either the child or the parent, no offence is committed under the section.¹⁵³ It has been observed in this respect that such a result is at variance with the underlying purpose of the section, though necessitated by its ill-drafted words.¹⁵⁴ It is not necessary to prove that the accused intended to deprive the parent permanently of the possession of the child.¹⁵⁵ Moreover, a person may be convicted under this section even though the child is no longer in the person's custody and there is no evidence to show where it is.¹⁵⁶

2.57 Section 56 contains a proviso to the effect that "no person who shall have claimed any right to the possession of such child, or shall be the mother or shall have claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof". In other words, the section is not applicable in cases where there is a *bona fide* dispute as to custody or access.¹⁵⁷ Somewhat clumsily, the section, having exempted persons with a claim of right from liability for the taking of children, fails to exempt them from liability for falsely imprisoning them; though such an exemption, if the purpose of the proviso is not to be defeated, must be held to follow by implication. The exemption does not extend to persons who snatch a child on the instructions of a parent or who aid and abet a parent in the

151 *R. v Prior* (1898) 19 L.R. (N.S.W.).

152 *Belis* (1893) 17 Cox 660.

153 *Mears* [1875] Crim. L. Rev. 155.

154 *Williams, op cit*, p.219.

155 *R. v Powell* (1914) 79 J.P. 272.

156 *R. v Johnson* (1884) 15 Cox 481. In this case, it was held that evidence of a fraudulent detention may be obtained from false statements as to the deposition of the child.

157 The inclusion of the words "any right to the possession of such child" indicates that the exemption extends to a claim in respect of access.

taking of a child by force or fraud.¹⁵⁸ Nor, clearly, will it extend to persons who knowingly receive or harbour a child after its abduction.¹⁵⁹

2.58 Section 55 of the 1861 Act provides that whosoever "shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanour" and liable to two years imprisonment. In *Prince*,¹⁶⁰ the defendant abducted a girl who was under 16 but whom he reasonably thought to be over that age because she looked very much older. The majority of the Court of Crown Cases Reserved held that although the statute required *mens rea* in respect of taking a girl out of the possession of her lawful guardian against his will, the prohibition was absolute in respect of the girl's age, so that the defendant's mistake as to her age was no defence.¹⁶¹ This principle is one of general application, so that in the absence of an express defence of reasonable mistake as to age, all statutory offences containing references to the victim's age are offences of "half *mens rea*".¹⁶²

2.59 The meaning of the word "unlawfully" in s.55 was also considered in *Prince*. In the course of his judgment, Denman J. held that, having regard to the legislative history of the provision and the mischief intended to be guarded against,

"it appears to me reasonably clear that the word 'unlawfully', in the true sense in which it was used, is fully satisfied by holding that it is equivalent to the words 'without lawful excuse' using those words as equivalent to 'without such an excuse as being proved would be a complete legal justification for the act, even where all the facts constituting the offence exist'."¹⁶³

2.60 The meaning of lawful "excuse", as opposed to authority, is unclear. It may be that it would cover such cases as where the defendant takes the girl because it is necessary to do so in order to save her from unlawful violence or injury, though necessity in this connection is strictly interpreted.¹⁶⁴ In *Tegerdine*,¹⁶⁵ it was argued that good motives, based on reasonable belief, could be an excuse, so that the putative father who took a child out of the possession of the mother because he reasonably believed it was not being well cared for, should have a defence. This argument was rejected by the English Court of Appeal, a decision which accords with the view of Bramwell B. in *Prince* "that though the statute probably principally aims at seduction for carnal purposes, the taking may be by a female, with a good motive. Nevertheless, though there may

¹⁵⁸ *Austin* [1981] 1 All ER 374; *R. v Duguld* (1906) 70 J.P. 294.

¹⁵⁹ This follows from the plain words of the section.

¹⁶⁰ (1875) 2 C.C.R. 154.

¹⁶¹ The judgment of the majority of 10 judges was delivered by Blackburn J., Brett J. dissenting.

¹⁶² See Williams, *op cit*, pp.221-2.

¹⁶³ 2 C.C.R. 154 at 178.

¹⁶⁴ See *Henman*, *supra*, n.141.

¹⁶⁵ [1983] Crim. L. Rev. 163, and commentary by Professor J.C. Smith.

be cases which are not immoral in one sense, I say that the act forbidden is wrong".¹⁶⁶ So an aunt who takes a girl under sixteen out of the possession of her parents because they are bringing her up to smoke and swear would presumably be guilty of the offence.¹⁶⁷

2.61 Although s.55 does not contain a proviso for persons with a claim of right similar to that in s.56, it may be that such a claim, as distinct from a merely philanthropic motive, may constitute a lawful excuse. In *Tinkler*,¹⁶⁸ Cockburn C.J. directed the jury that, though the defendant had no right to the custody of the child, they should acquit if they found he honestly believed that he had such a right. Similarly, lawful excuse will extend to cases where the defendant honestly believes that he or she has the parent's consent, or that the girl is in nobody's possession.¹⁶⁹

2.62 But recklessness as to whether the girl is in the possession of her parents or other lawful guardian will be sufficient *mens rea*.¹⁷⁰ The taking may be inferred to be against the will of the parent if it appears that, had the parent been asked, he or she would have refused consent.¹⁷¹ Where, however, the parent permits the daughter to lead an undisciplined lifestyle¹⁷² or does not take reasonable care of her,¹⁷³ this may be evidence of consent to the taking.

2.63 "Unlawfully" in s.56 has been held to mean the same as in the identical wording in s.55,¹⁷⁴ so that the above principles (in addition to the express defence of claim of right) are equally applicable to the offence of child-stealing.

2.64 The decided cases on s.56 also throw light on the meaning of the "taking" in offences of abduction generally. A "taking" is not equivalent to a detention. So, in *Alexander*,¹⁷⁵ D's conviction was quashed where the recorder had said that the offence consisted in keeping the girl secretly and preventing her parents from knowing of her whereabouts. The word "takes", however, does not imply the use of force, actual or constructive, and it is irrelevant that the girl freely consents to go.¹⁷⁶

166 Bramwell B. delivered the minority judgment of 5 judges in *Prince*, affirming the conviction on the ground that Prince had set out to commit a moral wrong or tort against the girl's father.

167 *Per* Smith, *op cit*, p.164. Religious or philanthropic motives were no defence in *Booth*, 12 Cox C.C. 231 (1872), and such a finding would be unaffected by the constitutional guarantee of religious freedom: see *People v See*, 258 I 11 152, 101 N.E. 257 (1913).

168 (1859) 1 F. & F. 513.

169 *Per* Smith, *op cit*. Clearly, the offence is committed although at the moment of abduction the parent, etc., is not in actual physical possession of the child: see *R. v Beble* [1979] Qd. R. 278.

170 There is older authority holding that D cannot be convicted unless the jury finds that the defendant knew the girl was in the possession of her father or guardian. *Hibbert* (1869) 1 C.C.R. 184; *Green* (1882) 3 F. and F. 274. This has been criticised as too narrow, and it is clear that recklessness as to such possession will now suffice: see Smith and Hogan, *Criminal Law* (6th ed., 1988), 455 and Williams, *op cit*, p.220.

171 *Handley* (1859) 1 F. and F. 848 (*per* Wightman J.), followed in *R. v West* (1874) 5 A.J.R. 19.

172 *Primelt* (1858) 1 F. and F. 50.

173 *Frazer* (1861) 8 Cox C.C. 446.

174 *Austin*, [1981] 1 All ER 374 at 377-8, in which Watkins L.J. specifically adopted the dictum of Denman in *Prince* 2 C.C.R. 154 at 178, which we have already quoted above.

175 (1912) 107 L.T. 240.

176 *Markletow* (1853) Dears C.C. 159.

2.65 Instead, there must be proof of some inducement, persuasion, blandishment or artifice on the part of the defendant.¹⁷⁷ In all cases, however, the question is whether the defendant's conduct has caused the girl to be kept out of the possession of her parents or guardian, so that if it is the girl's intention to stay away in any event, there will be no offence.¹⁷⁸

2.66 Even if the girl takes the initiative, the defendant is still guilty if he or she assists her in leaving; as where the defendant, at the girl's suggestion, brought a ladder to the window so that she might elope with him.¹⁷⁹ If, however, the defendant takes no active part in the matter, and the girl leaves without any persuasion or assistance, the defendant will not be guilty of "taking" her,¹⁸⁰ though the defendant may be guilty of detaining her. The defendant need not be present when the girl leaves, if she does so as the result of the defendant's persuasion.¹⁸¹ A girl does not, however, leave her father's possession merely because she is out of the house for a particular purpose,¹⁸² unless it is her intention not to return home.¹⁸³

2.67 For the purposes of either s.55 or s.56 the "taking" does not require a permanent deprivation, though in the latter offence the prosecution must prove the ulterior intent described in that section. In *Timmins*,¹⁸⁴ the defendant was guilty where he took a girl away for three days and slept with her at night. The father was deprived of the possession of the girl because it "placed her in a situation quite inconsistent with the existence of the relation of father and daughter."¹⁸⁵ In *Baillie*,¹⁸⁶ there was a sufficient deprivation where the girl was absent from her father's house only for a few hours since in that time the defendant married her so that the father "never could have the custody of her in the same sense as before her marriage".¹⁸⁷ The test according to Swanwick J. in *Jones*,¹⁸⁸ is whether there has been a substantial interference with the possessory relationship of parent and child, and an attempt to take a ten year old girl for a walk with the intention of indecently assaulting her was held in that case not to amount to an attempt to breach such a relationship.

2.68 That case, with its restrictive insistence on the possessory relationship of

177 *Olliver* (1886) 10 Cox C.C. 402 (*per* Bramwell B.); *R. v Mackney* 9 A.L.R. 9 (Supreme Court of Victoria).
 178 The authorities on this point are reviewed by the Western Australia Court of Criminal Appeal in *R. v Stanton* [1981] 3 A. Crim. L. 294.
 179 *Robins* (1844) 1 Car. & Kir. 456.
 180 *Jarvis* (1903) 20 Cox C.C. 249.
 181 *Olliver* (1886) 10 Cox C.C. 402. However, where she may be said to have already abandoned the possession of her father at the time of such persuasion, there can be no taking: see *R. v Blythe* 4 B.C.R. 276.
 182 *Markletow*, *supra*, n.176.
 183 *Raycock* (1871) 12 Cox C.C. 28. A girl who was in the service of and living in the house of an employer had clearly abandoned the possession of her father; see *R. v Miller* (1876) 13 Cox C.C. 179.
 184 (1860) 8 Cox C.C. 401. In *Slocum v The People*, 90 Ill 274 (1878), a few hours sufficed where there had been sexual intercourse.
 185 *Id.* at 404.
 186 (1859) 8 Cox C.C. 238.
 187 *Id.* at 239. In *R. v Jenkins* (1895) 21 V.L.R. 113, the Supreme Court of Victoria upheld a conviction where a short deprivation was accompanied by an element of harassment.
 188 [1973] Crim. L. Rev. 621.

parent and child as being the basis of abduction, was distinguished in *Mears*,¹⁸⁹ a case concerning s.56 of the 1861 Act. There a motorist stopped his car on seeing a little girl aged eight walking on the pavement. He was a stranger to her. He physically lifted her up. She screamed and he put her down and she ran away. It was held that momentary detention against the will of the child was sufficient forcible detention for the purposes of s.56 and that the jury could infer from that conduct an intent to deprive her parents of possession. The decision in *Jones* was distinguished on the ground that that arose under s.20 of Britain's *Sexual Offences Act, 1956*, which requires deprivation of possession of the parent but does not involve an act against the will of the child.

2.69 Although, as has been seen, s.55 of the 1861 Act is applicable to any abduction of a girl under 16, it is invoked almost entirely in seduction cases with a sexual element.¹⁹⁰ In this respect, the offence is closely related to that created by s.7 of the *Criminal Law Amendment Act, 1885*, as amended by s.20 of the *Criminal Law Amendment Act, 1935*, which provides as follows:

"Any person who -

with intent that any unmarried girl under the age of eighteen years should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally takes or causes to be taken such girl out of the possession and against the will of her father or mother, or any other such person having the lawful care or charge of her"

is guilty of a misdemeanour and liable to two years imprisonment.

2.70 A proviso in the 1885 Act providing for a defence of reasonable belief as to age was removed from the section by the 1935 Act, so that all the above principles will apply to this offence.¹⁹¹

2.71 Moreover, by s.54 of the 1861 Act, it is a felony punishable by fourteen years penal servitude to "force, take away or detain against her will any woman, of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person".¹⁹² Two further felonies of a similar nature, also punishable by fourteen years penal servitude, are created by s.53 of the Act. The first is committed by a person who, "from motives of lucre", takes away or detains any woman with an interest in any real or personal estate

189 *Mears* [1975] Crim. L. Rev.155 (per Watkin Powell J.). In a Queensland statute, the deprivation of custody was equated with a deprivation of the flexible notion of "safe-keeping": see *R. v Johnson* (1957) Q.S.R. 594.

190 See this Commission's Working Paper on *The Law Relating to Seduction and the Enticement and Harboring of a Child* (W.P.No.6-1979), pp.22-24, for related sexual offences. For the law relating to child abduction outside the jurisdiction, see this Commission's Report on *The Hague Convention on the Civil Aspects of International Child Abduction and some related matters* (LRC 12-1985), pp.36-45. And for some related caselaw on the operation of the Convention see Overall, [1990] Fam. Law 169.

191 In the Commission's Report on *Child Sexual Abuse*, (LRC 32-1990), the introduction of a defence based on reasonable mistake as to age is recommended.

192 On such a charge, it is evidently unnecessary to prove that intercourse actually took place, although the fact is admissible on the issue of intent: see *People v De Marcello*, 31 N.Y.S. 2d 608 (1941).

or a presumptive heiress or next-of-kin against her will with intent to marry or carnally know her or to cause her to be married or carnally known by any other person. The second is committed by a person who fraudulently allures, takes away or detains such a woman, being under the age of twenty-one, out of the possession and against the will of her father or mother or any other person having the lawful care or charge of her with the same intent. Where it is proved that the defendant knew that the woman had an interest in property, it appears that there is a presumption that he acted from motives of gain.¹⁹³

2.72 While the third of these offences is similar in terms to ss.55 and 56 of the 1861 Act and s.7 of the 1885 Act, as amended, in that it is committed against the will of the parent or lawful guardian, there must, in addition, be an element of fraud against the woman herself as well as the ulterior intent. The first two offences differ in that they may be committed only against the will of the woman herself. All three may be committed by simple detention.

2.73 Another offence which may be mentioned in this connection is that created by s.8 of the *Criminal Law Amendment Act, 1885*, which provides that any person who detains any woman in or upon any premises with intent that she may be unlawfully and carnally known by any man, or in any brothel, shall be liable to two years imprisonment.

Two further felonies of a similar nature, also punishable by fourteen years penal servitude, are created by s.53 of the Act. The first is committed by a person who, "from motives of lucre", takes away or detains any woman with an interest in any real or personal estate or a presumptive heiress or next-of-kin against her will with intent to marry or carnally know her or to cause her to be married or carnally known by any other person. The second is committed by a person who fraudulently allures, takes away or detains such a woman, being under the age of twenty-one, out of the possession and against the will of her father or mother or any other person having the lawful care or charge of her with the same intent. Where it is proved that the defendant knew that the woman had an interest in property, it appears that there is a presumption that he acted from motives of gain.¹⁹⁴

193 *R. v Barratt* (1840) C. & P. 387. In *R. v Taylor* (1876) 2 V.L.R. (L) 95, the Supreme Court of Victoria upheld a conviction on a similar charge where the only evidence was that the abductee's parents had been informed that she was entitled to benefit under her grandfather's will, together with the fact that her sister had already received a sum.

194 *R. v Barratt* (1840) C. & P. 387. In *R. v Taylor* (1876) 2 V.L.R. (L) 95, the Supreme Court of Victoria upheld a conviction on a similar charge where the only evidence was that the abductee's parents had been informed that she was entitled to benefit under her grandfather's will, together with the fact that her sister had already received a sum.

PART II: THE LAW IN OTHER JURISDICTIONS

CHAPTER 3: REFORM IN THE UNITED KINGDOM

3.1 The Law Commission of England and Wales has published in recent years a Draft Criminal Code¹ (Draft Code) which, with respect to offences against the person, is the culmination of work carried out by the Criminal Law Revision Committee (C.L.R.C.) in its Working Paper² and subsequent Report³ on Offences Against the Person, and by a "Code Team" of academic lawyers under the auspices of the Commission itself.⁴ Subsequent to the publication of the Code, the Law Commission published a Consultation Paper,⁵ and Report⁶ on Non-Fatal Offences Against the Person, incorporating a draft Bill, intended as the first in a series of bills each of which will be complete in itself and containing proposals for reform of the criminal law suitable for immediate enactment.

The Draft Code

3.2 Offences relating to the varying degrees of assault and to the causing of personal harm are contained in clauses 70-78 of the Draft Code, while ss.79-85 provide for offences of detention and abduction. Although it was decided not to include a general offence of deliberate endangerment, an extended offence of endangering traffic is provided for in clause 86. Explosives offences, driving offences, the setting of traps etc., and cruelty to children are also excluded from the Draft Code, though some of these have previously been the subject of

1 *A Criminal Code for England and Wales* (Law Com. No. 177), vol. 1, *Report and Draft Criminal Code Bill*; vol. 2, *Commentary on Draft Criminal Code Bill* (1989).

2 C.L.R.C. *Working Paper on Offences against the Person*, H.M.S.O., August 1976.

3 C.L.R.C. Fourteenth Report, *Offences against the Person* (1980), Cmnd. 7844.

4 *Codification of the Criminal Law: A Report to the Law Commission* (1985), (Law Com. No. 143).

5 *Legislating the Criminal Code, Offences Against the Person and General Principles*, Law Com. Consultation Paper No. 122, hereinafter L.C.C. 122.

6 *Legislating the Criminal Code, Offences Against the Person and General Principles*, Law Com. No. 218 hereinafter L.C. 218.

examination by the C.L.R.C. and the Code Team. Affray, together with two separate offences of threats and harassment, are provided for in clauses 200-202 as offences against public order.

The Draft Criminal Law Bill

3.3 The Draft Criminal Law Bill, hereinafter "the Bill", which accompanies the Law Commission's Report on Non-Fatal Offences, was built on the relevant text in the Draft Code. That section of the code was, in turn grounded on the recommendations in the C.L.R.C.'s Report on Offences Against the Person. In addition, the Report was preceded by a Consultation Paper. So the subject has been well ventilated in England in recent years. The Commission will draw both from the Code and the Bill in making its ultimate recommendations. The Bill covers the essential offences of violence, threats, poisoning, torture, abduction, detention, duress, justifiable use of force, fault and intoxication. It does not cover, for example, endangerment or harassment.

Common Assault, And Threats To Injure

3.4 Clause 75 of the Draft Code provides for a statutory offence of assault to replace assault and battery at common law in the following terms:

"A person is guilty of assault if he intentionally or recklessly -

- (a) applies force to or causes an impact on the body of another; or
- (b) causes another to believe that any such force or impact is imminent,

without the consent of the other or, where the act is likely or intended to cause personal harm, with or without his consent".

It is triable summarily only and punishable by six months imprisonment or a fine not exceeding level 5 on the standard scale⁷, or both. Assault and battery have already been restricted to summary procedure with the same penalty by virtue of s.39 of the *Criminal Justice Act, 1988*, thereby repealing that part of s.47 of the 1861 Act not relating to "assault occasioning actual bodily harm".⁸ Nevertheless, by virtue of s.40(1), a charge of common assault may still proceed on indictment if it,

- (a) is founded on the same facts or evidence as a count charging an indictable offence; or

⁷ A standard scale system of penalties payable on summary conviction was introduced by s.37 of the *Criminal Justice Act, 1982*, the levels (1-5) corresponding to fines of £50, £100, £400, £1,000 and £2,000 at the time of commencement.

⁸ See Schedule 16.

- (b) is part of a series of offences of the same or similar character as an indictable offence which is also charged

provided that, in either case, the facts or evidence relating to the offence were disclosed in an examination or deposition taken before a justice in the presence of the person charged. In such a proceeding, the offence will be tried in the same manner as if it were an indictable offence, though the Crown Court may only deal with the accused in respect of it in a manner in which a magistrate's court could have dealt with him.⁹ Section 46 of the 1861 Act, which by its first proviso prohibits judges from adjudicating on any assault and battery which they think a fit subject for prosecution on indictment, and by its second proviso prohibits them from adjudicating in disputes over title to land, etc¹⁰, was also abolished by the 1988 Act¹¹. The C.L.R.C. had previously observed that ousters of jurisdiction under the second proviso were unwarranted and that such challenges were in any event extremely rare.¹²

3.5 Irish law has already provided in a similar way for the inclusion of a summary offence on an indictment. Section 6 of the *Criminal Justice Act, 1951*, provides:

"Where a person is sent forward for trial for an indictable offence, the indictment may contain a count for having committed any offence triable summarily (in the section referred to as a summary offence) with which he has been charged and which arises out of the same set of facts and, if found guilty on that count, he may be sentenced to suffer any punishment which could be inflicted on a person summarily convicted of the summary offence".

3.6 Another procedural reform effected by the 1988 Act and preserved in clause 75 of the Draft Code is that a summary prosecution for assault need no longer be brought "by or on behalf of the party aggrieved". This restriction, it would appear, had led in practice to few public prosecutions being brought for simple assault, the victim generally being left to institute proceedings himself, a situation which had been criticised as capable of giving rise to injustice.¹³ The C.L.R.C. considered that it was fairer for victims of assault to be in the same position as other victims of offences against the person and accordingly recommended its abolition:

"In addition to assisting members of the public generally, the repeal of s.42 should lessen the difficulties which at present hinder the institution of proceedings against persons who assault public officials ... Persons assaulted will still be in a position to bring private prosecutions and may be left to do so in trivial cases if no injury has resulted. We would

9 S.40(2).

10 *Supra*, Chapter 1, page 10.

11 Schedule 16.

12 Fourteenth Report, *op cit*, para. 165.

13 *Id.*, paras. 163-164.

expect, however, that with the repeal of these provisions the police will show a greater readiness to undertake prosecutions in suitable cases. We very much hope that this will prove to be so in those cases of assaults on public officials in which the police are called in, as cases of this type, when proved, call for sharp punishment and in our opinion should be the subject of public prosecution".¹⁴

3.7 In Ireland, s.42 was amended by s.11(3) of the *Criminal Justice Act, 1951*, which provided

"Common assault and battery may be summarily prosecuted on complaint made by or on behalf of the aggrieved person *or otherwise*."

A Single Assault Offence

3.8 Clause 75(1) of the Draft Code implements the recommendation of the majority of the C.L.R.C. that there should continue to be a single offence covering assault, whether or not there is a battery, though not the view that the definition of the offence should be left to the common law.¹⁵ Paragraph (b) provides for the case where there is no battery and covers the obvious examples where a blow is aimed at the victim or where a pistol which he believes to be loaded is pointed at him. It does not extend to a mere threat to strike in the future because it must cause him to fear that the force or impact is imminent.

3.9 Clause 6 of the Bill is essentially a re-arrangement of clause 75 of the Draft Code. However sub-section (2) was added to cover expressly the common law exception for "trivial touchings".¹⁶ Clause 6 provides:

"6.-(1) A person is guilty of the offence 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
 - (ii) where the act is intended or likely to cause injury, with or 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.

(2) No such offence is committed if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the

¹⁴ *Id.* para. 164.

¹⁵ *Id.* paras. 159-160. In this connection, the Code Team pointed out that the C.L.R.C. does not regard codification as one of its functions, Law Com. No. 143, para. 15.47.

¹⁶ L.C. 218, paras. 20.1-20.7.

defendant does not know or believe that it is in fact unacceptable to the other person."

Threats

3.10 A minority of the C.L.R.C. were in favour of re-defining assault so as to exclude a threatened battery, and of creating offences of threatening to assault and threatening to injure. Assault would then have the same meaning in law as is understood by a layperson, and would reflect the fact that striking a person is different from threatening to strike a person. Moreover, the existing offence of threatening to murder under s.16 of the 1861 Act (and its proposed extension to include all threats to kill or cause serious injury)¹⁷ were considered to be good precedents for the creation of offences of threatening to assault or cause injury. In this respect, to confine the law to threats to cause serious injury might raise difficult questions of interpretation: for instance, is a threat to beat a person up a threat to cause injury or serious injury? They also pointed out that the existing law already covered some threats to injure and that there was no evidence that this had resulted in a plethora of prosecutions; a demand for money accompanied by a threat to injure could lead to liability for blackmail, though a demand for social advantage accompanied by the same threat would not be an offence; to threaten a person in public, though not in private, in circumstances likely to occasion a breach of the peace is an offence; a threatening gesture may in appropriate circumstances be a criminal assault; and a threat to do criminal damage to property, even though it be minor, is an offence.¹⁸

3.11 Professor Williams, of the minority, criticised the majority proposal on the ground that it would continue much of the inadequacy of the present law in respect of a verbal threat or a conditional threat unaccompanied by a threatening gesture, for example, where a man says to a woman that he will assault her if she does not undress for him. He therefore proposed two offences supplementary to the one proposed by the majority. It should be an offence for a person expressly or impliedly to threaten to use force against another

- (a) if that other does not do something that he is not in law required to do; or
- (b) if he does not refrain from doing something that in law he may do; or
- (c) if he does not make a submission that in law he is not required to make;

where the threat brings about the act, omission or submission. Secondly, it should be an offence for a person expressly or impliedly to threaten to use force against another if the person making the threat ought reasonably to foresee that the other person may sustain bodily injury or hurt as the result of the threat, either directly or in an effort to escape, and if such injury or hurt is in fact

¹⁷ *Infra*, n.19.

¹⁸ *Op cit*, para. 218, note 1.

suffered.¹⁹

3.12 The majority of the C.L.R.C., however, considered that although there was a case for making threats to injure, a criminal offence:

"to do so would inevitably bring into the criminal law a number of trivial acts, for example, the irate householder who threatens to box the ears of the small mischievous boy he finds on his property, or the kind of threats sometimes used in the course of squabbles between neighbours."²⁰

"Even if the new offence of threatening unlawful force were defined restrictively to cover a gesture threatening immediate force so that the substantive law is not affected, the majority see no virtue in putting into legislative form the common law distinction between assault and battery. There is also no virtue in introducing unnecessary complications into the criminal law. Such a change would have wider repercussions in that the civil law and criminal law on assault would become out of step with each other If there were to be an offence of threatening to assault, a distinction would arise between simple assault, attempted assault and threatened assault, and it would then be necessary to have alternative charges. This would lead to an unnecessary proliferation of offences".²¹

3.13 Clause 65 of the Draft Code, reproduced unchanged in clause 9 of the Bill, was accordingly limited to threats to kill or cause serious injury:

"A person is guilty of an offence if he makes to another a threat to cause the death of, or serious personal harm to, that other or a third person, intending that other to believe that it will be carried out"

3.14 The offence is triable either way and punishable on conviction on indictment by 10 years imprisonment. The clause, in addition to overcoming the limitation of s.16 of the 1861 Act in applying to any threat however made, preserves the penalty of 10 years imprisonment for threats to cause serious injury because of the gravity of some such threats, for example, a threat to "kneecap" another. As under s.16, there is no restriction that the threat must be made to the proposed victim.²²

3.15 As we have seen above, clause 6(1)(a) of the Bill covers cases of the application of force to, or the causing of an impact on, the body of another where no injury is caused. If any injury occurs, there will be an offence under clause 4, considered below.²³ The force or impact need not be direct, so that

19 *Op cit*, para. 218.

20 *Id.*

21 *Op cit*, para. 159.

22 See paras. 215-218 of the C.L.R.C.'s Fourteenth Report.

23 This analysis is put forward by the Code Team, Law Com. No. 143, para. 15.47, though such a delimitation of conduct does not necessarily follow from the wording of the sections.

it will be an assault if the defendant sets a "booby trap" for the victim or causes water to be poured over him or leads him to fall into a pit. Furthermore, the section recognises that some applications of force are, *prima facie*, assaults even if the victim consents, i.e. "where the act is intended or likely to cause injury", though this rule²⁴ itself remains subject to well-known exceptions at common law. In this connection the Code Team had proposed an additional subsection to the statutory definition of assault:

"(2) A person does not commit an offence under subs.(1) by an act done to another with his consent if it is a reasonable act to do in the course of a lawful game, sport, entertainment or medical treatment or is otherwise justified or excused by any provision or rule referred to in s.[45]."²⁵

Consent

3.16 Clause 45 of the Draft Code provides for a general defence for any act justified or excused by law. In their recent Report, the Law Commission point out that:

"existing common law defences based or arguably based on the consent of the victim are unaffected by the Criminal Law Bill. Therefore, strictly speaking, it is not necessary to mention the effect of consent in the specific provisions concerning assault, any more than it is mentioned in the definitions of other offences in the Criminal Law Bill. However, the whole essence of an assault is that it is an act done without the consent of the victim. Since *non-consensual* interference is thus so significant an element in assault it seemed helpful specifically to mention the effect of consent at common law, including the rule that in general one cannot consent to the infliction of *injury*, in the Bill's definition of assault."²⁶

3.17 The issues of when apparent consent should amount to real consent and when public policy should require a genuine consent to be disregarded because the act is too serious to go without punishment were considered by the C.L.R.C. to involve questions of medical ethics and public policy upon which it was inappropriate for a committee composed solely of lawyers to decide.²⁷ The defence of lawful correction was similarly considered to raise "controversial questions of great general public interest" which could not be examined by lawyers alone.²⁸ In consequence, the C.L.R.C. recommended that the common law defences of consent and of lawful correction should be continued for the time being in the circumstances in which it was then available.²⁹ In the light of

²⁴ Discussed *supra*, Chapter 1, page 31 *et seq.*

²⁵ Law Com. No. 143, clause 77(2), p.206, and para. 15-49 of the Report.

²⁶ L.C. 218, para. 19.1.

²⁷ Fourteenth Report, paras. 289-291.

²⁸ *Id.*, para. 293.

²⁹ *Id.*, paras. 294.3-294.2.

observations received, and of the decision in *Brown*,³⁰ the Commission is to publish a further Consultation Paper on the question of a victim's consent to assault in 1994.³¹

3.18 The Commission remark further that:

"[T]he situation was further complicated when, in *DPP v Little*,³² the Divisional Court adopted the view of May LJ in *Harrow Justices, ex parte Osuseri*³³ that the second part of section 47 of the 1861 Act had replaced assault³⁴ at common law with a new statutory offence; and that the effect of the subsequent replacement of that provision by section 39 of the Criminal Justice Act 1988 had been to create two separate statutory offences of assault and battery which could not, therefore, be charged in the same count of an indictment.

... Taking the opportunity afforded by the present law reform exercise to look at these matters afresh, we provisionally concluded in L.C.C.P. 122 that assault ought to be statutorily defined, and should constitute a single offence encompassing both 'battery' and 'psychic assault'.

... As to the need for definition, we disagreed with the view of a majority of the C.L.R.C. that the law relating to assault (in this case including battery) was now sufficiently well understood for it not to be necessary to provide a statutory definition of those concepts. A concept forming the substance of a criminal offence of violence ought, as a matter of principle, to be defined in any event. But, in addition, the remaining uncertainties and the undeveloped state of aspects of the current law of assault, including the exemption from that law of what we described as 'trivial touchings', made the restatement and confirmation of the whole concept of assault, including those aspects, highly desirable."³⁵

Self-Defence

3.19 Following a recommendation of the C.L.R.C.,³⁶ a statutory definition of self-defence, to replace the defence at common law, was provided in clause 44 of the Draft Code and reproduced with some variation in clauses 27 to 30 of the Bill. The Bill reproduces, in essence, the common law as defined by the Court of Appeal in *Gladstone Williams*,³⁷ the essential principle being that the accused should be judged according to the circumstances that he believed to exist. It follows from this that:

30 [1983] 2 WLR 556.

31 L.C. 218, para. 19.4.

32 [1992] 1 Q.B. 645 at 652.

33 [1988] Q.B. 589.

34 Here including battery.

35 L.C. 218, paras. 18.2-18.4, certain footnote references omitted.

36 Fourteenth Report, para. 294.

37 [1984] 78 Cr. App. R. 276.

"he cannot rely on circumstances unknown to him that would in fact have justified acts on his part that were unreasonable on the facts as he perceived them."³⁸ Although opinion was not unanimous on consultation, we think it right to maintain this long-standing common law rule. Citizens who react unreasonably to circumstances should not be exculpated by the accident of facts of which they were unaware."³⁹

3.20 Clauses 27 to 29 of the Bill provide:

"27.-(1) The use of force by a person for any of the following purposes, if only such as is reasonable in the circumstances as he believes them to be, does not constitute an offence -

- (a) to protect himself or another from injury, assault or detention caused by a criminal act;
- (b) to protect himself or (with the authority of that other) another from trespass to the person;
- (c) to protect his property from appropriation, destruction or damage caused by a criminal act or from trespass or infringement;
- (d) to protect property belonging to another from appropriation, destruction or damage caused by a criminal act or (with the authority of the other) from trespass or infringement; or
- (e) to prevent crime or a breach of the peace.

(2) The expressions "use of force" and "property" in subsection (1) are defined and extended by sections 29 and 30 respectively.

(3) For the purposes of this section an act involves a "crime" or is "criminal" although the person committing it, if charged with an offence in respect of it, would be acquitted on the ground that -

- (a) he was under ten years of age, or
- (b) he acted under duress, whether by threats or of circumstances, or
- (c) his act was involuntary, or
- (d) he was in a state of intoxication, or
- (e) he was insane, so as not to be responsible, according to law, for the act.

(4) The references in subsection (1) to protecting a person or property from anything include protecting him or it from its continuing; and the reference to preventing crime or a breach of the

³⁸ This is the "*Dadson*" principle: *Dadson* (1850) 2 Den. 35, 169 E.R. 407; see *supra*, Chapter 1, page 34.
³⁹ L.C. 218, para. 39.11, footnote reference omitted.

peace shall be similarly construed.

(5) For the purposes of this section the question whether the act against which force is used is of a kind mentioned in any of paragraphs (a) to (e) of subsection (1) shall be determined according to the circumstances as the person using the force ('D') believes them to be.

In the following provisions of this section references to unlawful or lawful acts are to acts which are or are not of such a kind.

(6) Where an act is lawful by reason only of a belief or suspicion which is mistaken, the defence provided by this section applies as in the case of an unlawful act, unless -

- (a) D knows or believes that the force is used against a constable or a person assisting a constable, and
- (b) the constable is acting in the execution of his duty,

in which case the defence applies only if D believes the force to be immediately necessary to prevent injury to himself or another.

(7) The defence provided by this section does not apply to a person who causes conduct or a state of affairs with a view to using force to resist or terminate it.

But the defence may apply although the occasion for the use of force arises only because he does something he may lawfully do, knowing that such an occasion may arise.

28.-(1) The use of force by a person in effecting or assisting in a lawful arrest, if only such as is reasonable in the circumstances as he believes them to be, does not constitute an offence.

(2) The expression "use of force" in subsection (1) is defined and extended by section 29.

(3) For the purposes of this section the question whether the arrest is lawful shall be determined according to the circumstances as the person using the force believed them to be.

29.-(1) For the purposes of sections 27 and 28 -

- (a) a person uses force in relation to another person or property not only where he applies force to, but also where he causes an impact on, the body of that person or that property;
- (b) a person shall be treated as using force in relation to

- another person if -
- (i) he threatens him with its use, or
 - (ii) he detains him without actually using it; and
- (c) a person shall be treated as using force in relation to property if he threatens a person with its use in relation to property.

(2) Those sections apply in relation to acts immediately preparatory to the use of force as they apply in relation to acts in which force is used.

(3) A threat of force may be reasonable although the actual use of force would not be.

(4) The fact that a person had an opportunity to retreat before using force shall be taken into account, in conjunction with other relevant evidence, in determining whether the use of force was reasonable."

3.21 The Commission summarise as follows:

"In accordance with the basic requirement of the defence of self-defence, ... the essence of all these cases is that they should have as their motive the *protection* of persons or property, or the *prevention* of crime or breach of the peace."⁴⁰

3.22 The Code Team had proposed to include a definition of a breach of the peace, broadly following the dictum of Watkins L.J. in *Howell*⁴¹, in the following terms:

"A breach of the peace occurs when, by unlawful violence, harm is done to a person, or in his presence to his property, or a person fears on reasonable grounds that unlawful violence likely to cause such harm is imminent".⁴²

The Law Commission, however, did not think it necessary to include such a definition.⁴³

3.23 Subclause (3) of clause 27 of the Bill is concerned with cases in which, to avoid uncertainty, the behaviour of a person against whom force is used is criminal although, if it were the subject of a criminal charge, that person would be acquitted. Because of the belief defence in subclause (1), resort to this subclause is only necessary where the person using force is aware of the special

40 L.C. 218, para. 38.4.

41 *Supra*, Chapter 1, page 93.

42 Law Com. No. 143, para. 13.39.

43 Law Com. No. 177, *Commentary* para. 12.27, note 50.

facts.⁴⁴ Subclause (6) relates to the position in the criminal law of the wrongly, though reasonably, suspected person who resists arrest or uses force to defend himself or herself against force reasonably used by the arrester. Although the conduct of a private person effecting an arrest may be "unlawful", neither that person nor the resister is guilty of any offence; yet where the person effecting the arrest is a constable acting in the execution of his or her duty, the suspected person must submit to arrest. This is so even if the person believes the arrest to be unlawful, though no offence is committed by using force believed to be immediately necessary to prevent such harm to oneself or another innocent person. The subclause in no way limits the right to resist an unlawful arrest, whether by a constable or not.⁴⁵

3.24 The following helpful examples are given in the Draft Code:

- "(44)(vi) P, a police officer, reasonably but wrongly believing D to be an armed, dangerous criminal, X, points a revolver at him. D, believing that he is about to be shot, strikes P and causes him serious personal harm. If in the light of D's belief this action is necessary and reasonable to prevent personal harm to D, he commits no offence, even though he knows P is a police officer acting lawfully.
- (44)(vii) P, a constable, is arresting Q. D, who believes that P has no grounds for making the arrest, uses force against P to free Q. In fact P has reasonable grounds for suspecting that Q has committed an arrestable offence. D has no defence under this section to a charge of assault or causing personal harm.
- (44)(viii) As in example 44(vii), but D also believes that P is about to cause Q personal harm. If the force used by D would have been necessary and reasonable to prevent the apprehended personal harm to a person wrongfully arrested, D commits no offence."⁴⁶

Duress

3.25 Clauses 25 and 26 of the Bill provide for statutory defences of duress by threats similar to that available at common law and of duress of circumstances (necessity) in cases where death or serious personal harm to oneself or another is threatened. Murder and attempted murder, whose exclusion from the scope of the defences was affirmed as recently as 1987 by the House of Lords in

44 L.C. 218, para. 38.20 *et seq.*

45 L.C. 218, paras. 39.1 - 39.5.

46 Appendix B, examples (vi), (vii), and (viii).

Howe⁴⁷ and were excluded in the Draft Code, are now covered in the Bill.⁴⁸

Mens Rea

3.26 The *mens rea* of assault under clause 6 of the Bill is intention or recklessness, these terms being defined in clause 1 of the Bill as follows:

- "1. For the purposes of this Part a person acts -
- (a) "intentionally" with respect to a result when -
- (i) it is his purpose to cause it, or
- (ii) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result; and
- (b) "recklessly" with respect to -
- (i) a circumstance, when he is aware of a risk that it exists or will exist, and
- (ii) a result, when he is aware of a risk that it will occur,
- and it is unreasonable, having regard to the circumstances known to him, to take that risk;
- and related expressions shall be construed accordingly."

Grievous Bodily Harm, Unlawful Wounding And Actual Bodily Harm

3.27 Clauses 2-4 of the Bill provide for a hierarchy of assaults to replace ss.18, 20, and 47 of the 1861 Act, in the following terms:

"2. -(1) A person is guilty of an offence if he intentionally causes serious injury to another.

(2) An offence under this section is committed notwithstanding that the injury occurs outside England and Wales if the act causing injury is done in England and Wales.

3. -(1) A person is guilty of an offence if he recklessly causes serious injury to another.

(2) An offence under this section is committed

⁴⁷ [1987] A.C. 417.
⁴⁸ L.C. 218, para. 31.8.

notwithstanding that the injury occurs outside England and Wales if the act causing injury is done in England and Wales.

4. A person is guilty of an offence if he intentionally or recklessly causes injury to another."

3.28 The offence in clause 2 is triable on indictment only and is punishable by life imprisonment. The offences in clauses 3 and 4 are triable either way and punishable on conviction on indictment by imprisonment for 5 years and 3 years respectively. "Personal harm" was defined by the Law Commission in clause 6 of the Code as "harm to body or mind and includes pain and unconsciousness" but no definition of "serious personal harm" is proposed, this being a matter for the court or jury on the facts of the particular case. This latter approach implements the recommendations of the C.L.R.C., though both its members and the Code Team preferred the adoption of "injury" and "serious injury" because they are readily understood words in ordinary use in the English language and would raise few problems of interpretation.⁴⁹

3.29 Professor Williams would have preferred a fuller definition of injury, to make it clear that, in addition to unconsciousness and mental injury, it covered severe pain or distress resulting from the use of force against the body (as in ill-treatment such as hooding) as well as shock. He would also have preferred "serious injury" to be defined - at one extreme it may mean an injury so serious as to endanger life or to result in permanent loss of a bodily or mental faculty; at the other, it may include a wound that heals rapidly. Moreover, both Professor Williams and Sir Rupert Cross favoured a maximum penalty of one year's imprisonment as an adequate deterrent for the offence provided for in clause 72.⁵⁰

3.30 In the Bill, the Commission reverts to using the word "injury" instead of harm. "Injury" is defined in clause 18 of the Bill .

"18. In this Part "injury" means -

- (a) physical injury, including pain, unconsciousness, or any other impairment of a person's physical condition, or
- (b) impairment of a person's mental health."

3.31 The distinction between causing serious personal harm intentionally and causing such harm recklessly is justified, in the words of the C.L.R.C., by the "definite moral and psychological difference between the two offences which it is appropriate for the criminal law to reflect". The C.L.R.C. was also of the opinion:

"that the merging of the mental element in such cases would cause

⁴⁹ Law Com. No. 143, *op cit*, para. 15.43 and C.L.R.C. Fourteenth Report, para. 154.
⁵⁰ Fourteenth Report, para. 71, notes 1 and 2.

difficult problems in the matter of penalty. All of us share the view that causing serious injury with intent to cause serious injury should carry a maximum penalty of life imprisonment to deal with those who repeatedly commit this grave offence of violence or who commit it on one occasion in circumstances just short of murder, but there is no justification ... for increasing to life imprisonment the penalty for causing serious injury recklessly, the offence intended to replace s.20, and which now carries a maximum penalty of 5 years".⁵¹

3.32 The retention of an offence similar to s.20 in the Code was justified by its value as an alternative verdict to s.18 and by the fact that its abolition would render the single offence of causing injury too broad. By contrast, the gravity of causing mere personal injury was considered not to overcome the difficulty for police, magistrates and juries in distinguishing between reckless and intentional acts, so these were punishable as one offence under clause 72 of the Code and are now so punishable under clause 4 of the Bill.⁵² We will examine this reasoning later.

3.33 All three offences are drafted in terms of "causing" injury, which, as has been seen, is a wider notion than "inflicting", "wounding" or "assaulting" and which does not import a requirement of an assault.⁵³ No problem arises in this respect in connection with offences of intent, as they involve an intention on the part of the defendant to bring about the type of injury alleged.

3.34 With respect to recklessness, the C.L.R.C. recognised that a wide range of conduct would be criminalised by an offence of causing injury recklessly, but considered that, having regard in particular to the judicial expansion of the notion of "inflicting" bodily harm and to the fact that causing serious injury recklessly was morally analogous to manslaughter, the law would not be appreciably widened by its inclusion.⁵⁴

Causation, Omissions And Duties

3.35 "Cause" was defined for this group of offences of violence in clause 17 of the Draft Code, which provides, *inter alia*, as follows:

"17.-(1) Subject to subs.(2) and (3), a person causes a result which is an element of an offence when -

- (a) he does an act which makes a more than negligible contribution to its occurrence; or
- (b) he omits to do an act which might prevent its

51 *Id.*, para. 152.

52 *Id.*

53 *Supra*, Chapter 1, page 59 *et seq.*

54 Fourteenth Report, para. 153.

occurrence and which he is under a duty to do according to the law relating to the offence.

(2) A person does not cause a result where, after he does such an act or makes such an omission, an act or event occurs -

- (a) which is the immediate and sufficient cause of the result;
- (b) which he did not foresee, and
- (c) which could not in the circumstances reasonably have been foreseen."

3.36 The clause seeks to restate principles of causation at common law,⁵⁵ and does not attempt to define the scope of the duty to act in respect of omissions, nor to list those offences which are capable of commission by omission, i.e. by failure to act despite a duty to do so. The reluctance of the Law Commission to attempt such delimitation in respect of offences against the person appears to have stemmed from the difficulty of deciding which offences generally are capable of commission by omission.⁵⁶ The Code Team, however, having regard to the fact that "the common law does not seem to have found it necessary to impose liability for omissions outside the field of offences against the person",⁵⁷ was of the view that there was no broader rule to incorporate into the Code than that recommended by the C.L.R.C. in respect of offences against the person:

"Save where liability for an omission is expressly imposed by statute,

- (a) liability for omissions should be restricted to the offences of murder, manslaughter, causing serious injury with intent, unlawful detention, kidnapping, abduction and aggravated abduction; and
- (b) such liability for omissions should arise only where the omission amounts to a breach of duty to act which is recognised at common law. The common law duties should not be codified".⁵⁸

3.37 The C.L.R.C., explaining its delimitation in (a), stated:

"It has never been shown to be necessary to include omissions resulting in injury which is not serious even though intentional, within the criminal

⁵⁵ See Law Com. No. 177, *Commentary*, paras. 7.14-7.22.

⁵⁶ *Id.*, para. 7.12.

⁵⁷ Law Com. No. 143, para. 7.9.

⁵⁸ Fourteenth Report, Part V, paras. 252-256.

law. A line has to be drawn somewhere and we are of opinion it should be drawn between serious injury and injury".⁵⁹

3.38 In this connection, the Code Team argued that it would be illogical and absurd for the law to afford greater protection to property than it does to the person, damage to property being the most likely area for potential expansion of liability for omission. Moreover, it would be impractical to seek to introduce a distinction between serious damage to property and other damage.⁶⁰ Unlike the C.L.R.C., the Code Team also proposed a definition of the scope of the duty to act in respect of those offences against the person capable of commission by omission, in the following terms:

"... a person is under a duty to do an act where there is a risk that the death of, or serious injury to, or the detention of, another will occur if that act is not done and that person -

- (a) (i) is the spouse or a parent or guardian or a child of; or
- (ii) is a member of the same household as; or
- (iii) has undertaken the care of,

the person endangered and the act is one which, in all the circumstances, including his age and other relevant personal characteristics, he could reasonably be expected to do; or

- (b) has a duty to do the act arising from -
 - (i) his tenure of a public office; or
 - (ii) any enactment; or
 - (iii) a contract, whether with the person endangered or not."⁶¹

3.39 The Law Commission, however, viewed these proposals as uncertain and controversial.⁶² It agrees⁶³ with the policy adopted by the CLRC that it is desirable to avoid imposing criminal liability in trivial and borderline cases, and that liability by omission should therefore be limited to the more serious offences. Under such a regime, for the defendant to commit a crime by omission, he would have, by failing to perform a given duty, to cause an outcome of some seriousness, and to do so with a significantly culpable state of mind. The C.L.R.C.'s list included only homicide, causing serious injury, kidnapping and abduction. The Bill makes express provision for liability by omission for the offences of intentional serious injury, torture, unlawful detention, kidnapping, abduction and aggravated abduction.

59 *Id.*, para. 254.

60 Law Com. No. 143, *op cit*, para. 7.9.

61 *Id.*, clause 20(2); *cf Commentary* at paras. 7.11-7.15. The duty arising from joint enterprises is left as a matter of interpretation for the court.

62 Law Com. No. 177, *Commentary*, paras. 7.10-7.12.

63 L.C. 218, paras. 11.2.

Clauses 19 and 20 of the Bill provide:

"19.-(1) An offence to which this section applies may be committed by a person who, with the result specified for the offence, omits to do an act that he is under a duty to do at common law.

(2) This section applies to the offences under the following sections -

- (a) section 2 (intentional serious injury),
- (b) section 10 (torture),
- (c) section 11 (unlawful detention),
- (d) section 12 (kidnapping),
- (e) section 14 (abduction of child by parent, etc.), and
- (f) section 16 (aggravated abduction).

(3) References in those sections to acts shall accordingly be construed as including omissions.

20. The provisions of this Part have effect subject to any enactment or rule of law providing a defence, or providing lawful authority, justification or excuse for an act or omission."

3.40 Even though the statutory offence of assault under clause 6 of the Bill is itself triable summarily only, a verdict of assault may be returned by a court or by a jury as an alternative to any of the offences provided for in clauses 2, 3, 4 and 8 of the Bill.⁶⁴

Poisoning

3.41 Clause 5 of the Bill provides as follows:

"5. -(1) A person is guilty of an offence if, knowing that the other does not consent to what is done, he intentionally or recklessly administers to or causes to be taken by another a substance which he knows to be capable of interfering substantially with the other's bodily functions.

(2) For the purposes of this section a substance capable of inducing unconsciousness or sleep is capable of interfering substantially with bodily functions."

3.42 This offence, which replaces s.24 of the 1861 Act in accordance with the recommendations of the C.L.R.C.,⁶⁵ is triable either way and punishable on conviction on indictment by three years imprisonment. No new offence replacing

⁶⁴ Law Com. No. 218, clause 23.

⁶⁵ Fourteenth Report, paras. 184-191.

s.23 of the 1861 Act is contained in the Bill, as those more serious cases of endangering life or inflicting serious harm by the administration of poison or other noxious substances may be prosecuted under clauses 2 to 4 of the Code.

3.43 Following the recommendations of the C.L.R.C., the provisions of the Bill do not penalise the person who administers a drug to a person who consents, not intending death or serious injury or foreseeing (at the time of such administration) that either of them might occur. The C.L.R.C. was of the opinion that such conduct, if it is to be criminalised, should be the subject of an offence of administering a controlled drug without lawful excuse under the law relating to the misuse of drugs.⁶⁶

Assaults On Particular Classes Of Persons, Or In Particular Circumstances

3.44 The C.L.R.C. recommended the repeal of ss.21 and 22 of the 1861 Act without replacement on the grounds that rendering a person insensible or unconscious or incapable of resistance by strangling etc, as well as the administration of any stupefying or overpowering drug, could be adequately prosecuted under those provisions now contained in clauses 2-5 of the Bill:

"Where these types of provision are needed to prevent the use of such means to facilitate serious offences, special provision should be made in relation to the particular offences, as for example in rape; but we do not consider it necessary to apply a special provision with a maximum penalty of life imprisonment to the generality of indictable offences. In that context we think that the 3 year maximum penalty provided by the offences of causing injury or administering any substance capable of interfering substantially with another's bodily functions will be sufficient."⁶⁷

3.45 The repeal without replacement of ss.36, 37, 39 and 40 of the 1861 Act was similarly recommended. These offences have become obsolete; in any event they are inconsistent with a modern approach to criminal law because they attach significance to the identity of the victim, as opposed to the gravity of the assault, in circumstances no longer justified by any public interest.⁶⁸

3.46 On similar grounds, the abolition of the offence of impeding escape from a shipwreck, provided for in s.17 of the 1861 Act, was also recommended. This was in spite of the fact that some of the conduct potentially caught by that provision, such as impeding a rescuer in his endeavour to save a person from shipwreck, would no longer be criminal.⁶⁹

3.47 By contrast, clauses 7 and 8 of the Bill preserve the offences of

⁶⁶ *Id.*, para. 180, thereby effectively overruling *Cato* (1976) 62 Cr. App. R. 41.

⁶⁷ *Id.*, paras. 207-208.

⁶⁸ *Id.*, para. 180.

⁶⁹ *Id.*, paras. 205-206.

assaulting a constable in the execution of his duty and assault with intent to resist arrest. The clauses provide as follows:

"7. -(1) A person is guilty of an offence if he assaults -

- (a) a constable acting in the execution of his duty, or
- (b) anyone assisting a constable so acting,

knowing that, or being reckless whether, the person assaulted or the person being assisted is a constable.

(2) It is immaterial whether the person committing the assault is aware that the constable is or may be acting in the execution of his duty.

(3) In this section "assault" means the offence under section 6.

8. -(1) A person is guilty of an offence if he assaults another intending to resist, prevent or terminate the lawful arrest of himself or a third person.

(2) For the purposes of this section the question whether the arrest is lawful shall be determined according to the circumstances as the defendant believes them to be.

(3) In this section "assault" means the offence under section 6."

3.48 The Law Commission justified the retention of these offences as follows:

"... Consultation strongly supported our provisional conclusion, in line with the earlier recommendations of the C.L.R.C.,⁷⁰ that the special protection that the law seeks to extend to constables justifies the retention of the separate offence of assaulting a constable, on the assumption that the defendant knows that, or is reckless as to whether, the person assaulted is in fact a constable. We here repeat the considerations that lead us to maintain that view in this Report, as reflected in clause 7 of the Criminal Law Bill.

... We emphasise that clause 7 is only concerned with *assault*: that is, the application of force without injury being caused. The more serious offences (now provided by clauses 2-4 of the Criminal Law Bill) are likely to be charged in any case where the defendant causes any significant injury to a police officer. However, even though the offence

70 Fourteenth Report, paras. 167-176.

of assaulting a constable may seem to overlap with the general offence of assault, there is force in the view that to abolish the special offence might be misinterpreted as the removal of one of the present protections of police officers. There is also some merit in retaining a separate offence as a measure of 'labelling', to identify a category of conduct that the law regards as particularly serious.

... Following consultation, we remain of the view that the offence should, like assault itself, be summary only, and subject to a maximum of six months' imprisonment. That outcome may appear illogical, in that an apparently more serious species of assault attracts no higher penalty than assault generally. However, we do not see justification for any offence that alleges assault, but not injury, being tried on indictment. We are fortified in that view by the recent reduction of the present crimes of assault and battery to the status of summary offences by section 39 of the Criminal Justice Act 1988."

As for the offence of assault to resist arrest, the Commission:

"agreed with the C.L.R.C.⁷¹ that the main reason for retaining this aggravated offence, triable either way, is that the conduct at which it is aimed could be particularly serious from a public point of view, for instance if the assault were committed to prevent a police officer arresting a person suspected of murder; even though there would be available in such a case the offence of assault on a constable and, if any injury were caused, the offences now under clauses 2-4 of the Criminal Law Bill.

... We were, however, more concerned than were the C.L.R.C. about the arguments against retaining the offence. That Committee had itself stressed that the offence should not be used where a summary offence, such as simple assault or assault on a constable, is more appropriate; and we were minded to think that in any other cases the offences now in clauses 2 to 4 of the Criminal Law Bill are likely in practice to be available. We also doubted whether it would be right to apply specially severe sanctions either where the arrest was unlawful, or where it would have been so had the facts been as the defendant believed them to be; yet at the same time it could be argued that to include the latter defence might be to undermine the simple effect in support of law enforcement, that appeared to be the main justification for the offence."⁷²

The Commission decided to retain the offence.

3.49 A further particular class of assault, retained and provided for in clause 78 of the Draft Code, is that of assault with intent to rob the person assaulted or

71 *Id.*, paras. 181-182.

72 L.C. 218, paras. 22.4-22.8.

a third person. It is triable on indictment only and punishable by life imprisonment. This offence, currently provided for in English law by s.8 of the *Theft Act, 1968*, was reproduced as an offence against the person rather than as an offence against property under the Draft Code.⁷³ The Law Commission in its Consultation Paper expressed doubt as to whether there is ever any need to charge with the offence as the circumstances will be captured by a charge of robbery or attempted robbery. For that reason and for reasons of tidiness, the offence was excluded from the Bill.⁷⁴

Children And Servants

3.50 Any act which endangers the life or which permanently injures the health of an apprentice or servant would be covered by the proposed offences of causing injury or serious injury, and there is no longer any need for the continuation of an offence of neglect in respect of such persons. The C.L.R.C., therefore, recommended that consideration should be given, in consultation with the responsible government departments, to the repeal without replacement of s.26 of the 1861 Act and of s.6 of the *Conspiracy and Protection of Property Act, 1875*.⁷⁵

3.51 Similarly, because s.27 of the 1861 Act had been superseded by the offence of cruelty to children in s.1(1) of the *Children and Young Persons Act, 1933*, the repeal of this provision without replacement was also recommended.⁷⁶ At the same time, it was suggested that consideration be given to conferring a wider power of arrest for the offence of cruelty than is contained in s.13 of the 1933 Act. This power is the same as that relating to the identical offence of cruelty under Irish law, contained in s.19 of the *Children Act, 1908*.⁷⁷ In this respect, while some members of the C.L.R.C. were against an extension of the power of arrest on the grounds that it would lead to inappropriate prosecutions in family cases, others were of the view that police needed a power to intervene immediately to prevent a child from continually being ill-treated by brutal or negligent parents.⁷⁸

3.52 The C.L.R.C. was also of the view that, having regard to the proposed offences of causing injury and serious injury and to the existing offence of cruelty, the common law offences arising from breach of duties of care within the family and the common law offence of failing to provide for one's children could also be abolished.⁷⁹

3.53 Although the English Law Commission has recognised that cruelty to children is plainly an important offence against the person which properly

73 The Commentary, at para. 14.46, justifies this on the grounds that assault with intent to rob is "essentially an offence against the person"; Law Com. No. 177, *Commentary*.

74 L.C.C.P. 122, paras. 9.31-9.33, L.C. 218, para. 22.12.

75 Fourteenth Report, para. 209.

76 *Id.*, para. 201.

77 *Supra*, Chapter 1, page 82.

78 Fourteenth Report, para. 201.

79 *Id.*, para. 203.

belongs in a comprehensive criminal code, it has not been included in the Draft Code on the grounds that it stands alongside many other offences in the 1933 Act which are not offences against the person.⁸⁰

Offences Of Endangerment

3.54 Clause 86 of the Draft Code provides for an offence of endangering traffic in the following terms:

"(1) A person is guilty of an offence if he -

- (a) intentionally places any dangerous obstruction upon a railway, road, waterway or aircraft runway, or interferes with any machinery, signal, equipment or other device for the direction, control or regulation of traffic thereon, or interferes with any conveyance intended to be used thereon; and
- (b) is or ought to be aware that injury to the person or damage to property may be caused thereby.

(2) In this section -

- (a) "conveyance" means any conveyance constructed or adapted for the carriage of a person or persons or of goods by land, water or air;
- (b) "waterway" means any route upon water regularly used by any conveyance".

3.55 The offence, which is triable either way and punishable on conviction on indictment by 7 years imprisonment, is committed where a person acts intentionally and is negligent as to causing personal injury or damage to property. It replaces, and extends to road, air and waterways traffic, ss.32 and 33 of the 1861 Act, which were said by the C.L.R.C. to be too narrowly defined in requiring an intent to endanger the safety of persons using the railway.⁸¹ It is triable either way because it is clearly an offence which can be either very serious or comparatively trivial.⁸²

3.56 The C.L.R.C., at the apparent request of the British Railways Board and the British Transport Police, also recommended that the less serious offence of endangering the safety of any railway passenger under s.34 of the 1861 Act should be left unrepealed with a view to its eventual incorporation into specific

⁸⁰ Law Com. No. 177, *Commentary*, para. 14.60.

⁸¹ Fourteenth Report, para. 195.

⁸² *Id.*, para. 196.

railways legislation.⁸³ The Law Commission agreed that while s.34 would not be needed if clause 86 of the Draft Code were enacted, it belonged, if anywhere, in railways legislation.⁸⁴

3.57 Clause 86 of the Draft Code is restricted to specific acts like those contained in ss.32 and 33 of the 1861 Act, so that it is clearly not a general endangerment provision which would apply, for example, to cases of reckless driving. In this connection, the Law Commission has recognised that the provision has been criticised as being too limited and particular for a code:

"It is argued that the Code should include a general offence of deliberate endangerment. We acknowledge the force of this argument but the creation of a general offence would be a substantial measure of law reform, requiring discussion and consultation which we have not been able to undertake."⁸⁵

3.58 Nevertheless, the C.L.R.C. did consider two further offences of endangerment under the 1861 Act, namely wanton and furious driving under s.35 and the setting of traps under s.31. With regard to the first, a special provision for carriages and vehicles causing injury was inconsistent and unnecessary. The proposed offences of intentionally and recklessly causing serious injury and injury would cover these circumstances. The special circumstance of driving was a matter relevant to sentencing, not to the definition of a substantive offence.⁸⁶ The repeal, without replacement, of s.35 was accordingly recommended, even though the ambit of English road traffic law would be restricted to a limited extent, as there would be gap between the offences of careless driving and causing death recklessly (manslaughter).

3.59 The C.L.R.C. notes the fact that the section is not confined to offences on the public roadway, the single aspect that makes it a "useful" offence to prosecutors. To fill this gap, the C.L.R.C. suggested that consideration be given to replacing the offence of reckless driving (a subjective test) by a driving offence involving complete disregard for the life or safety of other persons (an objective test).⁸⁷

3.60 As regards s.31, the C.L.R.C. recognised the need for a modernised offence prohibiting such devices as traps and spring guns:

"In our opinion the restriction imposed upon the scope of the section by *Munks*⁸⁸ is unjustifiable, and such devices should be prohibited. But a householder must be allowed to take reasonable steps to deter unauthorised persons from entering his property, and what types of

83 *Id.*, para. 197.

84 *Op cit.*, para. 14.59(d).

85 *Id.*, para. 14.58.

86 Fourteenth Report, para. 144.

87 *Id.*, paras. 145-148. Irish law is not the same as English law in this respect, as we have noted in Chapter 1.

88 [1964] 1 Q.B. 304, discussed *supra*, Chapter 1, page 71.

device should be permitted and what types should not must raise questions of public policy. Most of us consider that a committee of lawyers alone are not a suitable body to advise on these questions on which wide consultation with the various interests involved will clearly be necessary. We are of opinion therefore that further consideration should be given to these matters by the appropriate government departments."⁸⁹

Affray, Threats And Harassment

3.61 Clause 200 of the Draft Code provides as follows:

"(1) A person is guilty of affray if -

- (a) he uses or threatens unlawful violence towards another; and
- (b) his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety; and
- (c) he intends to use or threaten violence or is reckless whether his conduct is violent or threatens violence.

(2) Where 2 or more persons use or threaten the unlawful violence, it is the conduct of them taken together that must be considered for the purposes of subs.(1).

(3) For the purposes of this section a threat cannot be made by the use of words alone.

(4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.

(5) Affray may be committed in private as well as in public places.

(6) A constable may arrest without warrant anyone he reasonably suspects is committing affray."

3.62 The clause essentially restates the new statutory offence of affray under s.3 of the *English Public Order Act, 1986*,⁹⁰ and is substantially wider than that originally recommended by the Law Commission in its *Report on Offences Relating to Public Order*.⁹¹ Although the offence in this form is clearly closer

⁸⁹ Fourteenth Report, para. 213.

⁹⁰ *Supra*, Chapter 1, page 87 *et seq.*

⁹¹ Law Com. No. 123, *Offences Relating to Public Order* (Cmd. 208541, 1983), paras. 100-101.

to being an offence against the person, it is nevertheless included in the chapter of the Draft Code concerned with offences against public peace and safety. Clause 200 may be prosecuted either way and is punishable on conviction on indictment by three years imprisonment. A minor departure from the 1986 Act, consequent upon the adoption in the Code of a uniform definition of recklessness in subjective terms, is that recklessness, as opposed to awareness, is required in respect of whether the defendant's conduct is violent or threatens violence. This means that in addition to being aware of the risk it must be unreasonable to take it.⁹²

3.63 Two further minor offences, again essentially restating offences created by the 1986 Act⁹³ and again more analogous to offences against the person than against public order, are contained in clauses 201 and 202 of the Draft Code. Clause 201(1) provides as follows:

"(1) A person is guilty of an offence if -

- (a) he uses towards another threatening, abusive or insulting words or behaviour; or
- (b) he distributes or displays to another any writing, sign or other visible representation which is threatening, abusive or insulting,

intending to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked".

3.64 It is triable summarily only and punishable by 6 months imprisonment and/or a fine not exceeding level 5 on the standard scale.

3.65 Clause 202(1) provides:

"(1) A person is guilty of an offence if -

- (a) he uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
- (b) he displays any writing, sign or other visible representation which is threatening, abusive or insulting,⁹⁴

⁹² Law Com. No. 177, *Commentary*, para. 18.4.

⁹³ Ss.4 and 5 respectively.

⁹⁴ The Commission recommends in its *Report on the Crime of Libel*, that the common law offence of defamatory libel be retained but that any prosecution for the offence should require the fiat of the D.P.P. with a view to confining prosecutions to serious cases only.

within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby, and he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting, or is reckless whether it is threatening, abusive or insulting or (as the case may be) he intends his behaviour to be or is reckless whether it is disorderly".

3.66 This offence is also triable by summary procedure only and punishable by a fine not exceeding level 3 on the standard scale.

3.67 Specific and, in the case of clause 202, somewhat unusual powers of arrest exist in respect of both offences.⁹⁵ They may be committed both in public and in private, except where both defendant and victim are in a dwelling⁹⁶ or where the defendant is in a dwelling and has no reason to believe that his behaviour will be heard or seen outside that or any other dwelling (clause 202).⁹⁷ A person is also not guilty of an offence under clause 202 if he has no reason to believe that there is any person within hearing or sight who is likely to be caused harassment, alarm or distress,⁹⁸ or if his conduct is reasonable,⁹⁹ though the burden of proof in respect of all three defences is on the defendant.¹⁰⁰ As regards clause 201, subclause (2) provides for an additional element of fault in that the defendant must intend his behaviour, etc, to be threatening, abusive or insulting, or be reckless as to whether it is so. An alternative verdict under clause 201 may be returned in the case of a person charged with affray under clause 200.¹⁰¹

3.68 Apart from the difference in severity of punishment, some important distinctions between the two offences may be noted. In clause 202, the conduct in question need not be directed towards another person as is required by clause 201. Nor is the offence under clause 202 expressed to be committed by the distribution of offensive matter, as opposed to its display. If, however, the conduct is itself disorderly, a person may be convicted of the less serious offence.¹⁰² Yet the principal difference between the two is that the offence under clause 202 is not designed to prevent violence; its aim is to prevent harassment, alarm or distress.¹⁰³

3.69 Whereas the essence of previous English law, contained in s.5 of the *Public Order Act, 1936*, was that the threat was required to be likely to cause a

95 Clauses 201(4) and 202(5). The power of arrest without warrant under the latter subclause is subject to a requirement that the constable warn the offender to stop engaging in conduct which the constable reasonably suspects to be offensive, and that the offender engage in further such conduct immediately or shortly after the warning.

96 Clause 201(3).

97 Clause 202(3)(b).

98 Clause 202(3)(a).

99 Clause 202(3)(c).

100 Clause 202(4).

101 Schedule 16, p.137.

102 In *Alexander v Smith* 1984 S.L.T. 176, it was held by the High Court of Justiciary that selling a racist magazine constituted disorderly conduct.

103 See Smith, *Offences against Public Order* (Sweet & Maxwell, 1987), para. 7.03.

breach of the peace, it is enough for the purposes of clause 201 of the Draft Code that the defendant has used threatening, abusive or insulting language or conduct such that it is likely that immediate violence will be provoked, or that it causes a person to believe that there will be immediate violence used against him or a third person.¹⁰⁴ Although "it is the very essence of a threat that it should be made for the purpose of intimidating or overcoming the will of the person to whom it is addressed",¹⁰⁵ the threat need not therefore be one offering physical violence.¹⁰⁶

3.70 The terms "abusive" and "insulting" are semantically very similar¹⁰⁷ and can be used more or less interchangeably as "ordinary words" within the province of the tribunal of fact.¹⁰⁸ According to Williams, "language or conduct is not said to be insulting unless it is intended to show contempt or disesteem, or is understood by the hearer or observer to show this attitude".¹⁰⁹ In practice, however, even though he does not intend to insult, or is not seeking to abuse, a person may be guilty of the offence if he is aware that his conduct is or might be insulting.¹¹⁰

3.71 Where the person threatened, abused or insulted is a reasonable, law-abiding member of the public, or a police officer, no offence will normally be committed under the second limb of the clause because he or she is unlikely to be provoked to use unlawful violence by the speaker's comments. But if the prosecution can show an intention to provoke unlawful violence, as by causing a police officer to over-react, there will be an offence under the first limb.¹¹¹

3.72 As regards the requirement in clause 202 that the victim be likely to suffer harassment, alarm or distress, this is clearly a much lower threshold than the violence or possibility of violence that is the touchstone of clause 201. In this respect, it appears that mere annoyance or irritation arising, for example, from inconvenience are less strong emotions than "distress", which connotes some degree of perturbation and emotional upset. Equally, "harassment" connotes an element of persistence which would not be satisfied by a single act; and although alarm is not expressed to relate to any particular source of concern, it cannot exist in a vacuum - a person who is alarmed experiences a sudden fear or apprehension of a particular danger.¹¹²

3.73 It has been pointed out that, wittingly or otherwise, the introduction of

104 S.5 of the 1936 Act was repealed by s.9(2)(b) of the *Public Order Act, 1986*. It too was couched in terms of "threatening, abusive or insulting words or behaviour", so that some of the case-law on the previous section is still pertinent.

105 *Wood v Bowron* (1866) L.R. 2 Q.B. 21 at 30 (*per* Lush J.).

106 As to the scope of threatening words or behaviour within the meaning of these sections, see generally, Smith, *op cit*, para. 6.07.

107 See *Dickey* [1971] Crim. L. Rev. 265 at 268.

108 *Brutus v Cozens* [1973] A.C. 854 (House of Lords).

109 *Op cit*, p.64.

110 Smith, *op cit*, para. 6.09. See also the judgment of McCullough J. in *Parkin v Norman* [1983] Q.B. 92; *R v Williams* [1968] Crim. L.R. 563; *R v Arrowsmith* [1975] Q.B. 678.

111 Smith, *op cit*, 6.12.

112 *Id.*, 7.07.

the above two offences into English law by the *Public Order Act, 1986*, effectively pre-empted the question of whether there should be a new statutory assault by words alone.¹¹³ Clearly, the offences are capable of commission by words alone, and would cover some of the conduct which the CLRC had previously described as "the type of minor threats which no reasonable person would wish to be subject to criminal sanctions."¹¹⁴ Moreover, in apparent recognition of recent legislative intent, they are incorporated into the Draft Code without discussion.¹¹⁵ Apart from the threatening offence under clause 9, the Bill does not deal with threats, affray and harassment in the content of non-fatal offences against the person.

Explosives, Firearms And Offensive Weapons

3.74 Neither the C.L.R.C. nor the English Law Commission has yet undertaken a general review of explosives legislation, including ss.28, 29, 30, 64, and 65 of the 1861 Act and the *Explosives Substances Act, 1883*. It is intended, however, to include these offences in a comprehensive criminal code following such review.¹¹⁶

Torture

3.75 The United Kingdom has ratified the *United Nations Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment* and the *European Convention for the prevention of Torture and Inhuman or Degrading Treatment or Punishment*.¹¹⁷ Although other multilateral treaties such as the *International Covenant on Civil and Political Rights*¹¹⁸ (Art. 7) and the *European Convention on Human Rights*¹¹⁹ (Art. 3) expressly implement the absolute prohibition of torture under public international law,¹²⁰ the U.N. Convention differs in requiring specific domestic implementation by the creation of a new criminal offence of torture as well as the making of consequent

113 *Id.* 6.07.

114 Fourteenth Report, para. 159.

115 The English Law Commission in its *Commentary*, Law Com. No. 177, para. 18.4 simply states that clauses 198-202 of the Draft Code reproduce the offences contained in ss.1-5 of the 1986 Act.

116 Fourteenth Report, para. 202, note 1; Law Com. No. 177, *Commentary*, paras. 14.59 (b) and 18.11(b).

117 Adopted by the General Assembly of the U.N. on 10 December 1984. See generally, Burgers & Danelius, *The UN Convention against Torture*, (Martinus Nijhoff, Dordrecht/Boston/London, 1988); Chanet, 'La Convention des Nations Unies contre la torture et autres traitements cruels, inhumains ou dégradants,' (1984) 30 *Annuaire Français du Droit International* 625-636. The U.K. has recently made a declaration under Article 21 of the Convention recognising the competence of the Human Rights Committee to receive and consider communications from a State Party claiming that another State Party is not fulfilling its obligations under the Convention.

118 *International Covenant on Civil and Political Rights, and Optional Protocol*, 19 December 1966, (1967) 6 I.L.M. 368, entered into force in January 1976.

119 Duffy, *Article 8 of the European Convention on Human Rights* (1983) 32 I.C.L.Q. 316; also Doswald-Beck, (1978) 25 *Netherlands Internat. L. Rev.* 24.

120 Donnelly, *The Emerging International Regime against Torture* (1986) 33 *Netherlands Internat. L. Rev.* 1-23; Sohn, *Torture as a Violation of the Law of Nations* (1981) 11 *Georgia J. of Internat. & Compar. L.* 307.

arrangements for extradition.¹²¹

3.76 In order to enable the U.K. to ratify this Convention, an offence of torture was introduced by s.134 of the *Criminal Justice Act, 1988*.¹²² This has, in turn, been reproduced firstly in clause 74 of the Draft Criminal Code and subsequently in clause 10 of the Bill which provides as follows:

- "(1) A person commits the offence of torture if -
 - (a) in the performance or purported performance of his official duties as a public official, or
 - (b) at the instigation or with the consent or acquiescence of a public official who is performing or purporting to perform his official duties,

he intentionally inflicts severe pain or suffering on another.

(2) An offence under this section is committed whatever the nationality of the persons concerned and whether the conduct occurs in the United Kingdom or elsewhere.

(3) It is immaterial whether the pain or suffering is physical or mental.

(4) It is a defence in respect of any conduct for the defendant to prove that he had lawful authority, justification or excuse for the conduct.

(5) For this purpose "lawful authority, justification or excuse" means -

- (a) in relation to pain or suffering inflicted in the United Kingdom, lawful authority, justification or excuse under the law of the part of the United Kingdom where it was inflicted;
- (b) in relation to pain or suffering inflicted outside the United Kingdom by a United Kingdom official acting under the law of the United Kingdom, or any part of the United Kingdom, lawful authority, justification or

121 A Draft Optional Protocol submitted by Costa Rica at the time of the adoption of the Convention aimed to establish a preventive mechanism at the international level similar to that now provided for by the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, of 26 November 1987, which entered into force on 1 February 1989, (1989) 10 H.R.L.J. 192. See Cassese, *A New Approach to Human Rights - the 1987 Convention for the Prevention of Torture* (1989) 83 A.J.I.L. 128-153; Nowak (1988) 15 *Europäische Grundrechte-Zeitschrift*, 537; Vigny (1987) 43 *Annuaire Suisse du Droit International*, 62.

122 1988 *Current Law Statutes Annotated* (Sweet & Maxwell), C.33, pp.134-138 (entry into force on 29 September 1988). The offence is also in force in Northern Ireland, see (1988) 8 B.N.I.L.16.

excuse under that law;

- (c) in any other case, lawful authority, justification or excuse under the law of the place where the pain or suffering was inflicted.

(6) In this section "public official" includes any person acting in an official capacity, and "United Kingdom official" shall be construed accordingly."

3.77 The offence is triable on indictment only, and only by or with the consent of the Attorney General,¹²³ and is punishable by life imprisonment.

Under the Convention, torture is only defined as acts committed by a public official or someone acting in an official capacity, or acting with the consent or acquiescence of an official or such person. Moreover, the mental pain or suffering must be inflicted intentionally. Not all forms of torture will amount to criminal offences. In addition, psychological torture can take many forms such as being required to listen to someone else's physical suffering, deliberate disorientation and sensory deprivation. For this reason, and because of the risk that the word "inflict" might be narrowly construed to exclude liability for omissions, subclause (3) makes express reference to liability for omission so as to satisfy the U.K.'s international obligations in the matter.¹²⁴

3.78 Subclause (2) gives U.K. courts extra-territorial jurisdiction over offences of torture anywhere in the world. Although under Article 5 of the U.N. Convention a country is only required to establish such jurisdiction over torture by its nationals, committed on its ships or aircraft and (if it chooses) where its nationals are victims,¹²⁵ the offence under clause 74 of the Draft Code is considerably wider. Jurisdiction is conferred over all torturers everywhere, but if the alleged torturer is not a U.K. official, any possible defence is to be considered according to the law of the country where the events occurred. Since, according to Amnesty International,¹²⁶ torture is said to be practised in approximately half of the states of the world, this jurisdiction is theoretically a large one. Nevertheless, choice of law considerations, the necessity for successful extradition and the requirement of the Attorney General's consent for prosecution will, in practice, operate to make such prosecutions exceptional.

3.79 Sections 136-138 of the 1988 Act provide for the requisite extradition arrangements in respect of torture.¹²⁷

123 S.35 of the 1988 Act.

124 1988 *Current Law Statutes Annotated*, *supra*, n.122.

125 See texts cited, *supra*, n. 121.

126 *Torture in the Eighties*, Amnesty International Publications, London, 1984.

127 1988 *Current Law Statutes Annotated*, *supra*, n.122.

Detention And Abduction

3.80 In its Report, the C.L.R.C. recommended the creation of two offences of detention and two of abduction to replace the common law crimes of kidnapping and false imprisonment and the statutory offences of child stealing and abduction of an unmarried girl under the age of sixteen.¹²⁸ The *Child Abduction Act, 1984*, in substance, enacted the first of the two proposed abduction offences and created a second offence, going beyond the recommendations of the C.L.R.C., which may be committed by a person exempted from liability under the first abduction offence who takes or sends a child under the age of sixteen out of the U.K. without the "appropriate consent".¹²⁹ Clauses 11-16 of the Criminal Law Bill implement the C.L.R.C.'s recommendations, save where they have been overtaken by later legislation, which again is reproduced in substance in those clauses.

3.81 Clause 17 provides for the interpretation of "takes", "detains", "sends" and acting "without the consent" of another for the purposes of this group of offences:

17.-(1) For the purposes of sections 11 to 16 (offences of detention or abduction) -

- (a) a person shall be regarded as taking another if he causes the other to accompany him or a third person or causes him to be taken;
- (b) a person shall be regarded as detaining another if he causes the other to remain where he is; and
- (c) a person shall be regarded as sending another if he causes the other to be sent.

(2) For the purposes of those sections a person shall be treated as acting without the consent of another if he obtains the other's consent -

- (a) by force or threat of force, or
- (b) by deception causing the other to believe that he is under legal compulsion to consent.

3.82 In its Working Paper, the C.L.R.C. had suggested that "carrying off" should form part of the definition of the offences of detention and kidnapping. However, as "carrying off" is a form of detention and because it was desired that neither offence should be limited to such an action, this suggestion was subsequently abandoned.

¹²⁸ Fourteenth Report, para. 251. In its Report to the English Law Commission, Law Comm. No. 143, the Code Team did not consider this group of offences.

¹²⁹ 1984, c37. Cooper, *The Child Abduction Act 1984* (1985) J. of Crim. L. 69.

Unlawful Detention

3.83 Clause 11 replaces the common law offence of false imprisonment by one of unlawful detention, in the following terms:

11. A person is guilty of the offence of unlawful detention if he intentionally or recklessly takes or detains another without his consent.

The offence is triable either way and punishable on conviction on indictment by 5 years imprisonment. Clause 11 follows the recommendations of the C.L.R.C., who explained that:

"[T]he essence of unlawful detention should be the intentional or reckless detention, without lawful excuse, of a person without his consent and that it should cover (as the present law does) detaining a person, causing him to remain where he is, or causing him to accompany another person. Acquiescence obtained by duress should, of course, be no defence. We also propose that the offence should be committed where the victim acquiesces because he believes that he is under legal compulsion. An example would be where a person causes another to accompany him by falsely pretending that he is a police officer. We do not propose that other cases of deception should be included. The young man who persuades a girl to accompany him to a quiet spot on some untrue pretext, when in fact he is intending to make advances to her, should not be guilty of unlawful detention. ... In practice it will seldom be necessary to prosecute a parent, who has not got lawful control, for the unlawful detention of his child because such conduct will usually amount to a disobedience of a court order if there is in existence an order of a court exercising family jurisdiction. ... Nevertheless cases can occur when rapid preventive action in the interests of a child is required, as for example when a mentally disturbed father who has shown a propensity to violence, forcibly takes a young child out of its mother's care. Although the family courts can act quickly, the police, who will have power to arrest for the criminal offence, will be able to act even more quickly."¹³⁰

Kidnapping

3.84 The offence of kidnapping is defined in clause 12 of the Bill as an aggravated form of unlawful detention, punishable on indictment only by life imprisonment:

12. A person is guilty of the offence of kidnapping if he takes or detains another without that other's consent, intending to hold him to ransom or as a hostage, to send him out of the United Kingdom,

130

Fourteenth Report, para. 235, note 3.

or to commit an arrestable offence."

3.85 The definition again closely follows the recommendations of the C.L.R.C., who abandoned a previous suggestion in its Working Paper that kidnapping should also cover cases in which a person uses drugs or the threat of injury to detain a person. The question was also considered at that time as to whether a person who detains another, with the intention of subjecting the other to prolonged imprisonment, should fall within the offence of kidnapping. This too was rejected, on the grounds of difficulties of interpretation, as well as because virtually all such cases would involve the use of force, which in itself, in the view of the majority of the C.L.R.C., should transform the detention into a kidnapping. On consideration, however, it was decided that all of these circumstances were matters relevant to sentence after conviction for unlawful detention only; they should not form part of the definition of the more serious offence of kidnapping.¹³¹

3.86 Some criticisms received by the C.L.R.C. following the publication of its Working paper, suggested that a proviso should be included to the effect that a child under a certain age is not capable of giving a valid consent so as to negative unlawful detention or kidnapping. This would make the separate offences of abduction and aggravated abduction unnecessary. In reply, it was stated that

"... there is an important distinction between, on the one hand, the offences of unlawful detention and kidnapping, and on the other, the offences of abduction and aggravated abduction: the first two offences protect the liberty of the person, the second two the rights of parents. We are therefore recommending that certain specific defences should be created relating only to the abduction offences and not to unlawful detention and kidnapping."¹³²

Abduction

3.87 Accordingly, the essence of the abduction offences contained in the Bill is that they are committed without the consent of the child's parent or guardian. Clause 14 reproduces s.1 of the *Child Abduction Act, 1984*, and applies, in the main, to the so-called "tug of love" cases where a parent, disgruntled at being deprived of custody by a court, abducts the child and flees to another country.¹³³ Clause 15, corresponding to s.2 of the 1984 Act, creates a further offence of abduction where the wrongdoer is not a parent or guardian or a person in whose favour a custody order is in force. Such a person

131 Fourteenth Report, para. 236.

132 *Id.* para. 229. In its Working Paper, para. 153, the C.L.R.C. had proposed a third abduction offence, namely abduction of a child under 18 with intent to commit a sexual offence, punishable with a maximum penalty of two years imprisonment. Consideration of this proposal was deferred in its 14th Report as more naturally falling within its reference on sexual offences.

133 See Cooper, *op cit.* for an analysis of this offence. The Commission has already proposed the introduction of a similar offence in Irish Law, *cf Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters* (LRC 2-1985), p.44.

"(1) ... is guilty of an offence if, without lawful authority or reasonable excuse, he takes or detains a child under the age of sixteen -

- (a) so as to remove him from the lawful control of any person having lawful control of the child; or
- (b) so as to keep him out of the lawful control of any person entitled to lawful control of the child."

3.88 Unlike the offence under clause 14, there is no need for the removal of the child from the jurisdiction. Triable either way and punishable on conviction on indictment by seven years imprisonment, the offence is wider than s.56 of the 1861 Act in not requiring an intent to deprive a parent of possession. This accords with the proposals of the C.L.R.C., who wished to make clear that the offence of abduction should not require a "substantial interference" with the possessory relationship of parent and child, such as had been held to be the case in *Jones*, and also to ensure that interference with the responsibilities of persons having lawful control of the child for the time being should suffice. Thus, removal from a boarding school or child-minder's home is catered for.

3.89 Whereas the C.L.R.C. envisaged that the relevant age of the child victim of all abduction offences would, as under s.56 of the 1861 Act, be 14, "since parental control after that age may be difficult or non-existent", the 1984 Act and the Bill fix the age at 16. The pre-existing law is thus somewhat widened and this is taken a stage further by the extension in clause 17 of "taking" and "detaining" to include causing the child to be detained or inducing the child to remain with him or any other person. Although no express reference to *mens rea* is made, it follows from the recommendation of the C.L.R.C. that intention or recklessness as to either of the results in subclause (1)(a) or (b) will suffice.

Aggravated Abduction

3.90 The offence of aggravated abduction is provided for by clause 16 of the Draft Code. It is triable on indictment only and punishable on conviction on indictment by life imprisonment. It consists of the *actus reus* of abduction under subs.1 of clause 15 together with one of the intents required for kidnapping under Clause 12, i.e. with intent to hold the child to ransom or as a hostage, or to commit an arrestable offence, or, except in the case of a parent or guardian or a person in whose favour a custody order is in force, to send the child out of the United Kingdom. The offence of aggravated abduction, following the proposals of the C.L.R.C., is designed to cover cases in which the child is "kidnapped" but the facts do not amount to kidnapping as such because the child is a willing participant.

Child Abduction In Scotland

3.91 Unlike other common law jurisdictions, in Scotland the common law offences of abduction and plagium have survived and continued to govern the law

relating to child abduction. Abduction is committed by any person who carries off or confines any person forcibly against his will without lawful authority. Although not restricted by reference to the age of the victim or the purpose for which the abduction is carried out, it is an essential feature of the offence that the will of the victim is overcome, a requirement which has naturally given rise to difficulty in cases concerning the inducement of children. Plagium is the common law crime of child stealing which may be committed against children below the age of puberty. Such children are for this purpose treated as the property of their parents and therefore capable of being stolen. In consequence, plagium is "an archaic and somewhat anomalous crime" of aggravated theft.

3.92 In a recent review of the law relating to child abduction in Scotland, the Scottish Law Commission recommended that whereas the common law crime of abduction should not be abolished or specially modified by statute in relation to children, it should be supplemented by a single statutory offence of taking or detaining a child which would replace the common law offence of plagium. The proposed offence is similar in terms to clause 84 of the Draft Code, save that a person acting with lawful authority is expressed to include a person with a right of access to the child acting within the scope of that right. The adoption of this single offence was favoured over a previous suggestion that additional offences be created of removing a child by violence and of abduction so as to cause harm or danger to the child, or with the intention of causing him distress.

Hostage-taking

3.93 Clause 13 of the Bill reproduces the offence of hostage-taking created by s.1 of the *Taking of Hostages Act, 1982*, which itself was introduced for the purposes of implementing the *International Convention against the Taking of Hostages*:

"13.-(1) A person is guilty of the offence of hostage-taking if he takes or detains another and, in order to compel a state, international governmental organisation or person to do or abstain from doing any act, threatens to kill or injure him or to continue to detain him."

For the purposes of this offence, which is triable on indictment only and only by or with the consent of the Attorney General, both the nationality of the offender and the country where the offence is committed are immaterial.

3.94 The extradition arrangements in respect of hostage-taking are set out in the 1982 Act. Any offence under the Act or an attempt to commit such an offence may, in the absence of an extradition agreement between the United Kingdom and any other State Party to the Convention, be made extraditable by Order in Council. For this purpose the offence, wherever committed, is treated as having been committed within the jurisdiction of the other State Party.¹³⁴

Detention And Abduction By Omission

3.95 The C.L.R.C. recommended that all offences of detention and abduction should be expressed to be capable of commission by omission.¹³⁵ The offences in clauses 11, 12, 14 and 16 of the Bill are included in clause 19 as offences that can be committed by omission.¹³⁶

Alternative Verdicts

3.96 Clause 23 of the Bill provide for alternative verdicts as follows:

"23.-(1) For the purposes of the application of section 6(3) of the Criminal Law Act 1967 (alternative verdicts) to the trial of a person on indictment for any offence under this Part an allegation in the indictment of knowledge or intention includes an allegation of recklessness.

(2) If on the trial on indictment of a person charged with an offence under -

- (a) section 2 (intentional serious injury),
- (b) section 3 (reckless serious injury),
- (c) section 4 (intentional or reckless injury), or
- (d) section 8 (assault to resist arrest),

the jury find him not guilty of the charge, they may (without prejudice to section 6(3) of the Criminal Law Act 1967) find him guilty of an offence under section 6 (assault).

(3) If on the summary trial of a person charged with an offence under section 3 (reckless serious injury) the magistrates' court find him not guilty of that offence, they may find him guilty of an offence under section 4 (intentional or reckless injury) or section 6 (assault).

(4) If on the summary trial of a person charged with an offence under -

- (a) section 4 (intentional or reckless injury),
- (b) section 7 (assault on a constable), or
- (c) section 8 (assault to resist arrest),

the magistrates' court find him not guilty of that offence, they may find him guilty of an offence under section 6 (assault)."

¹³⁵ Fourteenth Report, para. 256.

¹³⁶ *Supra*, para. 3.36.

CHAPTER 4: CODIFICATION IN CANADA

4.1 The existing Canadian Criminal Code was first enacted in 1892,¹ and though amended many times since, with a major revision in 1955,² it remains much the same in structure, style and content as it was then.³ The Law Reform Commission of Canada was of the view that the Code, in addition to containing many gaps and obsolete provisions, over-extends the proper scope of the criminal law, is poorly organised and hard to understand, and fails to address many current problems.⁴ It may be noted in this connection that, in respect of non-fatal offences against the person, the substantive provisions of the Code are similar to those currently in force in Ireland.

4.2 In 1987, the Canadian Law Reform Commission published a new draft Criminal Code,⁵ being the culmination of fifteen years work on the simplification and rationalisation of the substantive criminal law. The proposed Code contains a useful classification of offences against the person, in the following terms:

(a) Crimes against personal safety and liberty⁶

1 Criminal Code, S.C. 1892, C. 29.

2 Criminal Code, S.C. 1953-54, C. 29.

3 Criminal Code, R.S.C. 1970, C. 34. The Law Reform Commission of Canada has been abolished and its functions taken over by the Federal Department of Justice.

4 *Report on Recodifying Criminal Law* (Report 31), Ottawa: L.R.C.C., 1987, at p.1. This Report is a revised and enlarged edition of Report 30 (1986).

5 *Id.* Introduction pp.1-5.

6 S.7 of the Canadian Charter of Rights and Freedoms provides, in terms similar to s.7(a) of the Canadian Bill of Rights and to the Fifth and Fourteenth Amendments to the U.S. Constitution, that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". It is established that each of these rights "is a distinct though related concept to be construed as such by the courts in a substantive, not merely procedural, sense": see *Reference re. s.94(2) of the Motor Vehicle Act* (1985) 24 D.L.R. (4th) 536 at 546-7. See generally, Hogg, *Canada's New Charter of Rights* (1984) 32 Am. J. Comp. L. 283; Alexander, *The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada* (1989) 105 L.Q.R. 561.

- (i) crimes against life (unlawful homicide)
 - (ii) crimes against bodily integrity
 - (iii) crimes against psychological integrity
 - (iv) crimes against personal liberty
 - (v) crimes causing danger; and
- (b) Crimes against personal security and privacy, which comprise unlawful surveillance and criminal intrusion.

4.3 The proposed Code does not ascribe sentences to these or any other offences, this task having been left to the Canadian Sentencing Commission.⁷

Crimes Against Bodily Integrity

4.4 Two basic offences of assault and of causing bodily harm are defined in ss.244 to 245.3 of the present Criminal Code. Assault may be committed in four different ways; by direct application of force⁸ (common law battery); by threatening to apply force⁹ (common law assault); by attempting to apply force¹⁰ (a surplusage since an attempt to commit a crime is itself a crime); and by armed begging¹¹ (an act remote from both the actual application of force and the threat of immediate violence). The offence of causing bodily harm, though nowhere defined, includes all assaults other than those of a trifling nature.¹² Other provisions in the Code provide for assaults on peace officers¹³ and officiating clergymen¹⁴, for masters causing bodily harm to servants and apprentices¹⁵, and for causing bodily harm with intent¹⁶, an aggravated form of the offence defined in s.245.3.

4.5 Other related offences include those of prize fighting¹⁷, pointing a firearm¹⁸, causing a disturbance in a public place by a variety of acts including fighting, molesting and discharging firearms¹⁹, the throwing of offensive volatile

7 The general principles of sentencing reform in Canada are set out in *"Sentencing Reform, A Canadian Approach"*, Report of the Canadian Sentencing Commission (1987).

8 Para. 244(1)(a). "Force" covers any touching, however slight and brief, without the exertion of strength or power: see *R v Burden* (1981) 64 C.C.C. (2d) 68.

9 Para. 244(1)(b).

10 *Id.*

11 Para. 244(1)(c).

12 Subs.245(2) of the Code formerly provided for two offences, unlawfully causing bodily harm and assault occasioning bodily harm. By reason of a 1982 amendment (S.C. 1980-81-82-83, c. 125, s.19), assault causing bodily harm, punishable by five years imprisonment, is now governed by para. 245(1)(1)(6), whereas the offence of unlawfully causing bodily harm is governed by s.245.3. Like assault with a weapon, it is punishable by ten years imprisonment. The penalty for aggravated assault, defined in s.245.2 as one which wounds, maims, disfigures or endangers the life of the victim, is fourteen years.

13 Para. 246(1)(a). Although a person who assaults another whom he knows to be an officer does so at his peril, the prosecution having no need to prove that the accused knew he was so acting, the offence requires the officer to be executing his duty at the time of the assault. This duty extends to taking reasonable steps to save the life of a person attempting suicide: see *R. v Dietrich* (1978) 39 C.C.C. (2d) 361 at 364.

14 S.172.

15 S.201.

16 S.228. This section is similar in terms to s.18 of the *Offences Against the Person Act, 1861*, *supra*, Chapter 1, page 63, though an ulterior intent to endanger the life of any person is included instead of an intent to disable.

17 S.81.

18 S.84.

19 S.171.

substances²⁰, administering a noxious thing²¹, and setting traps likely to cause bodily harm.²² Other specific offences contained in the Code include the communication of a venereal disease²³, the uttering of threats by letter, telegram, telephone, etc²⁴, and threats, etc, made in order to compel another to do or abstain from doing anything that he has a lawful right to do or abstain from doing.²⁵

4.6 The exact nature of the *mens rea* for assault is less than certain in Canada²⁶. There is also considerable lack of clarity as to the exact scope of the *actus reus* of the basic offences, in particular as to whether they may be committed by omission or by words alone and as to the meaning of "bodily harm".²⁷ This confusion, according to the Commission, is exacerbated by a conceptual flaw in the structure of the offences outlined above:

"More serious, however, is the way the law [has] erected serious assaults on the back of technical assaults. To a large extent many of the specific aggravated offences of violence are viewed as differing from the basic offences only in degree. Ordinary assault is applying technical force to a non-consenting victim, and aggravated assault is applying more force, that is, more than technical force, to a non-consenting victim. And force that is more than technical is force that causes bodily harm.

This view obscures at least three things. It blurs the fact that the difference between simple and aggravated assault is not so much a difference in degree as a difference in kind - touching that causes harm involves an additional dimension quite absent from mere touching. It confuses the two different values at stake: the law against simple assault protects one's right to bodily *inviolability* and to security against having liberties taken with one's person, whereas the law against assaults causing bodily harm protects one's right to bodily *integrity* and to security against bodily injury - the former looks to a kind of right to privacy and the latter to a right to be left whole. Finally it muddies the waters as concerns consent, because true consent is always a defence to simple

20 S.174.
 21 S.229, requiring an intent to endanger the life of, or to cause bodily harm to, the victim, or an intent to aggrieve or annoy the victim.
 22 S.231.
 23 S.253.
 24 The essence of this offence, provided for in s.331 under the chapter on offences against property, is the means of expressing the threat: see *R. v Basaraba* (1976) 24 C.C.C. (2d) 296 at 297. In consequence, when uttered through the required means, it is not necessary that the recipient appreciated that he was being threatened: *R. v Carons* (1978) 42 C.C.C. (2d) 19 at 21, or that the accused intended to carry out the threat: *R. v Johnson* (1913) 9 Cr. App. 57, 49. Nor need the intended victim be the direct recipient of the threat: *R. v Thompson* (1981) 59 C.C.C. (2d) 514 at 516. The offence has therefore been critically described as one which "consists in the simple expression of a thought" (*per* Beetz J.) in *R. v Nabis* (1975) 18 C.C.C. (2d) 144 at 154.
 25 S.381. This offence extends also to intimidation, watching, besetting and following for such purpose, and although usually prosecuted in relation to industrial disputes, it is not limited to that context: *R. v Basaraba* 24 C.C.C. (2d) at 298. The offence of threatening extends to a veiled or indirect threat without physical violence: *R. v Bonhomme* (1947) 88 C.C.C. 100 at 102-103.
 26 Assault was traditionally viewed as a crime of intent, a view apparently accepted in *R v George* [1960] S.C.R. 871 at 877 and 891 and *Leary v The Queen* [1977] 33 C.C.C. (2d) 473 at 476, 481 and 485. Since *Venna* [1976] Q.B. 421, the textbooks are in conflict, see L.R.C.C. W.P.38, *Assault* (1984) pp.6-7.
 27 L.R.C.C. W.P. 38, *Assault* (1984), pp.7-18 and 23-24.

assault but not necessarily always to assault causing bodily harm. Simple assault is essentially an act *in invitum* and assault causing bodily harm is not. However, offences which are not *in invitum* cannot really be built on the backs of those which are.

Most noteworthy of all, however, is the failure of English and hence Canadian law to recognise the existence of anything between simple assaults and those involving bodily harm. All that the law has provided for is simple assault (in the sense of battery) and a variety of more serious assaults causing harm. And, as we saw, the latter are seen simply as aggravated forms of the former.

Yet if we step back from the law, we cannot help seeing that in this context there are not two but three possibilities. At one end of the spectrum is *touching*, which only becomes objectionable when the victim objects or where it is clear that anybody in his shoes would object. At the other end is *harming*, which produces some permanent or long-lasting impairment of the victim's body or its functions and which may be objectionable whether or not the actual victim objects. There is a value set on physical wholeness and a general objection made to its impairment. Midway between touching and harming comes *hurting* (in the sense of inflicting pain without causing injury or damage) which is objectionable but only *prima facie* because there is no objection where the actual victim consents.

In our view, the failure to recognise a place for hurting has contributed to confusion. It has led the courts to stretch the meaning of 'bodily harm' to cover 'hurt ... that interferes with *comfort*' so long as it is more than transient or trifling - presumably it would cover what is done to patients sometimes by dentists and doctors. It has helped to misconceive the role of consent, because it may be argued that consent can legitimise hurt but cannot in general legitimise harm. It also obscures the existence of another value - the value set on the right to be free from pain and suffering, as opposed to the right to be free from having liberties taken with oneself and the right to be secure from harm and injury. Finally, it prevents a truly principled approach to the issues of medical treatment and physical sports."²⁸

4.7 The new Code accordingly restricts this area of the law to crimes of actual violence, relocates the crime of threatening immediate violence to the Chapter on "crimes against psychological integrity"²⁹ and reduces the rest of the law to two offences, in the following terms:

"7.-(1) **Assault by Touching or Hurting.** Everyone commits a crime who [offensively] touches or hurts another person without that

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29

Id., pp.25-26.
See our discussion later in this Chapter, page 172 *et seq.*

other's consent.

7.-(2) **Assault by Harming.** Everyone commits a crime who harms another person

- (a) purposely;
- (b) recklessly; or
- (c) through negligence."

4.8 Whereas the first offence is committed "purposely" only (a term which replaces "intent" in the new Code in order to overcome problems of specific and general intent)³⁰, assault by harming may be committed recklessly or through criminal negligence. Recklessness in the Code is given a subjective meaning, in that the defendant must be conscious that consequences will probably result from his deliberate conduct or that the circumstances of such conduct probably obtain.³¹ By contrast, criminal negligence, which is confined in the Code to negligently causing death or harm to another, or risk of death or harm to another, constitutes "a marked departure from the ordinary standard of reasonable care" in engaging in conduct, or taking a risk (conscious or otherwise) that consequences will result or that circumstances obtain.³² Where the risk is taken consciously, the difference between negligence and recklessness depends on the degree of unreasonableness, and this calls for a value judgment in each particular case.

4.9 Unlike assault by touching or hurting, assault by harming may also be committed by omission.³³ As regards assault by touching, a minority of the Commission would add the word "offensively" before "touches" to rule out trivial touching not ordinarily considered objectionable and to avoid resort to the fiction of implied consent as a means of excluding liability for non-hostile social contact. However, this approach was considered by the majority to be problematic. If the term is used subjectively, then it merely repeats the requirement that the touching be against the victim's will. If it is used objectively, then the law would be saying that, even in the absence of a legally recognised excuse or justification, it is not necessarily a crime deliberately to touch another against his will - which would be to abandon the notions of privacy and bodily inviolability which the offence is designed to protect.³⁴

30 Clause 2(4)(b) provides:

(i) A person acts purposely as to conduct if he means to engage in such conduct, and, in the case of an omission, if he also knows the circumstances giving rise to the duty to act or is reckless as to their existence.

(ii) A person acts purposely as to a consequence if he acts in order to effect:
(A) that consequence; or
(B) another consequence which he knows involves that consequence.

31 Also defined in clause 2(4)(b). An alternative formulation is also given: "A person is reckless as to consequences or circumstances if, in acting as he does, he consciously takes a risk, which in the circumstances known to him is highly unreasonable to take, that such consequences may result or that such circumstances may obtain".

32 *Id.*

33 L.R.C.C. W.P. 38, *Assault* (1984), p.27. See *infra*, for liability for omissions under the proposed Code in general.

34 L.R.C.C. Report 31, p.62.

4.10 The fundamental nature of these rights also overcame any objections to the retention of an offence similar to technical battery at common law. The problem of trivial wrongdoing was by no means peculiar to the offence of assault, and could be adequately dealt with by the defence of mistake of fact.³⁵

4.11 The Commission considered that a scheme of assault which distinguished hurting, defined as "inflicting physical pain", from harming, which means "to impair the body or its functions permanently or temporarily",³⁶ would have the particular advantage of allowing consent to "operate in law, just as in common sense, as a defence to touching or hurting, but not to harming".³⁷

"Clearly we recognise that consent can licence infliction of pain, for example, the pain inflicted by a beautician, a tattooist, an arm-wrestler, a boxer, a scientific experimenter, and so forth. And while we don't usually consent to pain, we do so often enough to make it impossible to exclude consent as a defence to hurting. Where problems do arise, they concern pain inflicted for sexual gratification. If the defendant pays the victim to let the defendant flagellate her, should the victim's consent be a defence? If X agrees to let Y, her immediate superior, cane her for some wrongdoing rather than report her to a higher authority with risk of dismissal, should X's consent be a defence for Y? If A pays B to inflict pain on him, should it make any difference to B's criminality whether A wants to conduct a scientific experiment, wants to be punished for his sins or is just indulging his masochism? Our own tentative view is this: since hurting causes no permanent or lasting damage, since it would be difficult for courts to inquire into motives and reasons in such cases and since it is hard to articulate a principle which would criminalise, say, the beating with his own consent of TE Lawrence but legitimise, say, the scourging of Henry II at Canterbury, the law should operate on the principle that consent is always a defence to hurting."³⁸

4.12 Such consent must be given by a competent person and not obtained by force, threat or deceit.³⁹

4.13 The Commission had initially considered that whereas a defence of informed consent to harm arising from medical treatment should be expressly provided for, no express rule was necessary in respect of sporting injuries - in lawful sports, participants should, by simple inference from the circumstances, be

35 *Id.* Clause 3(2) provides that no one is liable for a crime committed through lack of knowledge which is due to mistake or ignorance as to the relevant circumstances. This defence is subject to a requirement that the defendant's lack of knowledge, in crimes of recklessness and negligence, is not due to his own recklessness or negligence; nor will it operate where on the facts as he believed them he would have committed an included crime or a different crime to that charged.

36 These definitions are contained in clause 1(2).

37 L.R.C.C. W.P. 38, p.27.

38 *Id.* p.29.

39 Clause 1(2) defines consent in these terms. Duress is provided for in s.3(8) of the Code, in the following terms: "No-one is liable for committing a crime in reasonable response to threats of immediate serious harm to himself or another person unless he himself purposely causes the death of, or seriously harms, another person".

taken to consent, so far as the rules specify, to being touched, being hurt or being accidentally touched, hurt or harmed:

"What may require an express rule however is the sport of boxing. This sport, unlike all other lawful sports, allows intentional infliction of harm and injury - in no way can a knock-out blow be reckoned as not inflicting harm. Preservation of the lawful status of boxing then would require a special *ad hoc* provision based on no underlying principle but solely catering to expediency."⁴⁰

Such an exception, it was felt, would also have the virtue of highlighting the social anomaly of boxing.⁴¹

4.14 Clause 7(3) of the new Code, however, takes a different approach to the issue in providing that the intentional or reckless infliction of harm will not constitute an offence where such harm arises from:

- (a) the administration of treatment with the patient's informed consent for therapeutic purposes, or for purposes of medical research, involving risk of harm not disproportionate to the expected benefits; or
- (b) injuries inflicted during the course of, and in accordance with, the rules of a lawful sporting activity.

4.15 In the case of an unconscious patient, there can be a defence of necessity to a charge of assault⁴² (though not to homicide, for which separate provision is made in the Code).⁴³ "Medical treatment" covers not only surgical and dental treatment but also procedures taken for the purpose of diagnosis, prevention of disease, prevention of pregnancy or as ancillary to treatment.⁴⁴ A surgeon who administers therapeutic treatment with the patient's consent or a player who goes beyond the rules, in such a manner as to constitute "a marked departure from the ordinary standard of reasonable care", will nevertheless still be liable for assault by criminal negligence.⁴⁵ Breaches of the rules "reasonably incidental" to the game should not be captured by the criminal law.

4.16 The Commission had also previously considered whether the law should

40 L.R.C.C. W.P. 38, pp.31-33.

41 *Id.*, p.52.

42 Clause 3(9) provides for a defence of necessity, limited to actions which do not cause the death of, or seriously harm, another person, where i) the defendant acted to avoid immediate harm to the person or immediate serious damage to property; ii) such harm or damage substantially outweighed the harm or damage resulting from that crime; and iii) such harm or damage could not have been avoided by any lesser means.

43 Clause 6(6), relating to the administration of palliative care of a life-shortening nature.

44 See L.R.C.C. W.P. 26, *Medical Treatment and Criminal Law* (1980), pp.57 and 61.

45 Because clause 7(3) provides a defence only to the intentional or reckless infliction of harm under paras. (a) and (b) of clause 7(2), and not to para. (c).

continue to provide for an express defence of authority over children:⁴⁶

"The dilemma, then, is clear. The Commission would like to remove from the law a provision which enshrines and licenses the use of force on children. But, for the majority, the problem is how to do so without running the risk of wheeling the engines of law enforcement into the privacy of the home for every trivial slap or spanking. A more satisfactory way must be found than by reliance on prosecutorial discretion. Pending this, a majority of Commissioners recommends retaining a special exception for parents (and those acting with their permission) reasonably disciplining their children.

There is, however, a minority view that such an exception cannot be justified by fears of over-zealous intrusion into family life. The *Criminal Code* contains an important message that force is not to be used as a means of resolving tensions that flow from personal relationships, whether inside or outside the family. It recognises no exception limiting state reaction to other family assaults (for example, one spouse touching or hurting another against his or her will; or one sibling acting aggressively towards another). It does not limit reaction to conduct that constitutes other criminal offences, such as theft, mischief and intimidation. Nor does it offer more than a narrow band of protection to parents who act 'by way of correction'. In practice, family relationships normally do evoke attitudes of tolerance toward offensive conduct, both on the part of those offended against, as well as those whose duty it is to respond officially. Experience suggests that there is probably too much, not too little, institutional tolerance toward domestic situations, and it is doubtful that a special exception in the *Criminal Code* is required to protect families against over-zealous enforcement.

To the extent that a call for restraint in the use of the criminal power of the state is appropriate in these situations, the minority feels it should be addressed to enforcement attitudes, not to the letter of the law. Beyond blunting the message of the criminal law, to embrace such a narrow exception calls into question the meaning of our constitutional standards. The singling out of children, whether on the basis of age or a relationship of dependency, raises concerns about how far the state may go to deprive individuals of their 'security of the person,' and whether those embraced by the exception would enjoy the 'equal protection' of the Canadian Criminal law."⁴⁷

46 S.43 of the existing Criminal Code states:

"Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances."

47 This section used to extend also to the case of master and servant.
L.R.C.C. W.P. 38, pp.45-46.

4.17 The majority, however, could not rely simply on prosecutorial discretion - the rule of law could not be satisfied by provisions that fudge the issue, saying one thing in principle but allowing another in practice. Moreover, "when it comes to criminal law and rights such as the right of privacy, we should not have to rely on what people will do but should guard ourselves against what they may do. Such after all is the whole thrust of the call for a 'government of laws and not of men'.⁴⁸ Accordingly, clause 3(14) of the new Code provides for a defence of authority over children, in the following terms:

"No one is liable who, being a parent, fosterparent or guardian or having the express permission of such a person, touches, hurts, threatens to hurt or confines a person under eighteen years of age in his custody in the reasonable exercise of authority over such person".

4.18 Teachers may therefore only use force if given permission by parents to do so. They, and other persons, may nevertheless rely on a defence of necessity where they use force to avoid immediate harm to the child and such harm substantially outweighs the force used and cannot effectively be avoided by any lesser means. Such a defence will not, however, be open where the child is seriously harmed as a result.⁴⁹ If a child is hurt by the use of unreasonable force, there will be no defence; nor, clearly, is authority a defence to harming a child.

4.19 Moreover, the assault offences, together with all the offences against the person considered below, will be aggravated where the offence is committed knowingly against the offender's spouse, child, grandchild, parent or grandparent⁵⁰, thereby conferring some extra protection to persons liable to be subject to domestic violence.

4.20 All offences against the person will also be aggravated where they are committed:

pursuant to an agreement for valuable consideration;

with torture;

for the purpose of preparing, facilitating or concealing a crime or furthering an offender's escape from detection, arrest or conviction;

for terrorist or political motives;

with a weapon; or

by means which the accused knowingly or recklessly uses to harm more

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Id.
Clause 3(9).
Clause 10(10)(g).

than one person.⁵¹

4.21 Clause 3(10)(a) provides for the protection of self or others against unlawful force by using such force as is reasonably necessary to avoid the harm or hurt apprehended. This justification does not apply to the use of force against a person reasonably identifiable as a peace officer executing a warrant of arrest,⁵² who himself is not liable for using such force as is reasonably necessary and as is reasonable in the circumstances to arrest, recapture or prevent the escape of a suspect or offender.⁵³ As regards the use of force for the protection of property, both movable⁵⁴ and immovable,⁵⁵ this justification is limited to acts not amounting to purposely causing the death of, or seriously harming, another person.

4.22 Finally, it may be noted that the Commission rejected the retention of separate offences of administering a noxious thing and of communicating a venereal disease,⁵⁶ these being covered by the offences of causing or attempting to cause harm and also by the offence of endangering life and bodily integrity, considered below.⁵⁷

Crimes Against Psychological Integrity

4.23 As noted above, the new Code identifies assault at common law as a crime against psychological integrity and restricts it to threats to apply immediate force. On the other hand, attempts to apply force are covered by attempts to commit assault by touching, hurting or harming.⁵⁸ "Immediate threatening" is the third of four offences of deliberate threatening listed in ascending order of gravity in Chapter 8 of the new Code:

"8.-(1) **Harassment.** Everyone commits a crime who harasses and thereby frightens another person.

8.-(2) **Threatening.** Everyone commits a crime who threatens to hurt, harm or kill another person or to damage his property.

8.-(3) **Immediate Threatening.** Everyone commits a crime who threatens another person with immediate hurt, harm or death.

8.-(4) **Extortion.** Everyone commits a crime who threatens:

(a) to harm another person's reputation;

51 Clauses 10(10)(a)-10(10)(f).
52 Clause 3(10)(b).
53 Clause 3(13)(b).
54 Clause 3(11).
55 Clause 3(12).
56 L.R.C.C. W.P. 38, p.53.
57 Discussed below.
58 Discussed below.

- (b) to hurt, harm or kill another person or to damage his property; or
- (c) to inflict on another person immediate hurt, harm or death

for the purpose of making someone, whether the person threatened or not, do or refrain from doing some act."

4.24 The first of these offences is designed to replace an illogical array of offences under prior law ranging from hiding tools to using violence, and for this purpose focuses simply on the common characteristics of such conduct, namely its persistent and frightening nature.⁵⁹ The immediacy of the threats in the third offence renders them more serious than those covered by the second; similarly, the threats enumerated in the offence of extortion are in ascending order of gravity.⁶⁰

4.25 Whereas the offence in clause 8(4)(a) reproduces s.266 of the existing Criminal Code on threats to publish a defamatory libel with intent to extort, clauses 8(4)(b) and (c) replace s.305 on threats made without reasonable justification "with intent to extort or gain anything".⁶¹ It is established in this connection that there must be a justification not only for the demand but also for the making of the threats or menaces by which the accused seeks to compel compliance with the demand, so that a threat to cause death or bodily harm will never be justified.⁶² It is presumably for this reason that clause 8(4) omits any reference to "reasonable justification", extreme cases being covered by necessity, defence of the person and other justifications in clauses 3(7) to 3(17). On the other hand, the threat must be such as would intimidate, alarm or unsettle a person of ordinary firmness⁶³, so that a threat to do something which the victim knows will happen anyway, is insufficient.⁶⁴ Nevertheless, the threat need not be of immediate violence - advising a victim that he may be dealt with by a violent third party, for example, is sufficient.⁶⁵

Crimes Against Personal Liberty

4.26 The existing Canadian Criminal Code provides for three general crimes of wrongful deprivation of liberty. Subs.247(1) prohibits the kidnapping of someone with intent to confine him against his will, to send him outside Canada or to ransom him. Subs.247(2) prohibits the simple unlawful confinement or forceful seizure of another person; and subs.247.1(1) prohibits hostage taking in order to compel a third party to do an act or to abstain from doing an act. In

59 L.R.C.C. Report 31, p.84. For a summary of the existing Canadian law relating to threats, see W.P.38, pp.12-16.

60 *Id.*, p.85.

61 *Id.* The word "anything" is not restricted to tangible or material things. So in one case it was held to extend to sexual relations: see *R. v Bloch-Hanson* (1978) 38 C.C.C. (2d) 143.

62 *R. v Ntarelli and Volpe* [1988] 1 C.C.C. (2d) 154 at 160-161.

63 *R. v Bloch-Hanson*, *supra*, n.61 at 146-147.

64 *Id.*, at 147.

65 *R. v Swartz* (1977) 37 C.C.C. (2d) 409 at 412.

addition, the Code provides for four offences of abduction: of a person under sixteen; of a person under fourteen; by a parent in contravention of a custody order; and by a parent where there is no such order.⁶⁶

4.27 Chapter 9 of the New Code reduces this scheme of offences to two crimes of confinement and one of abduction, in the following terms:

"9.-(1) **Confinement.** Everyone commits a crime who confines another person without that other's consent.

9.-(2) **Kidnapping.** Everyone commits a crime who confines another person, without that other's consent, for the purpose of making him or some other person do or refrain from doing some act.

9.-(3) **Child Abduction.** Everyone commits a crime who takes or keeps a person under fourteen years of age, whether that person consents or not, for the purpose of depriving a parent, guardian or person who has lawful care or charge of that person of the possession of that person."

4.28 All three crimes may be committed purposely only. Kidnapping under s.9(2) is a particular form of aggravated confinement, limited to cases where it is the purpose of the offender to make the victim or some other person do or refrain from doing some act. Cases of kidnapping for ransom or extortion are clearly envisaged here, whereas the category of asportation from the jurisdiction has been abandoned.

4.29 Nevertheless, all three offences may be aggravated by any of the factors listed in clause 10(10) above.⁶⁷ Although the kidnapping offence appears at first sight to be somewhat limited, where a person is unlawfully confined, for example, with a weapon or is tortured, the offence will be one of aggravated confinement, of equivalent gravity to simple kidnapping.⁶⁸

4.30 A single offence of abduction is therefore retained to cover cases where a charge of kidnapping or unlawfully confining a child under 14 will not lie because the child consents to go with the abductor. The crime is limited to cases where it is the purpose of the abductor to deprive the lawful guardian of possession of such child. The previous offence of abducting a child under sixteen "has been dropped as out of keeping with modern views on child development".⁶⁹

⁶⁶ Provided for in ss.249(1), 250, 250.1 and 250.2(1) respectively.

⁶⁷ *Supra*, n.51. A confinement will therefore be aggravated if committed pursuant to an agreement for valuable consideration; with torture; for the purpose of preparing, facilitating or concealing a crime or furthering an offender's escape from detection, arrest or conviction; for terrorist or political motives; with a weapon; by means which the accused knowingly or recklessly uses to harm more than one person; or, finally, knowingly against the offender's spouse, child, grandchild, parent or grandparent.

⁶⁸ Equally, the offence of kidnapping under clause 9(2) will be aggravated by any of those elements listed in clause 10(10).

⁶⁹ L.R.C.C., Report 31, p.66.

Crimes Causing Danger

4.31 Chapter 10 of the new Code provides for a general crime of endangering, as well as for specific crimes of failure to rescue, impeding rescue and crimes relating to road traffic and other transportation facilities. Section 10(1) provides as follows:

Endangering. Everyone commits a crime who causes a risk of death or serious harm to another person:

- (a) purposely;
- (b) recklessly; or
- (c) through negligence.

4.32 This provision creates a new offence in Canadian law and forms the basis of the general principle underlying this chapter of offences by affording a residual provision for acts not covered by more specific clauses.⁷⁰ It thereby facilitates early law enforcement intervention to prevent harm before its actual occurrence and brings Canadian law into line with s.211.2 of the U.S. Model Penal Code,⁷¹ with most state codes in the U.S. and with European codes such as those of Austria and Sweden.⁷² The offence is limited, however, to causing risk of death or serious harm, and in this connection mirrors the offences of actually causing such harm in extending the *mens rea* to criminal negligence.⁷³ In certain situations endangerment may also be committed by omission.⁷⁴

4.33 Conduct endangering the convenience comfort and property of individuals is left to the civil law as more appropriate for injunction and compensation between the parties concerned.⁷⁵ Conduct endangering the convenience, comfort and property of the public continues to be dealt with under the special offence of common nuisance. Where a person "in a public place substantially and unreasonably either obstructs or inconveniences those exercising rights common to all members of the public", he commits the separate offence of public nuisance under s.22(7) of the new Code. This departs from the existing offence of public nuisance under Canadian law, which is specifically linked to acts which endanger the lives, safety or health of the public or which cause physical injury to any person, by criminalising such obstruction or inconvenience without endangerment or injury.⁷⁶

4.34 Crimes relating to the possession of firearms and explosives are provided

70 See L.R.C.C., W.P. 46, *Omissions, Negligence and Endangering* (1985), p.31 *et seq*; L.R.C.C., Report 31, pp.68-67.
71 *Infra*, chapter 5.
72 *Infra*, chapter 7.
73 Clause 7(2).
74 *Infra*.
75 L.R.C.C., W.P. 46, pp.38-40.
76 See L.R.C.C., Report 31, p.105.

for elsewhere in the new Code.⁷⁷ However, where the risk of death or serious injury is brought about by the use of a weapon, or by means which the accused knowingly or recklessly uses to harm more than one person, the offence of endangerment will be aggravated. Where injury actually results, these factors operate to aggravate the offences of assault by hurting or harming.⁷⁸

4.35 Section 10(2) of the new Code introduces into Canadian law an offence of failure to rescue, in the following terms:

- "(a) **General Rule.** Everyone commits a crime who, perceiving another person in immediate danger of death or serious harm, does not take reasonable steps to assist him.
- (b) **Exception.** Clause 10(2)(a) does not apply where the person cannot take reasonable steps to assist without risk of death or serious harm to himself or another person or where he has some other valid reason for not doing so".

4.36 In recommending the introduction of this offence, for which the envisaged penalty is relatively low, the Commission sought to bring Canadian law into line not only with "ordinary notions of morality" but also with the laws of many other countries, such as Belgium, France, Germany, Greece, Italy and Poland, as well as some jurisdictions in the U.S.A.⁷⁹ It was further considered that the offence would complete the journey made by the common law in respect of duties owed by those who create a danger, by statute in respect of motorists involved in accidents,⁸⁰ and by a similar duty of a general nature contained in the *Quebec Charter of Human Rights and Freedoms*.⁸¹

4.37 The exception in s.10(2)(b), together with the delimitation of the duty to one of taking reasonable steps in the circumstances, is said to overcome any objections as to vagueness. As regards the problem of identity and the lack of any personal or special relationship between the duty-bearer and the beneficiary, the Commission considered that the very situation of emergency had the effect of creating a personal, if temporary, relationship between an identifiable victim and an identifiable potential rescuer.⁸² Objections relating to the possibly unwarranted imposition of the criminal law on a rescuer's freedom of action were also rejected, on the grounds that the seldom and relatively limited intrusion on such freedom was justified by the greater interest in preserving life. Moreover, it was recommended that a "Good Samaritan" provision exempting those attempting *bona fide* rescue from liability for civil or criminal negligence should

77 See chapter 18, L.R.C.C. Report 31, p.161.

78 Clause 10(10).

79 L.R.C.C. Report 31, p.68; L.R.C.C. W.P. 46, pp.17-20.

80 Subs.233(2) of the existing Criminal Code imposes an obligation on such persons to "offer assistance" where any person has been injured.

81 S.2 of the Charter, R.S.Q. 1977, C. 12, provides that everyone whose life is in peril has a right to assistance, and that when someone's life is in peril, everyone must come to his aid unless it involves danger to himself or another or unless there is some other valid reason not to give assistance.

82 L.R.C.C. W.P. 46, pp.18-19.

simultaneously be introduced into the law.⁸³

4.38 Finally, it may be noted that the Commission considered the alternative of including within the "duty" section of the General Part of the Code a provision creating an "easy rescue" duty parallel to the other duties there included.⁸⁴ The problem with this approach, however, is that the non-rescuer would incur both too little and too much liability: no offence would be committed where no harm results to the person imperilled; and where death or harm results, such a scheme does not have the advantage of allowing a lesser offence than homicide or causing bodily harm to be charged.⁸⁵

Other Endangerment Offences

4.39 In addition to particular road traffic offences, the new Code contains a number of specific offences of endangerment which supplement the general offence of endangerment outlined above. Section 10(3) provides that "everyone commits a crime who impedes the rescue of another person in danger of death or serious harm". This includes impeding someone attempting to save either his own or another's life.⁸⁶ Section 10(4) provides that everyone commits a crime who purposely, recklessly or negligently operates a means of transportation (other than one humanly powered) in such a way, or in such condition of disrepair, as to cause a risk of death or serious harm to another person.⁸⁷ Again, where death or serious harm results, the provisions on homicide or assault will apply. Finally, s.10(9) provides for an offence of interfering with transportation facilities while they are actually being used, thereby causing risk of death or serious harm to another person.

Omissions

4.40 Unlike the English Law Commission⁸⁸ and the American Law Institute,⁸⁹ the Canadian Law Reform Commission has specified duties whose breach may give rise to criminal liability. Clause 2(3) of the New Code provides, *inter alia*, as follows:

- "(b) **Omissions.** No one is liable for an omission unless:
- (i) it is defined as a crime by this Code or by some other Act of the Parliament of Canada; or
 - (ii) it consists of a failure to perform a duty specified in this clause.

83 *Id.*, p.19.

84 As is the case, for example, under s.2 of the Quebec Charter.

85 *Op cit.*, p.20.

86 L.R.C.C. Report 31, p.68.

87 This provision, as it applies to motor vehicles, is not confined to endangerment on the highway or other public place; the sending out, as opposed to the operation, of unsafe aircraft or unseaworthy ships is covered by the provisions on furthering a crime in chapter 4 of the Code.

88 *Supra*, Chapter 3, page 139 *et seq.*

89 *Infra*, Chapter 5.

- (c) **Duties.** Everyone has a duty to take reasonable steps, where failure to do so endangers life, to:
- (i) provide necessities to
 - (A) his spouse,
 - (B) his children under eighteen years of age,
 - (C) other family members living in the same household, or
 - (D) anyone under his care if such person is unable to provide himself with necessities of life;⁹⁰
 - (ii) carry out an undertaking he has given or assumed;⁹¹
 - (iii) assist those in a shared hazardous and lawful enterprise with him;⁹² and
 - (iv) rectify dangers of his own creation or within his control.⁹³
- (d) **Medical Treatment Exception.** No one has a duty to provide or continue medical treatment which is therapeutically useless or for which informed consent is expressly refused or withdrawn."

4.41 Apart from specific crimes of omission, the clause makes criminal liability for omissions wholly subject to the New Code. Those crimes which are capable of commission by omission are stated to be crimes of homicide, bodily harm, endangering, vandalism and arson.⁹⁴ In this respect, the New Code is wider than originally proposed in the Commission's Working Paper on omissions and endangerment, which would have restricted the crime of endangering to acts.⁹⁵ On reconsideration, it was thought that the existing specific offences of endangering, such as dangerous driving, rather than the traditional doctrine relating to "result crimes", were a better policy guide, and weighed in favour of the inclusion of endangering as an offence capable of commission by omission.⁹⁶

Causation

4.42 Although the L.R.C.C. recognises that "[w]hether rules about causation have any greater place in a Criminal Code than rules of logic, mathematics or science is open to question",⁹⁷ clause 2(16) of the New Code nevertheless

90 Replacing s.197 of the Criminal Code, and extending it beyond children under 18 (this being generally the age of majority in Canada) and spouses. See L.R.C.C. W.P. 46, pp.12-14.

91 Replacing ss.198 and 199 of the Criminal Code, relating to medical treatment and dangerous acts respectively. This clause would cover foster-parents, guardians and others undertaking to look after children, as well as doctors, nurses and others undertaking the care of patients, except when ceasing to give therapeutically-useless medical treatment, see clause 2(3)(d). See also L.R.C.C. W.P. 46, pp.14-15.

92 This relates to people such as fellow mountaineers engaged in shared hazardous and lawful enterprises: "The range of interdependent duty is limited to those who by jointly undertaking the venture, implicitly commit themselves to each other", L.R.C.C. W.P. 46, p.15, quoting Fletcher, *Rethinking Criminal Law* (1978), p.614.

93 See L.R.C.C. W.P. 46, pp.8-11, for a conceptual analysis of such "omissions", and *supra*, Chapter 1, pages 53-55.

94 L.R.C.C. Report 31, p.19.

95 W.P. 46, p.39.

96 L.R.C.C. Report 31, p.20.

97 *Id.*, p.28.

provides for a general rule in respect of "causing" a result:

"Everyone causes a result when his conduct substantially contributes to its occurrence and no other unforeseen and unforeseeable cause supersedes it."

4.43 The Commentary explains that for there to be a "substantial" link between the accused's conduct and the result, the conduct must not be a mere *sine qua non* or necessary condition for the occurrence of the result.⁹⁸

CHAPTER 5: CODIFICATION IN NEW ZEALAND

5.1 In New Zealand, the law relating to offences against the person is currently being reviewed in the light of the *Crimes Bill, 1989*,¹ which sets out to revise and rewrite the existing corpus of substantive criminal law as previously codified in the *Crimes Act, 1961*.² In addition to abolishing certain obsolete offences and to attempting to codify the general principles of criminal liability, the 1989 Bill is important in embracing an explicitly conduct-oriented approach to offences of violence.

5.2 This approach, which holds that criminal liability should not be graded according to consequences, reflects the views of the New Zealand Law Reform Committee in its 1976 *Report on Culpable Homicide*. Sir James Fitzjames Stephen's arguments to the contrary were found by the Committee to be "medieval" and "unattractive".³ Nevertheless, it will be seen that the Bill does not wholly abandon the traditional focus on the degree of injury suffered, and that the substantive reforms as a whole must be viewed in the light of corresponding changes in sentencing and parole policy.

Liability

5.3 Clauses 21 to 24 of the 1989 Bill define the mental element required for offences, i.e. intention or knowledge, recklessness, heedlessness and negligence. The definitions of intention, knowledge and recklessness broadly follow those

1 No. 152-1.

2 No. 43 of 1961.

3 New Zealand Criminal Law Reform Committee, *Report on Culpable Homicide*, July 1976, paras. 48-47.

contained in the English Draft Code.⁴ Subjective recklessness as a basis for criminal liability was rejected, however. Instead, clauses 23 and 24 of the New Zealand Code provide for definitions of heedlessness (objective recklessness) and negligence.⁵

23. Heedlessness-(1) For the purposes of criminal responsibility, a person is heedless as to any consequence of any act of omission where-

- (a) The person gives no thought to whether there is a risk that the consequence will result, even though the risk would be obvious to any reasonable person; and
- (b) It is, in the circumstances, unreasonable to take the risk.

(2) For the purpose of criminal responsibility, a person is heedless as to any circumstances of any act or omission where-

- (a) The person does or omits to do the act without giving any thought to whether there is a risk that the circumstance exists or will exist, even though the risk would be obvious to any reasonable person; and
- (b) It is, in the circumstances, unreasonable to take the risk.

24. Negligence- For the purpose of criminal responsibility, a person is negligent in respect of any act if that act is in the circumstances a very serious deviation from the standard of care expected of a reasonable person.

Endangering

5.4 The conduct-oriented approach is particularly evident in clauses 130 and 132 of the new Bill, which will apply whether or not death or harm results from the offender's conduct, and which are designed to replace the existing offences of criminal nuisance,⁶ wounding with intent,⁷ injuring with intent⁸ and unlawful

4 Clause 21 provides that a person intends any consequence of any act if that person does the act meaning to bring about that consequence or knowing that it is 'highly probable'. Similar provision is made in respect of knowledge of the circumstances in which an act is done. The Explanatory Note to the Bill points out that there is 'nothing magic' about the words 'highly probable', though preferred over 'practically certain' (U.S. M.P.C.) and 'almost certain' (U.K. Code Team).

5 These definitions were originally formulated by the English Code Team, but later rejected: see Law Com. No. 143, pp.183-184.

6 S.145 of the 1961 Act provides that a person commits nuisance if he does an unlawful act or omits to discharge a legal duty, knowing that the act or omission will endanger the lives, safety or health of the public or of any individual. It is punishable by Imprisonment for one year.

7 S.188(1) prescribes a maximum penalty of imprisonment for 14 years for a person who, with intent to cause grievous bodily harm, wounds or causes grievous bodily harm to another. S.188(2) prescribes a maximum penalty of imprisonment for 7 years for a person who, with intent to injure, or with reckless disregard for the safety of others, wounds or causes grievous bodily harm to another.

injuring.⁹

5.5 Conduct previously punishable as manslaughter¹⁰, disabling,¹¹ acid throwing,¹² cruelty,¹³ or discharging a firearm or doing any dangerous act with intent,¹⁴ as well as the setting of traps,¹⁵ endangering transport¹⁶ or impeding rescue,¹⁷ will all also come within the ambit of these two offences.

5.6 Unless harm is intended, it is the reckless nature of the conduct and its inherent danger that determine liability in each of the new offences:

"130. Endangering with intent to cause serious bodily harm- (1)

Every person is liable to imprisonment for 14 years who-

- (a) Does any act, or omits without lawful excuse to perform or observe any legal duty, with intent to cause serious bodily harm to any other person; or
- (b) With reckless disregard for the safety of others, does any act or omits without lawful excuse to perform or observe any legal duty, knowing that the act or omission is likely to cause bodily harm to any other person.

(2) This section applies whether or not the act or omission results in death or bodily harm to any other person

8 S.189(1) prescribes a maximum penalty of Imprisonment for 10 years for a person who, with intent to cause grievous bodily harm, injures another. S.189(2) prescribes a maximum penalty of Imprisonment for 5 years for a person who, with intent to injure or with reckless disregard for the safety of others, injures another.

9 S.190 prescribes a maximum penalty of imprisonment for 3 years for a person who injures another in such circumstances that, had death ensued, that person would have been guilty of manslaughter.

10 Under clause 122 of the Bill, the distinction between murder and manslaughter is abolished, and 'culpable homicide' is limited to intentional killing.

11 S.197 of the 1981 Act provides for a maximum of 5 years for wilfully and unlawfully stupefying or rendering unconscious any other person. The possession of 'disabling substances' is punishable under clause 161 of the Bill, *infra*.

12 S.199 provides for a maximum penalty of imprisonment for 14 years for a person who, with intent to injure or disfigure anyone, throws at or applies to any person any corrosive or injurious substance.

13 S.195 provides that everyone is liable to imprisonment for a term not exceeding 5 years who, having the custody, control or charge of any child under the age of 16 years, wilfully ill-treats or neglects the child, or wilfully causes or permits the child to be ill-treated, in a manner likely to cause him unnecessary suffering, actual bodily harm, injury to health, or any mental disorder or disability.

14 S.198 provides for a maximum term of 14 years for a person who, with intent to do grievous bodily harm, a) discharges any firearm, airgun or other similar weapon at any person, or b) sends or delivers to any person, or puts in any place, any explosive or injurious substance or device, or c) sets fire to any property. Where such acts are done with intent to injure, or with reckless disregard for the safety of others, the maximum penalty is 7 years.

15 Under s.202, every one is liable to imprisonment for a term not exceeding 5 years who, with intent to injure, or with reckless disregard for the safety of others, sets or places or causes to be set or placed any trap or device that is likely to injure any person. The penalty for knowingly and wilfully permitting such a device to remain on land in one's occupation or possession is 3 years.

16 S.203 provides for a lengthy and particularised offence of endangering transport by land, water or air. The maximum penalty for acts done with intent to injure or to endanger the safety of any person is 14 years; where done unintentionally and in a manner likely to endanger safety, the penalty is 5 years.

17 S.204 provides for a maximum penalty of 10 years for a person who, without lawful justification or excuse, prevents or impedes or attempts to prevent or impede any person attempting to save his own life or any other person.

132. Endangering with intent to injure, etc.- (1) Every person is liable to imprisonment for 5 years who-

- (a) Does any act, or omits without lawful excuse to perform or observe any legal duty, with intent to injure any other person; or
- (b) With reckless disregard for the safety of others, or heedlessly, does any act or omits without lawful excuse to perform or observe any legal duty, the act or omission being likely to cause injury to any other person or to endanger the safety or health of any other person.

(2) Every person is liable to imprisonment for 2 years who negligently does any act or omits without lawful excuse to perform or observe any legal duty, the act or omission being likely to cause injury to any other person or to endanger the safety or health of any other person.

(3) This section applies whether or not the act or omission results in death or injury to any other person".

5.7 For the purposes of these offences and others,¹⁸ specific legal duties are provided for in clauses 118 to 121 of the Bill:

"Duties to Preserve Life or Prevent Harm

118. Duty to provide necessities of life- Every person who has charge of any other person who is-

- (a) Unable, by reason of detention, age, mental or physical condition, or any other cause, to withdraw from that charge; and
- (b) Unable to provide himself or herself with the necessities of life-

(whether that charge is undertaken by that person under any contract or is imposed upon that person by law or by reason of that person's unlawful act or otherwise) is under a legal duty to supply that person with the necessities of life.

119. Duty of person doing dangerous act- Every person who undertakes (except in case of necessity)-

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Particularly 'culpable homicide' under clause 122 of the Bill, which replaces the term 'murder' as the recognised legal description of unlawful, intentional killing.

- (a) To administer surgical or medical treatment; or
- (b) To do any other lawful act the doing of which is or may be dangerous to life-

is under a legal duty to have and to use reasonable knowledge, skill, and care in doing any such act.

120. Duty of person in charge of dangerous thing- Every person who-

- (a) Has in his or her charge or under his or her control anything whatever, whether animate or inanimate; or
- (b) Erects, makes, operates, or maintains anything whatever,-

which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against such danger and to use reasonable care to avoid it ...

121. Duty to avoid omission dangerous to life- Every person who undertakes to do any act, the omission to do which is or may be dangerous to life, is under a legal duty to do that act".

5.8 The duties are presently provided for in ss.151 and 155 to 157 of the 1961 Act, which in some cases also prescribe the maximum penalty for their breach. In the 1989 Bill, breaches are punishable instead, *inter alia*, under clauses 130 and 132. Those provisions in the 1961 Act relating to the abandonment and neglect of children¹⁹ are dropped as being adequately covered by clause 118, whereas that relating to the neglect of servants and apprentices²⁰ is itself abandoned as being outdated and obsolete.

5.9 These duties in clauses 118 to 121 are supplemented by those provided for in clause 20 of the Bill, which sets out the basis for criminal responsibility for omissions. In addition to an omission that itself expressly constitutes an offence,²¹ a person is criminally responsible for an offence of unlawful killing, or any other offence involving intentional serious injury or reckless endangerment, if he or she omits to do something that he or she is under a duty to do.²² Such a duty exists where death or serious injury may result from the omission and a) he or she is obliged to act by virtue of any enactment or of his or her tenure of any office or b) the person is the spouse or a parent or guardian or child of the other person, or is a member of the same household as that other

19 S.152 provides for a maximum penalty of 7 years for breach of the duty of a parent or legal guardian to provide necessities to a child under 16 in his actual custody whereby the death of the child is caused, his life endangered or his health permanently injured. Abandoning a child under 6 is, under s.154, subject to the same penalty.

20 S.153. The maximum penalty for such breach of duty is 5 years.

21 Subclause 20(2).

22 Subclause 20(3).

person, or has undertaken the care of that other person, and the act is one that, in all the circumstances, including the person's age, and other relevant personal characteristics, he or she could be reasonably expected to do.²³

5.10 A third offence of endangering is provided for in s.131 of the 1989 Bill. It essentially re-enacts the offences of aggravated wounding and aggravated injury contained in s.191 of the 1961 Act,²⁴ in the following terms:

"Endangering with intent to facilitate crime- (1) Every person is liable to imprisonment for 14 years who, with intent-

- (a) To commit, or to help in the commission of, any crime; or
- (b) To avoid detection, or the detection of any other person, in the commission of any crime; or
- (c) To avoid arrest or to escape, or to avoid the arrest or to help in the escape of any other person, after the commission of any crime,-

wounds any other person, or administers to any other person any substance for the purpose of causing unconsciousness or serious incapacity, or stops the breath of any other person.

(2) Every person is liable to imprisonment for 7 years who, with any intent specified in *subs.(1)* of this section, incapacitates or injures any other person in any manner not described in that subsection.

5.11 The description of this offence as one of endangering is curious, particularly having regard to the fact that, positioned between two offences which focus almost exclusively on the conduct of the accused, it continues to attach significance to concepts such as wounding and causing unconsciousness. It would perhaps be better described, as in the present s.191, as aggravated wounding or injury.

Assaults And Aggravated Assaults

5.12 Clause 152 re-enacts s.196 of the 1961 Act, relating to common assault, which is defined in clause 2 of the Bill as the act of

"(a) Intentionally applying or attempting to apply force to the person of another, directly or indirectly; or

²³ Subclauses 20(4) and (5).

²⁴ Subs.(1) of that section prescribes a maximum penalty of imprisonment for 14 years for a person who, with intent to commit any crime, to avoid detection or arrest, or to escape, or to assist any other person to commit any crime, avoid detection or arrest, or escape, wounds, maims, disfigures, or causes grievous bodily harm to any person, stupefies or renders unconscious any person, or by any violent means renders any person incapable of resistance. Subs.(2) prescribes a maximum penalty of imprisonment for 7 years for any person who, with the same intent, injures another.

- (b) threatening to apply such force to the person of another, if the person making the threat is, or causes the other person to believe on reasonable grounds that he or she is, able to carry out the threat immediately."

The definition, by omitting the existing words "by any act or gesture", will encompass purely verbal threats so long as they give rise to the requisite apprehension of immediate violence.

5.13 Whereas the maximum penalty for common assault is imprisonment for one year, where the assault is committed with intent to injure any other person, or with any of the requisite intents to facilitate crime contained in clause 131(1) above, or with intent to obstruct a policeman or other person in the lawful execution of process, the penalty is 3 years imprisonment. Clause 149 of the Bill, re-enacting s.202 C of the 1961 Act as inserted by a 1986 amendment,²⁵ provides for a penalty of 5 years imprisonment for assault with a weapon. This offence is committed by a person who uses anything as a weapon in assaulting any other person, in circumstances that *prima facie* show an intention to use it as a weapon.

5.14 Section 194 of the 1961 Act had provided for an additional form of aggravated assault, punishable by two years imprisonment, where committed against any child under the age of 14 years or by a male upon any female.

5.15 Assault with intent to rob is provided for in clause 188 of the Bill. It replaces the single offence contained in s.237 of the 1961 Act with two such offences, distinguished according to gravity in the following terms:

"Assault with intent to rob- (1) Every person is liable to imprisonment for 10 years who,-

- (a) Being together with any other person or persons; or
- (b) Being armed with any offensive weapon or instrument, or any thing appearing to be such a weapon or instrument,-

assaults any person with intent to rob the person.

(2) Every person is liable to imprisonment for 5 years who assaults any person with intent to rob that person."

5.16 Robbery, itself punishable by 10 years imprisonment, is defined in clause 186 as theft accompanied by violence or threats of violence, to any person or property, used to extort the property stolen or to prevent or overcome resistance to its being stolen. Aggravated robbery, punishable under clause 187 by

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S.5 of the *Crimes Amendment Act (No 2)*, 1986.

imprisonment for 14 years, is committed by a person who -

- "(a) Robs any other person, and at the time of, or immediately before, or immediately after the robbery, causes serious bodily harm to any person; or
- (b) Being together with any other person or persons, robs any person; or
- (c) Being armed with any offensive weapon or instrument, or any thing appearing to be such a weapon or instrument, robs any other person".

Poisoning Or Infecting

5.17 Section 200 of the 1961 Act provides for two offences of administering a poison or noxious substance, similar in terms to those provided for in Irish law.²⁶ Section 201, on the other hand, prescribes a maximum penalty of 14 years for a person who wilfully and without lawful justification or excuse causes or produces in any other person any disease or sickness.²⁷

5.18 Clause 153 of the 1989 Bill replaces these offences with a single integrated provision, whereby the penalty is linked solely to the intent or recklessness as to the harm done:

"153. Poisoning or infecting with disease- (1) Every person is liable to imprisonment for 14 years who, with intent to cause harm to any other person,-

- (a) Administers to, or causes to be taken by, that other person any toxic or noxious substance; or
- (b) Causes or produces in that other person any disease or sickness.

(2) Every person is liable to imprisonment for 5 years who, with reckless disregard for the safety of any other person,-

- (a) Administers to, or causes to be taken by, that other person any toxic or noxious substance; or
- (b) Causes or produces in that other person any disease or sickness."

Threatening

5.19 Clause 157 of the Bill, re-enacting s.306 of the 1961 Act, provides as

²⁶ *Supra*, Chapter 1, page 67.

²⁷ This offence was created by the 1961 Act, having no precedent in the *Crimes Act, 1908*.

follows:

"Threatening to kill or cause serious bodily harm- Every person is liable to imprisonment for 7 years who, by any means, threatens to kill or to cause serious bodily harm to any other person".

5.20 It has been seen that, in addition, a threat of lesser harm may constitute an assault under clause 152, provided it gives rise to a reasonable apprehension of immediate violence.²⁸ Moreover, a person who acts in a threatening manner within the view of any dwellinghouse with intent to frighten any person present in such house or being reckless as to that result, is liable to 3 years imprisonment under clause 158.

Aggravated Violence

5.21 One of the most innovative, and also criticised, features of the 1989 Bill is the creation of an offence of aggravated violence, punishable by 20 years imprisonment and triable only with the leave of the Solicitor-General.²⁹ The offence is set out in clause 148:

"Aggravated violence- (1) Every person is liable for 20 years who, by any act or series of acts of exceptionally serious violence or exceptionally serious cruelty, intentionally or recklessly cause serious bodily harm to any other person.

(2) Without limiting the matters that may be taken into account in determining for the purpose of *subs.(1)* of this section whether or not any act or series of acts of violence or cruelty is to be regarded as exceptionally serious, the following matters shall be taken into account.

- (a) The length of time over which the violence or cruelty occurred;
- (b) The number of persons involved in the violence or cruelty;
- (c) Whether the violence or cruelty was committed with intent to facilitate the commission of sexual violation or aggravated robbery, or was committed in the course of committing, or following on from the commission of, any such crime".

5.22 Conceptually, this offence stands at odds with the philosophy represented earlier in the Bill by the clauses abolishing wounding with intent to cause grievous bodily harm and other crimes in that class and replacing them with offences for which the consequences are not stated to be relevant to penalty.

²⁸ *Supra*, paragraph. 5.12.

²⁹ Subclause 148(3).

This inconsistency of theories in the Bill has been averted to by critics of both approaches. On the one hand, it is argued³⁰ that clause 148 continues to reflect the 'medieval' and 'unattractive' view of Stephens, rejected by the New Zealand Law Reform Committee in its 1976 *Report on Culpable Homicide*.³¹ This argument is based on the view that criminal liability should be graded according to consequences. The Commentators go on to say that the clause is entirely unnecessary in view of the maximum sentence of 14 years already provided for crimes of sexual violation, aggravated robbery, and endangering with intent to cause serious bodily harm. A final criticism is that the clause was clearly introduced as an unsuitable *quid pro quo* for the public acceptance of the abolition of the mandatory sentence for murder and of the term "murder" itself as the recognised legal description of unlawful, intentional killing.

5.23 On the other hand, it is argued³² that clause 148 is both sensible and timely; that it highlights the lack of realism in the exclusively conduct-based approach adopted elsewhere in the Bill; and that it may turn out to be an important change and a notable step forward in the deterrence of serious violence. Whatever about the realism of clauses 130 and 132 of the Bill, this view, it may be noted, is supported by recent reforms in sentencing and parole policy in New Zealand, as reflected in the *Criminal Justice Act, 1985*, and the proposed amendments thereto under Part XXI of the 1989 Bill.

5.24 In particular, s.5 of the 1985 Act, as amended by s.2 of the *Criminal Justice Act, (No. 3) of 1987*, provides that where an offender has been convicted of an offence punishable by 2 years imprisonment or more and uses serious violence against, or causes serious danger to the safety of, any other person, the court should impose a full-time custodial sentence unless special circumstances are shown. In the case of recidivist offenders, mere violence or danger will result in such a sentence.³³ Moreover, clause 343 of the 1989 Bill empowers a court, on imposing a sentence for culpable homicide otherwise than for life or for the new offence of aggravated violence, to fix a minimum period that must be served before the offender becomes eligible for parole. This period must be no longer than two thirds of the sentence or 10 years, whichever is the lesser. Finally, under clause 344 of the Bill, the right to parole does not apply to any sentence of imprisonment over 2 years imposed for attempted culpable homicide, sexual violation, robbery, aggravated robbery or the endangering and firearms offences under clauses 130, 132(1)(a), 159 and 160, noted above.

5.25 It may be seen from this scheme that the changes to the substantive law effected by the 1989 Bill in respect of violent offences are intertwined with corresponding reforms to penal policy. In this respect, New Zealand would

30 See (1989) N.Z.L.J. 251.

31 *Op cit.*

32 See (1989) N.Z.L.J. 240.

33 For an examination of the operation of these rules, see "S.5, Criminal Justice Act, 1985: Violent offences, special circumstances and judicial discretion", (1989) N.Z.L.J. 293-297, where it is concluded that judicial discretion in sentencing violent offenders has not thereby been undermined.

appear to be moving, as in Sweden,³⁴ towards a system of criminal justice founded on principles of protection rather than retribution.

Use Of Force

5.26 The provisions governing the justifiable use of force in the 1989 Bill are set out in clauses 37 to 40 (law enforcement), 41 to 47 (protection of persons) and 48 to 49 (protection of property). Clause 52 states the general principle that every person authorised by law to use force is criminally responsible for any excessive force used according to the nature and quality of the act that constitutes the excess,³⁵ whereas clause 53 provides for the continuity of justifications and excuses at common law in so far as they are not altered by or inconsistent with statute.³⁶

Consent

5.27 Clause 43 of the Bill codifies the common law rule that the purported consent of a person killed does not protect any party to the killing from criminal responsibility.³⁷ Consent to lesser forms of harm is left as a matter for the courts.³⁸ Clauses 44 and 45 provide for the case of consensual and nonconsensual medical treatment, in the following terms:

"44. Medical procedure with patient's consent- (1) Every person is protected from criminal responsibility for performing with reasonable care and skill any medical procedure on any person, with the consent of that person or of any other person entitled to give consent on the patient's behalf, for any lawful purpose.

(2) For the purposes of this section, sterilisation is a lawful purpose.³⁹

45. Necessary treatment without patient's consent- (1) Every person is protected from criminal responsibility for administering with reasonable care and skill any necessary therapeutic treatment to any person, without the consent of that person or of any other person entitled to give consent on the patient's behalf, if it would be unreasonable to delay treatment until such consent is obtained.

(2) For the purposes of this section, "therapeutic treatment" means medical treatment intended to benefit the patient's health; and

34 *Infra*, Chapter 7.

35 Re-enacting s.62 of the 1961 Act.

36 Re-enacting s.20(1) of the 1961 Act.

37 Re-enacting s.63 of the 1961 Act.

38 In accordance with the operation of clause 53, *supra*, text accompanying n.36.

39 Re-enacting s.61A of the 1961 Act, as inserted by s.2 of the *Crimes Amendment Act, 1977*, which was introduced, following the remarks of Denning L.J. in *Bravery v Bravery* [1954] 3 All E.R. 59, to clarify that consensual operations to effect sterilisation are justified.

includes any necessary ancillary medical procedures."⁴⁰

5.28 Whereas s.59 of the 1961 Act extends the concept of justifiable use of force to the correction of a child by teachers, clause 46 now limits the right of discipline to parents acting *in loco parentis*. It provides as follows:

"Parental discipline- (1) Every parent of a child, and every person acting as a parent of a child, is justified in using force by way of correction towards the child if the force used is reasonable and is not intended to cause actual bodily harm.

(2) The reasonableness of the force used is a question of fact".

5.29 Finally, clause 47 re-enacts s.60 of the 1961 Act, relating to the use of force on board an aircraft or a ship for the purpose of ensuring the safety of those on board.

"Discipline on board any ship or aircraft- (1) The person in command of any ship on a voyage or of any aircraft on a flight is justified in using, and ordering the use of, force for the purpose of ensuring the safety of those on board if-

- (a) That person believes on reasonable grounds that the use of force is necessary to achieve that purpose; and
- (b) The force used is reasonable.

(2) A person to whom any such order is given is justified in using force in obedience to the order if the force used is reasonable.

(3) The reasonableness of the grounds on which the use of force is believed to be necessary, and the reasonableness of the force used, are questions of fact".

Law Enforcement

5.30 Clauses 32 to 36 of the Bill govern powers of arrest and the execution of court orders, including any sentence, warrant or process which may be defective in form, or for which the court, in the particular case, lacked jurisdiction. Clause 37⁴¹ extends any justification or protection afforded by those provisions to the use of such force as may be necessary to effect the arrest or execute the order, provided such purpose could not be achieved by reasonable means in a less violent manner. Such force may also be used to prevent the

40 This replaces s.61 of the 1961 Act, which provides that every one is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit, if the performance of the operation was reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

41 Re-enacting ss.39 and 40(1) of the 1961 Act.

subsequent escape of the person arrested.⁴² In all cases, however, using force that is intended or is likely to cause death or serious bodily harm is justifiable only in certain situations by members of the police and persons assisting them.⁴³

5.31 Clause 38⁴⁴ applies a similar rule to the use of force to prevent the escape of any inmate from a penal institution, or to recapture one who has escaped. Under clause 39,⁴⁵ the question whether any objective could be achieved by reasonable means in a less violent manner includes the question whether it would have been reasonable to delay.

5.32 Clause 40⁴⁶ provides for the use of force in preventing riots or certain other offences:

"Every person is justified in using force as may be necessary-

- (a) To prevent or suppress a riot; or
- (b) To prevent the commission of any offence that is likely to cause-
 - (i) Immediate and serious injury to any person; or
 - (ii) Immediate and serious damage to any property".

Protection Of Persons And Property

5.33 In its 1979 *Report on Self Defence*,⁴⁷ the Criminal Law Reform Committee recommended, in place of the complicated statutory rules originally contained in the 1961 Act, the enactment of a "single comprehensive provision" that would require "no abstruse legal thought and no set words or formula to explain it".⁴⁸ In consequence, s.2(1) of the *Crimes Amendment Act, 1980*, replaced those rules with a simple definition recommended by the Committee, which in turn is reproduced in clause 41 of the 1989 Bill:

"Use of force in self-defence- Every person is justified in using, in self-defence or the defence of another, such force as, in the circumstances as that person believes them to be, it is reasonable to use".

5.34 In terms of intelligibility, this would appear to be an excellent model for the justifiable use of objectively reasonable force in the face of a subjectively perceived threat.⁴⁹ However, although New Zealand courts have acknowledged

42 Subclause 37(2).

43 Subclause 37(3).

44 Re-enacting s.40(2) of the 1961 Act.

45 This clause is new.

46 Replacing s.41 (in part) and ss.43 to 47 of the 1961 Act, which had made separate provision for the suppression of riots by the police, by members of the armed forces, and by others.

47 *Report on Self Defence*, Wellington, 1979.

48 *Id.*, p.8.

49 See generally, Brookbanks, *Self Defence in New Zealand* (1989) N.Z.L.J. 258-262.

that the defence extends to even an unreasonable belief in circumstances which justify defensive force,⁵⁰ one court has extended it to such force as one believes to be reasonable in the circumstances as one believes them to be.⁵¹ This proposition was nevertheless described in a subsequent case as "startling, not to say dangerous",⁵² and it appears that the better view is that the determination of what force was necessary is an independent matter for the jury.⁵³

5.35 Clause 42⁵⁴ of the Bill makes separate provision for the use of such force as may be necessary to prevent the commission of suicide. As regards the defence of movable property and of land or premises, clauses 48⁵⁵ and 49⁵⁶ provide for the use of reasonable force by persons lawfully in occupation or possession of such property to prevent trespass to such property, to retake possession and to remove any trespasser. In the case of defence of a dwellinghouse, the reasonableness of force used to prevent any forcible breaking and entering is to be judged according to the circumstances as the person believes them to be.⁵⁷ In all cases of defence of property, however, the justification does not extend to force which is intended to cause injury.⁵⁸

Kidnapping And Abduction

5.36 Clause 154, drawing on elements of the existing offences of kidnapping and abduction in ss.208 to 210 of the 1961 Act, is a notable feature of the 1989 Bill. It provides for a statutory definition of abduction:

"Abduction defined- Abduction is the act of a person who unlawfully takes away or detains any other person by force or the threat of force or by any restraint used against that person or some other person; and includes the unlawful taking away or detaining of any person with that person's consent if the consent is obtained by fraud or duress or enticement".

5.37 Clause 155(2) provides that the maximum penalty for abduction is 7 years imprisonment, although the definition clearly covers conduct of much lesser gravity as it extends to the detention of another by any restraint. Whereas the previous definition of kidnapping extended to a type of aggravated false imprisonment under s.209(1)(a), namely the taking and holding of a person with intent to cause that person to be confined or imprisoned, such conduct would now constitute abduction under clause 154.⁵⁹ Clause 155(1) provides for the offence of kidnapping, defined in terms of the abduction of another person with

50 For example, *Tulip v Police* (1988) N.Z. Recent Law 335.

51 *R. v Robinson* (1987) 2 C.R.N.Z. 632.

52 *R. v Murray CHC Wellington*, T. 26/87, 21 October 1987 (*per* Eichelbaum J.).

53 See Brookbanks, (1989) N.Z. Recent Law 24.

54 Based on the relevant part of s.41 of the 1961 Act.

55 Re-enacting s.52(1) of the 1961 Act.

56 Combining and re-enacting ss.55 and 56(1) of the 1961 Act.

57 Subclause 49(1).

58 Subclauses 48(2) and 49(3).

59 See Explanatory Note accompanying clause 154.

any of three ulterior intents:

- "(a) To send or take that person out of New Zealand or to cause that person to be sent or taken out of New Zealand; or
- (b) To hold that person for ransom; or
- (c) To have sexual connection with that other person or to cause him or her to have sexual connection⁶⁰ with any other person."

5.38 Whereas the first two categories of kidnapping were carried over from previous law,⁶¹ the third replaces the outdated offence under s.208 of the 1961 Act of abduction for the purposes of marriage or sexual intercourse.

5.39 As under the 1961 Act,⁶² separate provision is made for abduction of a child under 16, the definition extending to detention, including a continued detention by a person who had, but no longer has, lawful possession of the child. Clause 156 provides as follows:

"Abduction of child under 16 years- (1) Every person is liable to imprisonment for 7 years who, with intent to deprive any parent or guardian or other person having the lawful care or charge of any child under the age of 16 years of the possession of the child, unlawfully-

- (a) Takes or entices away the child; or
- (b) Detains the child, whether or not the person had lawful possession of the child before the unlawful detention commences; or
- (c) Receives the child knowing that the child has been so taken or enticed away or detained.

(2) It is no defence to a charge under this section that the child consented.

(3) It is a defence to a charge under this section that the person charged believed on reasonable grounds that he or she had a right to possession or continued possession of the child".

60 "Sexual connection" is defined in clause 135 as a) connection occasioned by the penetration of the genitalia or the anus of any person by i) any part of the body of any other person; or ii) any object held or manipulated by any other person, otherwise than for *bona fide* medical purposes: or b) connection between the mouth or tongue of any person and any part of the genitalia of any other person.

61 Paras. 209(1)(b) and (c).

62 S.210.

CHAPTER 6: THE LAW IN AUSTRALIA

Introduction

6.1 Apart from Victoria, no comprehensive codification or recodification of the law relating to offences against the person, or of the substantive criminal law in general, has been implemented recently in Australia. The law in this area, as contained in the Criminal Codes of Queensland,¹ Western Australia² and Tasmania³ and as governed by common law⁴ and statute⁵ in the other Australian jurisdictions, remains essentially the same in content, if not in form, to that obtaining in Ireland.

6.2 All the Australian jurisdictions, apart from Victoria, provide for statutory offences of wounding or causing grievous bodily harm and causing such harm with intent;⁶ of strangling or administering any stupefying thing with intent to facilitate the commission of an offence;⁷ of intentionally or wantonly endangering persons on a railway;⁸ of threatening or endangering the safety of aircraft and

1 Criminal Code (1899). See generally, *Carter's Criminal Law of Queensland* (6th ed., 1982).

2 The Western Australia Code is almost identical to the Queensland Code. It was first enacted in 1902 and repealed and re-enacted with certain amendments in 1913: Criminal Code Compilation Act (W.A.), appendix B. See generally, Carter, *op cit*, and Herlihy and Kenny, *Criminal Law in Queensland and Western Australia* (1978). The same Code was also adopted in Papua, then British New Guinea, in 1903 and in New Guinea in 1921.

3 *Criminal Code Act, 1924*.

4 The common law jurisdictions of Australia are the states of New South Wales, Victoria and South Australia, the commonwealth of Australia within the scope of its constitutional powers, the Northern Territory and the Australian Capital Territory.

5 Each of the common law jurisdictions have adopted extensive consolidating Acts in the field of the substantive criminal law, for example, *Crimes Act, 1900* (N.S.W.); *Crimes Act, 1958* (Vic.); *Criminal Law Consolidation Act, 1935* (S.A.). See generally, Bates, Buddin and Meure, *Criminal Law, Cases and Materials in N.S.W., Victoria and South Australia* (1979); Gillies, *Criminal Law* (2nd ed., 1990).

6 For example, Qd. and W.A. Codes, ss.317, 320, 323 and 294, 297, 301, respectively; Tasmania Code, ss.170 and 172; *Crimes Act* (N.S.W.), ss.33 & 35; C.L.C.A. (S.A.), ss.21 & 23.

7 Qd. & W.A. Codes, ss.315, 316 and 292, 293 respectively; Tasmania Code, ss.168 and 169; *Crimes Act* (N.S.W.), ss.37-38; C.L.C.A. (S.A.) s.25.

8 Qd. & W.A. Codes, ss.319, 329 and 296, 307 respectively; Tasmania Code, ss.173-174; *Crimes Act* (N.S.W.), ss.50-52; C.L.C.A. (S.A.), ss.35-37.

persons in it;⁹ of impeding escape from a shipwreck;¹⁰ of poisoning and administering any noxious thing;¹¹ of setting man-traps;¹² of sending written threats to kill;¹³ of the making, use or possession of explosives or other dangerous substances for the purpose of causing injury or endangering life;¹⁴ and of ill-treatment of children,¹⁵ servants or apprentices.¹⁶ In addition, all states provide for an offence of child-stealing¹⁷ and for several offences of abduction of women or young girls from financial motives or with intent to defile.¹⁸ A federal statute providing for an offence of torture has also been enacted in accordance with the *U.N. Torture Convention*.¹⁹

6.3 Common assault, false imprisonment, kidnapping, affray and public nuisance are also universally provided for either by statute or at common law. Whereas common assault is triable both summarily and on indictment in all jurisdictions,²⁰ Tasmania does not provide for the separate indictable offence of assault occasioning actual bodily harm, an offence punishable by either 3 years²¹ or 5 years²² imprisonment in those jurisdictions where it does exist. Tasmania does however provide for a separate offence of aggravated assault as such.²³ Queensland, Western Australia, and South Australia provide for "circumstances of aggravation" which, while operating to enlarge a magistrate's powers of sentencing, do not affect the actual conviction for common assault. Such circumstances include an assault on any female or on any male child under the age of 14.²⁴ Finally, it is established that for the purpose both of the Codes and the Australian common law,²⁵ the *mens rea* of assault is satisfied by a finding of recklessness.

6.4 In Part I of this Discussion Paper, we have incorporated some decisions of Australian courts on the scope and application of some of these offences for comparative purposes. In this Part, it remains for us to consider certain statutory innovations in Australian law which may be of interest in looking to the reform

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- 9 Qd. & W.A. Codes, ss.317a, 319a, 330-333 and 294a, 296a, 308-311 respectively; Tasmania Code, ss.180 and 276a-276g; *Crimes Act (N.S.W.)*, ss.32a, 32c; C.L.C.A. (S.A.), s.33.
 - 10 Qd. & W.A. Codes, ss.318 and 295 respectively; Tasmania Code, s.171; C.L.C.A. (S.A.), s.20.
 - 11 Qd. & W.A. Codes, ss.322 and 300 respectively; Tasmania Code, ss.175-176; *Crimes Act (N.S.W.)*, ss.39-41; C.L.C.A. (S.A.), ss.26-27.
 - 12 Qd. & W.A. Codes, ss.327 and 305 respectively; Tasmania Code, s.179; C.L.C.A. (S.A.), s.34.
 - 13 Qd. & W.A. Codes, ss.308 and 285 respectively; Tasmania Code, s.162; C.L.C.A. (S.A.), s.19.
 - 14 Qd. & W.A. Codes, ss.317, 321, 334, and 294, 299, 312 respectively; Tasmania Code, ss.170, 181; *Crimes Act (N.S.W.)*, ss.46-49; C.L.C.A. (S.A.), ss.31-33.
 - 15 Qd. & W.A. Codes, ss.326 and 304 respectively; Tasmania Code, s.178; *Community Welfare Act, 1972-76*, (S.A.), ss.72,73; *Crimes Act (N.S.W.)*, s.43.
 - 16 Qd. & W.A. Codes, ss.325 and 303 respectively.
 - 17 Qd. & W.A. Codes, ss.363 and 343 respectively; Tasmania Code, s.191; *Crimes Act (N.S.W.)*, s.91; *Crimes Act (Vic.)*, s.83; C.L.C.A. (S.A.), s.80.
 - 18 Qd. & W.A. Codes, ss.351, 352 and 329, 330 respectively; Tasmania Code, ss.186-189; *Crimes Act (N.S.W.)*, ss.86-90; *Crimes Act (Vic.)*, ss.59-62. In South Australia, the equivalent provisions were repealed by the *Criminal Law Consolidation (Amendment) Act, 1976*.
 - 19 *Australia (Federal) Crimes (Torture) Act, 1988* (No. 148).
 - 20 For example *Crimes Act (N.S.W.)*, ss.61 and 493; C.L.C.A. (S.A.), ss.39,46.
 - 21 *Crimes Act (N.S.W.)*, s.59; Qd. & W.A. Codes, ss.339 and 317 respectively.
 - 22 C.L.C.A. (S.A.) s.40.
 - 23 Criminal Code, s.183 (with intent to commit a crime, resist arrest, prevent lawful apprehension or prevent lawful seizure of lands or goods). Ss.338, 338a and 316, 316a of the Qd. and W.A. Codes also provide for offences of assaulting a magistrate preserving a wreck and a member of any aircraft crew.
 - 24 For example, s.344, of the Qd. Code.
 - 25 See Howard, *Criminal Law* (3rd ed., 1977), pp.125-129.

of existing law in Ireland.

Statutory Innovations

(a) Assault

6.5 Section 245 of the Queensland Criminal Code and s.222 of the Western Australia Code provide for a statutory definition of assault in the following terms:

"A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without his consent, or with his consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without his consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose, is said to assault that other person, and the act is called an assault.

The term "applies force" includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort".

6.6 This may be contrasted with the definition contained in s.182 of the Tasmanian Code:

"(1) An assault is the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening by any gesture to apply such force to the person of another, if the person making the attempt or threat has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose; or the act of depriving another of his liberty.

(2) Words alone cannot constitute an assault.

(3) An act which is reasonably necessary for the common intercourse of life if done only for the purpose of such intercourse, and which is not disproportionate to the occasion, does not constitute an assault.

(4) Except in cases in which it is specially provided that consent cannot be given, or shall not be a defence, an assault is not unlawful if committed with the consent of the person assaulted unless the act is otherwise unlawful, and the injury is of such a nature, or is done under such circumstances, as to be injurious to the public, as well as to the person assaulted, and to involve a breach of the peace".

6.7 The Codes therefore discard the notion of battery and use assault in its popular sense to include the actual application of force as well as the threat or

attempt to do so. In doing so, they have also abolished the requirement in assault at common law that the defendant's actions should create in the mind of the victim a belief that unlawful physical force is about to be applied to his or her person. So a person may be assaulted, even in the absence of actual physical force, without knowing anything about it.²⁶ A third difference from the common law arises from the inclusion of heat, light, electricity, gas, odour and other substances within the definition in the Queensland and Western Australia Codes. Nevertheless, although going beyond what has actually been decided at common law, it is probable that the application of force by such means would satisfy the principle that the force be direct.²⁷

6.8 The Codes also accept the view that an assault cannot be constituted by words alone, a limitation which has been criticised by Australian commentators on similar grounds to those put forward by Glanville Williams in respect of the common law.²⁸ Finally, the Tasmanian Code differs from the other codes in two further respects: by providing for an express defence of common intercourse instead of relying on the doctrine of implied consent; and by including deprivation of liberty within the notion of assault instead of providing for the separate offence of false imprisonment.

(b) Kidnapping

6.9 The confusion surrounding the meaning and scope of kidnapping at common law has led most Australian jurisdictions to adopt a statutory offence of kidnapping first formulated in New South Wales, Victoria and Queensland in 1961.²⁹ It provides as follows:

"Any person who

- (a) with intent to extort or gain anything from, or procure anything to be done or omitted to be done, by any person, by a demand containing threats of injury or detriment of any kind to be caused to any person (whether by the offender or any other person) if the demand is not complied with, takes or entices away, or detains, the person in respect of whom those threats are made; or
- (b) receives or harbours the person in respect of whom the threats referred to in paragraph (a) are made knowing that person to have been taken or enticed away or detained as mentioned therein, is guilty of kidnapping".

6.10 In Queensland and Western Australia, this offence is known as

²⁶ *Id.* p.123.

²⁷ *Id.* p.124.

²⁸ *Id.* pp.124-25.

²⁹ *Crimes Act (N.S.W.)*, s.90a; *Crimes Act (Vic.)*, s.63a; Qd. Code, s.354a; *Kidnapping Act, 1960-1971 (S.A.)*.

kidnapping for ransom, and is distinguished from kidnapping *simpliciter*, which is committed by any person who forcibly takes or detains another with intent to compel that other to work for him against his will.³⁰ In some jurisdictions, express provision is also made for a lesser penalty where the victim has been set at liberty in any manner whatsoever without having suffered any grievous bodily harm.³¹

(c) Threats

6.11 Some Australian jurisdictions provide for a simple statutory offence of coercion. For example, s.359 of the Queensland Code provides that any person who threatens to do any injury, or cause any detriment of any kind to another, with intent to prevent or hinder that other person from doing any act which the person is lawfully entitled to do, or with intent to compel the person to do any act which the person is lawfully entitled to abstain from doing, is guilty of a misdemeanour and punishable on conviction by a fine or imprisonment for one year. For this purpose, it has been held that the "detriment" need not itself involve a criminal or unlawful act - it is sufficient for the prosecution to prove that the threat in question is to cause a detriment to another by inducing a violation of that other person's legal rights, contractual or otherwise.³²

6.12 In addition, some jurisdictions have provided for an offence of making false threats of danger, similar to the offence of making "terroristic threats" under s.211.3 of the Model Penal Code. S.276AA of the Tasmanian Criminal Code, for example, provides for such an offence where a person "makes a statement or conveys information, being a statement or information that he knows to be false, to the effect that, or from which it could be reasonably inferred that, some act has been, will be or is likely to be, done at any place that is of such a nature as to give rise, or be likely to give rise, to serious risk of danger to persons or property at or near that place".

(d) Justifiable force

6.13 In addition to setting out the substantive offences, the Criminal Codes of Queensland, Western Australia and Tasmania provide for an extensive delimitation of the circumstances in which the use of force may be justified, as well as of the relationships and circumstances giving rise to a duty to preserve the health of others, and hence to criminal liability for injuries resulting from any omission to perform such a duty.³³ Most, if not all, defences of general application are also set in the Codes.

30 Qd. and W.A. Codes, ss.354 and 332 respectively.

31 For example, Qd. Code, s.354a; *Crimes Act (N.S.W.)*, s.90a.

32 *R. v Zaphir* [1978] Qd. R. 151.

33 Qd. Code, ss.285-290; W.A. Code, ss.262-267; Tasmania Code, ss.144-151 & 156(2)(b).

Effecting Arrest

6.14 The Codes all provide for the lawful use of such force as may be reasonably necessary to overcome any force used in resisting the lawful execution of any sentence, process or warrant. This includes (for the purposes of criminal liability) a sentence, process or warrant that has been erroneously passed or made without jurisdiction, provided that the person executing the warrant, etc, or any person assisting him does not know of the error or acts in good faith and in the belief that it is a valid warrant, etc. No person who uses force, believing in good faith and on reasonable grounds that the person arrested is the person named in the warrant or that the warrant or process is good in law, will be criminally responsible for the use of such force.³⁴

Preventing The Commission Of A Crime

6.15 Provision is also made for the lawful use of force reasonably necessary to prevent escape from arrest or lawful custody, to prevent a breach of the peace, or to suppress a riot.³⁵ As regards the lawful use of force for the prosecution of crime, there is a difference of approach in the Codes. Section 39 of the Tasmanian Code provides as follows:

"It is lawful for any person to use such force as he believes on reasonable grounds to be necessary in order to prevent the commission of a crime, the commission of which would be likely to cause immediate and serious injury to any person or property, or in order to prevent any act being done which he believes on reasonable grounds would, if done, amount to any such crime".

6.16 By contrast, the Queensland and Western Australia Codes provide that:

"It is lawful for any person to use such force as is reasonably necessary in order to prevent the commission of an offence which is such that the offender may be arrested without warrant; or in order to prevent any act from being done as to which he believes, on reasonable grounds, that it would, if done, amount to any such offence; or in order to prevent a person whom he believes, on reasonable grounds, to be of unsound mind from doing violence to any person or property".³⁶

Prevention Of Danger

6.17 Special provision is also made for the use of such force as is reasonably necessary to avoid danger to the safety of ships and aircraft and of their passengers.³⁷ For example, s.281 of the Queensland Code provides as follows:

34 Qd. & W.A. Codes, ss.247-254 and 224-231 respectively; Tasmania Code, ss.21-28.

35 Qd. & W.A. Codes, ss.255-258, 260-265 and ss.232-235, 237-242 respectively; Tasmania Code, ss.30-32 and 34-38.

36 Ss.286 and 243 respectively.

37 Qd. & W.A. Codes, ss.281 and 258 respectively; Tasmania Code, ss.39a and 39b.

"It is lawful for the master or other person in command of-

- (a) A vessel on a voyage; or
- (b) An aircraft on a flight,

himself and for any person acting by his authority to use, for the purpose of maintaining good order and discipline on board the vessel or aircraft, such force as he or such person acting by his authority believes, on reasonable grounds, to be necessary, and as is reasonable under the circumstances".

Defence Of Self And Property

6.18 The Code provisions relating to defence of self or others and of property are somewhat elaborate, being complicated on the one hand by the extension of the law of provocation to non-fatal assaults and on the other by distinctions between moveable and real property and between persons acting with a claim of right and others.³⁸ In New Zealand, it has been seen that similar distinctions between provoked and unprovoked assaults have been abandoned in favour of a simple statutory defence of self-defence, and that the use of force for the protection of property has been limited to those in lawful occupation or possession of such property, subject to a proviso that the force used cannot be intended to cause injury.³⁹ In the Australian Codes, by contrast, this proviso is stated in terms of such force as is likely or intended to cause death or grievous bodily harm, and it does not apply at all to the case of defence of one's dwelling house.⁴⁰

6.19 In addition, it may be noted that s.49 of the Tasmanian Code goes substantially beyond the common law in extending the justifiable use of force to such force as is no more than necessary "to prevent [an] assault or the repetition of it". The Queensland and Western Australian Codes go even further in providing that it is lawful for a person to use such force as is reasonably necessary to prevent the repetition of an act or insult of such a nature as to constitute provocation to him for an assault, provided that such force is not intended or likely to cause death or grievous bodily harm.⁴¹

Domestic Discipline

6.20 Identical provision is made in the Codes for cases of domestic discipline, in the following terms:

"It is lawful for a parent or a person in the place of a parent or for a schoolmaster [or master], to use, by way of correction, towards a child

38 See Qd. & W.A. Codes, ss.267-279 and 244-256 respectively; Tasmania Code, ss.40-49.

39 *Supra*, Chapter 5, page 193 *et seq.*

40 *Supra*, n.38.

41 Qd. & W.A. Codes, ss.270 and 247 respectively. See *Howe v R.* (1980) 55 A.L.J.R. 5; 32 A.L.R. 478.

or pupil [or apprentice] respectively under his care, such force as is reasonable under the circumstances".⁴²

6.21 The lawful chastisement of apprentices, is provided for in both the Queensland and Western Australia provisions.

Surgical Operations

6.22 Section 282 of the Queensland Code provides as follows:

"Surgical operations. A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case."

6.23 Clearly, such circumstances would include the presence or absence of the patient's consent. In Tasmania, the equivalent section is limited to consensual treatment and extends also to civil liability. It provides further that a parent or any person having the care of a child too young to exercise a reasonable discretion in the matter may give such consent and that in the case of incompetent persons, the operation may be performed without consent.⁴³

Death And Injury

6.24 In Queensland and Western Australia, it is expressly provided that a person cannot consent to his own death.⁴⁴ In Tasmania, this is extended also to any injury likely to cause death (except in the case of surgery).⁴⁵ In this respect, it should be noted that the common law rules relating to the vitiation of consent apply equally in Queensland and Western Australia, so that consent to lesser degrees of harm may also be ineffective.⁴⁶ In Tasmania, the rule is narrowed somewhat; the act consented to must be otherwise unlawful, and the injury must be of such a nature, or be done under such circumstances, as to be injurious to the public as well as to the person assaulted, and must also involve a breach of the peace.⁴⁷

42 Qd. & W.A. Codes, ss.280 and 257 respectively; Tasmania Code, s.50.

43 Tasmania Code, s.51.

44 Ss.284 and 261 respectively.

45 S.53.

46 S.264 of the Qd. Code (W.A., s.241) expressly provides that the application of force by one person to the person of another may be unlawful, although it is done with the consent of that other person.

47 S.182(4).

(a) **Omission and duties**

6.25 Apart from some minor points of detail,⁴⁸ identical provision is made in each of the codes for the duties of care to which one must conform for the preservation of human life.⁴⁹ Four of these provisions are identical in substance to clauses 118-121 of the *New Zealand Crimes Bill* set out above. These relate to the duty to provide the "necessaries of life" to certain persons, to the duty of persons doing dangerous acts or in charge of dangerous things, and the duty to complete a voluntarily undertaken act, the omission to do which is or may be dangerous to human life or health. The remaining two categories relate to the duty owed by the "head of the family" to any child under the age of 16 who is a member of his or her household, and to the duty of a master in respect of any servant or apprentice under the age of 16.

6.26 As under the *New Zealand Crimes Act*, these sections do not in themselves create offences. Instead, they are ancillary to those offences against the person in the Codes which are stated to be capable of commission by omission. These are for the most part limited to murder, manslaughter, causing grievous bodily harm and other life-endangering offences,⁵⁰ a limitation which is made explicit in s.152 of the Tasmania Code, which provides as follows:

"A person who without lawful excuse omits to perform any of the duties mentioned in this chapter shall be criminally responsible for such omission if the same causes the death of or grievous bodily harm to any person to whom such duty is owed, or endangers his life, or permanently injures his health".

6.27 The *mens rea* for such omissions is governed by the *mens rea* of the particular crime charged. In the case of persons doing dangerous acts or in charge of dangerous things, it follows from the particular provisions that negligence will nevertheless be relevant to the issue of whether there has in fact been an omission, such negligence being the standard applicable to manslaughter.⁵¹ Where manslaughter is charged, such criminal negligence will also evidently constitute the *mens rea* of the offences. In Queensland and Western Australia, there is an additional offence of "negligent acts causing harm" which on the one hand imports the notion of constructive liability in manslaughter to the offence of assault occasioning actual bodily harm and on the other imposes liability for causing such harm in breach of the above duties:

"Any person who unlawfully does any act, or omits to do any act which it is his duty to do, by which act or omission bodily harm is actually caused to any person, is guilty of a misdemeanour, and is liable to

48 The Tasmania Code specifies that the expression 'necessaries of life' includes medical and surgical aid and medicine (s.146) and makes express provision for the liability of those to whom such duties are delegated (s.148).

49 *Supra*, n.31.

50 For example, Qd. Code, ss.291, 293 and 306(2).

51 See Carter, *op cit*, pp.231-32.

imprisonment with hard labour for two years".⁵²

(b) Victoria

6.28 In Victoria, Part I of the *Crimes Act, 1958*, which followed the traditional and elaborate subclassifications of offences against the person set out at the beginning of this chapter, was amended by the *Criminal (Amendment) Act, 1985*. Sections 11-13 were repealed and ss.15-43 were replaced with the new offences now inserted in ss.4-31 of the principal Act.⁵³ In many respects, the reforms introduced are similar to those proposed in the English Draft Code. In particular, the offences corresponding to ss.47, 20 and 18 of the 1861 Act in Irish law are replaced by offences of intentionally causing serious injury;⁵⁴ recklessly causing serious injury;⁵⁵ and intentionally or recklessly causing injury.⁵⁶

6.29 In these, as in all the new offences, the terms "intentionally" and "recklessly" are not defined and therefore remain subject to interpretation at common law. "Injury", however, is expressed to include "unconsciousness, hysteria, pain and any substantial impairment of bodily function", and "serious injury" is stated to include "a combination of injuries".⁵⁷

Threats

6.30 Section 20 makes it an offence to threaten to kill any person, intending that the recipient of the threat will fear that the threat will be carried out, or being reckless in that regard. The threat may be made to any person and the defendant need not have the intent to carry it out. A parallel offence, relating to a threat to inflict serious injury, is created by s.21. Although a mere threat to injure does not come within the offence, it may be observed that the lesser requirement of recklessness in respect of whether the recipient of the threat will fear that it will be carried out might nevertheless bring certain threats which are not *prima facie* threats to inflict serious injury within the scope of the offence.

New Offences

6.31 The other offences against the person introduced by the 1985 Act are concerned with administering certain substances without lawful excuse;⁵⁸ negligently causing serious injury;⁵⁹ setting traps with intent to kill or cause serious injury, or being reckless in that regard;⁶⁰ extortion by threats to kill;⁶¹ and threatening injury⁶² or using firearms⁶³ to prevent arrest. Two offences

52 Od. & W.A. Codes, ss.328 and 306 respectively.
53 For commentary, see Gillies, *Criminal Law* (2nd ed., 1990), pp.538-39.
54 S.16.
55 S.17.
56 S.18.
57 S.15.
58 S.19.
59 S.24.
60 Ss.25-26.
61 S.27.
62 S.30.

of reckless endangerment are also created, one relating to endangering life and one relating to placing another person in danger of serious injury.⁶⁴

6.32 Several indictable offences of assault are also created by s.31. These include assaults or threats to assault a person with intent to commit an indictable offence and assaults or threats to assault a police officer acting in the execution of his or her duty, or with intent to resist or prevent lawful apprehension. Simple assault is defined in subs.2 as meaning

"... the direct or indirect application of force by a person to the body of, or to clothing or equipment worn by, another person, where the application of force is

- (a) without lawful excuse; and
- (b) with intent to inflict or being reckless as to the infliction of bodily injury, pain, discomfort, damage, insult or deprivation of liberty,

and results in the infliction of such consequence (whether or not the consequence inflicted is the consequence intended or foreseen)".

6.33 "Application of force" is defined in subs.3 as including "a) application of heat, light, electric current or any other form of energy and b) application of matter in solid, liquid or gaseous form".

Proposals For Reform

6.34 In 1973, the Australian Attorney General set in train the preparation of a federal criminal code. This initiative, however, was subsequently redirected towards the more modest task of rationalising the criminal law of the Australian Capital Territory (A.C.T.). Although a report was prepared, the project has now been shelved.⁶⁵ Many of the reforms proposed for the A.C.T. were nevertheless adopted by the *Criminal Law and Penal Methods Reform Committee of South Australia* in its Fourth Report in 1977, when it undertook a general review of the substantive criminal law of South Australia and made a number of recommendations for reform.⁶⁶ These recommendations remain unimplemented in South Australia, and no further general review of crimes of violence has since been undertaken in any other Australian jurisdiction apart from Victoria.

South Australia

6.35 The South Australia Committee recommended that the distinction

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S.29.

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Ss.22 and 23.

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Report of Working Party on Territorial Criminal Law (1975).

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Criminal Law and Penal Methods Reform Committee Reports 3-4 (1975-77) pp.61-96.

between assault and battery be discontinued and that there should be created a new statutory offence of assault.⁶⁷ Any threat of immediate harm to the victim made in the victim's presence, whether by words or gestures or by any bodily act, should constitute such an assault. Following the existing Australian Codes, it was also recommended that in the case of gestures, it should be irrelevant whether they are seen by the victim or not.⁶⁸ In addition, the Committee recommended that there should be a statutory defence of common intercourse to any simple assault defined to include the application of force of any kind to the person of another in accordance with s.245 of the Queensland Code, though not "a defence in the strict sense, i.e., to be proved by the defendant, but that evidence that the circumstances were such that the defendant's actions went beyond common intercourse should be a normal part of the case for the prosecution".⁶⁹

6.36 As regards more serious categories of assault, the Committee recommended that the general framework of the law of assault and related offences be tripartite, consisting of three offences distinguished from each other by the degree of harm inflicted as opposed to the status or characteristics of the victim or the intention of the perpetrator:

"Simple or common assault would be, as now, an assault without any additional feature treated by the law as an aggravation. Assault occasioning actual bodily harm would be an assault in which some relatively minor degree of injury is inflicted, but nothing serious. Assault occasioning serious bodily harm would be an assault which results in serious injury to the person. We envisage that the defendant would be charged with the most serious degree of assault which seemed appropriate on the evidence but that the jury would have power to convict him of a lesser assault if they saw fit. In conformity with our recommendations with respect to the mental element throughout this report, we recommend that all assaults be defined in terms of intention and recklessness as these expressions have been previously explained. That is to say, for example, that the defendant is guilty of an assault occasioning actual bodily harm only if he intended to cause either that degree of harm or some more serious injury, or was reckless as to the substantial risk of either of those consequences. If he was not intentional or reckless in this sense, he is guilty at most of simple assault".⁷⁰

6.37 Thus, whereas recklessness is given a substantive meaning, being "an appreciation of a high likelihood" that a result will come about or that a circumstance exists,⁷¹ and whereas the rule in *Mowatt*⁷² is rejected, the scheme proposed is exclusively result-oriented in structure, with no distinction drawn

87 *Id.* p.61.

68 *Id.* p.62.

69 *Id.* p.63.

70 *Id.* pp.62-63.

71 *Id.* pp.67.

72 [1967] 3 All E.R. 47.

between such recklessness and an intention.

6.38 The Committee also considered that there was value in preserving a distinction between assaults properly so called and offences of causing harm on the grounds that the latter should not require proof of an assault. In consequence, it recommended that the offence of unlawful wounding and of causing grievous bodily harm with intent be replaced by the following two offences:

- "1. Whosoever by any means causes serious bodily harm to another person either intentionally or being reckless to the causing of serious bodily harm to any person shall be guilty of an offence.
2. Whosoever by any means intentionally or recklessly causes bodily harm to another person shall be guilty of an offence".⁷³

6.39 Having regard to these offences and to the wide definition proposed for the "application of force" for the purposes of the law of assault, it was further recommended that the offences of strangling, choking, stupefying or poisoning be repealed without replacement.⁷⁴ For the same reasons, the Committee recommended the abolition of the offences of assaulting a clergyman or a magistrate preserving a wreck, or committed in the course of any unlawful combination or conspiracy to raise the rate of wages, and of the offence of hindering or preventing a seaman from engaging in his occupation.⁷⁵

6.40 The abolition of the offence of abandoning or exposing any child under 2 years was also recommended on the grounds that such conduct is adequately penalised by the offence of cruelty.⁷⁶ As regards the statutory offence of neglect to maintain certain specified persons such as wives, children, wards, lunatics, idiots, apprentices, servants, and infants "or otherwise",⁷⁷ the Committee was of the view that while it was likely that certain persons continued to require the direct protection of the criminal law from such neglect, the categories were not susceptible to isolation and classification.

"It is particularly difficult to bring liabilities to maintain or care for people within a formula based on occupational description or family relationship. Our view is that a liability to care for another is always a question of fact. The most important single fact is the assumption of a liability to care for another. This is a circumstance not usually difficult to determine upon adequate evidence. We recommend in consequence the repeal of s.29 of the *Criminal Law Consolidation Act, 1935-1976* and its replacement with an offence of causing harm to any person for whose welfare the defendant is or has become responsible as a matter of fact.

⁷³ *Op cit*, p.76.

⁷⁴ *Id.*

⁷⁵ *Id.*, p.81.

⁷⁶ *Id.*, p.71.

⁷⁷ Provided for in s.29 of the C.L.C.A. (S.A.), 1935-1976.

To the extent that such situations are not covered by other legislation, prosecutions for such an offence are likely to be made only where the facts are of a serious nature. This being so, we do not think that leaving the question of responsibility to care for another to the jury as a question of fact upon the evidence is likely to cause difficulty."⁷⁸

6.41 At the same time, the Committee recommended the creation of an offence of reckless endangerment based on s.211.2 of the Model Penal Code of the American Law Institute in the following terms:

"A person commits an offence if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury".⁷⁹

6.42 The adoption of this offence would, in the view of the Committee, obviate the need for a specific provision relating to the setting of mantraps.⁸⁰ On the other hand, it was considered that a specific offence of endangering transport should be created to replace the more limited offence of endangering railway vehicles and railway lines. This offence, based on a similar reform proposed for the A.C.T., would provide as follows:

"Whosoever being reckless as to endangering the safety of another person:

- (a) removes anything from or places anything on, in, over, or under any place, or any area of water, that is used for or in connexion with the passage or carriage of persons or of goods by land, water or air; or
- (b) does anything to any property that is used for or in connexion with the carriage of persons or of goods by land, water or air; or
- (c) shoots or throws anything at, into, or upon any vehicle, ship, or aircraft; or
- (d) causes anything to come in contact with any vehicle, ship or aircraft; or
- (e) uses or exhibits any false or misleading light or signal or otherwise creates a false or misleading impression in respect of any matter relevant to the height, direction or speed of any vehicle, ship, or aircraft; or

⁷⁸ *Id.*, pp.77-78.

⁷⁹ *Id.*, pp.77.

⁸⁰ *Id.*, pp.79.

- (f) does any other unlawful act, or omits to do any act which it is his duty to do, in respect of any such place, area of water, or property as aforesaid, or in respect of any vehicle, ship or aircraft, commits an offence."⁸¹

6.43 The three explosives offences in South Australia similar to those provided for under Irish law in the 1861 Act, also created problems. In the view of the Committee, there was clearly a case for continuing to make specific provision against injury caused by explosives, notwithstanding that such conduct might also be prosecuted as actual or attempted murder or assault occasioning serious bodily harm. It was accordingly recommended that all three offences be replaced by a single offence of causing injury to any person by the use of any explosive substance either intentionally or being reckless as to the causing of such injury.⁸²

6.44 The Committee also considered the question of the appropriate age of consent to medical treatment and tattooing and concluded that 16 should be the specified age for both purposes.⁸³ In addition, it was considered that, for the purposes of the criminal law, no person should be required to undergo medical treatment if it is against his religious beliefs and that the consent rule should therefore apply as much in these circumstances as in any other.⁸⁴ In this connection, it may be noted that South Australian law provides that an operation may be performed upon a child who is under 18 where it is essential to save the life of such child and parental consent to such an operation has not been given.⁸⁵

6.45 As regards the offence of kidnapping, the Committee recommended that the formulation of the offence in s.212.1 of the Model Penal Code⁸⁶ be adopted, with certain modifications, as follows:

- "i) removal of or confinement of the victim should not need to be from any particular place or for any particular length of time; and
- ii) the requisite ulterior intents should be
- a) to hold for ransom or reward, or as a shield or hostage; or
 - b) to facilitate the commission of any felony or flight thereafter; or
 - c) to promote a political belief; or
 - d) to inflict bodily harm on or to terrorize the victim or

81

Id.

82

Id.

83

Id.

84

Id.

85 *Emergency Medical Treatment of Children Act, 1960-1971.*

86 *Infra*, Chapter 7.

another, or being reckless as to the causing of death or serious bodily harm to another."

6.46 It was further recommended that the final category attract a higher penalty than the first three, and that provision be made for the reduction of the gravity of the offence in cases where the victim has been voluntarily released alive and in a safe place prior to trial. For the purposes of the offence, the appropriate age for consent to what would otherwise be a kidnapping was considered to be 16 years. Finally, although it was considered that the creation of this offence would go far towards removing the need for the common law offence of false imprisonment, it was recommended that a statutory offence of "unlawful restraint" be created to cover any residual unlawful confinements.⁸⁷

⁸⁷ *Id.*

CHAPTER 7: CODIFICATION IN THE UNITED STATES

Assault, Aggravated Assault And Threats

7.1 In the United States, only a very few states, such as Rhode Island¹ and Virginia², have left the offences of assault and battery to be defined at common law, the pertinent statutes merely prescribing a punishment for each offence. Some jurisdictions like Arkansas³ have nevertheless retained the descriptive distinction, while others, such as Montana, define the term "assault" to embrace both assault and battery at common law.⁴ In Maine, "assault" is defined so as to embrace only common law battery. Assault is adequately covered by attempt provisions and by a new offence of "criminal threatening", which is defined as intentionally or knowingly placing another person in fear of imminent bodily injury (as opposed to mere physical contact).⁵ Some jurisdictions, moreover, require a "physical injury" for a battery, mere offensive touching not being sufficiently serious to constitute that crime.⁶

7.2 Where technical battery is retained, it is generally limited, as in Illinois⁷ and Maine,⁸ to physical contact of an insulting or offensive nature.

7.3 Although at common law there were no degrees of assault and battery,

1 Gen Laws of R.I., s.11-5-3.

2 Code of Va., s.18-2-57.

3 Ark. Stats. Ann., ss.41-1601 *et seq.*

4 Rev. Code of Mont., ss.94-5-201 *et seq.*

5 Me. Rev. Stats. Ann., 17-A, ss.207 *et seq.* Where assault is not recognised as such, it is prosecuted as an attempted battery: see Burns Indiana Stat. Ann., Title 35 Art. 42 et, 1 (1979), (1976) 10 Ind. L. Rev. 1.17.

6 E.g. Ark. Stats. Ann., s.41-1601 (commentary); Minn. Stats. Ann., s.609-22; Wis. Stats. Ann., s.940-19. The term "physical injury" is synonymous with "physical force" as opposed to "bodily injury" in Arizona, *State v Bustamonte*, 122 Ariz. 182, 593, P 2 d912 (1978).

7 Ill. Ann. Stats., 38, s.12-3 ("physical contact of an insulting or provoking nature"). In Arizona, "knowingly touching another person with intent to injure, insult or provoke such person" does not require a person-to-person contact, but may be committed by throwing urine on the other: see *State v Mathews*, 130 Ariz. 46, 633 P 2d 1039 (1981).

8 *Supra*, n.5, "bodily injury or offensive physical contact"; Iowa Crim. Code, s.708.1 (1978), "Insulting or offensive".

each being a misdemeanour,⁹ the tendency has been to subdivide the offences into degrees, with the higher degrees being felonies. The same result has been achieved by distinguishing between "simple" assault on the one hand and aggravated assault or battery on the other.¹⁰ In this respect, an assault is typically aggravated when it is accompanied by an intent to commit a specified felony, such as murder, rape or robbery.¹¹ In addition to proving an assault,¹² the pertinent felonious intent must be established.¹³

The Model Penal Code has chosen to treat assaults with intent to kill, rape or rob as attempted murder, rape or robbery, the accepted theory being that every assault with intent to commit a felony amounts to an attempt to commit that felony.¹⁴

7.4 An assault or battery with a dangerous¹⁵ or deadly¹⁶ weapon is usually classified as a felony. The offence will be higher or lower in degree depending on whether the defendant acted intentionally, recklessly, or only negligently; whether serious physical injury or only physical injury resulted; and whether a deadly or only an ordinary weapon was used.¹⁷ The offence may also be aggravated where the assault with a dangerous weapon was committed in a dwelling house.¹⁸ The gist of this offence is the use or intended use of a weapon, so that mere possession at the time of an assault will not be an aggravating factor.¹⁹

7.5 Whether a weapon is deadly or dangerous is ordinarily a question of fact to be determined by all the attendant circumstances, especially by the mode of use and by the effect likely to be produced by it.²⁰ It is nevertheless the duty of the court to declare some weapons, such as guns, revolvers, pistols and swords, when used within striking distance of the victim, to be lethal as a matter of law.²¹ The following objects have been held to be deadly or dangerous weapons: a bowie knife; a knife with a blade only two inches long; a chisel, when used for stabbing; a heavy iron weight; large stones; a rock; a bottle; a plastic chair; and an automobile. An unloaded gun, when pointed at another, is not a deadly weapon; but, when used as a bludgeon, may or may not qualify as such a weapon, depending on its size, weight and manner of use. A fist, or foot

9 For example, *State v Maier*, 13 N.J. 235, 99 A 2d 21.

10 For example, *Simpson v State*, 59 Ala. 1; *State v Serenson*, 44 Hawaii 601, 359 P 2d 289; *Black v State*, 137 Tex. Crim. 516, 132 SW2d 267.

11 For example, Gen. Laws of R.I., s.11-5-1; Rev. Code of Wash. Ann., s.9A.36.020(1)(d).

12 *People v Lee Kong*, 95 Cal. 668, 30 P 800; *Armijo v People*, 157 Colo 217, 402 P 2d 79; *State v Thyer*, 143 Kan. 238, 53 P 2d 907.

13 *U.S. v Tharp* (Dist. Col.) F Cas. No 16458; *Gallery v State*, 92 Ga. 463, 17 S.E. 863.

14 A.L.I., Model Penal Code, s.201.10, Tent. Draft No.9, Comment at 82 (1959), now Art. 211.1 M.P.C. (1962): see Commentary, p.184.

15 For example, Gen. Laws of R.I., s.11-5-2.

16 For example, Me. Rev. Stats. Ann., 17-A, s.208(1)(b).

17 For example, Ark. Stats. Ann., ss.41-1801 *et seq*; Ill. Ann. Stats., 38, ss12-2, 12-4; Rev. Code of Mont., ff94-5-201, 94-5-202; Rev. Code of Wash. Ann., ff9A. 36.010 *et seq*; Wis. Stats. Ann., f940, 24.

18 For example, Gen. Laws of R.I., s.11-5-4.

19 *People v Congleton*, 44 Cal. 92; *State v Napper*, 6 Nev. 113. See 92 A.L.R. 2d 636, (intent to do physical harm an essential of the crime of assault with a deadly or dangerous weapon).

20 For example, *U.S. v Johnson* (Ca. 4 Va.) 324 F. 2d 264.

21 *People v Pittullo*, 116 Cal. App. 2d 373, 253, P. 2d 705.

covered with an ordinary shoe, is not a dangerous or deadly weapon; but, under certain circumstances, kicking may constitute an assault with such a weapon.²²

7.6 An assault may also be aggravated if it is committed upon a police officer,²³ fireman,²⁴ teacher,²⁵ or other person engaged in the performance of a public duty,²⁶ but only where the defendant knows that the victim is such a person.²⁷

7.7 The constitutionality of such provisions has been upheld on the grounds that a state may legitimately afford greater protection to categories of people who are subjected to greater risks in performing special duties by imposing an enhanced punishment for an offence committed against such persons.²⁸ Moreover, a state may, in the absence of a fundamental right, differentiate between similarly, though not identically situated persons, without violating the principle of equal protection of the law provided it shows a rational basis for doing so.²⁹ In consequence, where the distinction is reasonably related to a legitimate government objective, the courts will refuse to consider whether the legislature's chosen means were the best available.³⁰

7.8 In Illinois, an assault or battery is aggravated where the perpetrator knows the victim to be either physically handicapped or over sixty years of age.³¹ A "physically handicapped person" is defined as one who suffers from a permanent disabling condition, which results from disease, injury, functional disorder, or congenital condition.³²

7.9 In some jurisdictions the old common law crime of mayhem is still recognised as a separate offence.³³ The Alabama statute is typical. A person commits mayhem when he "unlawfully, maliciously, and intentionally cuts out or disables the tongue; puts out or destroys an eye; cuts, bites or strikes off an ear; cuts, bites off, slits, mutilates, or destroys the nose or lip; or cuts, bites, tears, strikes off, or disables a limb or member of any other person".³⁴ Although in a growing number of jurisdictions, as under the Model Penal Code, mayhem has been abolished as a separate offence, the disablement and disfigurement elements have been included in pertinent assault and battery provisions as aggravating circumstances. For example, in New York, a person is guilty of assault in the

22 Wharton's *Criminal Law*, vol. 1, pp. 331-333 (14th ed., 1978 and Supplement, 1983).

23 For example, Rev. Code of Montana, ss.94-5-202(1)(d); *Jeanes v State*, 60 Tex. Crim. 440, 132 S.W.352.

24 For example, Gen. Laws of R.I., s.11-5-5.

25 *Id.*, s.11-5-7.

26 For example, Ill. Ann. Stats., 38, ss.12-2(4), (5), (8), (10), 12-4 (4), (5), (9).

27 *Kernan v State*, 11 Ind. 471; *Commonwealth v Cooley*, 72 Mass. 350; *State v Downer*, 8 Vt. 424.

28 *People v Hannon*, 53 Ill. 2d 79, 289 Ne. 2d 611 (1972), cert. denied, 411 U.S. 937 (1973), cited with approval in *People v Watson*, 118 Ill.2d 62, 514 Ne. 2d (1987) (Supreme Court of Illinois), discussed in (1989) 20 Loy. U. Chi. L.J. 353 *et seq.*

29 *Watson, op cit*, p.170, citing *People v Tosch*, 114 Ill.2d 474, 481, 501 Ne. 2d 1253, 1256 (1986), cert. denied, 107 S. Ct. 3235 (1987).

30 *Id.*

31 Ill. Rev. Stat., ch 38, para 12-2(a)(11), 12-2(a) 12 and 12-4(b)(13) (1987).

32 *Id.*, para. 2-15a (1987).

33 For example, Code of Ala., 14 s259; Cal. Penal Code, s.203; Idaho Code, s.18-5001.

34 *Id.*

first degree when “[w]ith intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such a person or a third person”.³⁵

The Model Penal Code

7.10 Section 211.1 of the Model Penal Code abolishes these categories of assault, battery and mayhem in favour of a single, integrated provision creating two offences of assault and aggravated assault, in the following terms:

- “(1) ***Simple Assault.*** A person is guilty of assault if he:
- (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
 - (b) negligently causes bodily injury to another with a deadly weapon; or
 - (c) attempts by physical menace to put another in fear of imminent serious bodily injury.

Simple assault is a misdemeanour unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanour.

(2) ***Aggravated Assault.*** A person is guilty of aggravated assault if he:

- (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or
- (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault under paragraph (b) is a felony of the third degree”.

7.11 The provision ranges in seriousness, from a petty misdemeanour, punishable by 30 days imprisonment, to a felony of the second degree, punishable by 10 years imprisonment. This range depends on the gravity of harm intended or caused and the dangerousness of the means used (though not according to the

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N.Y. Penal Law, s.120.10(2). See also, Ark. Stats. Ann., s.41-1601(1).

status of the victim).³⁶

Harm And Injury

7.12 Although harm based solely on insult or emotional trauma is excluded,³⁷ "bodily injury" is defined in s.210.O to mean "physical pain, illness or any impairment of the physical condition". This includes more than the consequences of direct attack, so that such harm caused indirectly, by, for example, exposing another to inclement weather or by non-therapeutic administration of a drug or narcotic, is also covered. Special provision for such offences is thereby obviated.³⁸ "Serious bodily injury", on the other hand, is defined in the same section to mean any "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ". This definition encompasses the drastic harms covered by the common law felony of mayhem and adds a residual category of harm creating substantial risk of death.

7.13 The term "bodily harm" is retained in many state Codes, and has been upheld as definite enough, in its commonly understood legal meaning as "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent", to meet the requirements of due process.³⁹

Mens Rea

7.14 Section 211.1 follows the tradition of making the use of a deadly weapon an aggravating factor for the crime of assault. Subsection (1)(b), exceptionally, extends liability to negligent infliction of injury with a deadly weapon on the grounds that "any use of an instrument or substance known for its capability of causing death should be accompanied by special care and restraint".⁴⁰ Moreover, under subs.(2)(b), the purposeful or knowing infliction of such harm by such means is a felony of the third degree, as opposed to a misdemeanour under subs.(1)(a) when caused by any other means.

7.15 Apart from subs.(1)(b), liability for assault is limited to conduct that is at least reckless. In this connection, the special category of recklessness "under circumstances manifesting extreme indifference to the value of human life", adapted from and intended to mirror the definition of murder in the M.P.C. for

36 The categories of felony and misdemeanour are set out in Article 6 of the Code. Article 7 provides for sentencing guidelines and criteria for these categories. Sa.7.01(a) and 7.01(b) provide that a sentence of imprisonment should normally be withheld where the defendant did not contemplate, or that his conduct did not cause or threaten, serious harm.

37 In a statute using the term "assault" to cover the entire field of assault and battery, it was said: "Petty batteries not producing injury do not constitute criminal assault", *State v Capwell*, 52 Or., App. 43, 627 P. 2d 905 at 907 (1981). But see *supra*, n.7 and n.8. And under a different statute, it was held no defence to a charge of third degree assault that the repeated touching of the other's head with fingers was intended only to be "insulting": see *State v Johnson*, 29 Wn.App. 307, 628 P.2d 479 (1981).

38 Though some existing statutes continue to do so, for example, Wis.s.940.28 (abandonment of a child); Iowa, s.708.5 (narcotics).

39 *People v Mays*, 91 Ill. 2d 251, 256, 437 Ne. 2d 633, 635-36 (1982).

40 A.L.I. Commentary to s.211.1, p.191.

the purposes of causing serious bodily injury, is only satisfied where the actor has perceived and consciously disregarded the risk of death of another.⁴¹ This result is consistent with the general approach of the M.P.C. "that serious felony sanctions should be grounded securely in the subjective culpability of the actor".⁴²

7.16 Under s.2.02(d) of the M.P.C., a person acts negligently with respect to a material element of an offence when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

7.17 A "deadly weapon" is defined in s.210.0 to include a firearm and any "other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury".

7.18 According to the A.L.I. commentary:

"This definition is designed to take account of the ingenuity of those who desire to hurt their fellows without encompassing every use of an ordinary object that could cause death or serious injury. It includes poisons, explosives, and caustic chemicals, as well as handguns and knives. It also reaches certain instruments that become deadly weapons only because of the manner of their use. Thus... if an actor purposely aims his car at a pedestrian...[the] car fits the definition of a deadly weapon. Once the auto is used in such a fashion, the actor is liable for a felony of the third degree under subs.(2)(b), even if he causes only non-serious bodily injury. Of course, in many instances, intentional use of a deadly weapon will contribute to the proof of an attempt to cause serious bodily injury and lead to a conviction of a felony of the second degree under subs.(2)(a)".⁴³

7.19 As noted above,⁴⁴ by including attempts as well as completed offences in subss.(1)(a) and (2) and in other provisions of the M.P.C., such as those relating to murder, robbery, and rape, the necessity for a series of "assault-with-intent-to" offences is eliminated. In this connection, conduct must be "strongly corroborative of the actor's criminal purpose" in order to constitute the "substantial step" required for an attempt under the M.P.C.⁴⁵ The inclusion of attempt in subs.(1)(c) also solves the dilemma of whether there could be an

41 Recklessness is subjectively defined in s.2.02(c) of the Code.

42 A.L.I. Commentary to s.210.2, p.28.

43 A.L.I. Commentary to s.432.10.2, p.431228.

44 *Supra*, see text accompanying n.14.

45 Under s.5.01(1)(c) and s.5.01(2) of the Code.

attempted assault at common law or, as the cases put it, an attempt to attempt.⁴⁶ According to the A.L.I. commentary, s.211.1 will only "allow reaching back into dangerous preparatory conduct to the extent that it is desirable for the criminal law to intercede".⁴⁷

7.20 Although the M.P.C. provisions on assault have been faithfully followed in some revised Codes,⁴⁸ others have achieved essentially the same result in a different way. For example, the proposed federal criminal code defines separate offences of maiming, aggravated battery and battery, distinguished according to the gravity of harm in much the same manner as the M.P.C.; placing another in fear of imminent bodily harm is punished as the separate offence of menacing; unsuccessful efforts to inflict injury are covered by a separate attempt provision; and use of a deadly weapon constitutes an independent offence covering use of a firearm or other weapon during the commission of any crime.⁴⁹ Other Codes depart from the approach of the M.P.C. in following the New York law providing for strict liability for bodily injury caused in the commission of or flight from a felony, and for an aggravated offence of assault committed with intent to frustrate specified public servants in the performance of their duties.⁵⁰

7.21 The offence of "physical menacing" in subs.(1)(c) of s.211.1 is limited to threats of imminent serious bodily injury as defined above. This reflects the judgment that attempts to place another in fear of bodily injury, which includes mere physical pain, are too trivial and too common to warrant penal sanction. "Imposition of criminal liability in such cases is especially problematical in the light of the difficulty of knowing whether an aggressive posture is taken in earnest or merely in fulfilment of some human equivalent of ritual display",⁵¹ this being presumably a reference to masochism.

7.22 Where there is an actual attempt to inflict bodily injury, as opposed to a threat, the remaining provisions of the section naturally apply. And so long as the threatened injury is imminent, it will not matter that it is conditioned upon the occurrence of some event which the actor is not privileged to seek, i.e. subs.(1)(c) extends to cases of "conditional assault".⁵²

7.23 Consent is relevant to the operation of s.211.1 in two ways. First, the

46 *Supra*, paragraph 7.10.

47 A.L.I. Commentary to s.211.1, p.185.

48 N.H. ss.631:1 and 2 (with a separate provision, s.631:4, for physical menacing); N.J. s.2C:12-1 (with additional provisions for interfering with police officers, firemen, or first-aid workers); SD ss.22-18-1 and 1.1 (with certain culpability differences and provision for assault on police officers); Vt. title 13, ss.1023 to 1024 (includes provisions for administering harmful substances and interference with police officers).

49 U.S. (p) 5. 1437, ss.1611 (maiming), 1612 (aggravated battery), 1613 (battery), 1614 (menacing), 1823 (firearms) (1798). See also Federal Criminal Code Study Draft (National Commission on Reform of Federal Criminal Laws) (1970), pp167-172. The commentary to the aggravated assault provision of this Draft suggests a special category of "crippling injury" defined as "an injury which creates a substantial and permanent inability to carry on normal bodily functions, such as blindness, substantial paralysis, or multiple amputation".

50 N.Y. Penal Law, ss.120.05(3) and 120.05(6); Ala., ss.13A-6-20 to -22; Ky. ss.508.010-030; Wash.ss.9A.36.010-030, though it appears that only four states, Ala., Colo., W.Va. and Iowa, follow the felony - assault approach of New York (A.L.I. Commentary to s.211.2, p.187, note 57).

51 A.L.I. Commentary to s.211.1, pp.192-193.

52 *Supra*, Chapter 1, page 12.

general defence of consent defined in s.2.11 recognises consent as a defence to offences involving bodily injury in three situations: where the injury consented to or threatened is "not serious"; where the injury, even if serious, is a "reasonably foreseeable hazard" of lawful concerted activity such as an athletic contest or competitive sport; and where the consent establishes a justification under Article 3 of the M.P.C. considered below. Secondly, subsection (1) is graded as a petty misdemeanour in cases where the offence is "committed in a fight or scuffle entered into by mutual consent". This reduction in penalty operates where consent does not otherwise operate to afford a complete defence, as where the injury is not serious.

7.24 *De minimis* infractions are governed by s.2.12 of the Code, which provides that a court shall dismiss a prosecution if, having regard to the conduct charged and the attendant circumstances, it finds that the defendant's conduct, *inter alia*, was within a customary licence or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offence. Consent will not, however, be operative (in addition to cases where it is induced by force, duress or deception or given by a person not authorised so to consent or one who "by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged"), where it is given by a person whose improvident consent is sought to be prevented by the law defining the offence.⁵³

Justification For Use Of Force

7.25 The justifiable use of force by persons vested with particular responsibility for the care, discipline or safety of others is governed by s.3.08 of the Code, which provides as follows:

The use of force upon or toward the person of another is justifiable if:

"(1) the actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and:

- (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and
- (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation; or

(2) the actor is a teacher or a person otherwise entrusted with the care or supervision for a special purpose of a minor and:

- (a) the actor believes that the force used is necessary to further such special purpose, including the maintenance of reasonable discipline in a school, class or other group, and that the use of such force is consistent with the welfare of the minor; and
- (b) the degree of force, if it had been used by the parent or guardian of the minor, would not be unjustifiable under Subs.(1)(b) of this Section; or

(3) the actor is the guardian or other person similarly responsible for the general care and supervision of an incompetent person and:

- (a) the force is used for the purpose of safeguarding or promoting the welfare of the incompetent person, including the prevention of his misconduct, or, when such incompetent person is in a hospital or other institution for his care and custody, for the maintenance of reasonable discipline in such institution; and
- (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme or unnecessary pain, mental distress, or humiliation; or

(4) the actor is a doctor or other therapist or a person assisting him at his direction and

- (a) the force is used for the purpose of administering a recognised form of treatment that the actor believes to be adapted to promoting the physical or mental health of the patient; and
- (b) the treatment is administered with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of his parent or guardian or other person legally competent to consent on his behalf, or the treatment is administered in an emergency when the actor believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent; or

(5) the actor is a warden or other authorised official of a correctional institution and:

- (a) he believes that the force used is necessary for the purpose of enforcing the lawful rules or procedures of the institution, unless his belief in the lawfulness of the rule or procedure sought to be enforced is erroneous and his error is due to ignorance or mistake as to the provision of the Code, any other provision of the criminal law or the law governing the administration of the institution; and
- (b) the nature or degree of force used is not forbidden by Article 303 or 304 of the Code;⁵⁴ and
- (c) if deadly force is used, its use is otherwise justifiable under this Article; or

(6) the actor is a person responsible for the safety of a vessel or an aircraft or a person acting at his direction and:

- (a) he believes that the force used is necessary to prevent interference with the operation of the vessel or aircraft or obstruction of the execution of a lawful order, unless his belief in the lawfulness of the order is erroneous and his error is due to ignorance or mistake as to the law defining his authority; and
- (b) if deadly force is used, its use is otherwise justifiable under this Article; or

(7) the actor is a person who is authorised or required by law to maintain order or decorum in a vehicle, train or other carrier or in a place where others are assembled, and

- (a) he believes that the force used is necessary for such purpose; and
- (b) the force used is not designed to cause or known to create a substantial risk of causing death, bodily injury, or extreme mental distress".

7.26 In each instance provided for by this section, the actor's belief in the necessity of his use of force is subject to a requirement, in offences for which

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Article 303, while providing a general justification for the use of force in the execution of a public duty, subjects the use of force and deadly force against the person to the more specific principles of justification set out in Article 3 generally.

recklessness or negligence suffice, that he is not reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force.⁵⁵

7.27 The distinction between a belief that corporal punishment is necessary for the maintenance of discipline, in the case of teachers, and a use for the purpose of discipline, in the case of parents and guardians, without a requirement of belief in its necessity, may be more theoretical than actual in the matter of enforcement.⁵⁶ In this connection, the U.S. Supreme Court has held that the cruel-and-unusual punishment clause of the Eighth Amendment applies only to punishment for violation of the criminal law and hence is inapplicable to school discipline, where the traditional common law remedies were said to be fully adequate to afford due process.⁵⁷ If a teacher or other school authority exceeds the bounds of reasonable discipline, he or she is subject to a civil action for damages and, if *mens rea* is shown, to criminal prosecution.⁵⁸ It was further held that due process does not require notice and hearing prior to the imposition of corporal punishment in public schools.⁵⁹ In a later case, however, the U.S. Court of Appeals held that a public school student severely injured by the use of disciplinary corporal punishment can press substantive due process claims for deprivation of the Fourteenth Amendment right to bodily security thereby extending to school children the constitutional protection provided in the criminal context by virtue of the Eighth Amendment.⁶⁰

7.28 Be that as it may, the right of parents to determine the mode of discipline for their children is not characterised as a fundamental right for the purposes of the U.S. Constitution, and because corporal punishment is said to further a national and legitimate state interest of maintaining discipline in schools, the state's interest has been held to prevail over the parents' rights.⁶¹

Domestic Violence

7.29 In the context of domestic violence, it may be noted that wife-beating has in some states been made punishable by express statutory provision, this being at times merely to emphasise the unlawfulness of the act, whereas in other Codes it is to provide an aggravated penalty for such battery.⁶² Most jurisdictions have dropped any special reference to a wife and punish the corporal abuse of any

55 Section 3.09(2). Under s.3.09(1), the use of force will also be unjustified where the actor's belief in the unlawfulness of the force or conduct which he or she seeks to resist or in the lawfulness of an arrest which he or she seeks to effect is erroneous, or if the error is due to a mistake or ignorance of the law.

56 See Perkins & Boyce, *Criminal Law* (3rd ed., New York, 1982), p.1107.

57 *Ingraham v Wright*, 430 U.S. 651, 97 S. Ct. 1401 (1977). Four Justices dissented in holding that the Constitution forbids cruel and unusual punishment for any purpose whatsoever. They emphasised, however, that corporal punishment in schools would not be unconstitutional if it was reasonable, 430 U.S. at 693.

58 See, for example, *Boyd v State*, 88 Ala. 169, 7 So. 268; *Anderson v State*, 40 Tenn. 455; *State v Williams*, 27 Vt. 755; *Commonwealth v Randall*, 70 Mass. 36.

59 The dissenting Justices also disagreed with this holding, though an 'elaborate hearing was not required, but rather an informal give-and-take between student and disciplinarian' so as to give the student 'an opportunity to explain his version of the facts'.

60 *Hall v Tawney*, 621 F. 2d 607 (4th Cir. 1980).

61 *Baker v Owen*, 395 F Supp. 294 (M.D.N.C. 1975), aff'd 423 U.S. 907 (1975).

62 See Perkins & Boyce, *op cit*, p.1105.

person by his or her spouse.⁶³ Several states have enacted statutes for the prevention of domestic violence and for the protection of victims of such violence.⁶⁴

Medical Treatment

7.30 As regards the justification provided for emergency medical treatment in s.3.08(4), the general justification of "choice of evils" provided for in s.3.02 may operate where the treatment is not administered by a "doctor or other therapist or a person assisting him". This section, which is an innovation in the Code analogous to the defence of duress of circumstances/necessity emerging in English law,⁶⁵ provides as follows:

"(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

- (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offence charged; and
- (b) neither the Code nor other law defining the offence provides exceptions or defences dealing with the specific situation involved; and
- (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offence for which recklessness or negligence, as the case may be, suffices to establish culpability".

7.31 Oregon has a statute on choice of evils that has been construed to provide a defence if there is evidence that the defendant's conduct was necessary to avoid a threatened injury, that the threatened injury was imminent, and that it was reasonable for the defendant to believe that the need to avoid the injury was greater than the need to avoid the harmful conduct charged.⁶⁶

Protection Of Persons Or Property

7.32 Sections 3.04 to 3.07 provide for the justifiable use of force for the protection of self or others or of property, as well as for the purpose of effecting

63 For example, West's Ann. Cal. Pen. Code, s.273.5 (1977).

64 For example, Mass. Gen. Laws. C. 208 s.34c (1978).

65 *Supra*, Chapter 3, paragraph 3.25.

66 O.R.S. s.161.200 (1979): see *State v Matthews*, 30 OR. App. 1133 at 1136, 569 P. 2d 662 at 663 (1977).

an arrest, preventing escape, and preventing suicide or the commission of a crime. In line with the general policy of downgrading the use of force in law enforcement and crime prevention and placing the emphasis instead on the protection of life and personal safety, the Code attaches considerable importance to the use of force for the protection of others.⁶⁷ Most of the revised codes follow this approach in treating defence of others as equivalent to self-defence, leaving no trace of the view that a person who goes to the aid of another acts at his peril in respect of the right of that person to such aid,⁶⁸ though there is at least one exception.⁶⁹

7.33 The Code authorises the use of reasonable non-deadly force to prevent the commission or consummation of any crime involving or threatening bodily harm, damage to or loss of property or a breach of the peace. This goes a little beyond the authority of previous law in that one having no interest in property would not have been entitled to use force to prevent the crime, but not beyond the statutory trend authorising private arrest for any public offence committed in his presence.⁷⁰ On the other hand, except where necessary to suppress a riot or a mutiny, the use of deadly force is limited to situations in which the actor believes there is a substantial risk that death or serious harm will result unless the crime is prevented. Although most revised codes have followed the approach of the M.P.C. in respect of non-deadly force, this restriction on the use of deadly force has not been widely accepted.⁷¹ Most have therefore found it necessary to authorise the use of such force in other situations, such as where it reasonably seems necessary to prevent arson, burglary, kidnapping, rape, robbery, or a forcible felony.⁷²

7.34 The Code also authorises the use of reasonable non-deadly force for the protection of one's property, and it appears that all revised codes similarly limit such defence (as distinguished from self-defence, defence of the habitation and the use of force in crime protection) to the use of non-deadly force.⁷³

7.35 Some revised codes authorise the use of such force in defence of the property of a third person;⁷⁴ others limit it to the actor's own property or property "he has a legal duty to protect,"⁷⁵ whereas the Code goes further than

67 See Perkins & Boyce, *op cit*, p.1108 *et seq*.

68 Section 3.05(1) of the Code provides that the use of such force is justifiable when a) the author would be justified in using such force to protect himself or herself against the injury believed to be threatened to the other person, and b) under the circumstances as the actor believes them to be, the person whom the actor seeks to protect would be justified in using such protective force, and c) the actor believes that intervention is necessary for the protection of such other person.

69 The Kentucky Revised Statute, s.503.070 (1980), limits the defence to "the circumstances as they actually exist". Perkins & Boyce, *op cit*, p.1111.

70 Hawaii and Pennsylvania are among the few who follow the Code. A threat to use deadly force, intended or as a bluff, is not deadly force: see *State v Realina*, 1 Haw. App. 187, 616 P. 2d 229 (1980).

71 Perkins & Boyce, *op cit*, p.112, notes 34-38, cite the penal Codes containing such provisions including Arkansas, Colorado, Kentucky, Maine, Texas (which extends to theft at night), Connecticut, Georgia, Illinois, Indiana, Minnesota, Montana, New York, and Utah.

72 Under s.3.06 of the Code, the governing provision in this connection, there are limited provisions for the use of deadly force but these relate to what are in fact problems of defence of the habitation and crime prevention.

73 For example, Delaware, Hawaii, Iowa, Kentucky, Texas, Washington and Wisconsin. Perkins & Boyce, *op cit*, p.1158, note 38.

74 For example, Georgia, Illinois, Indiana, Montana, Utah.

any of these in authorising the use of force for the protection of property in the possession of another to the same extent as if it were in the author's own possession.⁷⁶

7.36 Section 3.06(5) provides that this justification extends to the use of a device for the purpose of protecting property only if:

- "(a) the device is not designed to cause or known to create a substantial risk of causing death or serious bodily injury; and
- (b) the use of the particular device to protect the property from entry or trespass is reasonable under the circumstances as the actor believes them to be; and
- (c) the device is one customarily used for such a purpose or reasonable care is taken to make known to probable intruders the fact that it is used."

7.37 Most of the new Codes do not make specific provision for the use of spring guns or traps set for the defence of the habitation or other property. The few giving attention to the problem have imposed the restriction in (a) above⁷⁷, or have prohibited the use of any unattended spring gun or trap set for the defence of property.⁷⁸

7.38 Finally, it may be noted that the substitution of the word "protection" in the Code for "defence" has had little effect upon state legislation.⁷⁹ The term is clearly wider in ordinary usage, and at least one statute allowing the use of force for the protection of self or family has been declared unconstitutional.⁸⁰

Coercion, Harassment And Threats

7.39 Where the injury threatened is not sufficiently serious or imminent or where the threat is conveyed verbally rather than by physical menace, other sections of the M.P.C. may nevertheless apply. Two provisions may be specifically noted in this connection. First, s.212.5 creates an offence of "criminal coercion" prohibiting specified categories of threat, including a threat to commit any criminal offence, made with the purpose of unlawfully restricting another's freedom of action to his detriment. This is a residual offence included to complement and supplement more specific provisions relating to extortion, corruption and criminal mischief (with respect to property) as well as assault and terroristic threats (with respect to the person).⁸¹ It is unusual in that the

76 See Model Penal Code 37 (Tent. Draft No 8, 1958).

77 For example, 11 Del. Code s.466 (1979); Haw. Rev. Stat. s.703-306 (1976).

78 For example, Iowa Code. s.704.4 (1978).

79 Perkins & Boyce, *op cit*, p.114, note 86, list only five states which have adopted the term.

80 Nebraska, Revised Stat. Supp., s.29-114 (1969): see *State v Goodseal*, 186 Neb. 359, 183 Nw. 2d 258 (1971).

81 As to "terroristic threats", see s.211.3, considered below. For references to other related offences, see A.L.I. Commentary to s.212.5, p.264.

protected interest is the victim's freedom of action, as opposed to his liberty or bodily integrity. Second, s.250.4 provides for an offence of harassment, *inter alia*, in the following terms:

"A person commits a petty misdemeanour if with purpose to harass another, he...

(2) insults, taunts or challenges another in a manner likely to provoke violent or disorderly response; or...

(4) subjects another to an offensive touching; or

(5) engages in any other course of alarming conduct serving no legitimate purpose of the actor".

7.40 The section applies to harassment of an individual, whereas the public nuisance aspects of comparable behaviour are covered by the offence of disorderly conduct under s.250.2. Subsection (2) is analogous to the common law misdemeanour of challenging another to fight or attempting to provoke another to give such challenge⁸² - it is the prospect of violence and disorder that the provision seeks to avoid and not merely unwelcome conversation. The words must be directed at another person and must be sufficiently offensive to raise a probability of physical retaliation by the addressee or someone acting in his interest. Whether such likelihood exists is determined objectively, liability being premised on the risk intentionally created by the actor rather than on the subjective reaction of others. This does not mean, however, that the standard is uniform in all situations. A violent response from a friend, or from a law enforcement officer, or from a comrade in an army boot camp, would not be expected in circumstances where it might be from a stranger.⁸³

Offensive Touching

7.41 Subsection (4) proscribes any offensive touching of another person's body or clothing, and is analogous to the case of a technical battery at common law.⁸⁴ It is a lesser offence of a broadly similar character to that of touching the sexual or intimate parts of another, denominated "sexual assault", under s.213.4 of the M.P.C.⁸⁵ Again, whether the touching is offensive is an objective determination that does not depend, save in an evidentiary sense, upon the victim's reaction. And again, though objective, the standard is not immutable. A pat on a hunchback's hump may well be offensive if done with a purpose to harass. According to the A.L.I. commentary:

82 *Supra*, Chapter 1.

83 A.L.I. Commentary to s.250.4, pp.364-366.

84 *Supra*, Chapter 1.

85 Prior to the drafting of the M.P.C., U.S. legislation had not generally followed England and other jurisdictions in distinguishing sexual from other assaults by increasing the penalties and by disallowing consent for assaults upon children under 18. Instead, apart from assault with intent to rape or commit sodomy, the legislation was predominantly aimed at 'gross lewdness', i.e. consensual behaviour in public. S.213.4 now treats indecent contact as a lesser sexual offence rather than as a species of assault: see A.L.I. Commentary, p.397 *et seq.*

"Of course, even here the actor must have been shown to have been at least reckless with respect to the offensive character of the touching, but usually proof of this culpability will be subsumed in the more demanding requirement of a purpose to harass. It is that element of specific intent that precludes application of this provision to the myriad instances of unwanted jostling and other contact that may occur in any crowded environment but that reflects no purposive effort to harass a fellow citizen".⁸⁶

7.42 Subsection (5) is a residual offence, analogous to public nuisance at common law, which, like subs.(4) dealing with offensive touching, has only received support in a minority of revised state codes, it being viewed as unnecessary and potentially unconstitutional for overbreadth and vagueness.⁸⁷ In its Commentary, however, the A.L.I. states that although the offence is necessarily drafted in a general way, it is not an open-ended catch-all provision:

"It requires first that the actor intend to harass. Second, his conduct must be alarming to another. Alarm, of course, may be induced in an infinite variety of ways, but the requirement excludes from the offence actions not productive of anxiety or distress. Even if the actor is misguided in such matters, he will avoid liability if he lacks the minimum culpability of recklessness with respect to the alarming character of his act. Finally, subs.(5) requires that the harassment serve 'legitimate purpose of the actor'. It is true that this language is hardly self-executing. It invites judicial exploration and occasionally may require delicate judgments. The import of the phrase, however, is broadly to exclude from this subsection any conduct that directly furthers some legitimate desire or objective of the actor. This element of the residual offence should limit its application to unarguably reprehensible instances of intentional imposition on another".⁸⁸

7.43 The offence created by s.211.3 of the M.P.C., covering "terroristic threats", is a more familiar and accepted provision in the revised state codes.⁸⁹ It provides as follows:

"A person is guilty of a felony of the third degree if he threatens to commit any crime of violence with purpose to terrorise another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience".

⁸⁶ *Op cit*, p.367.

⁸⁷ The Alabama Revised Code indicates specifically that such a provision is undesirable, Ala. s.13A-11-8, Commentary. But see statutes noted in A.L.I. Commentary to s.250.4, p.368.

⁸⁸ *Op cit*, p.368.

⁸⁹ See also the commentary to the virtually identical offence of 'terrorising' under s.1614 of the Federal Criminal Code Study Draft (1970), p.170, which states that the provision reaches, in one consolidated statute, both efforts to terrorise a person by a threat serious enough to cause 'sustained fear', for example, though threats to kidnap or to murder, and acts of public terrorism, such as bomb scares. Lesser threats are covered by separate offences of menacing, coercion and harassment.

7.44 The section is designed to fill the lacuna in prior law in respect of threats to frighten, rather than to coerce. In some jurisdictions, physical menacing was assimilated into the crime of assault,⁹⁰ but only a few states had laws against terrorising by verbal threat.⁹¹ Some statutes were limited to threatening letters, or to menacing phonecalls;⁹² others were specific to the person threatened, as, for example, the federal statute for punishing threat of death or bodily harm to the president, vice-president or president-elect.⁹³ The objective of s.211.3 is therefore to proscribe conduct that creates serious alarm for personal safety, irrespective of any intention on the part of the actor to carry out his threat or to coerce payment or performance by the victim. The harm sought to be avoided is the likely psychological distress and panic for the person or persons threatened, as well as the serious inconvenience of evacuation, etc, in the case of a threat involving destruction of a public place.

7.45 Specifically, the section requires that the actor threaten to commit a crime of violence; these include the homicide and assault offences, some versions of rape and other sexual crimes, kidnapping, robbery and arson. The threat of such harm must be communicated with a purpose to cause terror or serious public inconvenience or at least in reckless disregard of the risk of causing such harm. Whereas "evacuation of a building, place of assembly, or facility of public transportation" are illustrations of "serious" public inconvenience, threats creating the prospect of relatively trivial inconvenience are excluded from the section, as are threats of personal attack insufficiently grave to amount to terrorisation.⁹⁴ Threats of the former type may nevertheless be prosecuted under s.250.3, which premises liability for false public alarms on communication of a baseless report of a crime or catastrophe in a context likely to cause "public inconvenience or alarm".

Reckless Endangerment

7.46 In the U.S., as elsewhere, no offence was committed at common law by a person who, as a result of reckless conduct, created a risk of bodily harm, but no individual happened to be placed in reasonable apprehension of such harm although a potential victim was within the zone of danger.⁹⁵ The offence of recklessly endangering another person, provided for in s.211.2 of the M.P.C., is designed to fill this gap:

"A person commits a misdemeanour if he recklessly engages in conduct which places or may place another person in danger of death or serious

90 For example, *Edwards v State*, 4 Ga. App. 849 at 850, 62 S.E. 565 (1908); *State v Wilson*, 218 Or 575 at 582, 346 P. 2d 115 at 119 (1959).

91 For example, Tex. arts. 1265, 1266(repealed 1974) - the threat had to be "seriously made" and not "merely idly with no intention of executing the same". The federal crime of "terrorising" is committed "with intent to keep another human being in sustained fear for his or another's safety" etc, as opposed to "with purpose to terrorise another".

92 For example, Ga. s.26-1802, N.J. s.2A: 105-3; Ohio s.2901-39, repealed in 1969, 1979 and 1974 respectively (letters); Vi. tit., 13, s.1027 (phonecalls).

93 18 U.S.C., s.871.

94 A.L.I. Commentary to s.211.3, pp.206-207.

95 See A.L.I., M.P.C., s.201.11, Tent. Draft No. 9, Comment at 86-87 (1959).

bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded".

7.47 Its principal antecedent was a Wisconsin statute authorising felony sanctions for conduct "imminently dangerous to another and evincing a depraved mind, regardless of human life".⁹⁶ This formulation reached only extreme recklessness with respect to the risk of death. The wider formulation in the M.P.C. is accompanied by a reduction in penalty to that of a misdemeanour.

7.48 Prior law in other jurisdictions contained a host of prohibitions on particular types of reckless conduct, which together revealed no consistent policy with respect to the degree of risk necessary, the level of culpability required or the penalty provided for.⁹⁷

7.49 Section 211.2 carries forward the substance of this multitude of *ad hoc* statutory provisions, penalising specific instances of risk creation, in an attempt to give them coherence.

7.50 Virtually every revised code has since followed the M.P.C. in providing for an offence of this type,⁹⁸ though often omitting the presumption of recklessness attaching to pointing a firearm,⁹⁹ this being covered by the generic offence of use of a firearm in the commission of any crime.¹⁰⁰ Many revised codes define the offence in terms of a *substantial* risk. For example:

"A person is guilty of reckless endangerment when he recklessly engages in conduct which creates a substantial risk of death or serious physical injury to another person".¹⁰¹

7.51 Several states have retained an offence similar to the Wisconsin provision outlined above, which is normally considered a misdemeanour though exceptionally a felony.¹⁰² Among them, the New York Penal Law provides that a person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, that person recklessly engages in conduct which creates a grave risk of death to another person.¹⁰³ As with other endangerment offences, there is no requirement of intent on the part of the actor nor of any apprehension on the part of the victim, the conduct being directed at unspecified persons.¹⁰⁴

96 Wis. s.941.30 (originally enacted in 1955).

97 See the provisions of New York and California law outlined in the A.L.I. Commentary to s.211.2, pp.195-198.

98 For example, N.H. s.631.3; Pa. tit. 18 s.2705; Tex. s.22.05. See, also, the federal provision, U.S. (p) S1437, s.1817 (1978) and, generally, Gorove, *Offences causing Danger* (1982) 30 A.G.C.L. 515 *et seq.*

99 These include Texas, *op cit*, and Vermont, tit. 13, s.1025.

100 For example, S.C. s.16-23-490 and U.S. (p) s.1437, s.1823 (1978).

101 Me. Rev. Stats. Ann., 17-A, s.211(1).

102 N.Y. Penal Law, s.120.25; Del. Code Ann. Tit. 11, s.604 (1979); N.D. Cent., Code s.12.1-17-03 (1976).

103 *Id.*

104 *In the matter of David AL*, 64 Misc. 2d 360, 314 N.Y.S 2d 708 at 711 (1970). See *State v Hanson*, 256 N.W.2d 364 (N.D. 1977); *People v Dekosta*, 132 Ill. App. 3d 691, 270 N.E. 2d 475 (1971).

7.52 More significant variation occurs with respect to penalty. The majority of revised codes classify reckless endangerment as a misdemeanour, with maximum terms of imprisonment of two years or less.¹⁰⁵ Others distinguish between risk of serious bodily injury, a misdemeanour, and risk of death, a felony usually requiring that degree of extreme recklessness required for murder, and punishable by up to 10 years imprisonment.¹⁰⁶ The proposed federal Code distinguishes between risk of death and risk of serious bodily injury, though both are there classified as felonies punishable by 5 and 2 years imprisonment respectively.¹⁰⁷

7.53 At all events, in jurisdictions which now recognise this offence, the pattern is complete. If a defendant acts recklessly and kills another, he is guilty of manslaughter; if he injures another, he is guilty of assault; and if he engages in conduct that places another in danger of death or serious bodily injury, he is guilty of endangerment. Where he acts recklessly under circumstances manifesting extreme indifference to the value of human life, he is guilty of murder where death results or aggravated assault where serious bodily injury results.

7.54 In its Commentary, the A.L.I. points out that, seen in this light, the decision to create an offence of reckless endangerment does no more than import into the law of unintentional homicide and personal injury the principle that conduct in some sense preliminary to harm may be an appropriate target of penal sanctions, if committed with the requisite *mens rea*.¹⁰⁸ In this respect, the A.L.I. recognises that the magnitude of disparity in sentence based solely on whether or not harm has actually resulted from the creation of the risk is problematic in that it largely depends on luck.

7.55 Nevertheless, the widespread adherence in Anglo-American law to emphasis on results, the evidentiary significance of resulting harm,¹⁰⁹ the retributive element in the penal law, as well as the conviction of the public at large that death or serious bodily injury is simply different from risk creation, irrespective of any conceptual justification, all contribute to justifying that disparity. Moreover, such divergence may to some extent be essential:

"It cannot be expected that juries will lightly return verdicts leading to severe sentences in the absence of the resentment aroused by the infliction of serious injuries. Whatever abstract logic may suggest, a prudent legislator cannot disregard these facts in the enactment of a

105 A.L.I. Commentary to s.211.2, p.197, at note 18. Alabama, New Hampshire, Maine, Oregon, Vermont, Washington and Michigan provide for one year's imprisonment; Colorado and Texas for 6 months; Pennsylvania for two years; Massachusetts for two and a half years.

106 *Id.* p.198, notes 19-20. These include Arkansas, Hawaii and Kentucky, which extend the aggravated offence to include any "physical injury", as opposed to "serious physical injury" in Arizona, Delaware and New York.

107 U.S. (p) s.1437, s.1617 (1978).

108 *Op cit.* pp.199-200.

109 The notion here is that retrospective judgments about such matters as the dangerousness of conduct and the actor's subjective perception of risk are always difficult and potentially infirm. That the act did in fact cause injury is one way of corroborating its inherent danger; that the specified harm resulted in a not improbable way is an indication that the actor must have perceived the risk of its occurrence.

penal Code".¹¹⁰

7.56 As regards the scope of s.211.2, it follows from s.2.02 of the M.P.C. that the actor must perceive and consciously disregard a substantial and unjustifiable risk that his action will or may place another in danger of death or serious injury. For example, firing a gun at an apparently occupied building may suffice for liability, even if none of the inhabitants is at home at the time, but if the defendant knows that no one is in the building, he will lack the required culpability.

7.57 Other examples of reckless endangerment include poisoning a well from which water is customarily taken for human consumption and opening the draw of a bridge as cars are about to pass over it, though endangerment statutes have most frequently been applied to firearm and traffic cases.¹¹¹ Furthermore, the nature and purpose of the actor's conduct and the circumstances known to the actor must be such that disregard of the risk amounts to a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.¹¹² This requirement excludes from liability under this section both unconscious risk creation and conscious endangering where the circumstances justify such conduct. For example, violently pushing a child down a railway embankment may be justified where it is done to avoid the immediate prospect of more serious harm from an approaching train.¹¹³ Finally, recklessly placing another in danger of harm of lesser gravity than "serious bodily injury", i.e. injury which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ, is not an offence under this provision.

7.58 The effect of the presumption in the second sentence of the section is that, although the burden of proof beyond reasonable doubt remains on the prosecution, the court must instruct the jury that they may regard knowingly pointing a firearm at another as sufficient evidence of endangerment, unless it is satisfied that the evidence as a whole clearly negatives such a finding.¹¹⁴

7.59 There may be situations in which the same act constitutes a specific offence with respect to one person while it gives rise to reckless endangerment against another. For example, in a bank holdup the armed robber may only demand and take money from one of the cashiers, though the other cashiers and customers in the bank who are witnessing the robbery may thereby be endangered, in which case the robber may be guilty on one count of endangerment with respect to each threatened individual.¹¹⁵ In this

110 *Op cit*, pp.202-203, and preceding policy discussion, pp.188-203, and references to Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, (1974) 122 U. Pa. Law Rev. 1497; and Packer, *The Model Penal Code and Beyond*, (1963) 63 Colum. L. Rev. 594.

111 Examples from A.L.I. Commentary, p.203, and Gorove, *op cit*, pp.519-20.

112 Following from the definition of recklessness in s.2.02(2)(c).

113 Examples from A.L.I. Commentary. Such conduct is also excused by virtue of the 'choice of evils' provision in s.3.02 of the Code.

114 A.L.I. Commentary, p.204.

115 Gorove, *op cit*, p.520.

connection, a prosecution for assault and endangerment has been upheld where the defendant's conduct violated two statutes with respect to separate victims.¹¹⁶

7.60 In at least two states, the constitutionality of endangerment statutes has been challenged, in each case unsuccessfully, for want of due process in failing to set forth an ascertainable standard of guilt.¹¹⁷

Endangering The Welfare Of Children

7.61 A specific offence of endangering children is provided for in s.230.4 of the M.P.C., in the following terms:

"A parent, guardian or other person supervising the welfare of a child under 18 commits a misdemeanour if he knowingly endangers the child's welfare by violating a duty of care, protection or support".

7.62 This offence, which is the only penal prohibition in the M.P.C. that enforces the special duties incumbent on persons responsible for the care and supervision of children, is as significant for what it omits as for what it criminalises. In particular, it does not embrace conduct that "contributes to the delinquency"¹¹⁸, or "corrupts the morals" of a minor, these being formerly incorporated in the Juvenile Court Acts of most U.S. jurisdictions. The A.L.I. concluded that these were meaningless and undesirable criminological concepts:

"The basic error in such legislation is the assumption that the vague and comprehensive terms used to confer jurisdiction on juvenile courts are also appropriate for definition of a criminal offence. It is one thing to vest expansive authority in an agency charged with promoting the welfare of children and quite another to give a court equivalent latitude in defining crimes for which adults may be subjected to penal sanction... Aside from possible constitutional infirmity, these statutes invite abdication of the legislative responsibility to make relatively discrete judgments about such matters as *mens rea*, grading corroboration of complaining witnesses, and adequacy of proof generally".¹¹⁹

7.63 Section 230.4 is accordingly limited to acts or omissions that breach a settled legal obligation arising from the supervisory relationship of actor to child. Such breach of duty must actually endanger the physical, moral or mental welfare of the child, so that *de minimis* failures and less serious default for which civil

116 In *Commonwealth v Lawton*, 414 A. 2d 658 (Penn. 1979), it was held that assault and endangerment did not merge (i.e. for the purposes of double jeopardy) since the defendants' conduct violated two statutes with respect to separate individuals.

117 New York: *People v Nixon*, 33 A. 2d 403, 309 NYS 2d 23b (1970); North Dakota: *State v Henson*, 256 NW. 2d 364 (1977).

118 According to the A.L.I. Commentary, Georgia and Maine appear to have been the only states not to have enacted such laws at the time of the adoption of the M.P.C.: see Commentary to s.230.4, pp.444-449, for criticism.

119 *Id.*, pp.449-50.

sanctions should be adequate are excluded. Moreover, the requirement of knowledge means that the actor must know of the facts giving rise to the duty of care, protection or support (though not of the legal duty itself) and also be aware that the child is under 18.¹²⁰

7.64 All recent code revisions include special offences designed for the protection of children, many following the general approach of the M.P.C. by defining the offence as a violation of a duty of care that endangers the child or as acts that may prove mentally, physically or morally injurious to the minor.¹²¹ Some confine the offence to endangerment of physical welfare,¹²² whereas others extend it to include any person who might endanger the child.¹²³ There are also several states that have retained offences of the type criticised by the A.L.I.,¹²⁴ and others that have included a defence designed to exempt certain religious practices from the scope of the offence.¹²⁵ Finally, many states provide for alternative or supplemental offences to that of endangering a child, including the abandonment or neglect of a child,¹²⁶ the selling of children,¹²⁷ child abuse,¹²⁸ and other specified acts with minors.¹²⁹

7.65 Most revisions which follow s.230.4 of the M.P.C. grade it as a misdemeanour, commonly punishable by one year's imprisonment.¹³⁰ A few states increase the penalty where the child is seriously injured,¹³¹ or if the accused is a repeated offender.¹³² In this connection, serious injury resulting from child abuse may be prosecuted under the M.P.C. provisions on assault and other forms of physical injury, while repeat offenders may receive a greater penalty under the sentencing guidelines in s.6.09 and 7.04 of the M.P.C.

Duty To Rescue And Duty To Notify

7.66 At least two U.S. states, Vermont and Minnesota, have enacted legislation making it a misdemeanour for people who witness others in serious danger not to render reasonable assistance, provided they can do so without endangering themselves.¹³³ Two other states, Rhode Island and Massachusetts, require those who witness certain violent crimes to notify the police, though in

120 *Id.*, pp.450-52.

121 For example, Del. tit. 11, s.1102(1); Iowa, s.726.6(1); Kan., ss.21-3607 and 3608; N.Y., s.260.10(1).

122 For example, Ala., s.13A-13-6(a)(1); Mo., s.568.050; Ohio, s.2919.22(A).

123 For example, Haw., s.709-904; Ala., *op cit*; Mc., tit. 17A, s.554(1); Mo., *op cit*; N.H., s.639:3(I).

124 For example, Nebraska, s.27-709.

125 For example, Kan., s.21-3608(1)(c), which exempts the victim's parent or guardian who 'in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognised church or religious denomination, for the treatment or cure of disease or remedial care of such child'.

126 For example, N.J., s.2C:24-4(a); N.M., s.40A-6-1 (for child of 10 or under).

127 For example, N.J., s.2C:24-6(b); Utah, s.76-7-203.

128 For example, Colo., s.18-6-401; Fla., ss.827.01 to .09.

129 These mostly relate to gambling, liquor, prostitution, enticement and unlawful dealing, though at least one state provides for a specific offence of tattooing a child, N.H., s.639:3(II); see A.L.I. Commentary to s.230.4, p.453, note 47.

130 *Id.*, pp.453-4, note 48.

131 For example, Ohio., s.2919.22(c) - five years.

132 *Id.* - five years; Mont., s.94-5-607(3) - increased fine.

133 Referred to by Wilson, *The Defence of Others - Criminal Law and the Good Samaritan* (1988) 33 McGill L.J. 756 at 807.

Rhode Island, puzzlingly, this duty is limited to cases of actual or attempted first degree sexual assault.¹³⁴

Kidnapping

7.67 Section 212.1 of the Model Penal Code provides as follows:

"A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:

- (a) to hold for ransom or reward, or as a shield or hostage; or
- (b) to facilitate commission of any felony or flight thereafter; or
- (c) to inflict bodily injury on or to terrorise the victim or another; or
- (d) to interfere with the performance of any government or political function.

Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place prior to trial, in which case it is a felony of the second degree. A removal or confinement is unlawful within the meaning of this Section if it is accomplished by force, threat or deception, or, in the case of a person who is under the age of 14 or incompetent, if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare."

7.68 Although kidnapping had become a felony by statute in most U.S. jurisdictions at the time of the adoption of the M.P.C., there was little consistency of approach in these enactments, the same conduct being covered by offences carrying different titles and widely diverse punishments, often far out of proportion to the gravity of the underlying conduct.¹³⁵ The response of the M.P.C., and of most revised codes adopted since, has been to retain kidnapping as an aggravated felony, but to restrict its scope to cases of substantial removal or confinement for certain specified purposes.¹³⁶

134

Id.

135 For an analysis and criticism of these provisions, see A.L.I. Commentary to s.212.1, pp.210-20.

136 Whether the Code has achieved such restriction is open to doubt. See generally, Diamond, *Kidnapping - A Modern Definition* (1985) 13 A.J. Crim. L. 1 for a criticism of the M.P.C. approach and certain of the state laws in this area.

7.69 The inclusion of the word "vicinity", as opposed to "place", as well as the requirement that the removal or confinement be "substantial" is designed to preclude convictions for kidnapping in respect of conduct which is merely incidental to the commission of a more serious crime. In consequence, a rapist who pushes a victim into a nearby alleyway or hall, or a robber who locks a householder in a room while he searches other rooms in the house, will not be guilty of kidnapping in addition to those offences. Where, however, a person is removed from "his place of residence or business", these being places of relative security, it is not necessary that the distance removed or the period of time confined be substantial.

7.70 Although kidnapping another by confining him "for a substantial period of time in a place of isolation" dispenses with the traditional requirement of asportation, the rationale is the same in that such confinement removes the victim from the usual protection of society. In this connection, a formulation which would have declared a person guilty of kidnapping "if he removes another to a place where he is isolated from the protection of law or the aid of others" was rejected on the grounds that it might require proof that the victim had actually reached the isolated place where the kidnapper meant to hold him.¹³⁷

7.71 Whether the offence is based on removal or confinement, the conduct must be accomplished "unlawfully", which is defined in s.212.1 to include the usual forms of force, threat and deception and further provides that removal or confinement of an underage or mentally incompetent person is unlawful if it is accomplished without the consent of a parent, etc. This formulation not only covers conduct often designated as "enticing" or " inveigling"¹³⁸ but also extends to cases where a child or incompetent person is removed at his own request. In this respect, the M.P.C. uses 14 as the best approximation of that "point in adolescence when youngsters commonly begin to exercise independent judgment as to choice of companions and freedom of movement".¹³⁹

7.72 It follows that, providing always that the actor has one of the stated nefarious purposes, a parent may kidnap his or her own child and a guardian his or her own ward, just as a stranger may kidnap any innocent victim, where it is effected by force, threat or deception. Where there is no force, threat or deception, however, the kidnapping offence can only be made out if the actor is a stranger and the victim is under 14 years old.¹⁴⁰ Legally privileged removals and confinements, for example, by policemen or jailors, do not constitute kidnapping under s.212.1 even if there is proof that the actor had one of the

137 A.L.I. Commentary, pp.223-24.

138 As to the various interpretations of these terms, which sometimes extend to mere inducement, see Note, *A Rationale for the Law of Kidnapping* (1953) 53 Colum. L. Rev. 540 at 552-53.

139 A.L.I. Commentary, p.225, which at note 50 cites the following revised state codes also designating 14 as the decisive age: Arkansas, Michigan, Louisiana, Indiana, Kansas, Maine, Missouri, New Jersey, Pennsylvania and Texas, as well as the proposed U.S. federal code.

140 See A.L.I. Commentary to the offence of interference with custody under s.212.4 of the Code, p.253.

prohibited purposes.¹⁴¹ A person who mistakenly believes himself or herself entitled to effect a removal or confinement is similarly excused from liability unless misapprehension of the facts is at least reckless.¹⁴²

7.73 Section 212.1 reduces the penalty for kidnapping, generally, to 10 years imprisonment, while confining a penalty of life imprisonment to instances in which the victim is not voluntarily released alive.¹⁴³ This reduction in grading, together with the restrictive definitions of "removes" and "confines", justifies the extension of kidnapping beyond kidnapping for ransom to the other purposes stated in paragraphs (a) to (d).¹⁴⁴ Apart from kidnapping for the purpose of interfering with the performance of any governmental or political function, which is designed to deal with cases of political terrorism, the underlying rationale for inclusion of these particular purposes is that they involve an obvious and serious danger to the victim.¹⁴⁵

7.74 The list of purposes in s.212.1 is designed to exclude from kidnapping cases where a parent, out of affection, takes his child away from another parent or lawful custodian; or detention for the purpose of prosecution or treatment; or, for example, driving an unwilling acquaintance about the countryside to compel him or her to listen to proposals of business or love. Similarly, a person who compels or tricks another into driving him or her somewhere merely for the sake of the ride would not be included, although paragraph (b) would reach such conduct if it were for the purpose of facilitating a felony or flight thereafter.¹⁴⁶

7.75 The Model Code specification of prescribed purposes has proved substantially influential. Most revised codes include all four stated purposes, though many add to the list. Examples include a plan to hold another in slavery¹⁴⁷, intent to subject the victim to sexual abuse¹⁴⁸, to obtain the release of somebody held in lawful custody¹⁴⁹, or to inflict extreme mental distress on the victim or a third person.¹⁵⁰ In Maine, a person commits kidnapping when, in addition to the act of restraint, he exposes the victim to a "risk of serious bodily injury" or secretes and holds him in "a place where he is not likely to be found".¹⁵¹ Although the A.L.I. commentary states that a removal or confinement with intent "to inflict bodily injury on or to terrorize" the victim is designed to cover "vengeful or sadistic abduction involving threat of torture,

141 This follows from s.3.03 of the Code, which provides a justification for conduct required or authorised by law. The Commentary explains that the reason for excluding such cases from the scope of s.212.1 is that otherwise liability would hinge entirely on a finding of evil purpose (p.225).

142 S.3.09.

143 For discussion, see *infra*.

144 The provisions of the Code restricting cumulation of punishments, ss.1.07-1.09, 6.07 and 7.03, are stated to be the third safeguard in this respect. "In any other circumstances, it would be desirable to confine kidnapping to seizure for ransom", (A.L.I. Commentary, p.229).

145 *Id.*, pp.227-8.

146 *Id.*, p.228.

147 For example, Ariz., s.13-1304; Minn., s.609.25(4); Mont., s.94-5-303 (1)(e); N.D., s.12-1-18-01(1)(c).

148 For example, N.Y., s.135.25(2)(a); Tex., s.20-04 (a)(4).

149 For example, Ind., s.35-42-3-2-(3).

150 For example, Rev. Code of Wash. Ann., s.9A.40.020.

151 Me. Rev. Stats. Ann., 17-A s.301(b). The element of "secret confinement" in such jurisdictions may be significant: see *Doss v State*, 220 Ala. 30, 68 ALR 712 *et seq.* and *infra*, paragraph 7.80.

death, or other extremely frightening experiences", many jurisdictions follow Maine in limiting the harm to "serious bodily injury".¹⁵²

7.76 In Illinois, kidnapping occurs when a person knowingly and secretly confines another against their will, or by force or threat of imminent force "carries" a person against their will.¹⁵³ The secrecy element may be satisfied by either the secrecy of the confinement or the secrecy of the place of confinement, these being objective criteria which appear capable of proof by evidence that nobody was aware of the victim's whereabouts and that attempts to contact the victim at the place of confinement were unsuccessful.¹⁵⁴

7.77 In some jurisdictions, kidnapping has been subdivided into degrees. In Montana, the act of restraint for the purpose of ransom or some other prohibited purpose is "aggravated kidnapping". Simple kidnapping is committed when, in addition to the act of restraint, the actor secretes or holds the victim "in a place of isolation" or uses or threatens to use "physical force".¹⁵⁵ In Iowa, kidnapping is first defined in substance as a confinement of the victim for a prohibited purpose. If the victim "suffers serious injury, or is intentionally subjected to torture or sexual abuse", it is kidnapping in the first degree; if the defendant's purpose is to hold the victim "for ransom" or if the defendant is armed with a "dangerous weapon", it is kidnapping in the second degree; while any other kidnapping is one in the third degree.¹⁵⁶

7.78 In other jurisdictions, such as Washington and New York, the definition of kidnapping in the first or second degrees is expressed in terms of the intentional "abduction" of another for stated purposes. In New York, first degree kidnapping is restricted to "the classic crime of kidnapping for ransom and its equivalents" and other specified instances when the abduction lasts more than 12 hours or the victim dies during the abduction.¹⁵⁷ In this respect, a person "abducts" another if the person restrains the other by either a) secreting or holding the other in a place where the other is not likely to be found, or b) using or threatening to use deadly force (Washington) or violence (New York).¹⁵⁸ Restraint is here given its most usual meaning in the law of false imprisonment as "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty".¹⁵⁹ In states which have adopted this scheme, it is ordinarily an affirmative defence that the actor is a relative of the victim and that the person's sole intent was to assume control over the victim. In such a case, the actor may be guilty of the esser offence of unlawful imprisonment where the abductee is over 16, or of one of the lesser offences of custodial interference where the victim is below 16.¹⁶⁰

152 A.L.I. Commentary, p.228.

153 Ill. Rev. Stat., ch. 38, paras. 10-1-10(2) (1987).

154 *People v Enoch*, 122 Ill. 2d 178, 522 N.E. 2d 1124 (Supreme Court of Illinois, 1988).

155 Rev. Code of Montana, ss.94-5-302-303.

156 Iowa. Code. Ann., ss.710.1-710.4

157 N.Y. Penal Law, ss.135-20-25 (1987), discussed by Diamond, *op cit*.

158 Rev. Code of Wash. Ann., s.9A-40.010(2).

159 Rev. Code of Wash. Ann., s.9A-40.010(1).

160 N.Y., s.135.30: see A.L.I. Commentary, pp.230-31.

7.79 Evidently, the revised codes do not reflect the consistency of approach sought by the M.P.C., and there remains much confusion as to what constitute the essential elements of kidnapping in many U.S. jurisdictions.¹⁶¹ This has to a large extent been caused by the continued emphasis on asportation as a requirement for the offence, partially retained in s.212.1 of the M.P.C. itself. Any asportation from inside or outside a house or business is sufficient if done with one of the requisite purposes, including the facilitation of any felony or flight thereafter, an approach which appears inconsistent with the Commentary's recognition that the core of the offence is the substantial isolation of the victim.¹⁶² Furthermore, the M.P.C. offers little guidance as to what constitutes "a substantial distance from the vicinity where the victim is found".

7.80 Recent attempts by state courts to delimit the offence have done little to clarify the issue. Whereas the Supreme Court of California first overruled decisions holding that any asportation, including that incidental to the commission of other offences, could constitute kidnapping,¹⁶³ the Court now holds that asportation is sufficient so long as it is neither "slight nor insubstantial", this being measured in terms of linear distances.¹⁶⁴ California courts have held movements as short as 700 yards, or one block, to be "substantial".¹⁶⁵ Minimal asportation for aggravated kidnapping will also suffice so long as there is increased risk of harm associated with the movement.¹⁶⁶ An unarmed robbery conducted after a forced ride around the block may, therefore, constitute aggravated kidnapping, if the driver is sufficiently distracted or impaired so as to increase the risk of a traffic accident, or there is sufficient risk of an imprudent escape attempt by the victim.¹⁶⁷

7.81 In New York, the breadth of the offence of kidnapping in the second degree continues to raise what the New York Court of Appeals has characterised as a "merger issue".¹⁶⁸ What constitutes sufficient asportation for such kidnapping to exist in conjunction with a robbery, assault or rape, or other offences? Although the answer remains unclear,¹⁶⁹ the requirement is clearly

161 See Diamond, *op cit.*

162 A.L.I. Commentary, p.222.

163 *Cotton v Superior Court*, 56 Cal. 2d 459, 364 P. 2d 241 (1961); *People v Daniels*, 71 Cal. 1119, 459 P. 2d 225. The court in *Daniels* formulated a two-prong test for aggravated kidnapping: (1) the movement of the victim must be more than merely incidental to the other offence, and (2) the risk of harm must be substantially increased over that necessarily present in the execution of that other offence.

164 *People v Stanworth*, 11 Cal. 3d 588, 522 P. 2d 1058 (1974), 803 at 1069.

165 *People v Apo*, 25 Cal. App 3d 790, 102 Cal. Rptr. 242 (1972); *People v Thornton*, 11 Cal. 3d 738, 523 P. 2d 267 (1974).

166 *In re Earley*, 14 Cal. 3d 122, 534 P. 2d 721 (1975).

167 *Id.* The Earley Court did, however, reaffirm an earlier holding that "acts of removing a victim from public view do not in themselves substantially increase the risk of harm within our rule in *Daniels*", *supra*, n.164, but added that such acts remained a circumstance to be considered in that determination.

168 See *People v Cassidy*, 40 N.Y. 2d 783, 358 N.E. 2d 870 (1976) at 785-86 and 872.

169 In *Cassidy*, *supra*, the "merger doctrine" precluded the defendant's conviction for second degree kidnapping where he dragged a woman at knifepoint 70 feet into a garage, where he sexually assaulted her; in *People v Spinks*, 58 A.D. 659, 395 N.Y.S. 2d 709 (1977), the N.Y. Supreme Court Appellate division reversed a conviction for second degree kidnapping where the defendant not only confined the victims in the course of a burglary, but also ordered them at gunpoint to travel in their own car to a wooded area, where they were tied to a tree and their car was taken; but it appears from the N.Y. Court of Appeal's ruling in *People v Miles*, 23 N.Y. 2d 527, 245 N.E. 688, cert denied, 395 U.S. 948 (1969), that a kidnapping conviction will almost always be upheld when connected with a murder or extortion charge.

stricter than that adopted in California.¹⁷⁰ In Michigan, the Supreme Court has formulated factors to measure asportation incidental to the crime. If the movement is merely incidental to a lesser crime, it will not suffice, whereas if there is movement incidental to a murder, extortion or hostage-taking, and even to kidnapping itself,¹⁷¹ kidnapping is automatically established.¹⁷² Movement incidental to an offence of equal gravity will also suffice.¹⁷³

7.82 Kansas has rejected all three of the foregoing tests, focusing instead on whether the asportation substantially facilitates another crime.¹⁷⁴ This has been held to mean, *inter alia*, that the movement must make the other crime substantially easier of commission or substantially lessen the risk of detection, a requirement which has led to convictions which would not even be upheld under the Californian test.¹⁷⁵

7.83 Questions of capital punishment aside, most U.S. jurisdictions authorise life imprisonment for some form of kidnapping, this being justified by the life-endangering nature of the offence. The M.P.C. is drafted on the premise, however, that many of the provisions in state law which provide for the most extreme penalties when the victim is subjected to any form of bodily harm are unduly broad,¹⁷⁶ because mitigation is only possible where the victim is returned without injury. If the most severe sanctions are available once some harm has come to the victim, there is no remaining incentive not to do further harm.¹⁷⁷ Under s.212.1 of the M.P.C., therefore, while ordinary kidnapping combined, for example, with aggravated assault, may be the subject of multiple or consecutive sentencing, thereby extending the maximum sentence to 20 rather than 10 years, the actor may still escape the extreme sanctions of a first degree felony by preserving the life of the victim and voluntarily releasing the victim alive and in a safe place prior to trial.

7.84 The effect of the scheme is to provide at all times an incentive to release the victim and not to inflict any further harm - penalties will escalate above the second-degree level according to the degree of harm inflicted upon the victim and the number of separate offences committed. The requirement that the release be "voluntary" means that rescue by the police or escape by the victim will

170 See *Spinks, supra*.

171 A circular standard which Diamond, *op cit*, describes as almost defying comprehension.

172 *People v Adams*, 389 Mich. 222, 205 N.W.2d 415 (1973), rejecting a "change of environment" test extending beyond geographic location to "the totality of the surroundings, animate and inanimate" proposed by the Court of Appeals.

173 *People v Barker*, 411 Mich., 291, 307 N.W.2d 61 (1981), a case of first-degree sexual assault.

174 *State v Buggs*, 219 Kan. 203, 547 P. 2d 720 (1976). The statute, Kan. Stat. Ann., s.21-3420 (1981) is identical to s.212.1 of the M.P.C. in respect of the prohibited purposes, but does not require that the victim be removed "from his place of residence or business or a substantial distance", but merely a "taking or confinement".

175 In *Buggs, supra*, at 214, the Court construed the statute as "requiring no particular distance of removal, nor any particular time or place of confinement", and upheld the conviction for movement from outside to inside a store for the purpose of robbery. In Florida, where the Buggs kidnapping test has been adopted, the movement of an assault victim from a kitchen to a bedroom was found by the Supreme Court to satisfy the test: see *Faison v State*, 426 So. 2d 963 at 966 (1983).

176 A.L.I. Commentary, p.233 *et seq*.

177 In *U.S. v Parker*, 103 F. 2d 857 (3d Cir.) cert. denied, 307 U.S. 642 (1939), it was recognised that the effect of the "liberated unharmed" rule in a federal statute may be to prolong detention so that the victim recovers before being released: see *Robinson v U.S.*, 324 U.S. 282 (1945).

not operate in mitigation of the first-degree penalties, a consideration which would appear not to apply in the older formula that the victim be "liberated unharmed".¹⁷⁸

7.85 The overwhelming majority of recently revised codes accept the M.P.C. judgment that some mitigation of the offence should occur based upon the victim's status upon release, though there is considerable variation as to the required condition of the victim upon release. These include mitigation where the victim is released alive,¹⁷⁹ following the M.P.C., without serious physical or bodily injury,¹⁸⁰ without permanent injury,¹⁸¹ without physical injury of any sort,¹⁸² or "unharmed".¹⁸³ There is also variation as to the required timing of the release, although again the M.P.C. requirement of release prior to trial is widely followed.¹⁸⁴

7.86 In those states which do not follow the M.P.C. scheme of mitigation, a much broader range of conduct is included in the most aggravated forms of kidnapping. This is achieved by placing more emphasis on the nature of the confinement and by permitting a broader range of purposes to suffice.¹⁸⁵

False Imprisonment

7.87 Although false imprisonment as it is known at common law was recognised in very few states prior to the adoption of the Model Penal Code,¹⁸⁶ most states now have a modified statutory offence of false imprisonment broadly following s.212.3 of the M.P.C., which provides as follows:

"A person commits a misdemeanour if he knowingly restrains another unlawfully so as to substantially interfere with his liberty".

7.88 The inclusion of the words "knowingly" and "substantially" operate to avoid imposition of criminal sanctions in every case that might support a civil action for false imprisonment.¹⁸⁷ The interference with liberty must be "substantial" and not merely "inconsequential".¹⁸⁸ For example, brief detention of a suspected shoplifter, expressly permitted by a number of revised codes,¹⁸⁹ is not an offence under s.212.3. Some revisions also provide a defence for

178 A.L.I. Commentary, p.235, note 94.

179 For example, Colo., s.18-3-301(2).

180 For example, Ala., s.13A-6-43(b).

181 For example, Wis., s.940.31(2).

182 For example, Ariz., s.13-1304(b).

183 For example, Ky., s.509.040(2).

184 A.L.I. Commentary.

185 See the discussion of s.135 of the New York Penal Law at pp.236-7 of the A.L.I. Commentary, *op cit*, and *supra*, text accompanying n.170-173.

186 In 1980, California, s.236; Idaho, s.18-2901; and Nevada, s.200.460 were the only three states providing for an offence of false imprisonment under non-revised Codes.

187 The Restatement provision on false imprisonment does not require the confinement to be "substantial", though *de minimis* detentions will not give rise to liability, *Restatement, Second, Torts* s.35(1985).

188 See Commentary to Ark. Stats. Ann., s.41-1704.

189 For example, Hawaii, s.707-722(3); Kan. s.21-3424(3); Neb. s.28-315. Other statutes exclude acts done in the performance of duty by any law enforcement officer; for example, Colo. s.18-3-303. These situations would be excluded from s.212.3 of the Code by the requirement that the actor knows the restraint to be unlawful.

restraint of a child by a parent or other relative whose sole purpose is to assume control of such child, thereby exculpating the non-custodial parent who removes their child from the custody of his or her estranged spouse.¹⁹⁰ The prevailing pattern, however, is to deal with such conduct under a special provision on custodial interference, following the approach in s.212.4 of the M.P.C., discussed below.¹⁹¹

Felonious Restraint

7.89 It is a separate, aggravated offence of false imprisonment to knowingly restrain another unlawfully in circumstances exposing the other person to risk of serious bodily injury, or to hold another in a condition of involuntary servitude, known as "felonious restraint" under s.212.2 of the M.P.C. This is an intermediate offence between false imprisonment and kidnapping, commonly covered in state law either by a generic offence of kidnapping, subject to equally grave sanctions as the most aggravated forms of that offence,¹⁹² or by lesser offences of "simple kidnapping", also subject to severe, though significantly disparate, sanctions.¹⁹³

7.90 The prescribed penalty for the M.P.C. offence is imprisonment for one to five years. Of those jurisdictions that have adopted substantially the same offence, the longest maximum penalty is ten years.¹⁹⁴ The remainder authorise imprisonment for seven years or less, whereas those revised codes that have carried forward so called simple kidnapping statutes generally prescribe penalties of between ten and twenty-five years.¹⁹⁵ Most revisions also follow s.212.2 in using risk, or substantial risk,¹⁹⁶ of serious physical injury to the victim as the determinative criterion of felony liability. The action giving rise to such risk must amount to unlawful restraint.¹⁹⁷

7.91 Moreover, the section requires proof that the defendant acted knowingly, i.e. that the defendant was aware of restraining the victim, that the restraint was unlawful, and that it exposed the victim to physical danger. The A.L.I. considered that recklessness would be an inappropriate standard for either false imprisonment or felonious restraint. The conduct involved would virtually always be purposeful or knowing with respect to the fact of restraint; the element of serious bodily injury is stated expressly in terms of risk, thereby covering the person who is reckless with respect to such harm; and the requirement of knowledge in respect of the unlawful character of the restraint would guard against convicting police officers of felonious restraint because of defects in their

190 For example, Ala., s.13A-6-42(2); Del., tit. 11, s.784. Under s.9A.40.030(2) of the Revised Code of Washington, this defence extends even to second degree kidnapping. A "relative" is defined in s.9A.40.010(3) as "an ancestor, descendant or sibling, including a relative of the same degree through marriage or adoption, or a spouse".

191 *Infra*, pages 249-252.

192 For example, Alas. s.11.15.260; D.C., s.22-2101; Mich., s.750.349.

193 See Note, *A Rationale of the Law of Kidnapping*, (1953) 53 Colum. L. Rev. 540-48, and statutes cited in A.L.I. Commentary to s.212.2, p.239, note 9.

194 Ohio, s.2905.02; Tex., s.20.02(c).

195 For example, Cal., s.207; Mass., ch. 265, s.26; Tenn., s.39-2601.

196 For example, Ark. Stats. Ann., s.41-1703.

197 A.L.I. Commentary, pp.241-42.

arresting authority, as well as against unwarranted interference in custody disputes.¹⁹⁸

7.92 Section 212.2 is distinguished from kidnapping either by the lack of substantial removal or confinement, as required for the greater offence, or by the absence of any of the specified kidnapping purposes. Thus, a person who restrains another for an insubstantial period of time or in a public place may be guilty of felonious restraint but not of kidnapping. In either case, the actor has not effected that substantial isolation of the victim from the protection of the law which is the hallmark of the crime of kidnapping. Additionally, this section comes into play for substantial removal or confinement that is not accompanied by one of the designated kidnapping purposes. Thus, for example, the actor who uses a gun to force another to drive him or her somewhere engages in unlawful restraint under circumstances exposing the victim to risk of serious bodily harm. If the actor does so in order to terrorize the victim or in order to commit or escape from a felony, he or she may be convicted of kidnapping under s.212.1. But if the purpose is merely to obtain transportation, the actor is liable only for the lesser offence of felonious restraint.¹⁹⁹

7.93 In this connection, it may be noted that some states have created a new crime of "vehicular piracy", a felony analogous to kidnapping. It is committed, as in Arkansas, when a person "seizes or exercises control, by force or threat of violence", over: a) any aircraft occupied by an unconsenting person; or b) any other vehicle having a seating capacity of more than eight passengers, operated by a common or contract carrier of passengers for hire, and occupied by an unconsenting person.²⁰⁰ Piracy of an aircraft is punishable more severely than piracy of some other vehicle.²⁰¹

7.94 The abolition of slavery under the thirteenth amendment to the U.S. Constitution has been given effect by federal statute,²⁰² and more generally by state kidnapping laws which include slavery or involuntary servitude as one of the requisite kidnapping purposes.²⁰³ Section 212.1 of the M.P.C. does not cover such conduct, however, since a person may be held in a condition of involuntary servitude more or less openly. Where the victim is not isolated from the protection of the law, placed in danger of death, or terrorised, holding another in involuntary servitude is a lesser felony than kidnapping, and is characterised as an alternative version of felonious restraint under s.212.2.²⁰⁴ This approach has been followed in a number of revised codes.²⁰⁵

198 *Id.*, pp.242-43.

199 *Id.*, pp.240-41.

200 Ark. Stats. Ann., s.41-1705(1).

201 Ark. Stats. Ann., s.41-1705(2).

202 18 U.S.C., s.1581 (1976).

203 For example, Ariz., s.13-1303; Mich., s.750.349 (aggravated kidnapping); Cal., s.207; Idaho, s.18-4501 (simple kidnapping).

204 A.L.I. Commentary, pp.243-44.

205 For example, Mass. (p) ch. 265, s.14; U.S. (p) s.1437, s.1622(a)(4) (1978).

Custodial Interference

7.95 The requirement in the offences of false imprisonment and felonious restraint that the actor "knowingly restrains another unlawfully" means that the actor must be aware that he or she is violating a legal duty established by the criminal or civil law. The overlap with the misdemeanour of unlawful interference with custody, defined in s.212.4 to cover persons who knowingly or recklessly take or entice any child under the age of 18 from the custody of its parent, guardian or other lawful custodian, or a committed person away from lawful custody, not having any privilege to do so, is thereby limited to situations where the defendant knows the conduct to be unlawful and, in the case of s.212.2, that the defendant is aware of the risk of serious bodily injury. When these elements are present, the relationship between the actor and the victim is irrelevant. Section 212.4 is therefore a lesser offence included in s.212.2 and 212.3, so that conviction of unlawful interference with custody is not possible on the same set of facts as conviction for either of those offences.²⁰⁶

7.96 It is an express defence to the offence of custodial interference that the actor believed that the action was necessary to preserve the child from danger to its welfare, a subjective consideration, or that the child, being at the time not less than 14 years old, was taken away at its own instigation without enticement and without purpose to commit a criminal offence. In this connection, proof that the child was below the critical age gives rise to a presumption that the actor knew the child's age or acted in reckless disregard thereof. These defences do not extend, however, to the taking away of a "committed person" from custody, though they may be "viewed as prime candidates for the exercise of discretion to forego criminal prosecution in such cases".²⁰⁷

7.97 Although s.212.4 is normally a misdemeanour, where the actor is not a parent or person in equivalent relation to the child and where the other knows that the conduct will cause serious alarm for the child's safety, or where the actor is reckless as to the likelihood of causing such harm, the offence is elevated to a felony of the third degree. Parents, etc, are excluded from this heavier penalty on the grounds that fear for safety will be less justified where the offender is a person more likely to be favourably disposed to the welfare of the child. Where the child's welfare is actually threatened, a prosecution for felonious restraint, reckless endangerment or endangerment of the child, or for assault, may be brought. Moreover, conduct which causes serious alarm for the child's safety within the meaning of s.212.4 threatens many of the same interests protected by the more serious offence of kidnapping, though it may not be accompanied by any of the specific purposes that characterise that offence.

7.98 The effect of s.212.1 is to include within the kidnapping offence removal of a child under the age of 14 by a stranger without the consent of an appropriate guardian, irrespective of any force, threat or deception normally required for that offence. In consequence, s.212.4 mirrors s.212.1 in preventing

²⁰⁶ A.L.I. Commentary to s.212.4, pp.252-57.
²⁰⁷ *Id.*, p.262.

inappropriate intrusion of the criminal law into intra-family custody disputes.

7.99 Most jurisdictions with revised criminal laws follow the M.P.C. in providing for a separate offence of interference with custody, though many do not extend to committed persons generally.²⁰⁸ In some states, parents are completely exempted,²⁰⁹ while in others their liability is confined to cases where they act in contravention of a court order.²¹⁰ Still others follow the M.P.C. in recognising the parental relationship as a factor in grading.²¹¹ Finally, several revised codes exculpate or partially excuse the actor who voluntarily returns the child within some specified time, for example, before arrest, before trial or within seven days.²¹²

7.100 The Code specifies 18 as the limit of parental control to be protected against outside interference, this being "the point at which children usually complete high school and move into the relative independence of self-support or higher education".²¹³ While several revised codes agree with this approach,²¹⁴ others follow older child-stealing statutes in specifying 16 or an even younger age as the critical age.²¹⁵ Significantly, states using younger ages typically have no defence that a child between 14 and 18 was taken away at its own instigation without enticement and without purpose to commit a criminal offence with or against the child.²¹⁶ Similarly, in states where parents are either partially or completely exempt from the offence, the defence that the action was necessary to preserve the child from danger to its welfare is generally not provided for.²¹⁷

7.101 The omission of any offence of "abduction" in this part of the Code is logical in that much of what is prohibited by the widely varying state laws on abduction belongs in the chapter on sexual offences, having little more in common than that they prohibit the taking, enticing or detaining of a female person for some unlawful purpose directly associated with the fact that she is female rather than male. The importance of maintaining parental custody against unlawful interruption, on the other hand, is recognised in the offence of custodial interference. Moreover, if kidnapping had from the first had its present scope in U.S. law, there would have been no need for special provision for abduction, and such statutes are, in consequence, disappearing.²¹⁸

208 For example, Colo., s.18-3-304; Tex., ss.25.03, 04.

209 For example, Haw., s.707-723; Ind., s.35-42-3-3(1).

210 For example, Iowa, s.710.6; Minn., s.609.26.

211 For example, Iowa, ss.710.5, 6; Ky., s.509.070.

212 Ky., *id* (before arrest); Mont., s.94-5-305 (before trial); Tex., s.25.03 (within 7 days).

213 A.L.I. Commentary, p.258.

214 For example, Colo., s.18-3-304; Pa., tit. 18, s.2904.

215 For example, Del., tit. 11, s.785(16); N.Y., s.135.34(16); 38, s.10-2(a)(2)(13).

216 *Id*. Although the burden of proof remains on the prosecution, it is for the accused to raise such an 'affirmative defence' under s.1.12 of the M.P.C.

217 While the A.L.I. Commentary states this defence to be 'especially appropriate in light of the usual opportunity to control participants in a custody dispute through issuance of court orders backed by the contempt power', it recognises that defiance of such orders remains a serious practical problem, particularly in that Supreme Court decisions have allowed one state to refuse enforcement chiefly through the use of the flexible doctrine of changed circumstances (pp.258-261).

218 See Perkins & Boyce, *op cit*, pp.182-188.

Confinement And Obstruction

7.102 The definition of "unlawful force" against which force may be used for the protection of self or others or of property, as well as for the purpose of effecting an arrest, preventing escape or preventing suicide or the commission of a crime, is stated in s.3.11(1) to include confinement. Equally, justifiable force for such purposes extends to the use of confinement as a protective measure, though "only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can, unless the person confined has been arrested on a charge of crime".²¹⁹

7.103 Section 306(6) of the Code provides for instances of obstruction, as opposed to confinement. Though obstruction is not an offence in itself, the section provides that the use of force to pass a person whom the actor believes to be purposely or knowingly and unjustifiably obstructing him or her from going to a place the actor may lawfully go is justifiable provided that:

- "(a) the actor believes that the person against whom he uses force has no claim of right to obstruct the actor; and
- (b) the actor is not being obstructed from entry or movement on land that he knows to be in the possession or custody of the person obstructing him, or in the possession or custody of another person by whose authority the obstructor acts, unless the circumstances, as the actor believes them to be, are of such urgency that it would not be reasonable to postpone the entry or movement on such land until a court order is obtained; and
- (c) the force used is not greater than would be justifiable if the person obstructing the actor were using force against him to prevent his passage."

Omissions

7.104 The M.P.C. does not attempt to delimit those offences against the person, or offences generally, that are capable of commission by omission, nor to codify the existence and scope of common law duties. In consequence, s.2.01(3) of the Code simply provides:

"Liability for the commission of an offence may not be based on an omission unaccompanied by action unless:

- (a) the omission is expressly made sufficient by the law defining the offence; or
- (b) a duty to perform the omitted act is otherwise imposed

by law".

Causation

7.105 Section 2.03(1) of the Code states the minimum requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result, namely that the conduct must be an antecedent but for which the result would not have occurred. It also provides that additional causal requirements may be imposed by the Code or by the law defining the offences. This is not to say, however, that such "but for" causation is sufficient by itself because additional limitations are provided for in the following subsections.

7.106 Section 2.03(2) replaces the traditional language of proximate causation by language which focuses on the relationship between the purpose or contemplation of the actor and the actual result of the actor's conduct, in the following terms:

"When purposely or knowingly causing a particular result is an element of an offence, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

- (a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury designed or contemplated would have been more serious or more extensive than that caused; or
- (b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offence."

7.107 Section (3) performs the same function for offences in which recklessness or negligence is an element. Liability is predicted on "but for causation", subject to limitations based on the relationship between the risks created by the actor's conduct that supports a finding of recklessness or negligence and the consequences that in fact ensued.

7.108 Section (4) is addressed to strict liability offences. It provides that the causal element is not established unless the actual result is a probable consequence of the actor's conduct, "a minimal protection against the limitless extrapolation of liability without fault".²²⁰

220 See M.P.C., Part I *Commentaries*, vol. 1, p.255 *et seq.*

PART III: PROPOSALS FOR REFORM

CHAPTER 8: PRELIMINARY CONSIDERATIONS

8.1 In Part I of this Report, the Commission has undertaken an examination of the existing statutory and common law offences of violence and endangerment and of offences against liberty. In doing so, we have been mindful of the number of offences which fall for consideration in this area of the law, as well as of the importance of the position of each offence in the overall scheme and of how it may relate to the other offences. Clearly, for example, an understanding of the scope and operation of assault occasioning actual bodily harm, or of affray, cannot be reached by considering it in isolation from alternative charges.

8.2 For the same reasons, and at the risk of repetition, in Part II of this Report, the Commission has given separate treatment to the existing laws and proposed reforms in other jurisdictions. In this respect, we have considered that an understanding of these laws is best facilitated by considering them in their particular context rather than in isolation. For example, it has been seen that the absence of an offence equivalent to assault occasioning actual bodily harm, or to affray, in other jurisdictions may be attributable to the existence of classes of aggravated assault or to offences against public order or to powers of arrest which do not obtain in Ireland. The particular offences may also, in those jurisdictions which have codified the general principles of liability, be subject to particular definitions of intention or recklessness, etc. Moreover, it has been seen that the content of the proposed reforms in New Zealand has been considerably affected by corresponding reforms in sentencing and penal policy.

8.3 The question of the possible codification of the general principles of causation and liability which should govern any proposed new scheme of offences necessarily arises in this study. In this respect, it may be recalled that the Commission has stopped short of making such recommendations in previous Reports on the grounds that this constituted a measure of reform of general application which, on balance, it was inappropriate to propose in the context of

the reform of a particular category of offences. In our *Report on Malicious Damage*, for example, it was decided, with some hesitation, to defer any final recommendation on the law relating to intoxication until the issue could be examined, within the context of a project for the codification of the general part of the criminal law.¹ At the same time, we have recognised the advantage of maintaining a common approach to the question of *mens rea* in relation to criminal offences generally² and have done so, for example, in recommending the adoption of a subjective standard of recklessness whenever the issue has arisen.³ We have decided to remain consistent and to defer consideration of general principles of criminality to distinct reports. We make exceptions for self defence and considerations of culpability as being inextricably relevant to this study.

8.4 There is little doubt that violent crimes are and will remain the most threatening to the public's sense of security.⁴ Unlike most other categories of crime, the fear and indignation aroused by violence to the person and the common interest of self-preservation give rise to an unusual consensus as to the need for criminal sanctions to punish such conduct.⁵ This consensus may be attributable in part to a collective exaggerated perception of the likelihood of falling victim to crimes of violence and to the amount of publicity given to them.⁶ In addition, as noted by Greenwood in the context of violence in the United States, violent crimes receive the most attention within the criminal justice system:

"Reports of violent crimes in progress receive first priority in dispatching patrol cars. Reported violent crimes are more systematically investigated than any other type. Violent offenders are more rigorously prosecuted and more likely to be imprisoned than offenders charged with other types of crimes. Whenever there is an unexpected rise in violent crime, the political and public reaction is predictable. More police and tougher sentences are called for. The judiciary is castigated for its lenient sentencing."⁷

8.5 To this it may be added that the substantive law relating to violence is peculiarly susceptible to the demand for the creation of new or broader offences as a reaction to isolated incidents or to the acquittal of even a single offender, particularly in a small jurisdiction like Ireland. Indeed, the 1861 Act is a consolidation of such piecemeal and detailed measures. In looking to the reform of the present structure of offences, therefore, it is important not only to delimit new offences which are collectively comprehensive as to the categories of

1 *Report on Malicious Damage* (LRC 26-1988), p.24. See also *Report on Rape* (LRC 24-1988), p.10.

2 *Report on Malicious Damage*, p.20.

3 For example, *Report on Rape*, p.10; *Report on Receiving Stolen Property* (LRC 23-1987), p.100; *Report on Malicious Damage*, p.20.

4 See generally, *Criminal Violence* (Wolfgang and Weiner, (eds.), *Criminal Violence*, (Sage Publications, 1982).

5 See Boydell and Grindstaff, *Public Opinion toward Legal Sanctions for Crimes of Violence* (1974) 65 J. Crim. Law and Criminology 113 at 118.

6 See Wolfgang & Singer, *Victim Categories of Crime* (1978) 69 J. Crim. L. & Criminology 379.

7 *The Violent Offender in the Criminal Justice System*, in *Criminal Violence*, p.320.

mischief to be prevented or punished, but also to exercise caution in assigning penalties to such offences.

8.6 In this respect, whereas it is a common feature of all criminal justice systems, at least in the absence of war or civil strife,⁸ that offences against the person represent only a small proportion of the total crime rate, the vast majority of offences being crimes against property,⁹ it is probable that Ireland may be characterised as a relatively non-violent country. In the United Kingdom, for example, the number of indictable offences against the person recorded between 1955 and 1970 increased at a much greater rate than the number of indictable offences generally.¹⁰ Crimes of violence against persons have also increased on a relative scale to other offences since the late 1940s in most European countries, including the Netherlands, Germany, France, Italy and Switzerland, and similar trends have also been recorded in many non-European countries.¹¹

8.7 Among the factors associated with such increases in violence are urbanisation and the greater anonymity of urban life; increases in drug abuse and alcohol consumption; the greater availability of firearms and offensive weapons; ethnic or racial tension; and, particularly in relation to domestic violence, the greater incidence of unemployment and of financial stress arising from frustrated economic expectations. Economic inequality is universally recognised as the principal root cause of offences against property, with or without violence. It also appears to be a universal rule of thumb that men are at least ten times more likely to commit violent offences against the person than women.¹² In addition, it is undisputed that a propensity to aggression will often be exacerbated or activated by the consumption of alcohol.

8.8 In this last connection, studies carried out in Finland have shown that the majority of assault offenders are intoxicated at the time of the offence and that the percentage of intoxicated offenders increases in direct proportion to the degree of violence involved. Even the victims are under the influence of alcohol in most cases. Between 1969 and 1970, the amount of alcohol consumed rose by 42 per cent as a result of liberalised laws on drink, and the assault rate jumped by 38 per cent over the same period.¹³

8.9 Whether the greater social, if not physical, toleration of alcohol in Ireland may operate to make the Finnish statistics inapplicable to the Irish situation is a matter which may deserve further investigation.

8.10 The criminal law has a necessarily limited contribution to make to the

8 See generally, Johnson (ed.), *International Handbook of Contemporary Developments in Criminology: Europe, Africa, Middle East and Asia* (Greenwood, 1983).

9 *Id.*

10 *Id.* Richard F. Sparks, pp.80-81.

11 *Id.* Such non-European countries include India, Israel, Korea, Nigeria and South Africa.

12 *Id.* The expression "rule of thumb" is said to derive from the rule formerly adopted in English courts that a man was allowed to beat his wife with a whip or rattan no thicker than the width of his thumb, *supra* Chapter 1, paragraph 1.69.

13 See Ankeri Antila in Johnson, *op cit*, pp.201-202.

reduction and control of violence. Statistics relating to prosecution and conviction of offences against the person must be regarded as only an indication of the general incidence of violence in the country at any one time - a significant number of such offences, and certainly the vast majority of assaults, are never brought to the attention of the Gardaí.¹⁴

8.11 It may be observed that there is an unusual amount of duplicative and overlapping statutory offences in the broad category of non-fatal and non-sexual offences against the person. Although the issue has not yet been litigated in Ireland, it has been seen that such duplication may give rise to three separate constitutional violations in the United States.¹⁵ Notwithstanding that many of these offences are no longer prosecuted in practice and that they may be regarded as obsolete, the existence of separate provisions with often widely disparate maximum penalties is a feature of the law which, if nothing else, contributes to its lack of internal cohesion.

Statistics

8.12 The Commission considers that the achievement of greater transparency and consistency in the criminal justice system would be greatly assisted if information relating to all criminal proceedings in the State were computerised. *The Commission recommends in the present context that consideration be given by the Minister for Justice to the creation of a National Bureau of Criminal Statistics staffed by experts in criminological research which would be responsible for the collation and publication of more detailed statistics relating to the incidence, prosecution and disposal of offences in Ireland than are presently contained in the annual Reports of the Garda Commissioner.* In the view of the Commission, having regard to the considerable benefits which would accrue to the criminal justice system, to the defendants themselves and to all those concerned with its operation, the creation of such a body, perhaps within the Department of Justice and working in consultation with the Gardaí and with the Office of the D.P.P., would not constitute an undue additional burden on the time and resources of the Government.

¹⁴ In 1973, a study carried out in three inner London areas found evidence that the volume of indictable crimes committed against both property and persons was over eleven times as great as police statistics suggested: see Sparks, *op cit.* See also the *First Report of the Select Committee on Crime, Lawlessness and Vandalism* (Neighbourhood Watch), 1984.

¹⁵ *Supra*, Chapter 7.

CHAPTER 9: DISCUSSION AND PROPOSALS FOR REFORM

A. Crimes of violence and endangerment

The Commission's Approach

9.1 It has been seen that our existing criminal law seeks to protect the physical security of the person by means of the two basic offences of assault and battery at common law, together with a superstructure of specific statutory offences against the person, principally contained in the *Offences Against the Person Act, 1861*. These are supplemented by certain common law and statutory offences relating to breaches of duty resulting in injury, by statutory "precursor" offences relating to the possession, manufacture and sale of dangerous things, and by the common law offences of public nuisance and affray.

9.2 This scheme of offences, in extending beyond the actual or attempted use of unlawful force or violence to the threat of such violence and to the unjustified creation of risks which threaten such violence, for the most part corresponds to the constitutional right sought to be protected, i.e. the right to bodily integrity. In this respect, it may be argued that the existing substantive law has not given rise to serious difficulty in practice; in this as in other areas of the criminal law, it is the procedural rather than the substantive rules which have exercised the courts and which are of more practical significance to the prosecution and defence alike.

9.3 Be that as it may be, the existing corpus of offences against the person, in addition to containing many gaps and obsolete provisions, over-extends the proper scope of the criminal law, is poorly organised and hard to understand, and fails to address many current problems. Moreover, there is inconsistency and incoherence in the provision of penalties. Commenting on the Fourteenth Report on the English Criminal Law Revision Committee, Professor Brian Hogan has likened this predominantly Victorian law to a typical Victorian town house:

"The virtues include, above all, stylishness, followed by commodiousness and solidity. The vices include a plethora of unnecessary features, servants quarters for which there are no longer servants, and the ruinous expense of maintenance and heating Perhaps the best thing to do is to modernise the old homestead, preserving what is sound, restoring what is worn, and replacing what is rotten. But ... [the] advantages of having all offences against the person together with defences set out in a single statute are so obvious that they ought not to be lightly discarded. It is difficult to believe, for instance, that the crime of assault, after all these years of judicial development, is not a ready candidate for statutory definition."

9.4 Having regard to the necessity for clarity in the criminal law, the extended analogy may not be quite apposite - the virtues of preserving buildings are not easily transferable to the criminal law, where it will be of no comfort to either a defendant or a prosecutor that the substantive law is of archaeological or aesthetic interest. Furthermore, the scope and content of the criminal law is not simply a reflection of the limits of social tolerance. It informs the conduct of police and prosecutors in the exercise of their respective duties, and delimits those breaches of obligation for which the State may legitimately impose a sanction, including the loss of liberty.

9.5 In this connection, the response of the law to offences of violence naturally finds its place at the core of the criminal justice system. In looking to its reform, therefore, the Commission is mindful that the clear and simple expression of the substantive rules is the first step in the continuing development of a fair, accountable and efficient system of criminal justice. For these reasons, the general approach of the Commission in this as in some other areas of the criminal law is to take the existing principles and rules as its starting point in an attempt simply and coherently to revise and restate the law.

The Interests Sought To Be Protected

9.6 The State's duties in respect of the protection of the citizen's right to bodily integrity are primarily discharged by the adoption and enforcement of appropriate measures for the promotion and protection of public health and safety. Injury resulting from negligence is almost exclusively the province of private law. In consequence, the role of the criminal law is limited to providing sanctions for persons who intentionally or recklessly cause harm to others. Acts of harming, then, are the direct objects of the criminal law, not simply states of harm as such.¹ From the legislative point of view, however, states of harm are fundamental, for they determine in part which acts are the proper target of penal legislation.

9.7 Clearly not everything we dislike or resent, and wish to avoid, is harmful

¹ See for example, *Report on Malicious Damage* (LRC 26-1988), chapter 4.

to us. Many experiences which distress, offend or irritate us are suffered for a time and then go, leaving us as whole and undamaged as we were before. According to Feinberg,² such unhappy but not necessarily harmful experiences may be divided into two categories, those that hurt and those that offend:

"The most prominent hurts, of course, are physical pains, and they can serve as a model of comparison for identifying 'mental pains' which are also 'hurts' if only by courtesy of metaphor. Offended mental states can also be compared in a certain respect with familiar physical analogues, namely, the motley assortment of non-painful physical discomforts. Physical pains include pangs, twinges, aches, stabs, stitches, cricks, and throbs, as caused by cuts, bruises, sores, infections, muscle spasms, over-dilated or contracted arteries, gas pressures, and the like. Roughly analogous to these are various forms of mental suffering (they 'hurt' too): 'wounded' feelings, bitterness, keen disappointment, remorse, depression, grief, 'heartache', despair. Non-painful forms of physical unpleasantness include nausea (which can be even more miserable a condition than pain, but does not, strictly speaking, *hurt*), itches, dizziness, tension, hyperactivity, fatigue, sleeplessness, chills, weakness, stiffness, extremes of heat and cold, and other discomforts. For our present purposes, these can be lumped together with physical pains as forms of physical discomfort. Analogous to them, however, are various non-painful mental states, which are of sufficient interest to be placed in a separate category, and labelled 'forms of offendedness'. Like their physical analogues, these form a great miscellany of conditions that have little in common except that they don't hurt but are nevertheless universally disliked."³

9.8 The latter forms of "offendedness" are said to include transitory disappointments and disillusionments, hurt, pride, disgust, shocked sensibilities, irritation, frustration, anxiety, embarrassment, shame, guilt, boredom and certain kinds of responsive anger and fear. Although Feinberg recognises that these conceptual distinctions are to some extent arbitrary, his analysis is a useful one for the purposes of identifying the minimum threshold of the criminal law and, to a lesser extent, for distinguishing meaningfully between different types of physical and mental harm.

9.9 We have recommended in our Report on the topic⁴ that while a crime of Defamatory Libel, consisting of publishing false and defamatory matters, should be retained, a reduction should be made in the number of different ways in which the offence can be committed.

9.10 Insults, taunts and affronts not captured by that offence, no matter how obscene or contemptuous, are not normally capable of giving rise to a sufficient

² *Harm to Others* (Oxford University Press, 1984), p.46.

³ *Id.*

⁴ *Report on the Crime of Libel*, (LRC 41-1991).

degree of mental anguish to deserve criminal sanctions. And although offensive telephone calls have been criminalised in many jurisdictions, including Ireland, such an offence is more akin to an offence of harassment, where the experience is severe, prolonged or constantly repeated and therefore capable of causing an obsessive and incapacitating degree of mental anguish or annoyance. Similarly, following somebody is not an offence in itself, though being persistently followed may clearly be a frightening experience, as well as constituting an unjustified attack on one's liberty and privacy.

9.11 To criminalise such acts of harassment, however, is not by the same token to permit open-ended, uncontrolled, violent responses to them. In this respect, insulting words or behaviour not amounting to acts of violence may elicit a violent response in one of two ways: they may directly arouse anger in the listener or they might function as formal invitations to combat. The former method is provocation; the latter is challenge. Provocations are essentially causal mechanisms which exploit the known tendency of a certain class of words to evoke emotional responses, and the presumed tendency of certain persons or classes of person to respond passionately to them. "The propensity of human beings to react passionately to insults is not like the tendency of sugar to dissolve in water",⁵ however, and the law properly denies a defence of provocation to a person who responds with sticks and stones to mere words.

9.12 As regards challenges, there are insults going beyond an expression of hostility or contempt to a formal declaration of antagonism, analogous to the breaking off of diplomatic relations between nations. They are signs that the normal constraints of civility have been lifted, warnings that violent consequences may follow. Not quite curses, not quite statements of fixed intention, they are often so close to a threat of violence as to be indistinguishable from it. In some particularly contentious groups, a conventional understanding takes the insult itself to express a threat.

9.13 The response of the law to such challenges in the United States, for example, has been to penalise "fighting words",⁶ whereas in other jurisdictions the traditional and universally recognised verbal and non-verbal forms of initiating a duel, as by throwing down a gauntlet, have been prohibited.⁷ In Ireland, it has been seen that the rule that words alone cannot amount to an assault, coupled with the requirement of immediacy, has limited the legal response to such threats of violence. A more rational approach might penalise such actions or words as create an apprehension of immediate violence, or which create a reasonable apprehension of any violence.

9.14 In this connection, the constitutional guarantee of freedom of expression, as well as the guiding principle of criminal, if not constitutional, law that freedom

5 Feinberg, *Offence to Others* (Oxford University Press, 1985), p.226.

6 For example, *Chaplinsky v New Hampshire* 315 U.S. 568 (1942), and generally, Feinberg, *op cit*, pp.4 & 226-236.

7 For example, Art. 316 of the Greek Penal Code, 1950; Art. 158 of the Austrian Penal Code; Art. 99 of Argentina's Penal Code.

of action is to be maximised, place necessary limits on the prohibition of words or conduct. To base such a prohibition on the subjective apprehension of the victim might raise constitutional difficulties in certain circumstances, and it may therefore be more consistent with principle to provide for an objective limitation of reasonableness in respect of any apprehension of unlawful violence for the purposes of assault. Such a requirement has the additional advantage of overcoming some of the difficulties associated with the notion of assault at common law. At the same time, it would bring the law of assault into line with the power of the court to bind persons over to keep the peace for acts which cause others to fear on reasonable grounds that unlawful violence likely to result in personal injury is imminent.

9.15 As regards threats of greater degrees of violence and threats made for the purpose of compelling a person to do something which he is lawfully bound to do, this constitutional counterbalance holds lesser weight and such threats may clearly be the subject of greater penalties.

9.16 As has been seen, the law prohibits the least touching of, and the least causing of an impact on, the person of another without lawful excuse. Although such an act does not correspond to ordinary notions of criminality and although it may be seen as a peculiar feature in the development of the English law of assault rarely provided for in non common-law jurisdictions,⁸ it represents an important recognition of the inviolability of the person, consistent with the constitutional right to bodily integrity. In this respect, in order to abandon the notion of a technical battery by qualifying such contact with a requirement of offensiveness, as in some U.S. jurisdictions and as proposed by a minority of the Canadian Law Reform Commission,⁹ it would have to be shown that there was a greater general interest in permitting such freedom of action.

9.17 The freedom of persons to move amongst each other and touch each other in common intercourse, however, may be provided for by the doctrine of *de minimis* infractions, as reflected in the operation of the defence of mistake of fact, or by the legal fiction of implied consent, or by a statutory burden of proof on the prosecution to show that a particular contact went beyond what constitutes reasonable common intercourse. Moreover, as pointed out by the majority of the Canadian Law Reform Commission, if a requirement of offensiveness or seriousness is interpreted subjectively, then it merely repeats the requirement that the touching be against the victim's will; and if used objectively, the result would be that, even in the absence of a legally recognised excuse or justification, a person must submit to physical interference, albeit minor, against his will.¹⁰

9.18 In this context, we note that the English Law Commission has, after

8 An examination of the provisions of the numerous civil law codes reproduced in *The American Series of Foreign Penal Codes* (Sweet and Maxwell) reveals that very few countries criminalise the mere application of force, as opposed to assaults resulting in or intended to cause injury.

9 *Supra*, Chapter 4.

10 *Id.*

obtaining broad support for the measure in consultation, included a "common intercourse" provision in their Draft Criminal Law Bill. Clause 6(2) provides:

" (2) No such offence is committed if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is in fact unacceptable to the other person."

9.19 The operation of the law of consent in respect of assault occasioning actual bodily harm is clearly unsatisfactory. In particular, the rule, if it is the rule in Ireland, that one cannot consent to such harm is plainly unreal. As pointed out by the Canadian Law Reform Commission, "while we don't usually consent to pain, we do so often enough to make it impossible to exclude consent as a defence to hurting".¹¹ In its scheme of offences, therefore, consent is a defence to assault by touching or hurting, but not to assault by harming. Similarly, under the U.S. Model Penal Code, a person may consent to bodily injury which is "not serious".¹²

9.20 Having regard to the fact that absence of consent is a definitional element in s.47 of the 1861 Act which falls to be proven by the prosecution, the constitutionality of this doctrine might be open to question in that the scope of the offence would be effectively determined by judicial notions of propriety. As Williams points out,¹³ it turns an offence designed for the prevention of aggression into one that gives a judge and jury discretion to punish people for what they deem improper. Again, as we noted above, the English Law Commission, in the wake of the *Brown*¹⁴ case, is to publish a Consultation Paper on consent to injury in 1994.

9.21 These defects or potential defects in the law of consent are exacerbated by the absence of any clear guideline as to how consent operates in respect of contact sports, medical treatment, dangerous activities, fights and scuffles. Each of these issues involves a consideration of the proper scope of the criminal law and will be more fully discussed below, together with the question of capacity to consent. For the present purposes of identifying the gravity of injury which may be consented to, this question is necessarily bound up with the question of how the substantive offences can meaningfully distinguish between different degrees of physical and mental harm.

9.22 The existing notions of actual bodily harm and grievous bodily harm (by wounding, maiming, disabling or disfiguring or by any other means) are in several respects problematic, notably in relation to the provision of penalties under ss.18, 20 and 47 of the 1861 Act. In particular, an assault occasioning any non-trivial

11

Id.

12 *Supra*, Chapter 7.

13 *Supra*, Chapter 1, pages 37-39.

14 [1992] 2 All ER. *Supra*, paragraph 1.115.

bodily harm and the malicious infliction of grievous bodily harm are both punishable by the same penalty. Moreover, having regard to advances in medical science, the existence of a wound, being a mere rupture of the skin, should not in itself give rise to an aggravated penalty.

9.23 In addition, although resolutions of the issue have recently emerged in Australia and England, there is doubt as to whether an injury which has been "inflicted" may also be said to have been "caused" or "occasioned". Together with the proliferation of species of grievous bodily harm and nefarious intents in s.18, this scheme of offences creates unnecessary complications for the drafting and prosecution of charges on indictment. To this it may be added that the laborious, condensed, antiquated language of these provisions can serve only to alienate defendants from the criminal process.

9.24 Section 47 creates an offence of assault occasioning actual bodily harm, *simpliciter*. Sections 18 and 20 are more elaborate.

"18. Whosoever shall unlawfully and maliciously by any Means whatsoever wound or cause any grievous bodily Harm to any Person, or shoot at any Person, or, by drawing a Trigger or in any other Manner, attempt to discharge any Kind of loaded Arms at any Person, with Intent, in any of the Cases aforesaid, to maim, disfigure, or disable any Person, or to do some other 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, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Three Years, - or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour, and with or without Solitary Confinement.

20. Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily Harm 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, at the Discretion of the Court to be kept in Penal Servitude for the Term of Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour."

9.25 It has been seen that the English Law Commission's Draft Criminal Law Bill replaces ss.47, 20, and 18 of the 1861 Act with separate offences of intentionally or recklessly causing personal injury, recklessly causing serious personal injury and intentionally causing serious personal injury. Whereas the gravity of the injury is said to justify the retention of a distinction between intentionally and recklessly causing serious personal injury, thereby preserving the usefulness of an offence analogous to s.20 and the penalty of life imprisonment for a similar offence to s.18, a result-oriented approach is retained in respect of

the lesser offence, which corresponds to the existing s.47.¹⁵

9.26 Together with the new statutory offence of assault, comprising assault and battery at common law and also drafted in terms of "causing", this scheme of offences has much to recommend it. It is grounded in the C.L.R.C.'s conviction that:

"Just as there is a need to separate death caused by an intentional act (murder) from death caused recklessly (manslaughter), in order to distinguish the gravest from the less grave forms of homicide, there is similarly a need to separate the intentional causing of serious injury from the reckless causing of serious injury. There is, in our opinion, a definite moral and psychological difference between the two offences which it is appropriate for the criminal law to reflect."¹⁶

The English Law Commission, observing "that the provisions of the 1861 Act as now authoritatively interpreted in *Savage*,¹⁷ compel a formulation of the law that cannot be justified on grounds of logic, efficacy or justice",¹⁸ concludes:

"The greatest problem of the present law is, however, the lack of coherence in sections 20 and 47 between the consequences for which the accused is punished and the mental state that is sufficient for his conviction. Thus section 20 is, in a non-wounding case, directed at punishing the infliction of *serious* bodily harm; but all that the accused needs to have foreseen as the result of his actions is any minor physical harm. Similarly, section 47 is directed at punishing the causing of actual bodily harm; but all that the accused needs to have foreseen as the result of his actions is either fear of violence on another's part or any 'physical contact' with any person. The House of Lords in *Savage* commented on this incoherence between the acts forbidden by the offences and the required mental state, but not from the point of view of general policy.¹⁹ One cannot but agree with the view expressed by the C.L.R.C.,²⁰ that the current law is, in this respect, both unjust and ineffective."²¹

15 *Supra*, Chapter 3, pp.143-145.

16 C.L.R.C., Fourteenth Report, para. 152.

17 [1992] 1 A.C. 699.

18 Law Com. No. 218, para. 12.13.

19 The House was pressed with an argument that the analysis of section 20 adopted by Diplock L.J. in *Mowatt* [1968] 1 Q.B. 421 at 428D, that all that the accused need foresee is "some physical harm to some person, albeit of a minor character", was incorrect, because of an alleged "general principle" that "a person should not be criminally liable for consequences of his conduct unless he foresaw a consequence falling into the same legal category as that set out in the indictment" (*Savage* [1992] 1 A.C. 699 at 751H-752A). The House however pointed out that such a principle did not apply generally throughout the criminal law, citing murder and manslaughter as examples. The construction of section 20, and in particular the implications of the word "maliciously" as used in that section, could not, therefore, be determined by appeal to any such principle. That, however, leaves open the more general question of whether, when one is considering general policy, and not merely the irrational results of what was recognised in *Savage* itself as being piece-meal legislation, it is desirable for there to be an incoherence between the consequence for which the accused is punished and the accused's mental state with regard to that consequence.

20 *Working Paper on Offences against the Person*, 1976, paras. 110-117; and Fourteenth Report, paras. 149-152.

21 L.C. 218, para. 12.26. Certain footnote references omitted.

9.27 Much depends on the definition of recklessness. In our *Reports on Receiving*²² and on *Malicious Damage*²³ we recommended that the definition of recklessness approved of by Henchy J. in his judgment in *Murray*²⁴ should be adopted:

"A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves culpability of high degree."

9.28 In the *Criminal Damage Act, 1991*, the Government has adopted the test of recklessness laid down in the *Cunningham* case,²⁵ the subjective test recommended by the Commission in its *Report on Malicious Damage*.²⁶

9.29 We have also considered the following principle, which was propounded by the late Professor C.S. Kenny in the first edition of his *Outlines of the Criminal Law* published in 1902 and repeated at page 186 of the 16th edition by Mr J.W. Cecil Turner and published in 1952:

"In any statutory definition of a crime, malice must be taken not in the old vague sense of wickedness in general but as requiring either (1) an actual intention to do the particular *kind* of harm that was done; or (2) recklessness as to whether such harm should occur or not (i.e. *the accused has foreseen* that the particular kind of harm might be done and yet has gone on to take the risk of it). It is neither limited or nor does it indeed require any ill will towards the person injured"

9.30 This is the subjective approach to recklessness, reaffirmed in *Savage*.²⁷

9.31 While it is not exactly our previously suggested definition, it is the familiar test of recklessness being followed at the moment in our courts and is perfectly acceptable.

9.32 Another approach which has been suggested is to provide for a broader offence to replace that of causing injury, namely that of inflicting unlawful personal violence, whether resulting in injury or not.²⁸ This would be a purely summary offence and would obviate the need for the retention of a separate offence of assault. However, even if such an offence were to be made triable either way, the Commission considers this idea to be somewhat too broad. It is,

22 LRC 23-1987.

23 LRC 26-1988.

24 [1977] I.R. 360 at 403.

25 [1957] 2 Q.B. 396.

26 *Op cit.*

27 *Supra*, Chapter 1.

28 Harris, *Offences Against the Person*, (1977) N.L.J. 28 at 30.

in our view, clearly desirable that the causing of injury not amounting to serious injury should continue to be distinguished from less serious assaults, and that the criminal law should continue to protect against certain acts which, though not amounting to a threat or an attempt to inflict unlawful personal violence, cause a person to fear on reasonable grounds that such violence is likely.

9.33 The English Law Commission originally rejected the terms "injury" and "serious injury" proposed by the C.L.R.C. and the Code Team, as readily understood words which would raise few problems of interpretation, preferring instead the term "personal harm" so as to accommodate the inclusion of mental harm. This preference may also owe something to historical usage. Unlike "injury" which derives from the Latin *injuria* and which for many centuries meant a wrong or injustice, "harm" was traditionally used to denote damage, impairment or loss.²⁹

9.34 "Personal harm" is defined in the English Draft Code as "harm to body or mind, including pain or unconsciousness". The corresponding notion of "hurting" in the Canadian Draft Code, defined as "inflicting physical pain" is distinguished from "harming", meaning "to impair the body or its functions permanently or temporarily". Under the Model Penal Code, by contrast, "bodily injury" means "physical pain, illness or any impairment of the physical condition", as distinct from "injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ", characterised as "serious bodily injury". The New Zealand Crimes Bill distinguishes between injuring and causing serious bodily harm without defining either term. The Victoria Crimes Act defines "injury" to include "unconsciousness, hysteria, pain and any substantial impairment of bodily function" and "serious injury" to include a combination of such injuries.³⁰

9.35 Dr. Glanville Williams³¹ criticised the Draft Code's use of "harm" rather than "injury" as a less natural use of language to express damage to mind or body and as a word which might be read as extending the law too widely. As a result, the Law Commission, not persuaded by all of Dr. William's criticisms, by a narrow margin reverted to "injury" rather than "harm"³² as the more appropriate word with which to describe the interference with the body which would attract a criminal charge.

9.36 In determining the degree of injury for the purposes of aggravated punishment, other penal codes variously have regard to whether the injury is life-threatening, permanent or temporary and to whether an illness is curable or

29 Feinberg, *op cit*, pp.106-107, points out that this historical distinction no longer corresponds with ordinary usage, and suggests that, for the purposes of conceptual analysis, these meanings should be reversed.

30 *Supra*, Chapters 3, 4 and 5.

31 (1990) *New L.J.* 1227.

32 See L.C.C.P. No. 122, paras. 8.9-8.12.

incurable;³³ whether it involves disfigurement, or the impairment, deprivation or destruction of any sense, organ or joint, or the fracture or dislocation of any bone;³⁴ whether it produces a miscarriage in a woman;³⁵ whether it results in or deteriorates towards mental illness;³⁶ whether it renders the victim unconscious or similarly helpless;³⁷ and to whether the injury, pain or illness is protracted as, for example, by causing the impairment of the functioning of an organ, or an incapacity to work, or which requires continued medical treatment, for more than a specified number of days.³⁸

9.37 Evidently, these distinctions are cruder than those proposed in England, Canada and the U.S., which each seek to provide a relatively flexible and abstract guideline for penalties in respect of the continuum of possible injuries inflicted. Although more helpful, however, none of these in itself provides a solution to the existing problem of when an assault may be said to occasion "actual bodily harm", and as to when such harm is sufficiently serious to be "grievous". In Canada, the most serious category of injury would include the temporary impairment of a bodily function and, as in the U.S., the lesser offence would include physical pain, thereby blurring the distinction between that offence and an assault. Although the Draft Code definition of "personal harm" would be construed as requiring such pain to be harmful to body or mind, "harm" itself is undefined in the Code, and the category of "serious personal harm" is left as a matter for the court on the particular facts of the case.

9.38 The Commission recognises that there is some merit in leaving such discretion to the tribunal of fact. Nevertheless, having regard to the appropriate disparity in penalty between these offences and the need to avoid blurring of the borders if possible, we consider that such discretion is not unduly fettered by providing for a statutory definition of serious harm or injury. The Model Penal Code definition of "injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ" provides a workable and sufficiently grave standard in this respect.

9.39 If one wished to define harm or injury one could do so as "any substantial impairment of the body or mind, including unconsciousness, and including severe pain or distress or protracted shock resulting from the use of force against the body". Such impairment would therefore include illness and severe or prolonged pain, and is to be distinguished from mere pain or other minor physical harm, such as scratches, bruises and abrasions, which are properly characterised as hurting and which should be assimilated to the law of assault.

33 For example, Swedish Penal Code, chapter 6, s.3; Art. 583 of the Italian Penal Code; Art. 229 of the Norwegian Penal Code.

34 For example, Art. 309 of the French Penal Code; Art. 583 of the Italian Penal Code; Art. 155 of the Polish Penal Code.

35 For example, Art. 376 of the Colombian Penal Code.

36 For example, Art. 310 of the Greek Penal Code; Art. 224 of the Penal Code of the F.R.G.

37 For example, Art. 229 of the Norwegian Penal Code.

38 For example, Arts. 309 and 312 of the French Penal Code; Art. 420 of the Spanish Penal Code; Art. 180 of the Romanian Penal Code.

In addition to preventing the undue expansion of the offence designed to replace s.47 of the 1861 Act, this scheme would bring the law of assault closer to the popular notion of what constitutes an assault. It would, moreover, accommodate a pragmatic distinction between transient and longer-persisting injury or harm.

9.40 As regards the extension of the definition to include impairment of the mind, the Commission has had regard to the fact that while such impairment is often of equal, if not greater, gravity than physical impairment, it is the consequential harm to mental health and not the mere causing of distress which justifies the intrusion of this particular offence. Apart from the special case of fear or apprehension of personal violence, and of physical pain, which is as much a mental as a physiological condition, mental distress not amounting to an impairment of the mind or its functions would not warrant protection. So, for example, a hysterical or nervous condition will have to be sufficiently serious to amount to an impairment of the mind or its functions to satisfy the statutory test for the type of offence under scrutiny.

9.41 The Commission is conscious that the question of what constitutes an impairment of the mind will necessarily involve a greater degree of expert evidence than may be required for an impairment of the body, which in many cases will be obvious. Nevertheless, the criminal burden of proof as to the existence of such an impairment, together with the requirement, in crimes of intention or recklessness, of foresight or subjective advertence to the virtual certainty or likelihood of the particular type of harm, will act as a natural bar to frivolous or vexatious prosecutions. In this connection, the Commission has also had regard to the fact that *Miller*,³⁹ a case decided in 1953, appears to be the only reported authority in common law jurisdictions for the proposition that actual bodily harm includes mental harm, though it is almost universally cited in textbooks and no court has come to a contrary conclusion. Moreover, the fact that the rule has not given rise to difficulties in practice is supported by its express or implicit inclusion in the offences proposed in England, Canada and the U.S. As we recognised in considering the Model Penal Code in the U.S.A.,⁴⁰ the degree of harm or injury occasioned by a particular act of violence is a matter of chance, fluke or luck. It follows that even in the context of recklessness the gravity of an offence of violence should not be determined by the result. The intent or the degree of injury foreseen as possible would be more relevant to gravity in strict logic than the harm actually caused. This is exemplified in the typical case of the single punch thrown in an angry moment outside a pub which causes a person to fall, hit his head on the footpath and die as the result of the latter impact. Even in a recklessness context, death would not be in the reasonable contemplation of the assailant. Although a charge of manslaughter would lie, a charge of assault under s.47 might be more appropriate.

9.42 However, we are compelled, regretfully, to agree with the American Law

³⁹ [1954] 2 Q.B. 282.
⁴⁰ *Supra*, Chapter 7.

Institute that, whatever the legal logic, the public will always regard death or serious injury as different from risk creation and as we noted above,⁴¹ the fact that the act did in fact cause injury⁴² is one way of corroborating its inherent danger. The fact that the specified harm resulted in a "not improbable" way could be said to be an indication that the actor must have perceived the risk of its occurrence.

Assault: A Simple Scheme

9.43 Assault, theft and causing damage are the foundation offences in the criminal law. Were the basic offences not clear and certain, it would be difficult to build a coherent code. The Commission would put a greater premium on clarity than on simplicity even if this entails somewhat wordy and technical drafting. We have also shown a consistent reluctance to change laws that are well settled, like any building with good foundations. For example, as we point out in our *Report on Dishonesty*, we believe the *English Theft Act, 1968*, went wrong in importing a new word, the word "dishonesty", into the law of theft, without definition.

9.44 First of all, *we recommend that ss.18, 20, 42, 46 and 47 of the 1861 Act should be repealed*. We propose to build our new structure for non-fatal offences of violence from the less serious up to the most serious. Leaving the procedural considerations aside, the basic law of assault works well and, apart from rolling assault and battery into the one offence, we would reproduce the common law offence of assault and maintain the offence of assault occasioning actual bodily harm. The basic offence of assault should be a summary offence. The offence of assault occasioning actual bodily harm should be triable either way at the election of the D.P.P.

9.45 However confused the law may have been in England in recent times, we are satisfied that the requisite *mens rea* for assault should be intention or recklessness. Recklessness in this context is subjective recklessness as described in the *Cunningham*⁴³ decision and not simply negligence which is the appropriate test in a civil context. The accused must have foreseen the particular type of harm the act might cause.

9.46 The same test of *mens rea* should apply to assault occasioning actual bodily harm. Section 47 does not expressly state the mental element required, but it postulates an assault, and therefore should require intention or recklessness.

9.47 Since the word "maliciously", as used in s.20 of the 1861 Act, is generally taken to mean intentionally or recklessly; since "actual bodily harm" would include wounding and since the penalty, 5 years, is the same as that for the s.47

41 *Id.*
42 *Id.*
43 *Supra*, n.25.

offence, s.20 is a redundant offence and there is no point at all in retaining it. One is left with the more serious assaults captured at the moment, by s.18 of the 1861 Act. These could all be captured by an offence of assault occasioning serious (or grievous) bodily harm with the same *mens rea* criteria, intention or recklessness, as for the other assault offence. What could be simpler, what test more familiar? The problem, if it be a problem, is that one is left with no offence of specific intent like the s.18 offence. The C.L.R.C. found this approach

"at first sight attractive, but, on considering the types of cases which might fall into each category of offence, we decided that just as there is a need to separate death caused by an intentional act (murder) from death caused recklessly (manslaughter), in order to distinguish the gravest from the less grave forms of homicide, there is simply a need to separate the intentional causing of serious injury from the reckless causing of serious injury. There is, in our opinion, a definite moral and psychological difference between the two offences which it is appropriate for the criminal law to reflect. We are also of opinion that the merging of the mental element in such cases would cause difficult problems in the matter of penalty. All of us share the view that causing serious injury with intent to cause serious injury should carry a maximum penalty of life imprisonment to deal with those who repeatedly commit this grave offence of violence or who commit it on one occasion in circumstances just short of murder, but there is no justification in our opinion for increasing to life imprisonment the penalty for causing serious injury recklessly, the offence intended to replace s.20, and which now carries a maximum penalty of 5 years. We considered, as another means of simplifying our Working Paper proposals, whether to have one offence of causing serious injury with intent to cause serious injury and one offence of causing serious injury recklessly or injury recklessly or with intent (the latter offence replacing ss.20 and 47 of the Act of 1861). This was rejected on the ground that the gap between the two offences would be too great. It would amount to an abolition of s.20, an offence which we think has value: juries often return a verdict under s.20 as a compromise on an indictment for an offence under s.18. The abolition of the offence equivalent to s.20 would render the single offence of causing injury too broad. As stated above, we are of opinion that the moral distinction between the two types of mental element involved in acts of violence amounting to serious injury justifies two separate offences. We appreciate, however, that it is not an easy distinction for the police, magistrates and juries to have to make, and, with regard to acts of violence amounting to injury but not serious injury, we feel that the law need not be altered to require the distinction in mental elements to be made in every case: accordingly we are now in favour of merging our provisionally proposed offence of causing injury with intent to cause injury and causing injury recklessly into one offence."⁴⁴

9.48 The C.L.R.C. acknowledge the difficulty for police, magistrates and juries of separating the offence of intent from the offence of recklessness and roll the offences into one where injury is not serious. If law reform creates difficulties for police, courts and juries, why reform the law at all? Reform should, if possible, make life easier for those involved. It is entirely inconsistent to preserve the "uneasy" distinction for cases of serious injury and to run away from it for less serious cases.

9.49 When the relevant test of recklessness is a subjective one, the distinction is very uneasy indeed. If I shoot, stab or choke someone or do something else obviously dangerous to him realising that I may cause him serious harm but still proceeding with my deed, it should impress no one that I did not *intend* to cause serious injury. One is as likely to obtain an admission to murder as to an intent to cause serious injury. Without a "fall back" position allowing for recklessness, convictions for an offence of "pure" intent would be few indeed. For example, convictions for murder are extremely difficult to secure, even in the clearest cases.

9.50 Offences of violence causing injury are more likely to be offences of recklessness than anything else. There would be many convictions for murder if it were re-defined as an offence of recklessness. Recent experience with regard to the definition of rape⁴⁵ would not encourage one to seek to replace the offence of "murder" with a new offence of homicide.

9.51 Assuming the maximum penalty is a high one, the more "intentional" offence will collect the greater penalty. The test of intention or recklessness is one of the standard tests in the criminal law, familiar to the Courts, and easily explained and should apply across the board. The seriousness of an offence should be reflected in the available penalty, not in the mode of drafting. It is interesting to note that clause 19 of the English Draft Criminal Law Bill provides that an allegation of knowledge or intention includes an allegation of recklessness. *We are satisfied that the offences and any charges or counts in respect of them should incorporate the alternatives, intent and recklessness.*

9.52 Having regard to the above considerations, the following basic scheme of offences suggests itself to the Commission:

Assault

The offences of assault and battery at common law should be abolished, and replaced by a single statutory offence of assault, defined as follows:

" (1) A person is guilty of assault who, without lawful excuse, intentionally or recklessly-

⁴⁵ See the *Criminal Law (Rape) Act, 1990*.

(a) *causes physical hurt, or directly or indirectly applies force to or causes an impact on the body of another; or*

(b) *causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact,*

without the consent of the other.

(2) *For the purposes of subs.(1)(a), "force" includes-*

(a) *application of heat, light, electric current, noise or any other form of energy, and*

(b) *application of matter in solid, liquid or gaseous form."*

9.53 Paragraph (1)(a) covers the case of minor assaults not resulting in injury, and extends to technical batteries. It is based on clause 75(a) of the English Draft Code, with the addition of the category of "hurting", a readily understood word corresponding more closely to the common sense notion of an assault than the technical requirements of force or impact. Such force or impact need not be direct, thereby remedying the previous limitation on the law of common assault in relation to "booby traps" and other acts which make use of the victim's momentum.

9.54 Paragraph (1)(b) replaces the offence of assault at common law. The requirement of immediacy and the rule that words alone cannot constitute an assault are abandoned in favour of a requirement of reasonableness as to the apprehension of force or violence.

9.55 The reasonableness of the belief will in all cases be a matter of evidence, so that words or conduct, including conditional threats, which would not lead a person of reasonable firmness to apprehend such force, and threats of violence which are too remote in time will be excluded.

9.56 Both paragraphs are drafted in terms of "causing", and this approach together with the *mens rea* of intention or recklessness which governs the offence, will operate to prevent any undue expansion of the offence. In addition, and as under present law, it follows that an assault will not be capable of commission by omission.

9.57 Under the proposed definition, consent will always operate as a defence to assault. In this connection, the Commission has not considered it desirable to provide for a particular, limited definition of consent for the purposes of assault, as under s.182 of the Tasmanian Code.⁴⁶ Nor do we consider it necessary to

provide for an express defence of "reasonable common intercourse", as this may be adequately determined by the tribunal of fact as a matter of implied consent or mistake of fact. In this respect, it may be noted that the absence of a lawful excuse forms part of the definition of the offence.

9.58 Subs.(2) is based on s.31(3) of the *Victorian Crimes Act, 1958*,⁴⁷ and is included for the purposes of clarifying the meaning of "force" in paragraph 1(a).

9.59 *Assault should be triable summarily only, and be punishable by six months imprisonment or the maximum fine appropriate to the District Court or both. It should be possible to commence proceedings within 12 months of an offence* as certain allegations, in particular those involving alleged abuse of authority, can take months to investigate.

9.60 We have noted that the requirement in s.42 of the 1861 Act that a prosecution for assault be brought by or on behalf of the person aggrieved constituted an unnecessary restriction on the institution of proceedings and was amended by s.11(2) of the *Criminal Justice Act, 1951*, to provide that common assault and battery could be prosecuted on complaint made by the person aggrieved "or otherwise". Certain classes of assault are clearly deserving of public prosecution,⁴⁸ and persons assaulted will continue to be in a position to bring private prosecutions in appropriate cases. The Garda practice of bringing prosecutions as a common informer, criticised by Griffin J. in 1977,⁴⁹ is obviated by bringing prosecutions in the name of the D.P.P. The Commission sees no reason for ousting the District Court's jurisdiction in respect of assaults committed in connection with a dispute over title to land.⁵⁰ The use of force in defence of one's property is properly governed by the general principles of necessary defence. Where this defence fails, and there is otherwise no legally recognised excuse or justification for the use of force, the existence of a dispute as to title over land is irrelevant.

9.61 That part of s.46 which prohibits District Justices from adjudicating on any assault and battery which they deem fit for prosecution on indictment adds nothing to the procedures for preliminary examination and return for trial provided for by the *Criminal Justice Act, 1951*, and the *Criminal Procedure Act, 1967*. In particular, an assault occasioning actual bodily harm is included in the First Schedule to the 1951 Act as an indictable offence triable summarily.

9.62 On the other hand, it is clearly desirable that a charge of assault should continue to be triable on indictment where it arises out of the same set of facts as an indictable offence, as provided in s.6 of the *Criminal Justice Act, 1951*.

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Id.

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Although the English C.L.R.C. was particularly concerned that assaults on public officials should be the subject of greater prosecution, *supra*, p.133, the most obvious and more compelling reason for abolishing this restriction arises in the case of domestic assaults.

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Supra, Chapter 1.

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We assume the exclusion was made because the District Court was not supposed to have jurisdiction in matters of title.

9.63 *We recommend the creation of the following offences for more serious assaults:*

"(2) *A person who intentionally or recklessly assaults another causing him harm should be guilty of an offence and should be liable on conviction on indictment to be imprisoned for 5 years or to a fine of £5,000 or to both such fine and imprisonment or on summary conviction to imprisonment for one year and/or a fine of (the maximum available for a summary offence).*

(3) *A person who intentionally or recklessly assaults another causing him serious harm should be guilty of an offence and should be liable to be imprisoned for life or to pay a maximum fine of £100,000 or to both such fine and imprisonment."*

9.64 Despite the fact that the English Law Commission, having used "personal harm" in the Draft Code, by a narrow margin, reverted to "injury" in the Draft Bill, we still would prefer to use "harm" in the more serious assault offences. For a start, the word is in, trouble-free, use already in s.47 and in s.53 of the *Road Traffic Act, 1961* (as amended), in the offence of dangerous driving causing serious bodily harm. We are also satisfied that "harm" is a better word than injury to cover mental hurt.

9.65 We are not disposed to define "harm" as the law operates satisfactorily without a definition at the moment. However the word "bodily" is superfluous and its use is not conducive to a definition which includes mental "hurt". If it were felt necessary, the formula in the English Draft Code could be used. There, "personal harm" is defined as "harm to body or mind including pain and unconsciousness". The use of the word "actual" is also superfluous.

9.66 "Grievous" is a rather antiquated word and we prefer "serious", the word used already in the context of harm in road traffic legislation. *Serious harm should be defined as "injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ".*

9.67 One result of this approach is that it might be said to be inimical to "plea bargaining". One would lose the "fall-back" offence under s.20. If there was an assault and it caused serious harm, why should there be any "fall back"? It can be argued that there should simply be a plea of guilty and an address on sentence to the judge. But the Commission can envisage circumstances where the lesser offence of assault causing harm *would* afford a credible "fall-back" offence.

9.68 In the first place, there will be cases falling on the borderline between harm and serious harm. In the second, an accused could be, subjectively, reckless with regard to causing some harm while not appreciating that the deed

could cause serious harm. There is no "fall-back" from manslaughter either but where there is a will, criminal lawyers usually find a way to make a bargain. We would maintain a maximum penalty of life imprisonment for the "serious harm" offence.

9.69 It would be highly desirable, if possible, to avoid the necessity for medical evidence as to whether harm or injury was serious. Obtaining medical reports and securing the attendance of medical witnesses is a serious source of delay in prosecutions. In practice, under the present regime of offences, the question as to whether injury constitutes actual bodily harm or grievous bodily harm is usually obvious, straightforward and uncontested. Although the *Criminal Justice Act, 1984*, provides for modes of agreeing evidence in advance of a trial, the Code of the Criminal Bar is not favourable to this practice. As one experienced Senior Counsel has written in a submission to us on pre-trial review of evidence with a view to shortening trials, "the onus of proof rests on the prosecution, and the defence should not, by way of sanction or otherwise, be obliged to assist in any respect the prosecution in presenting its case".

9.70 In *Maier v A.G.*,⁵¹ while a provision in the *Road Traffic Act, 1968*, that a person's blood alcohol level could be proved "conclusively" by certificate was found to be unconstitutional, the Supreme Court indicated that proof of a fact by certificate "until the contrary is shown" would be lawful. This formula was adopted in the amending Road Traffic legislation in 1978 and in subsequent legislation, e.g. in s.10 of the *Misuse of Drugs Act, 1984*, where it is provided that production of a certificate signed by an officer of the Forensic Science Laboratory of the Department of Justice would be evidence of any fact thereby certified until the contrary was proved.

9.71 The proof of harm or serious harm in the context of offences against the person would appear to be even less potentially controversial than proof of whether a particular substance was a prohibited drug. The defendant can always challenge the evidence if he or she deems it proper or relevant to do. The provision in s.10 of the *Misuse of Drugs Act, 1984*, has operated smoothly and without controversy to the convenience of all. Medical evidence of actual bodily harm is not always a necessary proof. *Without prejudice to any other method of proof, the Commission would recommend that a provision similar to that in section 10 of the Misuse of Drugs Act, 1984, be made for proof of harm or serious harm by a doctor's certificate.*

Threats To Kill Or Cause Serious Injury

9.72 It has been seen that the scope of s.16 of the 1861 Act is unduly restrictive. It is limited, on the one hand, to threats made in writing, and on the other to threats to kill only. *We recommend that s.16 be repealed and replaced by an offence of threatening, by any means, to kill or cause serious harm to another*

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[1973] I.R. 140.

person. As under s.16, there should be no requirement that the threat be made to the proposed victim, though, following the wording of clause 9 of the English Draft Bill, *there should be an intention that the person receiving the threat believes that the threat will be carried out.*

9.73 Although the Commission recognises that some threats to cause serious harm are as grave as a threat to kill, we consider 10 years imprisonment to be an inappropriate penalty for either such threat. Instead, *the offence should be triable either way and punishable on conviction on indictment, as in New Zealand, by 7 years imprisonment.*

9.74 The Commission considers that adopting the definition of "serious harm" recommended above, together with the above definition of assault, should overcome the objections of the minority of the English C.L.R.C. who favoured the creation of offences of threatening to assault and threatening to injure while confining assault to battery only. Whereas, for example, a threat to break someone's leg would constitute a threat to cause serious injury, whether other, more amorphous threats, such as a threat to "fix someone up", would do so would depend on the circumstances and would be a matter of evidence for the court. Threats of lesser injury, including verbal, conditional and future threats, would be subject to a requirement of reasonableness in respect of the victim's apprehension of violence, thereby avoiding the prohibition of trivial threats. The proposed definition of assault would also cover the case of a person who threatened another in circumstances where he ought reasonably to foresee that the other person might fear immediate hurt.

Coercion And Harassment

9.75 Section 7 of the *Conspiracy and Protection of Property Act, 1875*, is the only existing offence of coercion in Irish law, and also the only offence concerned with acts of harassment. It has been seen that "intimidation" within the meaning of subs.(1) of this provision extends to threats of violence made with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing. The remaining subsections are concerned with specific types of persistent conduct also done with a view to such compulsion which would otherwise be properly characterised as acts of harassment rather than coercion.

9.76 *We recommend that the offence under s.7 should be triable either way and that the penalty should be increased to a maximum of 5 years and a £5,000 fine when prosecuted on indictment and the maximum District Court penalties when prosecuted summarily. The offence should be shorn of unnecessary specificity, such as the reference to hiding tools or clothes.*

9.77 Any acts of harassment which interfere seriously with a person's right to a peaceful and private life should be captured by the criminal law and not simply those which give rise to a fear of violence. An offence of harassment would capture, for example, the acts of the infatuated psychotic who follows a woman

in order to gain her affections.

9.78 *We recommend that a person who, without lawful authority or reasonable excuse, harasses another by persistently following, watching or besetting him or her in any place, by use of the telephone or otherwise, should be guilty of an offence. A person would harass another when his or her acts seriously interfered with another's peace or privacy.*

9.79 We consider it preferable to have separate offences of intimidation or harassment if only to highlight a difference in penalty. Intimidation, as it carries the threat of violence, should carry a greater penalty than harassment. Indeed the offence of harassment might best be left as a summary offence.

9.80 There are circumstances in which it might be permissible to engage in conduct that falls within the definition of the offence which we have proposed: overt surveillance by the Gardaí, for example. The question may also arise as to whether a creditor who repeatedly seeks to have a bill paid should be guilty of an offence. The answer would seem to be that, while clearly the point can be reached where persistence becomes harassment, the legitimacy or justifiability of the intrusion is a factor to which weight should be attached in determining whether the conduct was worthy of criminal sanction. For this reason, *we recommend that it should be necessary to prove that the conduct was without lawful authority or reasonable excuse.* We appreciate that this introduces an element of uncertainty, but without a proviso on these lines the offence would seem overbroad.

9.81 Section 13 of the *Post Office (Amendment) Act, 1951*, creates an offence of persistently making telephone calls without reasonable cause for the purpose of causing annoyance, inconvenience or needless anxiety to another person. This section was re-arranged by s.8 and the 4th Schedule of the *Post and Telecommunications Services Act, 1983*, but remains essentially the same. Section 4 of that Act provided that the offence could be triable either way with maximum penalties of 5 years and £50,000 fine on indictment.

9.82 Doubtless there will be cases which fall under s.13, but we are satisfied that there are many cases of this type of harassment where it is difficult to prove "the purpose of causing inconvenience etc". The love-crazed will protest the truth and beauty of their motives but are little less disruptive of the peace of the beloved than the persistent pest.

Terroristic Threats

9.83 A final category of threat which falls for consideration is a threat of violence made, as under s.211.3 of the Model Penal Code, "with intent to terrorise another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience". The analogous provisions in the English Draft Code are those

relating to "bomb scares", i.e. creating a bomb hoax, and creating a bomb hoax by communicating information.

9.84 The Commission considers that the proposed offence of threatening to kill or cause serious injury, together with the offence of threatening to damage property contained in s.3 of the *Criminal Damage Act, 1991*, make adequate provision for most such terroristic threats as are sought to be prohibited by s.211.3 of the Model Penal Code. Where the threat to kill or cause serious injury is made with intent to coerce, or in respect of more than one person, the offence may also be aggravated.

9.85 *For these reasons, the Commission would recommend that no separate offence relating to terroristic threats be created.*

Poisoning

9.86 Where injury or serious injury results from the administering of poison to another, the proposed offences of causing harm and causing serious harm may be charged in appropriate cases. Even if no such injury results, such conduct may be prosecuted as an attempt to cause harm or serious harm if the requisite intent may be proved.

9.87 If the above scheme is adopted, therefore, s.23 of the 1861 Act, which is concerned with administering a harmful substance so as thereby to endanger life or inflict grievous bodily harm, will become superfluous, and *the Commission would accordingly recommend that it be repealed without replacement.*

9.88 There remains to be considered the residual category of administering a noxious thing with intent to aggrieve or annoy under s.24 of the 1861 Act, for which a charge of causing injury or attempting to cause injury under the proposed new scheme would not be available. Having regard to the relatively trivial nature of the ulterior intent in such cases, and also to the potentially very wide interpretation of "noxious thing", to encompass even unwholesome substances, the Commission considers that it would be undesirable to retain this offence.

9.89 We nevertheless agree with the conclusions of the English C.L.R.C. as to the necessity for creating a separate offence designed to cover those cases where a person intentionally or recklessly gives to, or causes to be taken by, another, without the other's consent, any substance which the person knows to be capable of interfering substantially with the other's bodily functions, and that for this purpose, such a substance should include a substance capable of inducing unconsciousness or sleep. For the reasons given by the C.L.R.C., we consider that such an offence, now embodied in clause 5 of the Bill, contains the necessary words of limitation to ensure that it is not unduly expanded while at the same time extending to such reprehensible conduct as is not covered by the offence of causing harm.

9.90 In particular, the substance must be capable of interfering substantially with the victim's bodily functions (which includes the functions of the mind) and it must be administered without his consent. The English Law Commission added the words "to what is done" to the original draft in clause 73 of the Draft Code in order to:

"... put it beyond doubt that the defendant is guilty if he knows that the person to whom he administers the substance agrees to its administration in ignorance of its potential effect in any of the circumstances which may be relevant, including the quantity in which the substance is administered."⁵²

9.91 In this connection, the Commission also agrees that if a harmful substance is administered with consent in circumstances where it is not foreseen that injury may result, and if it is desired that such conduct be the subject of a specific criminal offence, consideration could be given to the creation of an offence of administering a controlled drug without *lawful excuse* by way of amendment to the *Misuse of Drugs Act*. In this connection, the Commission observes that such amendment may not be necessary on the grounds that such conduct might conceivably be prosecuted as the unlawful supply of a controlled drug, contrary to s.15(1) of the *Misuse of Drugs Act, 1977*. For the purposes of that offence, which is punishable on summary conviction by 12 months imprisonment and/or a fine of £250 and on indictment by 14 years imprisonment and/or a fine of £3,000, "supply" includes giving without payment.⁵³

9.92 *The Commission would accordingly recommend that s.24 of the 1861 Act be repealed, and replaced by an offence similar to that in clause 5 of the Bill, i.e.:*

"(1) *A person is guilty of an offence if, knowing that the other does not consent to what is done, he intentionally or recklessly administers to or causes to be taken by another a substance which he knows to be capable of interfering substantially with the other's bodily functions.*

(2) *For the purposes of this section a substance capable of inducing unconsciousness or sleep is capable of interfering substantially with bodily functions."*

9.93 *The offence should be triable either way and punishable on conviction on indictment by imprisonment for 3 years.*

Strangling And Rendering Unconscious

9.94 Unconsciousness is expressly included in the proposed definition of injury for the purposes of the offences of causing harm or serious harm, and is also contemplated in subs.(2) of the proposed offence of administering a

⁵² L.C. 218, para. 24.8.
⁵³ By s.1(1) of the Act.

substance without consent. Rendering a person insensible or unconscious or incapable of resistance by strangling, choking or suffocating, or by the administration of any stupefying or overpowering drug may therefore be prosecuted by charging the perpetrator with one of these offences, or with an attempt to commit any such offence.

9.95 In most cases, the penalties provided by the offences of causing harm and administering a substance without consent would be sufficient. In this respect, the Commission considers that the existing penalties of life imprisonment in respect of the offences under ss.21 and 22 of the 1861 Act are unwarranted.

9.96 *For these reasons, the Commission recommends that ss.21 and 22 of the 1861 Act be repealed without replacement. Similarly, we recommend that s.3(3) of the Criminal Law Amendment Act, 1885, as amended by s.8 of the Criminal Law Amendment Act, 1935, be repealed without replacement.*

Infecting With Disease

9.97 It has been seen that there is some confusion as to the existing criminal liability of a person who intentionally or recklessly infects another with any disease or sickness.⁵⁴ Where the disease is sufficiently serious to constitute grievous bodily harm, and where the requisite intent to inflict such harm is proved, a charge under s.18 of the 1861 Act may lie without the necessity of proof of an assault. Where the disease is transmitted by means of an assault, a charge under s.47 or s.20, depending on the gravity of the disease, may also lie. In this connection, it appears that consent may be a defence where there is no fraud as to the essential nature of the act consented to, or as to the identity of the actor, even where there is no disclosure of the risk of communication.

9.98 While the difficulties arising from the necessity for an assault will be remedied under the proposed scheme of offences relating to causing injury or serious injury, the operation of the above rules as to consent is plainly unsatisfactory. As a matter of common sense, a person who consents to sexual contact or to any other contact cannot be said by the same token to have consented to the resulting communication of disease in circumstances where the risk of such communication has been deliberately or recklessly concealed. On the other hand, where the risk has been disclosed, it can be argued that a person may legitimately consent to such risk, and that where the conduct consented to is not otherwise unlawful, the criminal law should not intervene.

9.99 In this connection, the Commission does not consider it desirable that consensual sexual activity involving a risk of AIDS or any other life-threatening or sexually transmitted disease should be made criminal. Disclosure of the risk of communication should not be discouraged. A prosecution for causing harm or serious harm would only lie where there had been an intentional or reckless

54 *Supra*, Chapter 1.

failure to disclose the risk and such harm actually resulted. Similarly, where no injury in fact resulted, such failure to disclose could result in a prosecution for the proposed offence of endangerment, considered below.

9.100 Consent to the risk of injury, it is important to remember, must be distinguished from consent to the actual infliction of injury, which the law may have a legitimate interest in denying. In this respect, where a person consents to be infected with a disease for *bona fide* medical purposes as, for example, in the case of immunisation, this should be provided for by way of exception. These and other principles relating to the operation of the law of consent in respect of non-fatal injury will be further discussed below.

9.101 We do not consider that a specific offence of causing or producing in another person any disease or sickness, as under s.153 of the New Zealand Crimes Bill and as provided for in many other penal codes,⁵⁵ is necessary. Whereas the effect of the New Zealand provision is to link the penalty for poisoning or infecting solely to the intent or recklessness as to the harm caused, the Commission, as indicated above, has preferred to retain a partially result-oriented approach in its proposed scheme of offences of causing injury, and we see no reason to depart from this approach here.

9.102 *For these reasons, the Commission would recommend that no separate offence relating to infecting with disease be created.*

9.103 It is hoped, then, that the above recommendations provide for a rational and coherent scheme of offences of violence, corresponding to the following penalties:

assault	12 months or fine of maximum gravity (summary)
threats to kill or cause serious injury	7 years
harassment	6 months or a fine of low-to-medium gravity (summary)
assault causing harm	5 years (triable either way)
assault causing serious harm	Life imprisonment (triable either way)
administering a substance without consent	3 years

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For example, Finnish Penal Code, chapter 21, s.5; Art. 284 of the Columbian Penal Code; Art. 318 of the French Penal Code; Art. 162 of the Polish Penal Code.

Aggravation

9.104 We now have to consider whether provision should be made for specific circumstances of aggravation for example,

- (a) by increasing the maximum penalty for each particular offence and leaving the matter to the discretion of the court in sentencing,
- (b) by providing for separate offences with increased penalties, in which the *actus reus* comprises the basic offence together with the circumstance of aggravation, or
- (c) by supplementing the basic offences with a set of common circumstances of aggravation which will operate to increase the penalty in each case in a manner proportionate to the penalty provided.

9.105 The first of these options has the merit of simplicity, although it can be argued that there are clearly a number of aggravating elements in offences of violence, beyond the gravity of injury inflicted or threatened, which ought to find reflection in the substantive criminal law. In addition to providing for a more certain and uniform standard to guide the courts in the exercise of their discretion as to sentence, the approaches suggested at (b) and (c) above might be said to offer an increased measure of deterrent protection to potential victims of certain categories of violence. Such aggravating circumstances could apply to the range of core offences of violence and therefore the third approach set out above might be preferred to the more particularised and clumsy method of creating separate aggravated offences for each crime.

9.106 The existing law on aggravated violence can be said to suffer from three principal defects. In the first place, the circumstances of aggravation are for the most part confined to assault and causing grievous bodily harm with intent. Secondly, inappropriate emphasis is placed on certain categories of victim, such as clergymen and seamen, and on certain categories of injury, such as strangling and rendering unconscious. And thirdly, no account is taken of certain circumstances of aggravation which might merit inclusion in the substantive law.

9.107 In this respect, the most obvious candidates for repeal are those provisions relating to assault on clergymen, magistrates preserving wrecks, traders in grain, flour, meal, malt or potatoes and seamen, and to assault committed in the course of any unlawful trade dispute, provided for in ss.36-37 and 39-41 of the 1861 Act. These offences are obsolete, bearing all the weight of their 130 years, and are in some cases potentially unconstitutional. *The Commission would accordingly recommend that they be repealed without replacement.*

9.108 It has been seen that s.38 of the 1861 Act provides, in effect, for three different categories of aggravated assault punishable by 2 years imprisonment:

assaulting, resisting or wilfully obstructing a peace officer in the due execution of his duty;

- assault with intent to commit a felony; and
- assault with intent to resist the lawful apprehension or detainer of oneself or any other person.

9.109 In its *Report on Offences under the Dublin Police Acts and Related Offences*,⁵⁸ the Commission, assuming the continuing need for specific offences relating to violent interference with peace officers performing their duty, pending an examination of all offences against the person, recommended that the first of these categories of assault be replaced by separate offences of assaulting a peace officer in the execution of his or her duty, triable either way and punishable on conviction on indictment by 2 years imprisonment and/or a fine of £500, and of obstructing a peace officer in the execution of his or her duty, triable summarily only and punishable by 3 months imprisonment and/or a fine of £200.

9.110 It was accordingly recommended that s.38 be repealed together with s.9 of the *Dublin Police Act, 1836*, and s.12 of the *Prevention of Crimes Act, 1871*.

9.111 Having conducted this general examination of the law relating to non-fatal offences against the person, the Commission remains satisfied of the importance of retaining specific offences with respect to assaulting, resisting and obstructing the Gardaí.

9.112 At present, the accused has an absolute right to trial by jury for the offences under s.38 of the 1861 Act. This has led over the years to many minor cases of assault on the Gardaí being tried before juries. Jurors are frequently aggrieved at having to devote their time to the trial of essentially minor matters when serious cases are waiting to be tried.

9.113 Those urging that an absolute right to trial by jury be retained for these cases argue that the evidence of Gardaí tends to be unreliable, particularly in cases involving themselves and that District Judges tend, unquestioningly, to believe Garda evidence. Those arguing for prosecution election for these cases point out that the Gardaí frequently get an impatient and incredulous hearing from juries, ignorant of the actual reason these minor cases fall to be tried by them and assuming the prosecutor chose the venue.

9.114 The Commission would require a greater weight of evidence than is before it to accept that it is unsafe for the law to permit the trial of minor offences of assault on the Gardaí by Ireland's District Judges. In addition, it is one of the functions of the D.P.P. to weigh all the evidence, including the Garda evidence, in prosecutions and to decide whether or not it is safe to proceed with cases. An alternative course would be to make assault on a Garda a purely summary offence, as recommended in the English Draft Bill, clause 7.

9.115 Accordingly, we renew our recommendation in respect of assaults on the Gardai as follows:

The existing offences of assault on a policeman or other peace officer should be replaced by a new offence for which knowledge that, or recklessness as to whether, the victim was a peace officer and was acting in the execution of duty would be required. A defendant wishing to deny knowledge or recklessness regarding the fact that the peace officer was acting in the execution of duty would have to adduce sufficient evidence that he or she believed that the peace officer was not acting in the execution of duty to raise an issue on the matter (i.e. there would be an evidential, but not a persuasive, burden on the defendant). The maximum penalty for the new offence should be, in the event of conviction on indictment, imprisonment for two years and/or a fine and, in the event of summary conviction, imprisonment for six months and/or a fine of £500.

Election for trial venue would be a matter for the prosecution.

9.116 We take this opportunity also to reiterate our recommendation as to the creation of separate offences of obstructing or resisting a peace officer in the execution of duty. *A person should be guilty of an offence if he or she intentionally or recklessly offers resistance to or obstructs a peace officer in the execution of duty. The offence should be triable summarily only and punishable by 3 months imprisonment and/or a fine of low-to-medium gravity. It should be possible to prosecute within 12 months for these offences. The term "peace officer" should be defined to include members of the Garda Síochána and of the Defence Forces, prison officers, sheriffs and traffic wardens. In this connection, consideration might also be given to the extension of this term to include firemen and ambulancemen, whose social functions may also legitimately be the subject of greater protection for the purposes of the criminal law.*

9.117 *As regards assault with intent to commit a felony, the remaining category of assault in s.38, the Commission considers that this is superfluous and that it should be discontinued together with the other offences contained in that section.* Where the requisite intent is proved, the assault will itself constitute an act more than merely preparatory to the commission of the felony and may therefore be prosecuted as an attempted felony, for which the maximum penalty will in all cases be greater than the 2 years provided for in s.38. At present, any advantage of alternative summary prosecution under s.38 is in any case effectively barred by the operation of s.46, which enjoins the District Court to send the case for trial in these circumstances. Moreover, if the prosecution on indictment for the attempt fails, the court may nevertheless convict the accused for assault under the proposed scheme.

9.118 The proposed Canadian Criminal Code and the New Zealand Crimes Bill, as well as numerous other penal codes, provide for aggravated offences of

violence committed with intent to commit, facilitate or conceal a crime.⁵⁷ In addition to providing a reflection of the qualitative difference of such acts from other acts of aggression in the substantive law, it is argued that this approach has obvious procedural advantages. Where injury or serious injury is inflicted in the course of an attempted rape, for example, there would otherwise be a necessity for cumulative charges in respect of causing such injury and the attempted rape.

9.119 As against that, it is no great burden on the prosecution to prefer distinct charges in respect of the "non-sexual" violence involved in a rape. For this reason, the approach in the Model Penal Code, of leaving minor assaults with intent to commit any felony to the law of attempt and more serious assaults to the court's powers in relation to cumulative and consecutive sentencing, commends itself to the Commission.

9.120 The offences of robbery and assault with intent to rob have been examined in the Commission's *Report on Dishonesty*.⁵⁸

9.121 In the United States, it has been seen that considerable emphasis is placed on the use of firearms for the purposes of aggravating offences of personal violence. Although this might be seen as the necessary corollary of the peculiar obsession for the ownership of guns in that country, similar aggravation is proposed for offences under the new Canadian Code and the New Zealand Crimes Bill. The desire to provide particular punishment for the possession and use of firearms also finds reflection in Irish and English law, notably in the Firearms Acts and in ss.14, 18 and 19 of the 1861 Act.⁵⁹

9.122 *Having regard to the proposed repeal of s.18, with its shooting offence, the Commission would also recommend the repeal without replacement of s.19 of the 1861 Act which defines "loaded" firearms.*

9.123 As regards the Firearms Acts, in addition to the simple offences of possession, etc., particular provision is made for possession while taking a vehicle, or with intent to commit an indictable offence, or to resist or prevent the arrest of oneself or another, all punishable by 14 years imprisonment. Although necessarily linked to the prevention of coercion and the actual, attempted or threatened infliction of serious injury, the Commission considers that these offences properly form the subject of a separate Code for the regulation of firearms and we accordingly make no recommendations in respect of their revision in this Report.

9.124 For the same reasons, the English C.L.R.C. and the Law Commission also put the examination of offences of causing injury by means of any firearm

57 For example, Art. 586 of the Italian Penal Code; s.233 of the Norwegian Penal Code; Art. 80 of the Argentine Penal Code.

58 LRC 43-1992, chapter 12.

59 For an examination of the role of firearms in violent crime, see Cook in *Criminal Violence*, Wolfgang & Weiner (eds.), 1982, chapter 5. Interestingly, Cook concludes that whereas an increased availability of firearms will result in an increase in homicide, assault-related injuries will decrease in number but increase in gravity.

or weapon to one side.

9.125 The actual, attempted or threatened use of violence to coerce the victim into doing or abstaining from doing something which the victim is legally entitled to abstain from doing or to do, could operate to aggravate all the basic offences.⁶⁰ Such coercion is among the most reprehensible and callous forms of violence, which ought to be distinguished from and more severely punished than basic offences, however, it can just as readily be addressed by increasing the penalties attaching to breaches of s.7 of the *Conspiracy and Protection of Property Act, 1875*, already recommended.

9.126 Other circumstances of aggravation contained in the Canadian scheme include committing an offence,

- knowingly against one's spouse, child, grandchild, parent or grandparent;
- pursuant to an agreement for valuable consideration;
- with torture; or
- for terrorist or political motives.⁶¹

9.127 In Illinois, assault is aggravated where it is committed knowingly against

- a "physically handicapped person", defined as a person who suffers from a permanent disabling condition, which results from disease, injury, functional disorder, or congenital condition; or
- against a person over 60 years of age.⁶²

9.128 The most common circumstances of aggravation found in other penal codes relate to an intent to commit a crime, or to resist arrest, or to coerce, as well as to the use of dangerous weapons or means and to the status of the victim as a public official.⁶³ Other examples include injury inflicted

- knowingly upon an ascendant, descendant or spouse, or upon a lineal ascendant of the defendant or of his or her spouse (the latter being clearly related to considerations of inheritance),⁶⁴
- by a recidivist,⁶⁵

60 See *supra*, page 284 *et seq.*

61 *Supra*, Chapter 4.

62 *Supra*, Chapter 7.

63 E.g. Finnish Penal Code, chapter 21, s8; Arts. 585-586 of the Italian Penal code; Art. 232 of the Norwegian Penal Code.

64 For example, Art. 257 of the Korean Penal Code; Art. 80 of the Argentine Penal Code.

65 For example, Art. 277 of the Japanese Penal Code.

- in a brawl or "joint aggression";⁶⁶
- treacherously, cruelly, for gain, promise or remuneration, or by reason of brutal perversity;⁶⁷
- upon a pregnant woman, though this is usually limited to the case where miscarriage results;⁶⁸
- on a child or other person incapable of defending himself, though this is usually limited to the case of cruelty or continuous neglect;⁶⁹
- on a witness or expert witness during the period of the exercise of their respective functions.⁷⁰

9.129 Still further circumstances of aggravation can be found in the laws of other jurisdictions. One of the primary objects of law reform is the simplification of the law. How much simpler to leave the court to assess the particular circumstances of each case before it and not replace the present complexity as to modes of committing the offence with a complex network of modes of aggravation. The circumstances of each accused will vary also, and we will not make anticipatory provision for this either.

Consent

9.130 Under the proposed scheme of assault and causing injury, a person may consent to being touched or hurt. The question remains as to whether consent could be a defence to a charge of causing harm or serious harm.

9.131 It remains to address the rule, deriving from the *dictum* of Swift J. in *Donovan*,⁷¹ that it is an unlawful act to beat another with such a degree of violence that the infliction of bodily harm is a probable consequence, and that such unlawfulness operates to vitiate consent. How should the law best deal with this matter? Three approaches may be mentioned.

1. Leaving the present law unchanged

9.132 The first would leave the question, as it is under present law, to be dealt with by reference to public policy. A difficulty with this approach is that it requires the Court to characterise as an assault conduct which was in fact consensual. We have already indicated our unhappiness with such an artificial approach, in our *Report on Child Sexual Abuse*, where we proposed that the

⁶⁶ For example, Art. 227 of the Penal Code of the F.R.G.

⁶⁷ For example, Art. 80 of the Argentine Penal Code.

⁶⁸ For example, Art. 376 of the Colombian Penal Code.

⁶⁹ For example, Arts. 413-421 of the Austrian Penal Code; Art. 233b of the Penal Code of the F.R.G.; Art. 312 of the Greek Penal Code (extending to a member of the person's household).

⁷⁰ Art. 420.4 of the Spanish Penal Code.

⁷¹ [1934] 2 K.B. 498.

structure of the offence of indecent assault to which a person under fifteen years was deemed incapable of consenting should be replaced by a new offence which avoids this artificiality.

2. Withdrawing the criminal sanction from bodily harm that is inflicted consensually

9.133 The second approach would involve withdrawing the criminal sanction from all acts of violence, however severe and whatever the circumstances of their occurrence, once it could be shown that the victim consented to them. This approach involves a shift in philosophy from that underlying the existing law. At present many acts are offences in spite of the fact that they are consensual. Thus, for example, it is no defence to a prosecution for murder to show that the victim consented to being killed. Of course, there is a difference between consensual killing and the consensual infliction of bodily harm, but the principle underlying the prohibition of both acts is inconsistent with the principle that the fact that the act is consensual should render it beyond the remit of the criminal law.

3. A specific offence for consensual infliction of bodily harm

9.134 The third approach seeks to accommodate the objection to the first approach, whilst not adhering to the radical shift of philosophy which the second approach would involve. This is to retain a criminal prohibition on the consensual infliction of bodily harm, whilst defining the offence so as to avoid any constructive, artificial characterisation of the conduct as non-consensual. How can this be best accomplished? Three possible strategies suggest themselves. The first would be for the legislation to prescribe a list of specific instances in which the consensual infliction of bodily harm is (or, as the case may be, is not) an offence. Thus, for example, the list could include (whether as legal or illegal) references to contact sports. The second strategy would state a general principle in reference to which the lawfulness or unlawfulness of the conduct would be determined. This would seek to give effect to the considerations of public policy which underline the existing law.

9.135 We see difficulties with both of these strategies. The task of drawing up a list of specific cases of legality or illegality seems a futile and self-defeating one. It would be impossible to anticipate all types of situations where consensual harm might be inflicted. For example, new sports or new fashions (in sports or in other activities) could make the list obsolete within a matter of months. A more fundamental objection to a listing strategy is that it could never adequately deal with what is a principled objection to the lawfulness of consensually inflicted harm, namely, that a person should not compromise the human dignity of another person by seriously interfering with his or her bodily integrity, even with his or her consent. Thus, for example, the commercial purchase of another's body parts understandably is a matter for social concern, even where the financial incentive is sufficiently high and the socio-economic circumstances of the vendor sufficiently independent to generate a freely-made bargain. Where the line

should be drawn is clearly not a matter for a statutory schedule. Buying a person's hair is plainly permissible but buying a person's lungs or some other part of the body which may leave the person totally debilitated seems equally plainly not permissible. The context of invasion of bodily integrity can also vary: soliciting the donation of an organ for altruistic purposes is quite different from soliciting its purchase.

9.136 As to the second strategy we see a difficulty of a different order. It is hard to articulate the public policy considerations which underlie the present law in such a way as to remove a sense of vagueness and uncertainty. People who propose to engage in consensual conduct should so far as possible be able to know in advance whether or not they will be breaking the law.

9.137 It would be wrong, however, to overstress this difficulty. Several offences have been developed at common law rather than by statute. Their definition is clarified through the gradual accretion of caselaw, from which the parameters of the offence may be determined with sufficient particularity to enlighten the determination as to whether proposed conduct is or is not lawful. The fact that the core concept (here, public policy) is of broad generality does not mean that the offence is of uncertain definition. The offence of manslaughter is defined by reference to the concept of *negligence*, whose core meaning is of the most opaque generality. Yet it would be a brave defendant charged with manslaughter who would hope to succeed in the argument that this offence is unconstitutionally void for vagueness.

9.138 This brings us to the third strategy, which would seek to incorporate as much definition as possible in the general principle whereby the legality of consensual infliction of harm is to be determined, and which would go on to provide a non-exhaustive list of situations where the conduct is or is not lawful. How would this be done? The first element is the general principle underlying the legality or illegality of the conduct. The pattern that emerges from the common law on this subject is that there is a societal interest in the protection of life and bodily integrity as values in themselves. The taking of a person's life even with consent involves the destruction of a thing of value. Similarly the infliction of bodily hurt or mutilation involves interference with a thing of human value. In this latter case, context is vital. The purpose of the infliction of the injury is crucial. At the core of this subject is the question of the normative dimensions of the relationship between one person and another person's disposition of his or her body, health or life. If individual autonomy is such that we are morally free to have done to our body, health or life as we please, then it may seem difficult to justify a criminal sanction on another person for doing that to which we freely consent. The philosophy underlying the present law is that individual autonomy does not run so far: our life and health are not our playthings to use or abuse as we wish. Human life is a thing of value, even if we do not in fact treat it as such. Society has a legitimate interest in protecting this thing of value against abuse, just as it may legitimately protect other things of value, which are under individuals' control. To regard human life and bodily integrity as devoid of value which generates a legitimate social interest in their

protection save in cases where people choose to respect that value is a controversial approach which is out of harmony with the central principles of our criminal law.

9.139 This being so, it may be possible to express the general principle of legality in these terms.

9.140 *A person who causes serious bodily harm to another with the other's consent shall be guilty of an offence unless that harm is inflicted:*

(a) *with the purpose of benefitting another person, or*

(b) *in pursuance of a socially beneficial function or activity,*

and, in either case, having regard to the intended beneficial purpose, function or activity, the infliction of that harm was reasonable.

9.141 Turning to the second element in this strategy, the legislation could go on to provide that, without prejudice to the generality of the foregoing, *the consensual infliction of serious harm is not to be unlawful if it occurs in the playing of a bona fide sport where the act causing the injury is done within the rules of that sport.* Such a clarification would ensure that injuries occurring within the rules of such sports as rugby and Gaelic football will not generate criminal liability. The inclusion of the reference of the *bona fide* quality of the sport is designed to prevent bogus characterisations.

9.142 The experts we consulted unanimously favoured the third, two-pronged, strategy and *we recommend its adoption.*

9.143 *Subject to the above qualifications, the Commission also recommends that a simple statutory definition of consent be adopted for those acts of violence or endangerment to which consent may be given. This should provide that consent is a defence to any such charge where it is freely given by a competent, informed person either expressly or by reasonable implication and not obtained by force, threat or deceit.*

9.144 The question of whether the conduct consented to has been obtained by deceit will be a question of fact to be decided upon the evidence. In relation to the offences to which it applies, therefore, the definition has the added advantage of abolishing the restrictive rule that the fraud must relate to the fundamental nature of the act or to the identity of the deceiver.⁷²

9.145 By extending also to implied consent, the definition provides a clear legal justification for an otherwise technical assault committed in the course of reasonable common day-to-day contracts. Because the absence of consent is a

definitional element of the offence which falls to be proven by the prosecution, no specific provision is necessary for such contacts.⁷³ As regards the defence of mistake of fact, this is a defence of general application whose possible codification should be considered together with other such defences in a separate Report.⁷⁴

9.146 As a result of the operation of the scheme, no special mitigation of sentence similar to that provided for in the Model Penal Code,⁷⁵ nor any undue extension of the law of consent as reluctantly formulated by the Alberta Court of Appeal,⁷⁶ is necessary in respect of harm or serious harm allegedly consented to in the course of fights or punch-ups freely entered into by the parties concerned. Whether such a fight has been freely entered into will be a matter of evidence for the tribunal of fact.

9.147 In this connection, *the Commission considers that the common law powers of arrest in respect of an actual or threatened breach of the peace, together with the offences of affray and causing injury, and those relating to the possession and use of firearms and offensive weapons, provide adequate protection both for the parties who enter into such fights and for the public in general. To extend the law relating to consensual fighting any further would, in the opinion of the Commission, be unwarranted.*

Contact Sports

9.148 "Sport" and sporting activities are implicitly engaged in for diversion and in a spirit of fair play. When tempers rise and the rules are broken in competitive anger or frustration, the players themselves, the referee or the responsible sporting body, or the spectators, may demand that such acts be condemned, and an internal sanction may be imposed. In the case of professional sports, the sanction of a temporary or permanent ban on playing, or of a fine, may have severe consequences for the player who uses excessive violence. The legal remedy in most such cases is a civil action in damages for any resulting injury, though the criminal law may serve as an "enforcer" or "policeman" of last resort.⁷⁷

9.149 It is clearly desirable that criminal liability should continue to attach to acts of violence committed in the course of sporting activities, and the Commission would accordingly not recommend that any general exemption be extended to persons engaged in contact sports, where the victim does not consent (expressly or impliedly) to the infliction of the injury. It must be recognised, however, that occasional prosecutions will not solve the wider problem relating to the practice and encouragement of unnecessary violence in sport. As pointed out by the Canadian Law Reform Commission, the curbing of sporting violence

73 See paragraph 9.18 *supra*.

74 See Chapter 6.

75 *Supra*, Chapter 7.

76 *Supra*, Chapter 4.

77 See Law Reform Commission of Canada, *Working Paper No. 38, Assault*, p.35.

in the long term requires a series of administrative and educational measures involving the participation of local government, sporting bodies and officials, parents, the media, etc. In the short term, the criminal law may be used, if not to resolve the problem, then at least to inhibit any marked increase in violence.

"The Criminal law therefore has a limited place at the sports arena ... When it is used, perhaps the offending player should not be the only individual to be charged. Means could be found to bring to account the coaches, managers, team owners and league officials who indirectly encourage and contribute to brutal exhibitions."⁷⁸

9.150 This view is supported by a leading English commentator on sport and the law, who concludes a recent examination of the increasing severity of custodial and non-custodial sentences for excessive violence used by both professional and amateur players with the warning that unless "the real villains, the aiders and abettors, are also prosecuted to conviction ... sport at the public level could be dead by 2,000".⁷⁹

9.151 Similar concern over the increased incidence of violence in sport has also arisen in Ireland, although contact sports remain predominantly amateur. Notwithstanding the availability of internal sanctions under the rules of the sporting bodies involved, the possibility should remain open of prosecuting those who as a matter of evidence may be proved to have aided and abetted the commission of an offence of violence. No special rules are necessary or desirable in this connection.

9.152 It remains to be seen whether special provision is necessary for the purposes of consent to sporting injuries. In principle, a participant in a sport or game may be regarded as consenting

- to any contact in accordance with the rules of the game;
- to any contact of an accidental nature arising incidentally in the course of it; and
- to incidental pain and to the risk of hurt or injury from such contact.

9.153 So, a football player impliedly consents to being tackled, to being kicked accidentally and to the risk of thereby being injured, but not to being deliberately punched or kicked. Because most contact sports do not licence the intentional or reckless infliction of injury, no exception would therefore appear necessary. Under the proposed scheme, a person may consent to being touched or hurt, and also to the risk of being injured. If the requisite intent or recklessness is absent and the contact is within the rules of the game, the fact that the force used is likely to cause injury will be irrelevant.

⁷⁸ *Supra*, Chapter 4.

⁷⁹ Grayson, *Keeping Sport Alive* (1990) N.L.J. 12 at 13.

9.154 In practice, the pace of most contact sport makes it difficult, if not impossible, to distinguish between a contact which is intentional and one which is reckless, yet another example of this perennial difficulty. In this connection, courts have traditionally deferred to the standards of the particular sport in determining what conduct is reasonable and therefore the subject of a voluntary assumption of risk (for the purposes of the civil law) or reckless and therefore not impliedly consented to (for the purposes of the criminal law).⁸⁰ At the heart of this assumption lies the traditional idea that sports produce valuable social benefits through the practice and example of fair play within an agreed set of rules.

9.155 This is no doubt true. Participation in sports promotes fitness and good health, discipline, teamwork and self-control. Yet judicial deference to sporting practice has been criticised on the grounds that the participants' right to bodily integrity is no longer adequately protected by the standards of professional sports in which the stakes are high and violence is a not uncommon occurrence. Instead, it is argued, the objective standard of the community as a whole should be applied.⁸¹

9.156 In its *Working Paper on Assault*, the Canadian Law Reform Commission initially proposed that, apart from the creation of an *ad hoc* exemption for the anomalous sport of boxing, the general criminal law should apply irrespective of the rules of any game, thereby facilitating the uniform treatment of violence on and off field.⁸² It subsequently abandoned this proposal in favour of an exemption of general application.⁸³ By contrast, federal legislation has been introduced in the United States for the purpose of curbing violence in professional sports through a specific system of fines and imprisonment.⁸⁴

9.157 Having regard to the amateur status of contact sports in Ireland and to the fact that the rules of most sports place reasonable limits on the degree of violence which may be consented to, the Commission considers that no such specific penalties should be provided for sporting violence. Nor do we consider it desirable that boxing should be singled out for exemption. The modification of the rules of boxing or of any other sport is rather a matter for regulation in accordance with public debate and medical evidence, including the evidence supporting the call by the World Medical Association for a universal ban on boxing.⁸⁵

9.158 In the meantime, the criminal law may be enforced when the rules of any sporting activity are broken. As regards the view that the criminal law should not yield to the standards of such activities, which may often be violent and

80 See Hink, *Compensating Injured Professional Athletes: The Mystique of Sport versus Traditional Tort Principles* (1980) 55 N.Y.U.L.R. 971; Hechter, *The Criminal Law and Violence in Sports* (1977) Crim. L.Q. 425.

81 *Id.*

82 L.R.C.C. W.P., *Assault* (1984).

83 *Supra*, Chapter 4.

84 *Sports Violence Act, 1980*, H.R. 7903, 96th Cong. 2nd sess.; *Sports Violence Act, 1981*, H.R. 2263, 97th Cong. 1st sess.

85 *Supra*, Chapter 4.

aggressive, it may be responded that the general criminal law is not the appropriate mechanism for stimulating changes in those standards. For example, if a person suffers serious brain damage as a result of a kick to the head inflicted in the course of participating in some martial art, the absence of any possibility of prosecuting his opponent is as likely to generate debate as the pursuit of any such prosecution. Having regard to the fact that the victim undertook that risk as part of a lawful sporting activity, it would also be unjust to prosecute his sparring partner in such circumstances. It may well be that public opinion would wish to proscribe any sporting activity participation in which resulted frequently in serious harm. Professional boxing might well fall into this category.

9.159 For these reasons, *the Commission recommends that specific provision should be made for consent to injuries inflicted during the course of, and in accordance with the rules of, a lawful sporting activity, along the following lines:*

"Every person is protected from criminal responsibility for causing harm or serious harm to another where such harm is inflicted during the course of, and in accordance with the rules of any bona fide sporting activity."

9.160 In this respect, although some commentators speak of prize fights as a phenomenon of the 19th century,⁸⁶ it appears from recent newspaper reports that the practice is alive and well in Ireland. Although such contests remain unlawful at common law,⁸⁷ under the proposed scheme consensual fights will be lawful to the extent that they do not involve the actual or attempted causing of serious harm, or do not amount to an affray, or an actual or threatened breach of the peace, or an offence relating to the possession or use of offensive weapons. Having regard to these offences, the Commission does not consider that it is necessary to make special provision for prize fights in the proposed scheme.

Medical Treatment

9.161 The principal reason offered by the English C.L.R.C. in its Fourteenth Report for leaving the defence of consent to injury to the common law was that consideration of the defence also necessitated an examination of the question of consent to medical treatment.

"Consideration will have to be given to such issues as the justification of deception in the interests of patients, consents to operations obtained on only partial information, and the treatment of the mentally ill, for example by electro-convulsive therapy; some doctors believe that forcible treatment may be in a patient's best interests while others do not. It seems to us that the general criminal law problems, the medical problems and the public policy questions are inextricably intertwined and we consider that a broader based committee composed not only of

86 For example, Williams, *Textbook of Criminal Law* (1st ed., 1978), pp.534-537.

87 *Id.* See also *Pallante v Stadium Pty. Ltd.* (No. 1) [1976] V.R. 331, in which the Supreme Court of Victoria found it difficult to formulate any precise criteria according to which a fight could be deemed unlawful.

lawyers but also of representatives of the medical profession and other interested bodies would be more suitable to review this topic".⁸⁸

9.162 While the Commission agrees that caution is necessary in approaching the issue of consent to medical treatment, we have considered that the benefits of providing for a simple, statutory definition of consent in relation to offences against the person outweigh any advantage in delaying such clarification pending a more complete review of the medical issues.

9.163 If a medical practitioner seriously misrepresents the nature of the treatment, this should be capable of vitiating the patient's consent, as for example, where a doctor said to the patient that a proposed treatment had no risk attached to it whereas in fact it had a high level of failures. Two difficult questions arise here. The first concerns the extent to which a "therapeutic privilege" should render such an intervention lawful. Should it suffice for the doctor to show that he or she thought it in the patient's welfare not to inform the patient of the risks attaching to what he or she intended to do, or should that defence be available only where it can be established objectively? The second question relates to a situation where the doctor has some independent incentive to provide less than full disclosure to the patients (such as a financial payment directly or indirectly dependent on the treatment being carried out). This is a difficult area for law reform. To weaken the existing criminal law protections seems to us unwarranted, to extend them controversial.

In a case where the warning given as to the possible risks attending an operation was insufficient or inadequate, the Supreme Court has held in *Walsh v Family Planning Services Ltd.*,⁸⁹ following the decision of the Canadian Supreme Court in *Reibl v Hughes*,⁹⁰ that the proper cause of action in the event of damage ensuing is a claim for damages for negligence and that a claim of assault should be confined to cases where there is no consent to the particular procedure or where an apparent consent has been vitiated by fraud or deception.

The experts we consulted advised against legislating for this specific area and agreed with our strategy of recommending a simple definition of consent which would provide that consent be "informed".

9.164 Sterilisation procedures require no specific provisions in the context of offences against the person.

9.165 As regards the question of capacity to consent, it has been seen that neither a minor nor a person suffering from a mental disorder is by reason only of such status incapable of giving an effective consent to medical treatment, or to any other physical touching. In all cases, it is a question of whether the patient is capable of understanding the essential nature, purpose and likely

⁸⁸ C.L.R.C. Fourteenth Report, Cmnd. 7844 (1980), para. 290.

⁸⁹ [1992] I.R. 496.

⁹⁰ (1980) 114 D.L.R. (3rd) 1.

effects of the treatment in question.

9.166 In this connection, the question arises as to whether specific provision should be made for the capacity of minors who are 16 years of age or over to consent to medical treatment, as under s.8(1) of the English *Family Law Reform Act, 1969*, which provides as follows:

"The consent of a minor who has attained the age of sixteen years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person, shall be as effective as it would be if he were of full age; and where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his parent or guardian".

9.167 Subsection (3) provides:

"Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted".

9.168 The enactment of such a provision in Irish law would provide for an element of certainty. It would, of necessity, have to accommodate the case of legitimate consents by persons under 16 years of age, or any other specified age, by the inclusion of a saver similar to subs.(3). As Lord Scarman stated in his opinion in the *Gillick* case:

"Certainty is always an advantage in the law, and in some branches of the law it is a necessity. But it brings with it an inflexibility and a rigidity which in some branches of the law can obstruct justice, impede the law's development and stamp on the law the mark of obsolescence where what is needed is the capacity for development. The law relating to parent and child is concerned with the problems of the growth and maturity of the human personality. If the law should impose upon the process of 'growing up' fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change".⁹¹

9.169 The *Gillick* decision might or might not be followed by our Supreme Court in a civil case but in criminal cases, certainty should be imported, where possible, and *we recommend that legislation be introduced similar to section 8 of the English Family Law Reform Act, 1969*.

9.170 As regards the related question of emergency medical treatment, this could be dealt with in any one of three ways: by providing for a limited

exemption for medical practitioners; by providing for a "choice of evils" provision similar to that contained in s.3.02 of the Model Penal Code⁹² and the "duress of circumstances" defence in clause 26 of the Bill, or by introducing a wider defence of necessity, as under clause 30 of the New Zealand Crimes Bill.⁹³ Although the last two options are attractive in that they would extend to emergency medical assistance by persons other than doctors and also to many other situations which as a matter of common sense should not be the subject of any criminal sanction, such as the restraint of a child who is playing with matches or the knocking-over of a blind person who is about to walk into a manhole, the Commission considers, on balance, that the introduction of such defences should fall for consideration in the context of a future review of the general part of the criminal law.

9.171 In consequence, *the Commission would confine itself in the present context to recommending the adoption of the following additional exemption, designed to provide a clear legal basis for emergency medical treatment by medical practitioners:*

"Every medical practitioner or a person assisting the practitioner at his or her direction who administers to any person any therapeutic treatment, including any ancillary medical procedures, necessary to save the life or preserve the health of such person when it is not reasonably possible to obtain consent to such procedures in the usual way shall have no responsibility under the criminal law in respect of any injury that may result to such person from such treatment."

9.172 The justification is stated in terms of immediate necessity rather than the unreasonableness of delaying such treatment pending consent, as under the Model Penal Code⁹⁴ and the New Zealand Crimes Bill.⁹⁵ In the view of the Commission, this provides a more precise standard of "emergency" analogous to the standard which applies to the defence of necessary defence.

9.173 The wider issues relating to the permissible treatment of permanently incompetent persons raise complex questions of both law and ethics which are beyond the scope of this Report, and the Commission therefore makes no recommendations in this regard. Where the treatment is immediately necessary to save life or preserve health, it will be governed by the emergency exemption. Where it is not, recourse may be had to the *parens patriae* jurisdiction of the courts. Nor does the Commission here make any recommendations for the introduction of procedures for obtaining consent to therapeutic treatment of mental illness similar to those provided for in the *Health (Mental Services) Act, 1981*.⁹⁶ The Commission understands that these provisions, which never entered into force, are currently being reviewed by the Department of Health with a view

92 *Supra*, Chapter 7.

93 *Supra*, Chapter 5.

94 *Supra*, Chapter 7.

95 *Supra*, Chapter 5.

96 S.44 of the Act, which has never entered into force, enables the Medical Council, with the consent of the Minister, to make rules for the obtaining of such consent.

to introducing new legislation.

Dangerous Exhibitions

9.174 It has been seen that the lawfulness of dangerous activities properly falls to be considered as a matter for statutory regulation. Where the particular activity is not so prohibited, a person may validly consent to run the risk of being injured or seriously injured.

9.175 The Commission has recommended against the introduction of any general offence of causing injury by negligence, and would similarly recommend against the creation of any rule which would operate to nullify such consent. Where the injury is self-inflicted, even as a result of a high degree of recklessness, no offence will be committed. In other cases, it will be for the prosecution to prove that the defendant was reckless in causing injury to the person who had consented to the risk.

9.176 However, there is clearly a continued need to provide for offences in respect of the employment of children in hazardous exercises. The existing offences, as provided for in the *Employment of Children Act, 1903*, the *Children's Dangerous Performances Act, 1879*, and the *Prevention of Cruelty to Children Act, 1904*, are in a number of respects unwieldy and make inadequate provision for penalties.⁹⁷ For these reasons *the Commission recommends that consideration be given, in consultation with the Department of Labour and in the light of the Safety, Health and Welfare at Work Act, 1989, to the repeal and revision of these provisions.*

Provocation

9.177 Although some penal codes make limited allowance for the use of force in anger, as in jealousy or revenge,⁹⁸ and although anger is frequently the cause of acts of violence, *the Commission considers that provocation, in the context of non - fatal offences, is properly restricted to the question of mitigation of sentence as a matter of discretion for the court after conviction*, and that there is no reason to elevate the issue to a complete or partial defence for the purposes of crimes of violence.⁹⁹ In those common law jurisdictions where an attempt has been made to accommodate a substantive defence of provocation to charges of assault, the result has been unsatisfactory and confusing. *The Commission accordingly makes no recommendations in this connection.*

Negligence And Constructive Liability

9.178 *The Commission does not consider it either necessary or desirable to*

97 *Supra*, Chapter 1, pages 76-79.

98 For example, the 'crime passionnelle' under Arts. 324 and 325 of the French Penal Code; see also Art. 382 of the Colombian Penal Code.

99 See Horder, *Sex, Violence and Sentencing in Domestic Provocation Cases* (1989) Crim. L. Rev. 546 for a recent examination of the sentencing practice of English courts in relation to cases of domestic provocation.

provide for a general offence of causing injury by negligence, as under the New Zealand Crimes Bill and the Queensland and Western Australia Codes,¹⁰⁰ nor to extend such liability to negligent acts resulting in serious injury, as under the proposed Canadian Code.¹⁰¹

9.179 *We consider that the normal principles of mens rea should continue to apply to unlawful acts which result in non-fatal injury, and would therefore reject the adoption of an offence of "constructive liability" similar to that provided for in the Queensland and Western Australia Codes.¹⁰² Where the requisite mens rea cannot be proved, the unlawful act may itself be the subject of an alternative charge or of an action in tort.*

Heedlessness

9.180 *In the absence of any indication that the requirements of intention and recklessness are giving rise in practice to difficulties of proof in relation to charges of malicious wounding or assault occasioning actual bodily harm, the Commission refrains from making any proposal for the creation of offences of heedlessly causing harm or heedlessly causing serious harm.*

9.181 *That acts of heedlessness may, having regard always to the particular characteristics of the defendant, be equally culpable as acts of recklessness is recognised in s.132(1)(b) of the New Zealand Crimes Bill, by which heedlessly causing injury is subject to the same penalty (5 years imprisonment) as recklessly or intentionally causing such injury.¹⁰³ In this connection, however, it should be noted that the New Zealand Bill is unusual, if not perverse, in providing universal penalties in respect of the causing of particular categories of harm irrespective of the mens rea while at the same time deeming the actual causing of harm to be irrelevant to such offences. It is thus a curious blend of an exclusively result-oriented and an exclusively conduct-oriented approach to criminal liability.*

Necessary Defence

9.182 *Fear, as opposed to anger, is the domain of the defence of necessary defence, and it has long been accommodated by the law. In looking to the possible restatement or revision of the rules relating to the justifiable use of force for the protection of self or others, or for the prevention of a breach of the peace or a crime, the Commission recognises at the outset that no great difficulties have arisen in the operation of these defences in Irish law. In consequence, it may be argued that the scope of the defences of necessary defence and prevention of crime should be left to develop at common law, particularly having regard to the fact that they extend also to the law of homicide.*

100 *Supra*, Chapters 5 & 6.

101 *Supra*, Chapter 3.

102 *Supra*, Chapter 6.

103 *Supra*, Chapter 5.

9.183 On balance, however, the Commission considers it both desirable and opportune that these defences be precisely and uniformly delimited by statute, and that the question of such codification falls naturally within the scope of this Report. Having had regard both to the existing law and to the statutory restatements proposed in other jurisdictions, *the Commission would recommend the adoption of a statutory defence to the use of force modelled on clauses 27 to 30 of the English Criminal Law Bill.*¹⁰⁴

9.184 We consider that, as a matter of both common sense and policy, the "*Dadson principle*", i.e. that an unknown excuse is no excuse, should continue to deny a person a defence to the use of unlawful force where he or she was unaware of any circumstances of justification at the material time.¹⁰⁵ The defence is accordingly stated, as in New Zealand,¹⁰⁶ exclusively in terms of the circumstances as the defendant believed them to be.

9.185 The Commission has refrained from taking the opportunity to clarify the scope of a "breach of the peace" by adopting the definition of the term originally formulated by Watkins L.J. in *R. v Howell* and subsequently put forward by the English Code Team.¹⁰⁷ The inclusion of such a definition in the proposed defence might be seen as preferable to perpetuating the somewhat vague notion at common law, irrespective of whether it is also adopted in the more general context of powers of arrest. Moreover, it could be said to provide a workable standard for the justifiable use of force which is immediately necessary and reasonable to prevent a person being put in reasonable fear of violence to person or property, or to remove the cause of the fear where it already exists.

9.186 On balance, however, the Commission considers that this question falls to be considered in the context of powers of arrest. In particular, a future review of the law relating to powers of arrest may result in a rationalisation which would obviate the need to resort to the concept of a breach of the peace. The proposed definition of assault already covers the case of a person who fears on reasonable grounds that unlawful violence to the person is likely. It is an offence to damage another's property without legal excuse. Pending such a general review of powers of arrest, however, the inclusion of the category of "breach of the peace" in subs.(1) is necessary to accommodate arrests in respect of such breaches, though it is, for the above reasons, included without definition.

9.187 In this connection, no detailed provision is made for the limits of permissible force used, for example, in defence of property, or in the prevention of crime by persons other than peace officers, as under the Model Penal Code, the Canadian Draft Code and the New Zealand Crimes Bill.¹⁰⁸ Instead, the question is left for determination on the evidence by the tribunal of fact. Clearly, for example, the removal of a trespasser by force without a prior request that the

104 *Supra*, Chapter 3.

105 *Supra*, Chapter 1.

106 *Supra*, Chapter 5.

107 *Supra*, Chapter 3.

108 *Supra*, Chapters 4, 5 & 7.

trespasser leave voluntarily, or the causing of serious injury in defence of property, will be unnecessary and unreasonable in all but the most exceptional cases. The Commission would nevertheless not wish to introduce an element of unnecessary inflexibility into this area.

9.188 In our *Report on Malicious Damage*, we recommended that, for the purposes of the defence of lawful excuse to a charge in respect of the destruction or damage of property, the question should be whether the accused held an honest belief both as to the immediate need for protection of the person or property and as to the reasonableness of the means of protection adopted.¹⁰⁹ Because this is wider than the proposed more general defence, which requires the means adopted to be objectively reasonable, the general defence is stated in subs.(7) to be without prejudice to the generality of any defence of lawful excuse to criminal damage to property or any other defence. The effect of this scheme accords with principle in providing greater limits to the justifiable use of force against persons than to the justifiable infliction of damage to property.

9.189 For the purposes of clarification, clause 29 provides that "force" includes force against property and extends to a threat of force against person or property and the detention of a person without the use of force. Clause 27 is included so as to ensure that the issue of criminal liability is not left in doubt or dependent upon the establishment of civil "unlawfulness". For example, it ought to be clear, without resorting to what may be uncertain principles of the law of tort, that a person who is attacked by a nine year old wielding a dagger or by a person of unsound mind may use reasonable and necessary force in self-defence although the attacker is immune from criminal liability.

9.190 It would be necessary to rely on clause 27 only where the defendant is aware of the facts which would constitute a ground for the acquittal of the person against whom the force is used. Where someone is unaware of the special facts, that person may rely on a belief in the circumstances in which it would have been reasonable to use force to prevent the unlawful result.

9.191 The effect of clause 27(6) is that no offence is committed by the wrongly, though reasonably, suspected person who resists arrest or uses force to defend himself or herself against force reasonably used by the person effecting the arrest. In such a case, neither the arrester nor the resister is committing an offence. The same principle applies to an innocent person's defence of property and for the other purposes listed in subs.(1).

9.192 With respect to arrest, however, this rule is subject to an important qualification. Where the person making the arrest is a constable acting in the execution of his or her duty, the suspected person must submit to arrest even if perfectly innocent and the constable's suspicion, though reasonable, is mistaken. This accommodates the present law that a person commits an offence if he or

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LRC 26-1988, para. 61.

she resists such arrest and further offences if he or she uses force, whether against the constable or a person assisting the constable in the execution of his or her duty. This is so even if the person believes the arrest to be unlawful.

9.193 However, the subsection codifies the rule in *R v Fennell*¹¹⁰ that although a person is required to submit to such arrest, the person need not do so where he or she believes there is "imminent danger of injury" to himself or herself or another person. This is so even in the case where the person is aware of the circumstances giving rise to the policeman's reasonable suspicion.

9.194 Clause 29(2) goes somewhat further than the actual decision in *Attorney's General's Reference (No. 2 of 1983)*,¹¹¹ which is simply to the effect that lawful defence must have a lawful object. Clearly, it is implicit that clause 27(1) will provide a defence to a charge of attempt, so that any act which is more than merely preparatory to the commission of the alleged offence must also be excused.

9.195 Nevertheless, clause 29(2) is necessary because acts immediately preceding the use of force may be capable of constituting other offences, particularly those relating to the possession of firearms and offensive weapons. This accords also with those cases which hold that there is no lawful authority or reasonable excuse for carrying an offensive weapon in a public place for self-defence "unless there is an imminent particular threat affecting the particular circumstances in which the weapon was carried".¹¹²

9.196 Clause 27(7) codifies the rules as stated by Lowry L.C.J. in *R v Browne*,¹¹³ that a person cannot rely on self-defence if he or she has deliberately provoked the attack with a view to using force to resist or terminate it.

9.197 That part of the same *dictum* which suggests that the defence will also be denied where the defendant's conduct was likely, or foreseen to be likely, to give rise to the need to use such force, however, is not followed. Instead, the second part of the subsection preserves the principle of freedom of action as applied in *Beatty v Gilbanks* and *R v Field*. A person may go about lawful business even if the person knows that he or she is likely to be met by unlawful violence from others, and may defend himself or herself in the event of such attack.¹¹⁴

110 *Supra*, Chapter 1.
111 [1984] 2 W.L.R. 465.
112 *Id.*
113 [1973] N.J. 96.
114 *Supra*, Chapter 1.

Lawful Correction

Whipping

9.198 It has been seen that a court may still pass a sentence of whipping for certain offences on young male offenders. Such whipping, although obsolete in practice, is in contravention of the European Convention of Human Rights, is potentially unconstitutional and is clearly unwarranted, and *the Commission would accordingly recommend that the power of any court to pass a sentence of whipping be abolished*. This may be done by the introduction of a simple provision similar to that provided for in s.2 of the *English Criminal Justice Act, 1948*, which provided:

"No person shall be sentenced by a court to whipping; and so far as any enactment confers power on a court to pass a sentence of whipping it shall cease to have effect."

Section 4(1)(d) of the Summary Jurisdiction over Children (Ireland) Act, 1884, and Rules 72 and 73 of the 1947 Rules for the Government of Prisons should be repealed and revoked accordingly.

Servants, Apprentices And Mariners

9.199 *The former defences of reasonable and moderate chastisement of apprentices and of mariners are now obsolete and should be formally abolished*. Under the proposed scheme, such persons would enjoy the same protection of the criminal law as others from unlawful violence, the lawfulness of any force used against them being determined according to whether it was immediately necessary and reasonable for the prevention of crime, the protection of self or others, etc. As indicated above, the Commission does not consider it necessary to make specific provision in this connection for the preservation of order or discipline on any vessel or aircraft.

Correction Of Children

9.200 It remains for us to consider whether the common law power of chastisement of children, as recognised in s.37 of the *Children Act, 1908*, should be abolished or restricted by statute. At the outset, it is helpful to distinguish between corporal punishment in schools, which has been the subject of most case law and critical discussion, and the right of parents or persons *in loco parentis* to use reasonable and moderate force by way of correction. The distinction is important because if, as is probably the case, the criminal immunity of teachers to use such force is independent of the immunity of parents, the use of "reasonable and moderate force" in schools will not be open to a charge of assault, irrespective of the wishes of the parents or the fact that the Department of Education has sought to prohibit the practice of corporal punishment in Irish

schools.¹¹⁵

9.201 Criticism of the use of force in schools is not a recent phenomenon. The anomaly in the common law was pointed out by an Indiana court as long ago as 1853:

"The husband can no longer moderately chastise his wife; nor, according to the most recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the schoolboy, 'with his shining morning face,' should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained

The law still tolerates corporal punishment in the schoolroom. The authorities are all that way, and the legislature has not thought proper to interfere. The public seem to cling to a despotism in the government of schools which has been discarded everywhere else In one respect the tendency of the rod is so evidently evil, that it might, perhaps, be arrested on the ground of public policy. The practice has an inherent proneness to abuse. The very act of whipping engenders passion, and very generally leads to excess Hence the spirit of the law is, and the leaning of the courts should be, to discountenance a practice which tends to excite human passions to heated and excessive action, ending in abuse and breaches of the peace. Such a system of petty tyranny cannot be watched too cautiously nor guarded too strictly"¹¹⁶

9.202 Almost 130 years later, Professor Hogan, commenting on the failure of the English Criminal Law Revision Committee to at least place limits on the use of such force, observed that "there are still some big people about who believe they have a prescriptive right to beat little people".¹¹⁷ In fact, the United Kingdom is now the only European country, East or West, which permits the use of corporal punishment in schools.¹¹⁸ As has been seen, the Canadian Draft Code and the New Zealand Crimes Bill both propose to remove the privilege of teachers to use such force.

9.203 This overwhelming tendency towards abolition of corporal punishment in schools is a reflection of the widespread recognition that such punishment is unnecessary, ineffective and counter-productive. The use of physical force in the classroom is a symptom of insufficient teacher training in respect of how to anticipate and solve school discipline problems effectively and without resort to violence, as well as in respect of classroom management and planning. Moreover, it undermines the teacher's ability to interpret a pupil's basic needs

¹¹⁵ Parents and teachers have also a broad discretion under the civil law as to the manner in which they maintain discipline: see McMahon and Binchy, *Irish Law of Torts*, (2nd ed., 1990), p.423.

¹¹⁶ *Cooper v McJunkin* (1853) 4 Ind. 290 at 293 (per Stuart J.).

¹¹⁷ *Non-Fatal Offences* (1980) Crim. L. Rev. 542 at 554.

¹¹⁸ See Pogany, *Education: The Rights of Children and Parents under the European Convention on Human Rights*, (1982) 132 N.L.J. 344.

and to provide an environment conducive to learning by eroding the youngster's basic trust and stimulating mistrust, anger and resentment.¹¹⁹

9.204 More seriously, corporal punishment in schools has been described as a process of institutionalising violence as a means of social control, whereby the basic prohibition of violence is blurred, child abuse is facilitated and aggression is encouraged by example:

"[E]ducation tends to recreate a society in its existing image, or to maintain its relative status quo, but it rarely if ever creates new social structures. Violence against children in rearing them may thus be a functional aspect of socialisation into a highly competitive and often violent society, one that puts a premium on the uninhibited pursuit of self-interest and that does not put into practice the philosophy of human cooperativeness which it preaches on ceremonial occasions and which is upheld in its ideological expressions and symbols."¹²⁰

9.205 Having regard to these considerations, and also to the existing prohibition on corporal punishment in Irish schools, *the Commission recommends that the law should be clarified so as to remove any existing immunity of teachers from criminal prosecution for assaults on children*. In making this recommendation, the Commission would stress that the abolition of this privilege in no way affects the use of force which is otherwise permissible under the law.

9.206 As regards those cases where the harassed teacher loses his or her temper and strikes a child in the heat of the moment, the use of such force is clearly unnecessary and will not be covered by the emergency defence. Although such a reaction might sometimes be understandable, it should not, in the opinion of the Commission, be countenanced by law, but should rather go as in other cases of violence to mitigation of sentence on the grounds of provocation. The ultimate sanction to enforce school discipline should be the removal of the child from school, by force if necessary, but by force used to remove a trespasser rather than as a chastisement.

9.207 Parental chastisement presents somewhat different considerations. On the one hand, the toleration of the law for parental force may be seen as an archaic reflection of parental rights surviving from a time when servants, apprentices, prisoners and others could be lawfully beaten, and as contributing to the serious social problem of child abuse. Violence in the home, it is argued, begets violence in society: the battered child is likely to become a battering parent.¹²¹ Moreover, as pointed out by the minority of the Canadian Law Reform Commission, it may be doubted whether the right to family privacy overcomes the child's right to security of the person, having regard to the fact

119 See Erikson, *Childhood and Society* (1950), and L.R.C.C. W.P. No. 38, *Assault*, pp.55-59.

120 Steinmetz and Straus, *Violence in the Family* (1974), p.142.

121 Freeman, *op cit*, p.239.

that the law makes no such allowance for other crimes committed within the family.

9.208 On this view, although much, and often the most serious, child abuse is the result of corporal punishment gone wrong, it is the action itself rather than its consequences which should be regarded as abusive:

"[T]o have an exception that condones the use of force, even for 'reasonably disciplining' a child, sets a national standard that can only heighten the potential for abuse that resides in all of us. One person's discipline is another's abuse, and to perpetuate even this narrow exception to criminal responsibility, operating as it does within a system designed to reject responsibility for conduct whenever there is a 'reasonable doubt', can encourage a climate for child abuse, and furnishes a slippery slope down which even the most well-meaning of disciplinarians may unwittingly slide."¹²²

9.209 On the other hand, it is argued that spanking or slapping is a widely accepted and supported form of effective family discipline. To remove the common law immunity would, in principle if not in practice, expose the family to the intrusion of the criminal law for every trivial slap or physical restraint. To leave this question to good sense and prosecutorial discretion, as urged by the minority of the Canadian Law Reform Commission, would be to fudge the issue.

9.210 It is presumably on account of such forceful pragmatic considerations that countries have been slow to waive the protection of parents and guardians from the ordinary application of the law of assault in the case of children. However, we are informed by the I.S.P.C.C. that five countries have now made all physical punishment of children unlawful, i.e Sweden, Norway, Denmark, Finland and Austria. The purpose and effect of these reforms, we are informed, has been to change attitudes to children and reduce violence, not to increase prosecution of parents or state intervention in families. In Sweden, only one parent has been prosecuted in 12 years for "ordinary" physical punishment. A father was given a small fine for spanking his 11 year old son. Opinion polls in Sweden have shown a dramatic change in attitudes to the punishment of children. But change is slow in emerging elsewhere.

"It would not be easy to abolish corporal punishment of children nor can we assume that enactment of legislation would affect parenting practices. And there are punishments more harmful and humiliating than a spanking. But it is difficult to see how the evil of physical abuse of children can be rooted out so long as certain physical attacks on children are regarded as proper. Parliament must take a lead and abolish corporal punishment in schools, community homes and other institutions where it still exists. This would symbolise society's rejection

of violence against children. A programme of public education could at the same time make parents aware of the dangers of hitting children and of alternative educational measures. It may take several generations before corporal punishment begins to disappear but at least a start would have been made to direct society away from using violence as a means of socialising children."¹²³

9.211 The Commission agrees with the spirit of this passage and would be confident that the criminal law of assault will apply to all, parents included, even sooner than envisaged by Freeman. But it is important that change be made in stages. The sudden introduction of criminal liability for any assault into the home without more education and information would be inimical to good reform and the interests of children. Foundations have to be laid with prudence. Without proper guidance in effective, enlightened, non-violent parenting, parents will feel lost, resentful and resistant to change.

9.212 For the moment, the Commission would consider it wise to postpone abolition of the common law exception for chastisement of children. We explored ways of restricting the right to chastise by statute, e.g. in the following way:

- The privilege should be restricted to force used in the reasonable exercise of authority by parents, guardians and other persons similarly responsible for the general care and supervision of a child (and to persons acting with their express permission);
- The force used must be reasonable and moderate, and in no case will it be considered so if it results in injury, or if it amounts to an attempt to cause injury;
- The child must be of sufficient age and understanding to appreciate the nature and purpose of the punishment.

However, this approach would give rise to serious problems of proof, e.g. of the borderline between tolerable and actionable harm or of the attainment of sufficient age and understanding to appreciate the purpose of punishment.

9.213 A cruder approach would be to dispense parents from prosecution for assaulting their children, in reasonable circumstances, i.e. under the least serious of the 3 categories of assault recommended above. This would amount to no more than a reproduction of the existing common law.

9.214 We see little point in abolishing the common law dispensation and replacing it with a statutory re-enactment of the same thing. This law has remained unchanged and undeveloped for years. Its statutory replacement would

¹²³ Freeman, *op cit*, p.119.

have a limited lifespan. In the meantime the law has evolved rapidly and has become more vigilant and effective in the area of abuse. The Commission is satisfied that, there is no legislative "half-way house". *Whereas it would be premature to abolish the common law chastisement exception immediately, the re-education of parents should proceed without delay and the exception should be abolished at the right time.*

Offences Against Children And Servants

9.215 Under present law, parents and other persons having the custody, charge or care of children are seldom prosecuted for assaulting, or for causing actual or grievous bodily harm to children. Instead, resort may be had to the specific offence of cruelty under s.12 of the *Children Act, 1908*, as amended by s.4 of the *Children Act, 1957*. As has been seen, this provision has effectively superseded the offence of endangering the life of a child under the age of 2 by abandonment or exposure, provided for by s.27 of the *Offences Against the Persons Act, 1861*.

9.216 *In the view of the Commission, therefore, s.27 of the 1861 Act is superfluous and should be repealed without replacement.* We do, however, endorse the sentiments long expressed by prosecutors that *the penalties for the s.12 offence are much too light and should be increased to 7 years imprisonment and/or a £7,000 fine on indictment and the maximum District Court penalties.*

9.217 Although the proposed offences of endangering and causing harm, together with our proposals relating to liability for omissions by parents and guardians of children, would cover most conduct covered by the existing offence of cruelty, the Commission does not consider it desirable that the latter offence be abolished, as under the Draft Canadian Code. Section 12 of the 1908 Act is a comprehensive offence specifically tailored to deal with cases of child cruelty and neglect. In practice, it has worked, being capable of extending to almost any serious deficiency in child care, and it also provides an important legal counterpoint to the popular notion of cruelty to children. As under the Model Penal Code, *there should be a specific offence of endangering children in one's care irrespective of the creation of a general offence of endangerment.*

9.218 In England, the maximum penalty for cruelty to children was increased from 2 years to 10 years by the *Criminal Justice Act, 1988*.¹²⁴ However, having regard to our recommendations as to causation and omissions, the more serious cases of cruelty and neglect may be prosecuted under the proposed scheme as the causing of harm or serious harm or as endangerment.

9.219 The Commission considers that there is clearly no longer any need for a specific provision relating to cruelty to and neglect of servants and apprentices. Apart from such special offences as are provided for in industrial legislation, particularly the *Safety, Health and Welfare at Work Act, 1989*, the causing of injury

124 Cf Wasik, *Cruelty to Children* (1988) J. of Crim. L. 389.

to such persons may be adequately prosecuted under the proposed scheme. In consequence, *the Commission would recommend that ss.26 and 73 of the Offences Against the Person Act, 1861, and s.6 of the Conspiracy and Protection of Property Act, 1875, be repealed without replacement.*

9.220 It has been seen that s.253 of the *Mental Treatment Act, 1945*, as amended by s.35 of the *Mental Treatment Act, 1961*, makes similar specific provision for an offence of cruelty, ill-treatment and neglect of persons of unsound mind. The offence, which is punishable on summary conviction by 6 months imprisonment and/or a fine of £100 and on indictment by 2 years imprisonment and/or a fine of £200, may be committed by any person having the charge of such a person, including a person in charge of or employed in a mental institution.

9.221 The *Health (Mental Services) Act, 1981*, sought to repeal this offence and to provide instead for a number of offences relating to breaches of duty by persons in charge of, or employed in, psychiatric institutions. However, the 1981 Act was never brought into force, and the Commission understands that the Department of Health is currently reviewing the existing laws in this area with a view to introducing new legislation. Although our recommendations relating to omissions and breaches of duty will facilitate the prosecution of persons who endanger the health of, or cause serious harm to, persons suffering from mental disorder in certain circumstances, we consider that any such new legislation should continue to provide for a specific offence of ill-treatment or wilful neglect of a mentally disordered person.

9.222 In this respect, there is nothing fundamentally wrong with s.253 of the 1945 Act, as amended. Apart from adjusting penalties and from replacing outmoded terms, the Commission does not consider that the existing offence would require substantive alteration. A possible reformulation of the offence is provided for in English law by s.127 of the *Mental Health Act, 1983*:

"Ill-treatment of patients

127.-(1) It shall be an offence for any person who is an officer on the staff of or otherwise employed in, or who is one of the managers of, a hospital or mental nursing home -

- (a) to ill-treat or wilfully to neglect a patient for the time being receiving treatment for mental disorder as an in-patient in that hospital or home; or
- (b) to ill-treat or wilfully to neglect, on the premises of which the hospital or home forms part, a patient for the time being receiving such treatment there as an out-patient.

(2) It shall be an offence for any individual to ill-treat or wilfully to neglect a mentally disordered patient who is for the time

being subject to his guardianship under this Act or otherwise in his custody or care (whether by virtue of any legal or moral obligation or otherwise).

(3) Any person guilty of an offence under this section shall be liable -

- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine of any amount, or to both.

(4) No proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions."

9.223 In the view of the Commission, such an offence would continue to provide an added measure of protection against the ill-treatment of this particularly vulnerable category of persons which might not be caught by the proposed offences of causing injury and of endangerment. *We would accordingly recommend that consideration should be given to the retention of an offence of cruelty to persons suffering from mental disorder in any future legislation prepared by the Department of Health.*

Unborn Children

9.224 There appears to have been no instance where the common law was shown to have envisaged offences against unborn children save where the unborn child was killed. One could not entirely rule out that possibility in the operation of the common law which continues in effect to be judge-made law.

Having regard to the fact that the common law treated as homicide the causing of the death of a child who, having been born alive, died as a result of injuries inflicted before birth, the common law clearly envisaged that causing injury to a child within the womb when the child was subsequently born alive could, in some circumstances at least, constitute a criminal offence. In *G. v An Bord Uchtala*,¹²⁵ Walsh J., suggested that a child has a constitutional right to be guarded against threats to its existence before and after birth, and Article 40.3.3° of the Constitution states:

"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate

that right".

9.226 The Commission has given preliminary consideration to the question whether, in the light of these constitutional principles, there should be an offence or offences involving the causing of harm or injury to the unborn child. The issues involved are complex, and we feel unprepared, in the context of a Report which focuses principally on non-fatal offences against the born, to make any definitive proposals. We propose to address this matter on a separate occasion, and to confine ourselves here to giving a broad indication of some of the questions involved.

9.227 Injury, or a threat of harm, to the unborn may arise in a variety of ways. These include an assault or other injury to a pregnant woman which incidentally, and perhaps even unintentionally, places the unborn at risk; a deliberate attempt to cause injury to the unborn; reckless conduct which may place the unborn at risk, such as the emission of noxious matter from an industrial process or the marketing of pharmaceutical products without warning of potential effects on the unborn; and the activities of a pregnant woman, such as the taking of drugs known to have harmful effect on the foetus. A full review of the law will require consideration of the necessity, practicability and effectiveness of employing the criminal law in these and perhaps other activities.

9.228 Difficult distinctions may need to be drawn, and it may not be possible within a single offence, such as endangerment, to cater for all the nuances. It is, for example, a matter of debate whether the criminal law is the appropriate mechanism for a State to use when addressing the injurious or reckless conduct of a woman which may present foreseeable risks to a foetus which she carries. There is the important matter of balancing the unborn's constitutional right to be protected from harm with the exercise of the pregnant woman's own constitutional rights.

9.229 The use of the criminal law in respect of harms emanating from a source other than the pregnant woman would appear to be less complex. Establishing *mens rea* in some cases could be seen to be difficult but, as the Commission has suggested on previous occasions, difficulties of proof do not present a conclusive argument against criminalising wrongful behaviour.

Endangerment

9.230 The Commission recognises that the creation of a new general offence of endangerment would represent an innovation in our criminal law, as Smith has observed, not without its difficulties:

"There is much to be said for a recognisably coherent set of underlying attitudes and standards relevant to the imposition of endangerment liability whatever the context. The chances of achievement of these objectives - whether relating to prosecutorial policy, the nature of substantive liability or levels of punishment - would be enhanced if the

sources of liability were less fragmentary. English law offers an *ad hoc* and generally pragmatic approach to the question of when risk creation ought to be penalised; the particular need, unless perceived as being especially compelling, will go unrecognised by the criminal law. In itself such an attitude is far from being objectionable; however, the practical demonstration of the need for and value of a more general prohibition of unjustifiable risk taking is inherently problematic. The difficulty lies in the very limited visibility of the 'endangerment' involved, it being often transient and either unwitnessed or lacking residual probative evidence. It is frequently on anticipatory observation or inspection of particular intrinsically hazardous activities (such as driving or running an industrial operation) by designated bodies (such as the police and the factories inspectorate) that produces the evidence of endangerment which would otherwise probably continue until actual harm materialises.

The benefits of generalising endangerment liability are necessarily speculative. The equivocality with which generalised endangerment liability is regarded in America is well demonstrated by the extensive differences in the use and grading of offences. However, any complete examination of the law relating to offences against the person ought to include an evaluation of the proper scope and form of endangerment liability The issue is worthy of, and requires, a full airing."¹²⁸

9.231 The strongest objection in theory to the creation of a general offence of endangerment relates to the proper reach of the criminal law. Such liability would extend to reckless acts not resulting in harm or injury which would not even incur civil liability, and which would, as Smith points out, be inherently uncertain. These arguments may nevertheless be readily countered.

9.232 In the first place, the criminal law is not solely concerned with actual harm, and in many ways already extends to acts which endanger life or health irrespective of the occurrence of injury. For example, if A attempts, incites B or conspires with C to injure V, he commits an offence even though no injury is in fact inflicted - the mere attempt, incitement or conspiracy suffices. Moreover, it has been seen that there are numerous "precursor" offences relating to the unlawful possession, manufacture or sale of firearms, offensive weapons and explosives. And those elements of the common law offence of public nuisance which are concerned with acts which interfere with comfort, enjoyment or health and acts dangerous to public safety are essentially offences of endangerment.

9.233 An offence of endangerment, recently created, is that of discharge of a firearm, being reckless as to whether any person will be injured, in s.8 of the *Firearms and Offensive Weapons Act, 1990*.

9.234 It has also been seen that the *Offences Against the Person Act, 1861*,

provides for offences of endangerment in s.17 (impeding persons endeavouring to save themselves or another from shipwreck), s.31 (traps) and ss.32-34 (railways). Section 9 of the *Conspiracy and Protection of Property Act, 1875*, relating to the breaking of a contract of service or of hiring, is also an offence of endangerment, though based in negligence. Dangerous and careless driving are summary offences under the *Road Traffic Acts*. Controlled drugs tend to be dangerous.

9.235 Clearly, then, our criminal law already condemns many acts of endangerment. In this connection, the idea of providing for general liability is not new. In 1846 and 1848, the English Criminal Law Commissioners recommended the creation of two such general offences: one being an offence of maliciously putting the life of another in danger, the other that of negligently causing danger to the life of another.¹²⁷ In the event, no such offences found their way into the Criminal Law of England, though more recently an offence of damaging property "with intent to endanger life or with recklessness in that regard"¹²⁸ has been created in England, and in our *Report on Malicious Damage*, we recommended the enactment of a similar offence in Irish law.¹²⁹

9.236 Whereas such an offence, in common with offences relating to traps, railways, weapons and explosives, is concerned with a special hazard involving particular risks, the offence of public nuisance may also be seen as involving a special factor justifying the intervention of the criminal law, namely its "public" element. Absent such special circumstances, it may be argued that there is no need for an offence of general application.

9.237 On the other hand, and as argued by the authors of the Model Penal Code, there is no reason in principle why the criminal law should penalise only such reckless conduct as results in injury. On the contrary, principle may demand that the fortuitous consequences of a person's conduct should be irrelevant to the issue of culpability, as under the New Zealand Crimes Bill. On this view, the occurrence of harm is a pointer but no more than a pointer to the existence of risk. The recklessness of the particular conduct will fall to be determined as in any other offence of recklessness.¹³⁰

9.238 Moreover, the right to bodily integrity would be given more comprehensive and consistent protection by the creation of such an offence. In the first place, it would cover the gap in existing law arising from the fact that a person who recklessly creates a risk of serious injury commits no offence although he may be prosecuted for attempt where he does so intentionally, or for causing serious injury where such injury results. In certain cases, where the evidence of intent is insufficient, it may provide a valuable alternative to a charge of attempted murder or attempting to cause serious injury.

127 *Second Report of the Criminal Law Commissioners (1846); Fourth Report (1848).*

128 S.1(2)a of the *Criminal Damage Act, 1971*.

129 LRC 26-1988, para. 40.

130 *Supra*, Chapter 5.

9.239 Secondly, it would provide a useful supplement to existing specific offences of endangerment. In this connection, the general offence would not be designed to replace all such offences, which in many cases would be the subject of greater penalties on account of the special hazards of the conduct sought to be prevented, but would provide instead for a residual generic offence. This would have the particular advantage of removing some anomalies which arise from the operation of existing law.

9.240 For example, if a builder causes obvious danger to the lives of others in the course of demolishing a building, he will commit a serious offence under the proposed offence of "malicious damage" referred to above, but may only be guilty of a far less serious offence under the *Safety, Health and Welfare at Work Act, 1989*, if he creates a similar degree of danger in the course of constructing a new building.

9.241 If the defendant is responsible for the design or construction of a building or of a domestic appliance and, fully aware of the risks, constructs a building which subsequently collapses when empty or installs such an appliance without ensuring adequate ventilation for the noxious fumes produced, he or she may only be liable to a fine for infringement of building regulations. "Individually, these and the many other imaginable cases are hardly of overwhelming importance, but their collective significance is less easily dismissed".¹³¹ Moreover, they are not easily distinguishable from more commonly occurring and unacceptably risky, behaviour which is at present penalised, such as reckless driving, and the objectives and justifications for penalising the latter may be viewed as having similar relevance to the less frequent or less predictable cases of endangerment.

9.242 In such cases of advertent risk-taking, where the risk of serious injury or death may be said to be "substantial", there is clearly a strong case for facilitating early intervention by authority to prevent the occurrence of actual harm. The creation of a general offence of endangerment would also give effect to the principle that the wanton disregard of others' safety is in itself deserving of condemnation and sanction as a serious infringement of basic values, irrespective of the manner in which such a risk is taken.

9.243 That such an offence does not in itself unduly extend the proper scope of the criminal law is supported not only by its inclusion in most U.S. criminal codes, but also by its incorporation in the penal codes of several European countries as a useful supplement to specific endangerment provisions.¹³² The undue expansion of liability may be avoided, in the view of the Commission, by limiting the offence:

- (a) to acts of advertent risk-taking, i.e. recklessness; and

¹³¹ Smith, *op cit.*

¹³² See Law Reform Commission of Canada, Working Paper No. 46, *Omissions, Negligence and Endangering* (1985), 35. Poland, Sweden and Austria are among the countries with general endangerment provisions.

- (b) to such acts as create a substantial risk of death or serious harm to another person. Recklessly placing another in danger of injury less than "serious harm" should not be covered, and the circumstances must be sufficiently serious to create a "substantial risk" of such harm, this being a question of fact for determination on the evidence.

9.244 Acts which are not complete in themselves, i.e. whose consequences are more lasting, such as the contamination of a building or of a water supply, will clearly come within the offence. Equally, it follows from our recommendations as to liability for omissions that a person who creates a substantial risk of death or serious injury to another in breach of any of the specified duties may be prosecuted for such omission on a charge of endangerment.

The Commission would therefore recommend that the following statutory offence of endangerment be created:

"A person is guilty of an offence who intentionally or recklessly engages in conduct which creates a substantial risk of death or serious harm to another person."

9.245 *The offence should be triable either way and punishable on conviction on indictment by 5 years imprisonment.* In this connection, whereas the Commission recognises that there are arguments of both policy and pragmatism against placing endangerment for all purposes on the same footing as the actual causing of harm, we nevertheless consider that 5 years is an appropriate penalty for recklessly creating a substantial risk of death or serious harm.

9.246 If this recommendation is implemented, the question arises as to whether there would also be a need for a specific offence of endangering transport, to replace and update the offences contained in ss.32-34 of the 1861 Act. Clearly these offences, as presently constituted, are either obsolete or inadequate to tackle the problem of interference with modern transportation facilities, and much of the conduct sought to be prohibited by them would be adequately covered by the proposed offence of endangerment.

9.247 In particular, the lesser offence of endangering the safety of railway passengers in s.34 of the 1861 Act, would be rendered obsolete by the more general offence, and *the Commission would accordingly recommend that it be repealed without replacement.*

9.248 Sections 32 and 33 are punishable by life imprisonment and require an intent to endanger the safety of persons using the railway. While these offences would also, in our opinion, be rendered obsolete by the general offence of endangerment, for which the penalty of 5 years is sufficient where no injury is caused, we consider that the dangerous obstruction of roads, railways, waterways and runways and the tampering with transportation facilities warrants the creation of a specific offence modelled on s.86 of the English Draft Code. The offence

should be committed where a person acts intentionally or is reckless as to causing personal injury or damage to property, be triable either way and, on account of the potential gravity of interference with aircraft, boats and other means of public transportation, be punishable on conviction on indictment by 7 years imprisonment. *The Commission would accordingly recommend that the following specific offence of endangering traffic be adopted:*

"(1) A person is guilty of an offence who -

- (a) intentionally places any dangerous obstruction upon a railway, road, waterway or aircraft runway, or interferes with any machinery, signal, equipment or other device for the direction, control or regulation of traffic thereon, or interferes with any conveyance intended to be used thereon; and*
- (b) is aware that injury to the person or damage to property may be caused thereby, or is reckless in that regard.*

(2) In this section -

- (a) "conveyance" means any conveyance constructed or adapted for the carriage of a person or persons or of goods by land, water or air;*
- (b) "waterway" means any route upon water regularly used by any conveyance."*

Sections 32 and 33 of the 1861 Act should be repealed accordingly.

9.249 As regards the setting of traps, where injury is caused by such devices, the person who set the device or who omitted to remove the device in reckless disregard of the safety of persons entering upon the land or premises may be prosecuted for causing the resulting injury under the proposed scheme. In this respect, the lawful use of force for the prevention of crime or for preventing a trespass to one's property will not extend to the setting of such traps, as such force must be immediately necessary and reasonable for such a purpose or be an act immediately preparatory to the use of such force.

9.250 Where no injury results, the person who sets such a device may be prosecuted for reckless endangerment, though the person who omits to remove such a device from his or her property may not be.¹³³ Apart from such endangerment by omission, therefore, the proposed scheme of offences may obviate the necessity for a provision similar to s.31 of the 1861 Act. Nevertheless, having regard to the desirability of penalising such intentional or reckless

133

Because, in the absence of a breach of one of the specified duties, there will be no liability for such an omission.

omission and to the inherent difficulties of proof in prosecuting the other offences in such circumstances, *the Commission would recommend that the following additional summary offence be created:*

“A person is guilty of an offence who intentionally or recklessly causes any device known to create a substantial risk of death or serious injury to be placed on his or her property or allows such a device to remain thereon”.

The offence should be triable summarily only, and punishable by a fine of medium-to-maximum gravity and/or imprisonment for 6 months. Section 31 of the 1861 Act should be repealed accordingly.

Having regard to the above recommendations, the Commission would also recommend that s.17 of the 1861 Act and s.9 of the Conspiracy and Protection of Property Act, 1875, be repealed without replacement as obsolete and unwarranted. In this connection, we do not consider that it is either necessary or desirable to make specific provision for a more general offence of impeding rescue, as under the Canadian Draft Code and as proposed in South Australia.¹³⁴

Omissions

9.251 It has been seen that the English Law Commission was reluctant to adopt those recommendations of the Code Team which purported to codify the common law duties which are capable of giving rise to liability for an omission and which exclusively delimited those offences which are capable of being committed by omission.¹³⁵ We consider that there is a clear need to clarify this important area of the law as it applies to offences against the person, and that the desire for certainty and accessibility in this connection demands not only that the offences which may be committed by omission, but also that the relevant duties, should be identified.

9.252 Instead of the approach in the Draft Code, the English Commission singled out the offences in respect of which a person would be liable if he or she failed to perform a common law duty.¹³⁶ The Commission is not disposed to follow this approach or the approach in the Model Penal Code,¹³⁷ at least in respect of offences against the person. Instead, and within the context of the reform of this category of offences, *we recommend that a provision such as the following on omissions and duties be adopted:*

“(1) A person who without lawful excuse omits to perform any of the duties mentioned in this section shall be guilty of an offence if such omission causes the death of, or serious harm to, or the detention of any person to whom such duty is owed, or if it endangers the life or

¹³⁴ *Supra*, Chapters 4 & 6.
¹³⁵ *Supra*, Chapter 3, pages 141-142.
¹³⁶ See Chapter 3, *supra*.
¹³⁷ *Supra*, Chapter 7.

permanently injures the health of any person.

(2) *A person is under a duty to do an act where there is a risk that the death of, or serious harm to, or the detention of, another person will occur if that act is not done and that person -*

- (a) (i) *is the spouse or a parent or guardian or a child of; or*
- (ii) *is a member of the same household as; or*
- (iii) *has undertaken the care of*

the person endangered, and the act is one which, in all the circumstances, including age and other relevant personal characteristics, he or she could reasonably be expected to do; or

- (b) *has a duty to do the act arising from -*
 - (i) *the tenure of a public office; or*
 - (ii) *any enactment; or*
 - (iii) *a contract, whether with the person endangered or not."*

9.253 Subsection (1) of this provision is modelled on s.152 of the Tasmanian Criminal Code.¹³⁸ As in the New Zealand Crimes Bill, liability for acts of endangerment by omission is made explicit.¹³⁹ In addition, and unlike the distinction drawn by the English C.L.R.C. between injury and serious injury,¹⁴⁰ an injury which is permanent, though not serious, is included within the provision as capable of giving rise to such liability. As under existing law, all offences of unlawful detention may also be committed by omission. Although the present Report is concerned with non-fatal offences against the person, the provision as a whole extends also, as a matter of logic, to cases of homicide, which at present constitute the most established exception to the rule against liability for omissions at common law.¹⁴¹

9.254 However, subs.(2) reproduces the provision formulated by the English Code Team on the duties which are capable of giving rise to liability for an omission. In a number of respects, this formulation has the advantage of being both more specific and more flexible than the formulations set out in the Australian Codes, the Canadian Draft Code and the New Zealand Crimes Bill. In particular, reference to the notion of "necessaries of life" is avoided by imposing a duty on certain persons in certain circumstances to prevent the death of, or serious harm to, or the detention of, another person. If, as a result of such a breach of duty, a person's health is endangered or if that person is permanently injured, seriously injured, detained or killed, the other may be prosecuted for the

138 *Supra*, Chapter 6.

139 *Supra*, Chapter 5.

140 *Supra*, Chapter 3.

141 For an examination of this area of the law generally, see Ashworth, *The Scope of Criminal Liability for Omissions*, (1989) 105 L.Q.R. 424.

relevant offence.

9.255 In addition, the risk of death, serious harm to, or detention of another which may arise from the failure to fulfil a public, statutory or contractual duty constitutes a more specific criterion than that of being in charge of any dangerous thing, or of doing any dangerous act, or of voluntarily undertaking to do any act, the omission to do which is or may be dangerous to life.

9.256 Finally, it should be noted that the question of criminal liability for failure to rescue persons in danger or for failure to report certain dangerous crimes, although of potential importance for the protection of health, remains to be considered.¹⁴²

Public Nuisance

9.257 It remains for us to consider whether the proposed offence of endangerment would also facilitate the abolition of the common law offence of public nuisance. As noted above, this offence is potentially unconstitutional and has become, as Spencer points out, virtually obsolete:

"At one time the crime of public nuisance did valiant service in the cause of public health and safety. In the days before there was much legislation on public health matters, public nuisance was the only offence for which it was possible to prosecute those who stank out the neighbourhood with fumes from glass-works, tanneries and smelters, or who kept pigs in the streets, or kept explosives in dangerous places, or spread infectious diseases, or sold unwholesome food and drink, or left the corpses of their relatives unburied, or made the public highway dangerous or impassable, or created any other danger to public safety and health. Over the last hundred years, however, virtually the entire area traditionally the province of public nuisance prosecutions has been comprehensively covered by statute."¹⁴³

9.258 Thus, legislation such as the *Local Government (Sanitary Services) Acts*, 1948 and 1964, provided for extensive, if not exhaustive, regulation for the disposal of bodies, for drainage and sewage facilities and for dangerous places and structures. The *Local Government (Roads and Motorways) Act*, 1974, also created offences for almost every conceivable method of obstructing a public highway, or damaging or endangering it. The *Derelict Sites Act*, 1961, the *Local Government (Water Pollution) Act*, 1977, and the *Litter Act*, 1982, as well as the *Local Government (Planning and Development) Act*, 1963, all provided for offences relating to dangers to health and safety which might previously have been prosecuted as public nuisance.

142 Ashworth, *op cit*, advocates the creation of such specific offences in English law, as well as an abandoning of the traditional hostility of the common law to such liability. For comparative discussion, see Feldbrugge, *Good and Bad Samaritans*, (1966) 14 Am. J. Comp. Law 630; Wilson, *The Defence of Others - Criminal Law and the Samaritan*, (1988) 33 McGill L.J. 756.

143 *Public Nuisance - A Critical Examination*, (1989) C.L.J. 55 at 76.

9.259 These offences were supplemented by further penalties for the spread of infectious diseases by verminous persons or articles or otherwise in the *Health Acts, 1947 and 1953*. Provision was made for the unlawful possession, importation, sale, purchase or manufacture of explosives and other dangerous substances by the *Dangerous Substances Act, 1972*.¹⁴⁴ The *Air Pollution Act, 1987*, now governs the unlawful emission of smoke, fumes and gases from industrial and other sources.

9.260 Public nuisances arising from the keeping of animals in the street, or from the keeping of wild or dangerous animals, fell, in turn, to be prosecuted under specific statutory offences in the *Town Improvement Clauses Act, 1847*, the *Slaughter of Animals Act, 1935*, the *Protection of Animals (Amendment) Act, 1965*, the *Protection of Animals Kept for Farming Purposes Act, 1984*, and the *Wildlife Act, 1976*.

9.261 Public nuisance prosecutions were at one time brought against tradesmen who sold unwholesome food, or who gave short weight. Such conduct was subsequently penalised under legislation such as the *Weights and Measures Acts, 1928 and 1936*, and the *Food Standards Act, 1974*, as well as by the *Consumer Information Act, 1978*, and the *Sale of Goods and Supply of Services Act, 1980*.

9.262 As a result of these and other statutes, there can hardly be any example of behaviour that endangers public health and safety which is not punishable as a specific statutory offence. Although the common law offence extends beyond such conduct to cover acts injurious to public morals and to the unlawful treatment of dead bodies, the Commission considers that the abolition of this vague and indefinitely extendible offence naturally falls within the ambit of this Report. Whereas there exist specific offences for the unlawful treatment of dead bodies, acts which are injurious to public morals are no longer a fit subject for prosecution by such an undefined standard. The argument in favour of the abolition of public nuisance as an offence is put forcefully by Spencer:

"Some people may think it is good that evil-doers can always be convicted of something when they have discovered a way of being naughty without apparently breaking the criminal law. Indeed, this 'flexibility' of the common law is sometimes said to be one of its advantages. The objection, of course, is that this flies in the face of the principle *nulla poena sine lege*: that the limits of the criminal law should be discoverable in advance, citizens should be able to find out what is and is not forbidden in order to avoid breaking the law, and that no one should be punished except for conduct which was a criminal offence at the time they did it. This principle is obviously broken when the prosecutor is allowed to prosecute someone for something that was not thought to be criminal at all when he did it, and it is equally broken when Parliament has decreed that his behaviour is an offence punishable

¹⁴⁴ The *Post Office Act, 1908*, s.63 provides for an offence of sending explosive, dangerous and noxious substances by post. It is punishable by a £10 fine or, on indictment, by 12 months imprisonment.

summarily with a small fine, and the prosecutor is allowed to proceed on the basis that it is an indictable offence punishable with life imprisonment. The argument that our courts do not create new offences, but only declare what the common law has always prohibited, is unconvincing when there is no way for the citizen to discover what it is that the common law has always prohibited in advance of the judges telling him in the course of punishing him for it, and it is even more unconvincing when an essential element of the offence was some modern invention - like the telephone, or sniffable glue - which arrived on the scene centuries after the birth of the common law."¹⁴⁵

9.263 In the view of the Commission, any residual category of conduct not caught by existing specific statutory offences is adequately provided for by the proposed offence of reckless endangerment, for which it must be proved that there exists a substantial risk of death or serious injury to other persons.

9.264 One objection may be that this removes the public element from the offence. The alternative may be to provide for an additional offence of "doing anything which creates a major hazard to the physical safety or health of the public", as suggested by Spencer,¹⁴⁶ or of "causing or risking a catastrophe", as under s.220.2 of the Model Penal Code and already rejected by us in our *Report on Criminal Damage*.¹⁴⁷ The offence of reckless endangerment, however, clearly extends to the same type of mischief sought to be prevented by an offence framed in terms of danger to the public and, having regard to the fact that the only case where reckless endangerment would not be available as an alternative to risking a catastrophe is where the risk created is limited to extensive property damage, *the Commission sees no reason for introducing such an additional offence.*

9.265 Lesser conduct may be the subject of civil proceedings, which will remain unaffected by the abolition of the offence of public nuisance. In this connection, it may be necessary to provide by statute that the abolition of the criminal offence does not affect the power of a local authority to take steps to abate nuisances under the *Public Health (Ireland) Act, 1878*, as amended by the *Factories Act, 1955*, and the *Office Premises Act, 1958*, as this power is clearly a useful, additional civil remedy in the hands of local authorities.

9.266 For these reasons, *the Commission would recommend the abolition of the common law offence of public nuisance without replacement, subject to a proviso that such abolition does not affect any existing power of a public authority to take steps to abate such nuisances or other conduct injurious to public health.*

Furious Driving

9.267 Under the proposed scheme, a person who causes serious harm whilst

¹⁴⁵ *Op cit*, pp.78-79.

¹⁴⁶ *Id*, p.84.

¹⁴⁷ LRC 26-1988, pp.29-31.

driving may be prosecuted for intentionally or recklessly causing such harm, irrespective of whether it may be said to have resulted from an act or omission. On the other hand, the offence of causing lesser harm by such means is not capable of commission by omission. However, where recklessness is proved, a failure or omission to slow down or to otherwise rectify an acknowledged risk of injury to others may be considered as an example of *pseudo-nonfeasance* within a wider course of conduct, i.e. driving, rather than an omission proper.

9.268 In all cases, it will not be necessary to prove that the harm resulted from conduct occurring on a public road or in a public place.

9.269 In practice, as under existing law, all but the most serious cases of intentionally or recklessly causing injury or serious injury will be prosecuted under the provisions of the Road Traffic Acts relating to dangerous and careless driving. It has been seen that these provisions have effectively superseded the offence of wanton or furious driving or racing under s.35 of the *Offences against the Person Act, 1861*, except, as happens not infrequently, where the driving occurs in a place which is not "public".

9.270 As noted by the English C.L.R.C., the special circumstance of driving is a matter, perhaps, relevant to sentencing, and not to the definition of a substantive offence. Moreover, the possible objection to the abolition of s.35 of the 1861 Act referred to by the C.L.R.C. in respect of English law does not arise under Irish law, because the offences of dangerous driving causing death or serious bodily harm, or dangerous driving *simpliciter* exist as intermediate offences between careless driving and manslaughter.¹⁴⁸ Finally, where a driver intentionally or recklessly creates a substantial risk of death or serious injury to another person in a place other than a public road or public place, this may be prosecuted under the proposed offence of endangerment.

9.271 *Subject to extending the driving offences in the Road Traffic Acts to "private" places, the Commission recommends that s.35 of the 1861 Act be repealed without replacement. This will necessitate the concurrent repeal of s.53(5) of the Road Traffic Act, 1961.*

Explosives

9.272 It has been seen that existing law provides for numerous offences relating to explosives. *The Explosive Substances Act, 1883*, contains the principal offences relating to the possession of explosives with intent to endanger life or property, these being supplemented by offences in the 1861 Acts relating to offences against the person and malicious damage. In addition, the *Dangerous Substances Act, 1972*, makes extensive provision for the importation, sale, purchase, possession, manufacture and marketing of explosives.

9.273 In our *Report on Malicious Damage*, we recommended that those provisions in the *Malicious Damage Act, 1861*, relating to explosives be repealed.

9.274 The question to be considered in the present context is, therefore, whether the explosives provisions in the *Offences Against the Person Act, 1861*, should be similarly repealed in that the 1883 Act makes adequate provision for the relevant activities.

9.275 The *Dangerous Substances Act, 1972*, provides an additional framework for the unlawful possession, etc., of dangerous and noxious things.

9.276 For these reasons, we recommend that ss.28, 29, 30, 64 and 65 of the *Offences Against the Person Act, 1861*, could be repealed without creating any undue rupture in the existing code of explosives offences.¹⁴⁹

Firearms And Offensive Weapons

9.277 Having regard to the fact that the Firearms Acts (recently amended) provide for a separate, self-contained code similar to that governing the possession, etc., of explosives, the Commission leaves the question of firearms offences for examination elsewhere.

9.278 Having regard to the new offence in s.8 of the Firearms and Offensive Weapons Act, 1990, the Commission recommends that s.14(15) of the *Dublin Police Act, 1842*, providing for the offence of wantonly discharging a firearm, be repealed without replacement.

Affray

9.279 Although the common law offence of affray has traditionally been classified as an offence against public order, it has been seen that it is more properly viewed as a hybrid offence, comprising actual or threatened unlawful violence against the person (and not against property) "such as to be calculated to terrify a person of reasonably firm character". The element of terror distinguishes it from offences against the person and emphasises that not all acts of personal violence amount to an affray. Moreover, it may still be an element of the offence in Irish law that it be committed in public.¹⁵⁰

9.280 Having regard to the proposed scheme, and in particular to our recommendation that assault be defined to include such conduct as causes another to believe on reasonable grounds that an unlawful application of force to or the unlawful causing of an impact on his or her body is likely, the Commission considers that the question of revising or abolishing the common law offence of affray falls more naturally within the present discussion than in relation to offences against public order. Under existing law, affray is an alternative

¹⁴⁹ This is supported by the apparent policy of prosecuting all such offences under the 1883 Act.
¹⁵⁰ *Supra*, Chapter 1.

charge to assault and offences of causing injury, and its continued usefulness must therefore be examined in the light of the proposed scheme.

9.281 The abundance of other offences which may be charged in cases of unlawful fighting may suggest that, since such conduct will always involve the commission of offences other than affray, no such offence is needed. On the other hand,

"affray is designed to deal with a type of conduct in which, by contrast with offences against the person, both the identity of the victim and the extent of his injury are immaterial ... [W]hile the fact that serious injuries are inflicted in the course of an affray may affect the general level of sentences imposed, it is not necessary to show that the particular defendant inflicted those particular injuries on a particular victim. The essence of affray lies rather in the fact that the defendant participates in fighting or other acts of violence inflicted on others of such a character as to cause alarm to the public."¹⁵¹

9.282 The prosecution's approach therefore differs, particularly as to the evidentiary requirements of the offence, and it is this pragmatic consideration which weighs in favour of the retention of an offence of affray - in a fight involving a number of participants it may often be impossible to prove that a particular defendant assaulted or caused injury to a particular victim. In such a case, as recognised by the House of Lords, "if each one [of the participants] were charged with an assault, there might be great confusion and difficulties as to evidence and as to what injuries were inflicted by which person. Then the appropriate course is to charge an affray".¹⁵²

9.283 In consequence, the abolition of the common law offence without replacement would create a significant gap in the law. Although it has been seen that the criminal laws of Canada and New Zealand no longer provide for such an offence, and although many other penal codes do not criminalise participation in a brawl *per se*, the Commission agrees with the English Law Commission that no firm conclusions can be drawn from this. Conduct of this nature, which in this country would be more readily dealt with by charges of affray,¹⁵³ may fall under the ambit of offences such as riot and unlawful assembling in other jurisdictions.

9.284 As against this, it may be argued that a continued offence of affray would undermine the evidentiary safeguards provided for in other offences against the person. On this view, there are substantial dangers of wrongful conviction if there is no detailed evidence of precisely what a defendant did; where there is such evidence, the defendant could be charged with the appropriate offence against the person. In this respect, the existing maximum

151 Law Com W.P. No. 82, para. 4.6.

152 *Button v D.P.P.* [1968] A.C. 591 at 620.

153 Law Com. No. 123, *Offences Relating to Public Order*, para. 3.6.

penalty of life imprisonment is, perhaps, inappropriate to an offence for which the prosecution need not prove the defendant's knowledge of the nature and extent of the violence perpetrated by any other persons engaged in the fight.

9.285 An examination of sentencing practice reveals that high penalties are rarely, if ever, imposed without it being shown that the particular defendant was responsible for particular injuries. Where the evidence indicates only that the defendant took part in a fight sufficiently serious to put others in fear for their personal safety, the Commission agrees with the English Law Commission that there is clearly no justification for a penalty any greater than 5 years imprisonment. If there are aggravating factors which might justify a higher sentence than this, the situations in which they occur are likely to provide sufficient evidence for proof of an appropriate offence against the person or a conspiracy or attempt to commit such an offence, carrying a higher maximum penalty. In this connection, it may be noted that courts at present draw a distinction between spontaneous affrays and ones which have been planned and which therefore amount to a conspiracy.

9.286 Objection might also be taken to the affray type offence on the grounds that a person who participates in a fight might also be said thereby to be engaging in conduct which creates a substantial risk of death or serious injury to others, and so be convicted of the proposed offence of endangerment. Whereas this may be true in certain cases, such as fights in which knives and other offensive weapons are used, it would not cover many brawls. More importantly, the two offences are concerned with distinct types of mischief; endangerment is aimed at the creation of a risk of violence, affray with the threat or use of violence.

9.287 For these reasons, the Commission considers that there is a continued need for a specific offence relating to participation in acts of unlawful violence. The element of "terror" in the common law offence should be carried over to the new offence so as to provide an appropriate delimitation of the level of violence required. However, we consider it unnecessarily restrictive to provide that the element of "terror" should relate to a bystander's personal safety. It should be extended to encompass fear for the safety of others, a very real fear which affray engenders. However, such conduct should be limited to the intentional or reckless use or threat of unlawful violence towards another, and should not extend to displays of force.

9.288 In the view of the Commission, such displays of force may be adequately prosecuted under the provisions of the *Firearms and Offensive Weapons Act, 1990*, relating to production of weapons or, when the display leads to fear of immediate violence, under the proposed offence of assault. Similarly, a mere altercation using threatening language does not constitute an affray at common law, and should be specifically excluded from the proposed offence. In appropriate cases, such a threat may be prosecuted as an assault.

9.289 For the same reasons, the Commission would recommend against the

introduction of offences similar to those contained in ss.201 and 202 of the English Draft Code. As noted above, we do not consider that the insulting or abusive words or behaviour addressed in those sections not amounting to threats of violence should be the subject of a criminal offence.¹⁵⁴

9.290 A more difficult question is whether any statutory offence of affray should extend beyond the use of unlawful violence to acts which threaten such violence. In this respect, it can be similarly argued that the proposed offences of assault and threatening to kill or cause serious injury, as well as the offences relating to offensive weapons and the common law power of arrest for threatened breaches of the peace, provide sufficient protection against threatened violence to the person. Where two groups are threatening each other, and it cannot be proved that a particular accused made a particular threat, the arguments for extending the criminal law to participation in such conduct do not apply with the same weight as to acts of street fighting which may result in serious injury.

9.291 On the other hand, a distinction between the use and threat of violence in the context of street fighting and brawls may be artificial, and may prevent the court from doing justice on the whole of the evidence relating to a particular incident. As argued by the English Law Commission, an offence of unlawful fighting to the terror of the public should be capable of penalising all those engaged in what was in all respects one incident, irrespective of whether their blows landed and notwithstanding that some defendants were merely threatening blows. Otherwise, a person closely connected with an affray, such as an individual brandishing a razor, would be excluded from the ambit of the offence:

"It must be accepted, however, that a broadening of the categories of prohibited acts in this way would permit the offence to be charged when no-one was actually engaged in acts of fighting. On the other hand, common law affray can at present be charged where the relevant conduct consists of threats alone, but we have no evidence that the offence is used in that way save where it is justified by quite exceptional circumstances. We would expect no change in prosecution practice under any new offence replacing the common law."¹⁵⁵

9.292 Such exceptional circumstances might include the case of an armed mob terrifying shoppers in a street or mall, where there may be insuperable difficulties in proving which person had a particular weapon.

9.293 On balance, the Commission considers that these considerations weigh in favour of the inclusion of threatened violence in a statutory offence of affray. The requirement that the threat be such as would cause a person of reasonable

¹⁵⁴ In this connection, it may be noted that the offence of using or engaging in any threatening, abusive or insulting words or behaviour proposed in our *Report on Offences under the Dublin Police Acts and Related Offences* (LRC 14-1985), p.49, is limited to conduct committed with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned. Similarly, the other two offences of disorderly conduct proposed in that Report are specific to particular times and circumstances: see pp.100-101.

¹⁵⁵ Law Com. No. 123, *Offences Relating to Public Order*, (Cmd. 208541, 1983).

firmness present at the scene to fear for his or her own or another's personal safety, together with the proviso that such a threat cannot be made by words alone, will in our view provide a sufficient safeguard against the undue extension of the offence.

9.294 The common law offence of affray requires only that one person be unlawfully fighting another: there is no need for both of them, or for a higher number, to be unlawfully fighting. Thus one person may be guilty of affray who makes a violent, unlawful attack on another, whether the other defends himself or herself or merely submits. The Commission considers that this rule should be retained: if several defendants are charged with affray, and the evidence is sufficient to convict only one of them, we see no reason why the one should not be guilty if there is sufficient evidence that the person has used unlawful acts of violence or threats of violence against another, provided that the acts were such as to induce fear in others. To further require that acts of self-defence on the part of others be disproved would lead to undue complexity in summings-up and would place an almost impossible burden on the prosecution.

9.295 The more usual type of affray is, however, where one person is fighting another, the activity of both being unlawful. For this reason, the English Law Commission initially recommended that the new offence be framed in terms of both types of activity i.e. "where two or more persons use or threaten unlawful violence against each other, or one or more persons use or threaten unlawful violence against another", even though it was strictly unnecessary to do so.¹⁵⁶ Section 200 of the Draft Code abandons this formulation in favour of simply using or threatening unlawful violence towards another, subject to the proviso that where two or more persons use or threaten the unlawful violence, it is the conduct of them taken together which is relevant.

9.296 Whereas the first of these formulations is somewhat clumsy, the second is in our view too wide in that it no longer focuses on the essential nature of the mischief sought to be prevented, i.e. fighting. Instead, we consider that the offence may be simply framed in terms of the conduct of two or more persons, subject to a proviso that a person who uses or threatens unlawful violence may be guilty of affray notwithstanding that any violence used or threatened against the person be lawful.

9.297 It remains for us to consider whether the offence should be capable of commission in private as well as in public, and whether a person of reasonable firmness need actually be, or be likely to be, present. As regards the first point, although there is Irish authority from 1871 that an indictment will be bad if it fails to aver that the affray occurred in a public place,¹⁵⁷ the House of Lords has since held that this is an erroneous view of the common law, apparently accepted since about 1820 but not in accord with previous authorities.¹⁵⁸ The

¹⁵⁶ *Id.*, p.100.

¹⁵⁷ *O'Neill* (1871) I.R. 6 C.L. 1.

¹⁵⁸ *Button v D.P.P.*, *supra*, n.143.

English Law Commission also argued that any limitation of a new offence to conduct occurring in public would place a serious restriction upon it:

"Take by way of illustration, the example of a large-scale fight which has broken out at a social gathering on private premises, for example a dance hall or discotheque to which on the occasion in question admission is by invitation only; the fight spills out onto the adjacent roadside. Were a new offence to be restricted to conduct in public places, only those in this overspill would be liable to be penalised; those engaged in the more serious fighting within would escape such liability, and if one volunteered evidence, they might escape liability altogether. Such a case illustrates the fine boundary which may often exist in practice between conduct in private and conduct in public, which in our view would make such a distinction illogical in any new offence, in addition to placing an unnecessary restriction upon it. It may be objected that inclusion of conduct in private places brings with it the danger that mere backyard fights will constitute a serious offence. But it must be observed, first, that, if this is a danger, it must already exist under the common law; secondly, that the same consideration applies to the law of assault, and if charges are brought in relatively trivial circumstances, this is likely to be viewed with disfavour by the courts and to be reflected in the penalty imposed; and, thirdly, the requirement that the conduct be sufficiently serious to instil fear in a reasonable bystander must, we think, provide a genuine safeguard if embodied in statutory form.

The argument that inclusion of conduct in a private place would unduly extend police powers cannot, in our view, be sustained. As we have pointed out, such conduct is covered by the present law; and it has for long been the case that, "where a constable hears an affray in a house, he may break in to suppress it, and may, in pursuit of an affrayer, break in to arrest him; and also where those who have made an affray in his presence fly to a house and are immediately pursued by him. And whatever criticism may be levelled at the more general proposition that the police have the power to enter premises without permission for the purpose of preventing a reasonably apprehended breach of the peace, we do not think that there can be any doubt that these powers currently exist where such a breach of the peace in the shape of violence or threatened violence to the person is actually occurring".¹⁵⁹

9.298 Clearly, a bystander might become just as fearful, if not more so, in private as he or she would in public. Yet, on a true examination of the rationale of the offence, the function of the bystander is to act as a measure of the requisite degree of violence:

"For this purpose it matters not whether there was a bystander close by, or a bystander who was actually terrified: his actual presence is, indeed, irrelevant. What is really in issue is whether a reasonable bystander, if present, would have been put in fear by the violence of the conduct in question. In practice, in most cases of affray there will be innocent bystanders who are witnesses to the fighting. It will be their evidence (coupled with the evidence of the participants in the fight and of the police) which will normally establish guilt. But ... to elevate the giving of such evidence into a positive requirement without which there can be no conviction for the offence misapprehends the real function of the concept of the bystander in this offence".¹⁶⁰

9.299 Prior to the abolition of the offence at common law in England, it was thought that although no proof of the presence or the likelihood of the presence of any other person was required for a public affray, where the affray occurred in private, it would have to be proved that terror was in fact caused to at least one person actually present. In the case of "public places", these are by definition a place where a member of the public may be, so that it would be an arbitrary qualification of the scope of that term to require proof beyond reasonable doubt of the reasonable likelihood of the presence of someone else in the locality. It would also present intractable problems for both prosecution and jury.

9.300 It may be argued that such distinctions betray the inherent unsuitability of the offence to conduct committed in private. On balance, however, the Commission considers that it would be undesirable to exclude serious brawls committed in private from the scope of the offence, and that the solution is to extend the test of the hypothetical bystander to private places. In cases where serious injury occurs as a result of such violence, it may be equally if not more difficult to prove that a particular person caused the serious injury although it is clear who took part in the fighting.

9.301 For these reasons, *the Commission recommends that the common law offence of affray be abolished, and that the following statutory offence be created:*

- "(1) *Where two or more persons intentionally or recklessly use or threaten unlawful violence against each other, and their conduct is such as would cause a person of reasonable firmness present at the scene to fear for his or her own or another person's personal safety, each of those persons commits the offence of affray.*
- (2) *A person who uses or threatens unlawful violence against another may be guilty of affray notwithstanding that the violence used or threatened against him or her is lawful.*

¹⁶⁰ *Id.*

- (3) *For the purposes of this section a threat cannot be made by words alone but should relate to conduct."*

9.302 *The offence should be triable either way, and be punishable on conviction on indictment by 5 years imprisonment and/or a fine.* We consider that it follows from this formulation that the offence may be committed in private as well as in public places, and that no person of reasonable firmness need actually be, or be likely to be, present at the scene. In consequence, specific provision for these elements is unnecessary. Nor does the Commission make any recommendations in the present context as to the possible powers of arrest and entry which may be conferred in respect of the offence.

Torture

9.303 Under the proposed scheme, the deliberate infliction of severe pain or acute mental anxiety could be prosecuted as the actual or attempted causing of injury or serious injury. Moreover, these offences, together with those relating to administering a substance without consent and threatening to kill or cause serious injury, might also be aggravated where they are committed by means of torture or inhuman or degrading treatment, irrespective of who is committing the offence. Deliberately exposing another to a substantial risk of death or serious injury will constitute endangerment.

9.304 Having regard to these offences, it may be argued that there is no need for a specific offence of torture. Where the criminal law does not provide adequate protection against any conceivable case of torture or degrading treatment, the courts may, and must, intervene to prevent the deliberate and conscious violation of personal rights by persons acting on behalf of the Executive.¹⁶¹

9.305 Nevertheless, torture is a qualitatively different act from other offences against the person, being the most common and brutal instrument of State repression throughout the world. It constitutes a violation of the international law of human rights, and hence the law of nations, as reflected in Article 7 of the *International Covenant on Civil and Political Rights* and Article 3 of the *European Convention on Human Rights*, both of which have been signed and ratified by Ireland. This acceptance of State responsibility for acts of torture or inhuman or degrading treatment or punishment has been supplemented by our ratification of the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, which establishes novel powers of preventive inspection at the regional level.

9.306 The creation of a specific offence of torture in domestic law, although not necessitated by these existing international obligations, would give concrete effect to the principle that torture constitutes a serious violation of the right to

bodily integrity which warrants special prohibition and punishment in the criminal law. It would also lend consistency and coherence to Ireland's condemnation of the practice of torture elsewhere, whether it be unilateral or within regional or international fora.

9.307 For these reasons, *the Commission recommends that consideration be given, in consultation with the Department of Foreign Affairs, to the creation of a specific offence of torture, thereby also facilitating Ireland's accession to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.* This Convention, which was adopted by the U.N. General Assembly in December 1984, differs from other international conventions in requiring the creation of a specific offence of torture in domestic law. As at 1 January 1993, it had been ratified by 70 countries. Article 1 provides as follows:

- "1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application".

9.308 Having regard in particular to the developing jurisprudence of the European Commission and Court of Human Rights as to the meaning of torture,¹⁶² the definition in s.1 is clearly a narrow one, and the Commission would recommend against providing for any restriction to such pain or suffering as is inflicted for a particular purpose. Instead, consideration should be given to the adoption of the simple definition provided for in s.74 of the English Draft Code: "the intentional infliction of severe pain or suffering in the performance or purported performance of an official duty".

9.309 In this connection, the Commission sees no reason for not extending the offence to any "inhuman or degrading treatment or punishment" intentionally inflicted in the performance or purported performance of an official duty, or, perhaps, for creating a separate such offence punishable by a lesser penalty.

162

See *Duffy* (1983) 32 I.C.L.Q. 316.

Whether such treatment or punishment requires an ulterior intent, which may be doubted, would then remain a matter of interpretation for the courts.

9.310 Article 2 of the Convention provides as follows:

- "1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture."

9.311 Section 3 provides for an important limitation on the defence of due obedience, which in many countries has been responsible for the erosion of effective prosecutions for gross violations of human rights.¹⁶³ Whatever about the status of this defence in Irish law generally,¹⁶⁴ the Commission would recommend that it be specifically ousted in respect of any new offence of torture or inhuman or degrading treatment or punishment.

9.312 The general legislative obligation in Article 2(1) is made specific in Articles 4 and 5, which provide as follows:

- "4. 1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.
5. 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases
 - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

163 For example in Argentina, laws were introduced between 1984 and 1989 which effectively ousted the jurisdiction of the courts to try military officers for gross violations of human rights committed between 1975 and 1983. The cornerstone of these laws was the defence of 'due obedience'.

164 See Brownlee, *Superior Orders - Time for a New Realism?*, (1989) Crim. L. Rev. 396.

- (b) When the alleged offender is a national of that State;
- (c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law."

As regards Article 4(1), the offences created will clearly be indictable offences, so that specific provision for attempts, etc. will be unnecessary. As to the maximum penalty, the Commission would suggest penalties of life imprisonment for torture and 20 years for inhuman or degrading treatment or punishment. Consideration should also be given to the creation of a wider jurisdiction than that envisaged in Article 5, as, for example, under subs.(2) of clause 10 of the English Commission's Draft Bill, which provides for extra-territorial jurisdiction over offences of torture anywhere in the world.¹⁶⁵

9.313 Although such jurisdiction would be theoretically immense, the Commission considers that it is justified for the purpose of prosecuting exceptional cases where extradition would not be desirable, as, for example, a mass torturer who himself comes within the rule of non-refoulement.¹⁶⁶ As under the English Draft Bill, any possible defence raised by an alleged torturer who is not an Irish official acting in the performance or purported performance of his or her official duties should be considered according to the law of the country where the events occurred. As an additional safeguard, and having regard to the serious nature of the charges, the consent of the D.P.P. should be required for the prosecution of all offences of torture or inhuman or degrading treatment or punishment.

B. Crimes against personal liberty

The Commission's Approach

9.314 The importance of the constitutional guarantee of personal liberty in Irish law is reflected in the relative rigour with which the courts have reviewed police powers of arrest and detention in the light of Article 40.4.1° of the Constitution. For this reason, the Commission has considered it desirable to

¹⁶⁵ See *supra*, Chapter 3, page 157.

¹⁶⁶ Literally, 'of not turning back'.

include a summary of those powers and of the constitutional principles which govern them in chapter 2. Where those powers are breached, and the requisite *mens rea* is proved, a prosecution may lie for false imprisonment. However, as indicated above, the possible reform of existing powers of arrest and detention in Irish law is a matter which falls outside the scope of the present Report, and we accordingly make no recommendations in this regard in the present context.

9.315 At the same time, it has been seen that the freedom of the person from every kind of restraint and detention not authorised by law may be regarded as an element of the more general "freedom of the person" under Article 40.3.2°, and that the constitutional duties of the State in respect of the protection and vindication of that right are primarily discharged for the purposes of the criminal law by the prevention and prosecution of the existing offences of false imprisonment, kidnapping and abduction. As with the existing offences of violence and endangerment, these offences for the most part correspond to the constitutional right sought to be protected.

9.316 There are nevertheless a number of serious defects in these offences which, having regard to the demand for clarity and accessibility in the expression of the substantive criminal law, together point to the need for a substantial review and restatement of the category of offences of detention and abduction.

9.317 Principal among these is the uncertainty surrounding the scope of the common law offence of kidnapping. For example, whose consent is relevant in the case of child-kidnap and how is the child's capacity to consent determined? Can a parent be convicted of kidnapping his own child? More significantly, what are the circumstances which transform a false imprisonment into a kidnapping, and what degree of asportation is or should be required? In this last connection, the very requirement of asportation is of doubtful value, and may be the only justification for maintaining the existing penalty of life imprisonment for the common law offence of false imprisonment.

9.318 Although false imprisonment does not give rise to similar difficulties of interpretation or definition, it is evidently an offence which may be readily codified with a view to providing a clear and simple expression of the substantive law and for which a more appropriate penalty should be substituted. Moreover, the law relating to abduction, as provided for in ss.53-56 of the *Offences Against the Person Act, 1861*, clearly needs to be rationalised as it is in many respects either confused or obsolete.

9.319 For these reasons, the general approach of the Commission in looking to the reform of existing offences against personal liberty, as with crimes of violence and endangerment, is to take the existing principles and rules as its starting point in an attempt simply and coherently, to revise and restate the law.

Kidnapping

9.320 Although kidnapping is an infamous crime, made a felony by s.11 of the

Criminal Law Act, 1976, perceived by the public with both dread and curiosity and instantly associated with intricate ransom plots, it is also a crime which has eluded meaningful definition at common law. Indeed, in looking to existing or proposed statutory restatements of the offence in other common law jurisdictions, all that can be safely concluded is that it is an aggravated form of unlawful detention, there being no consensus as to what those circumstances of aggravation may be.

9.321 In addition to the traditional form of "kidnapping beyond the seas", now stated in terms of an intent to send the victim out of the jurisdiction, these circumstances variously include an intent to hold the victim for ransom or as a shield or hostage, an intent to commit an "arrestable offence" or felony, or to facilitate flight thereafter, or to commit particular serious offences, such as aggravated sexual assault, inflicting bodily injury or terrorising the victim, or interfering with the performance of any governmental or political function. Under the proposed Canadian Code, it is defined simply as the confinement of another person, without that other's consent, for the purpose of making that other or some other person do or refrain from doing some act.¹⁶⁷

9.322 It has been seen that only in the United States is any requirement of asportation retained in respect of kidnapping, and that this has led to considerable difficulties in delimiting the scope of the offence. The original rationale for this aspect of the offence was that it removed the victim from the protection of the law in removing him or her from the jurisdiction. In this connection, s.364 of the Nigerian Criminal Code provides for a more faithful codification of the common law offence in defining kidnapping, in addition to "kidnapping beyond the seas", as a false imprisonment such that the victim shall not be able:

- (i) to apply to the Court for release; or
- (ii) to disclose the place and fact of the false imprisonment to anyone; or
- (iii) to be accessible to any person so entitled.¹⁶⁸

9.323 The Greek Penal Code provides for a similar offence of seizing another so as to deprive that other of the protection of the State.¹⁶⁹ Aside from the creation of special offences relating to the abduction of women and minors, however, most penal codes provide for offences of aggravated unlawful detention similar to the statutory kidnapping offences proposed in England and New Zealand. The circumstances of aggravation typically include detention,

- which is accompanied by torture or cruel treatment;¹⁷⁰

¹⁶⁷ *Supra*, Chapter 4.

¹⁶⁸ Art. 414 of the Nigerian Penal Code.

¹⁶⁹ Art. 322 of the Greek Penal Code.

¹⁷⁰ For example, Art. 344 of the French Penal Code.

- which results in death or serious injury;¹⁷¹
- which endangers life or limb or which exposes the victim to the risk of sexual exploitation or to the risk of political persecution;¹⁷²
- which places the victim in a helpless position, whether in a mortally dangerous place or otherwise;¹⁷³
- which is done with intent to deliver the victim into slavery, bondage or foreign military or maritime service;¹⁷⁴
- which results from an abuse of power;¹⁷⁵
- or which is done for the purposes of gain, extortion or ransom.¹⁷⁶

9.324 Other examples of aggravating circumstances include an unlawful detention for the purposes of marriage; by an armed person or by 2 or more persons; committed while wearing a false uniform, under a false name or by a false warrant; to the detriment of an ascendant, descendant or spouse; accompanied by a threat of death; or committed together with a crime against property.¹⁷⁷ Many penal codes also make specific provision for offences of slavery, unlawful arrest and offences against liberty not amounting to a total restraint of the person, i.e. offences of coercion. In this last connection, it will be seen that a detention for the purposes of coercion, where accompanied by a threat to kill or to injure or to continue to detain the victim, amounts to the offence of hostage-taking under the *International Convention against the Taking of Hostages*, considered below.

9.325 In some countries,¹⁷⁸ simple detention will be aggravated to a kidnapping where the victim is not released within a certain period, such as 15 days or 30 days, an idea which has already been seen in s.212.1 of the Model Penal Code, viz. confinement of another for a substantial period in a place of isolation with any of the requisite ulterior intents. The specific provision in that section for mitigation of sentence where the accused voluntarily releases the victim alive and in a safe place prior to trial also finds reflection in a few criminal codes, though usually framed in terms of mitigation for release within a specified number of days. In this respect, it has been seen that the approach of the Model Penal Code provides for a preferable system of mitigation in that it at all times creates an incentive to release the victim.¹⁷⁹

171 For example, chapter 4, s.1 of the Swedish Penal Code.

172 Art. 234a of the Penal Code of the F.R.G.

173 For example, Art. 224 of the Norwegian Penal Code.

174 For example, Art. 181 of the Romanian Penal Code; Art. 234 of the Penal Code of the F.R.G.

175 For example, Art. 805(2) and Art. 808 of the Italian Penal Code.

176 For example, Art. 9a of the Finnish Penal Code.

177 See generally, *The American Series of Foreign Penal Codes* (Sweet & Maxwell).

178 For example, Art. 185(2) of the Polish Penal Code.

179 *Supra*, Chapter 7.

9.326 Comparison with other jurisdictions, then, weighs in favour of the elimination of any requirement of asportation in aggravated forms of unlawful detention. In the United States, where it has been partially retained, it has been seen that attempts to qualify the requisite movement by reference to a "substantial distance", or by whether it increases the risk of harm to the victim, or by whether it is more than merely incidental to, or substantially facilitates, another offence, have done little to place the offence on a more rational basis.¹⁸⁰ In the view of the Commission, moreover, the existence of an element of asportation, while it might be relevant to sentencing, is not a sufficiently grave circumstance to justify elevating an offence of unlawful detention to the serious offence of kidnapping.

9.327 Nor do we consider that kidnapping should be defined in terms of such detention as removes the victim from access to or from the protection of the law, notwithstanding that this might more accurately reflect the original rationale for the offence. Many simple detentions may result in the effective isolation of the victim, albeit for only a short time, and in the absence of any nefarious intent or other circumstances of aggravation, such removal should not in itself be the subject of an aggravated penalty.

9.328 The essential question, therefore, arises as to whether there is any need for an aggravated offence at all. Under existing law, false imprisonment, punishable by life imprisonment, extends to all takings or detentions by force or the threat of force and it gives rise to no difficulties in practice. Where a person falsely imprisons another with intent to send that other out of the jurisdiction, for example, or to hold the other to ransom or as a hostage or shield, this may be taken into account for the purposes of sentencing. Kidnapping could accordingly be abolished altogether:

"Apart from one point, false imprisonment plus child abduction are quite sufficient to deal with all cases. The one point relates to restraint by deception. False imprisonment is committed by force or the threat of force, while kidnapping can alternatively be committed by fraud. The rule for false imprisonment follows from the definition of the crime, which requires a deprivation of liberty. The person who is deceived into going somewhere where he otherwise would not want to go is caused to behave in a certain way but is not literally deprived of his liberty. If the cunning deceiver says 'Come with me to America where you can get ten times your present wages', the person addressed, even though he believes what he is told, may reply: 'Stuff your America; I am going to Australia'. In other words, the victim's will, strictly speaking, is not constrained. If he goes, he goes freely, not because he has no option. Kidnapping, in contrast, is defined to include fraud. To get rid of kidnapping as an offence, and to make a desirable enlargement of false imprisonment, we would need an offence of procuring consent by fraud

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Id.

to remain in or to go to any place."¹⁸¹

9.329 The need to create this last-mentioned offence may also be obviated, however, by extending the concept of unlawful detention to all such acts as cause the victim to remain where he or she is; and the notion of a taking to all such acts as cause the victim to be taken or by making express provision for commission by fraud, as in Canada, New Zealand and the United States.

False Imprisonment

9.330 Taking all these factors into consideration, the Commission, sees little point in having offences both of kidnapping and of false imprisonment. The felony of false imprisonment carries life imprisonment and has been found perfectly appropriate for the various instances of the offence which have occurred in the State over the years: for example, the Herrema, Somerville, Guinness and O'Grady cases. Judges appear to have no difficulty in taking differing circumstances of aggravation into account in imposing sentence and no controversy of which we are aware has arisen in the context of sentencing for false imprisonment.

9.331 The offence of false imprisonment should be defined to be capable of commission by such fraud as causes the victim to believe that he or she was under a legal compulsion to consent to be detained. As under existing law, such fraud should be equivalent to a threat of force for the purposes of nullifying consent because the victim acquiesces in the belief that force may be used if he or she refuses to do so. In other cases of deception, the victim is free to withdraw consent at any time without fear of force being used, so that his or her liberty cannot be said to be totally restrained.

9.332 To extend the offence to such consent as is obtained by any deception or enticement, as in New Zealand and Canada, would in our view be to extend unduly the scope of the criminal law.

9.333 We would define the offence of false imprisonment so that offence can be laid in a charge or indictment simply as "That A falsely imprisoned B at ----- on the --- day of ---".

9.334 For these reasons, *the Commission recommends that the felony of kidnapping should be repealed and that the felony of false imprisonment be defined as follows:-*

"(1) *A person is guilty of false imprisonment who intentionally or recklessly takes or detains or otherwise restricts the personal liberty of another without that other's consent.*

- (2) *In this section, a person acts without the consent of another if the person obtains the other's consent by force or threat of force, or by deception causing the other to believe that he or she is under legal compulsion to consent".*

The maximum penalty for the offence should remain imprisonment for life.

Abduction

9.335 It has been seen that, apart from the offences created by ss.55 and 56 of the *Offences Against the Person Act, 1861*, all existing statutory offences of abduction are concerned with the abduction of women or young girls for sexual purposes, whether from motives of lucre or otherwise. Three of these offences are more properly classified as offences of detention in that they are committed against the will of the woman herself and do not require that she be taken out of the possession and against the will of her parents or lawful guardians. These are:

- the offence of forcing, taking away or detaining any woman against her will with intent that she be carnally known or married, contrary to s.54 of the 1861 Act, punishable by 14 years imprisonment;
- the offence of taking away or detaining any woman with an interest in property against her will and from motives of lucre, and with intent that she be carnally known or married, contrary to s.53 of the 1861 Act, also punishable by 14 years imprisonment; and
- the offence of detaining any woman in or upon any premises with intent that she may be unlawfully and carnally known by any man, or in any brothel, contrary to s.8 of the *Criminal Law Amendment Act, 1885*, punishable by 2 years imprisonment.

9.336 Section 53 of the 1861 Act also provides for an offence, also punishable by 14 years imprisonment, of fraudulently alluring any woman under 21 with an interest in property out of the possession and against the will of her parents or lawful guardians from motives of lucre and with intent that she be married or carnally known. Although this offence clearly seeks to protect parental interests, it has been seen that it also requires an element of fraud against the woman herself.

9.337 Having regard to the extension of the offence of false imprisonment to cover detention by fraud, the Commission considers that the above four offences are superfluous. In consequence, *we recommend that ss.53 and 54 of the 1861 Act and s.8 of the 1885 Act be abolished without replacement.*

9.338 The remaining offences are concerned with the abduction of any child under 14, contrary to s.56 of the 1861 Act, and punishable by 7 years imprisonment, or of any girl under 16 for purposes of seduction or otherwise,

contrary to s.55 of the 1861 Act or s.7 of the 1885 Act, as amended, both punishable by 2 years imprisonment. In addition to the duplication inherent in the last two offences, it has been seen that there are a number of problems with the operation of this scheme of offences. These include -

- the continuing discrimination as to age between males and females;
- the requirement that the taking constitute a substantial interference with the possessory relationship of parent and child;
- the anomalous rules relating to parental consent which have developed in the case-law;
- the lack of any defence of reasonable mistake as to age, and the lack of any express provision for a defence of reasonable excuse; and
- in relation to s.56, the limitation of the offence to such abduction as is effected by force or fraud.

9.339 These defects, together with the Victorian statutory language of the sections, weigh in favour of their replacement by a new statutory scheme of abduction. Before looking to the specific elements of such a scheme, however, it is necessary to consider whether any new offence of abduction should apply to the taking of a child by parents and others involved in custody or access disputes in respect of a child. It has been seen that it is an express (s.56) or implied (s.55) defence to a charge of abduction under existing law that the accused had a *bona fide* claim of right in respect of the child, this being a recognition of the qualitative difference between family and non-family abductions:

"The abduction of children who are unrelated to the abductors is uncommon. Men and women figure almost equally as culprits, but their motivation is different. Men take older children rather than infants, almost always from a sexual motive, and the affair sometimes ends in the murder of the child. When committed by women, the offence of 'baby-snatching' or 'child-stealing' (in popular terms) is generally an attempt to compensate for emotional deprivation or frustrated maternal feelings, and a real or imaginary miscarriage may be a predisposing factor. It is often associated with subnormality, schizophrenia or personality disorder; in the last case the woman may be attempting to influence a man by pretending that the baby is his. Although the offence causes great anxiety to the natural parents, the woman looks after the baby well and it is generally soon recovered. On some occasions judges have punished the offence rather severely, only to find, probably to their surprise, that public sympathy (at any rate as publicly expressed) then moves to the side of the woman baby-snatcher.

The picture for family abductions is different. When parents who have children fall out, all the family are placed under stress. The child will

probably love both parents, but may be compelled by the conflict to side with one. One parent (probably the mother) may be awarded sole custody, and if the other parent is on the warpath the child may be made a ward of court in order to fortify the position of the parent with custody

The ousted parent may try self-help by abduction. Various motives have been found: the parent's overwhelming love of the child, or his (her) response to the child's letters pleading to be allowed to be with him, or his deeming the custodian parent to be unfit, or a desire to re-establish a relationship with the custodian parent, or a belief that a parent has an inalienable right to custody. Or again there may be improper motives: vindictiveness, or blackmail - possession of the child being used as a means of stopping divorce proceedings or improving financial settlements. Whatever the motive, a child-snatch may cause deep distress to the other partner and to the child. These considerations show that parental abductions belong to the general subject of family law and need sensitive handling by the criminal courts."¹⁸²

9.340 The solution adopted in the English Draft Code was to provide that all offences of abduction be prosecuted only by or with the consent of the D.P.P. while at the same time exempting "persons connected with the child" and putative natural fathers from offences of abduction other than those committed with intent to send the child out of the jurisdiction, or with intent to hold the child to ransom or as a hostage or to commit an arrestable offence. Other cases of family abduction are thereby left as a matter for civil remedies. The creation of an offence of aggravated abduction in the English Draft Code was also designed to cover cases in which the child is "kidnapped" but the facts do not amount to kidnapping, i.e. aggravated unlawful detention, because the child has consented to go with the accused.

9.341 It is clearly desirable that parents who abduct their children with intent to hold them to ransom, etc, should be criminally liable for the fact of such abduction in the same way as strangers. In such cases, and in many other serious cases of family abduction, we consider that the civil law remedies should be supplemented by the sanction of the criminal law, and that there is no reason why these cannot be provided for, with appropriate safeguards, within a single offence of abduction. It has been seen that this is the approach taken in New Zealand, Canada and certain States in the U.S., and it also found reflection in the offence of abduction of a child under sixteen out of the jurisdiction recommended by the Commission in its Report on the Hague Convention, an offence which will now be included in the general offence of abduction we will recommend.

9.342 It has been seen that the existing offences of abduction under ss.55 and

182 Williams, *op cit*, pp.474-475.

56 of the 1861 Act do not require an intention to deprive another of the possession of the child, though they may be subject to a requirement of a substantial interference with the possessory relationship of parent and child. In this connection, the Commission agrees with the English C.L.R.C. that this is an undesirable restriction on the offence of abduction by strangers. Moreover, we consider that any new offence should not require an intention to deprive another of the lawful possession of the child, as in Canada and New Zealand. Instead, it should be enough that the child is removed from or kept out of the lawful control of any person entitled to such control of the child without lawful authority or reasonable excuse.

9.343 On the other hand, it should be a defence for parents, guardians or persons having custody of the child that they had no intention to deprive others having rights of guardianship or custody in relation to the child of those rights. In order to prevent the unwarranted intrusion of the criminal law into non-marital custody disputes, this defence should also be extended to persons who believe on reasonable grounds that they have a right to possession or continued possession of the child.

9.344 In the view of the Commission, the offence should be capable of commission against all children below the age of 16. At the same time, it should be a defence that the accused honestly believed the child was over 16, thereby reversing the restrictive rule adopted in *Prince*.¹⁸³ As indicated above, although we recognise that parental control may be difficult or non-existent in the case of certain children below sixteen, we consider that there are sufficient safeguards in the proposed offence to prevent against any undue extension of its scope.

9.345 The defence of lawful authority or reasonable excuse will clearly extend to any express or implied consent to the taking or detention of a child given by a parent or lawful guardian. In this connection, for the purposes of clarification, express provision should be made for a defence of having been unable to communicate with the parent, guardian or person having custody of the child, having taken all reasonable steps to do so, but believing that such person would consent if he or she were aware of all the relevant circumstances.

9.346 We would not recommend, however, that the defence of reasonable excuse should apply to abduction out of the jurisdiction, and we therefore consider that such express provision is unnecessary for the purposes of the more general offence.

9.347 In our *Report on the Hague Convention on the Civil Aspects of International Child Abduction and some Related Matters*, we recommended the creation of an offence of abduction of a child under 16 out of the jurisdiction.¹⁸⁴ This offence would be committed by any person who took or sent or kept a child (being a child habitually resident in the State) out of the

183
184

Supra, Chapter 2.
LRC 12-1985, p.44.

State in defiance of a court order or without the consent of each person who was a parent or guardian or to whom custody had been granted unless the leave of the court was obtained and unless the accused

- (a) honestly believed the child was over 16; or
- (b) had been unable to communicate with the requisite persons, having taken all reasonable steps to do so, but believed that they would all consent if they were aware of all the relevant circumstances; or
- (c) being a parent, guardian or person having custody of the child, had no intention to deprive others having rights of guardianship or custody in relation to the child of those rights.

9.348 It was also recommended that no prosecution should be brought without the consent of the person in breach of whose rights the child was abducted out of the jurisdiction.¹⁸⁵

9.349 That the consent of the child is irrelevant in such cases is in accord with the approach taken by the Supreme Court in *The People (A.G.) v Edge*,¹⁸⁶ an approach which in the view of the Commission is preferable to basing the offence on the absence of the child's consent. As argued by Glanville Williams in his criticism of the decision of the House of Lords in *R. v D.*, the law has and should continue to distinguish between two kinds of kidnap, adult-kidnap and child-kidnap, the first protecting the adult who is spirited away and the second the parents or their surrogates:

"[I]f it is a question of protecting the parental interest in the child, there is no reason why the period for which the parent is allowed a protected interest in the child should depend exclusively upon the child's understanding of issues. It seems reasonable to say that the period during which the parent should have authority in respect of the child should last for a fixed period, notwithstanding any precocity on the part of the child. *The Child Abduction Act, 1984* specifies the age of 16 as the time up to which the offence of child abduction can be committed by strangers, without any express qualification in respect of the child's capacity to consent; and fixing the age in this kind of way for the offence of abducting children seems right. Perhaps it would have been better to be more cautious and to have fixed the age of 15, in order to reduce the problems presented by precocious youngsters who go off to London (the previous legislation had fixed the age of 14, though 16 remained and remains the age below which girls are not supposed to elope), but whatever it is it should not be an age capable of being moved indefinitely downwards by proof of the youngster's understanding. To do that gives insufficient recognition to the concern of parents for their

¹⁸⁵ *Id.*
¹⁸⁶ [1943] I.R. 115.

children. Fixing an age is immensely more convenient for those who have to observe or advise on the law than looking at the maturity of the child in each case

There are other problems in basing the law of kidnapping on the absence of the child's consent. In a prosecution for kidnapping a child, the complainant is the aggrieved parent, not the child. The child's sympathies in the matter may be divided, or with the defendant. Nevertheless the theory of the matter, according to the Lords, is that the proceedings are meant to protect the liberty of the child. It follows that the child, if he is approaching or in his teens and is regarded as being of an age to give evidence, may be subpoenaed by the defendant and subjected to examination in court by both parties, each trying to get the child's support. But a public trial in the Crown Court in which one parent's liberty is at stake is a wholly unsuitable forum in which to ascertain the child's wish; and it may be crucial in deciding whether his father or mother (as the case may be) is to be punished. The proper disposition of the child is far better decided in the civil court than in the criminal. The civil methods of determination are not perfect, but at least they are better than a hasty determination by jury at a public trial.¹⁸⁷

9.350 For these reasons, and for the reasons set out in our *Report on the Hague Convention*, the Commission has preferred to set a fixed age of 16 for the purposes of abduction out of the jurisdiction, thereby extending the scope of the offence in respect of males by 2 years. Although we recognise that children below this age may have begun freely to choose their companions and be autonomous in their freedom of movement, we consider that there are sufficient safeguards in the proposed offence to prevent against any undue extension of its scope while at the same time providing for an appropriate measure of protection against such child abduction.¹⁸⁸

9.351 Having regard to these considerations, *the Commission recommends that ss.55 and 56 of the Offences against the Person Act, 1861, and s.7 of the Criminal Law Amendment Act, 1885, as amended by s.20 of the Criminal Law Amendment Act, 1935, be repealed and that the following offence of abduction be created:*

- "(1) *A person is guilty of an offence who,*
- (A) *without lawful authority or reasonable excuse, intentionally takes or detains a child under the age of sixteen -*
- (a) *so as to remove the child from the lawful*

187
188

Williams, *op cit*, at 478-480.
We also fixed on 16 as the relevant age at which consent to an operation could be given by the patient; see paragraph 9.162 *supra*.

*control of any person having lawful control of it;
or*

*(b) so as to keep the child out of the lawful control
of any person entitled to lawful control of it.*

*(B) takes, sends or keeps a child (being a child habitually
resident in the State) out of the State in defiance of a
court order or without the consent of each person who is
a parent or guardian of the child or to whom custody has
been granted unless the consent of the court was
obtained.*

*(2) A person does not commit an offence under this section
by reason of anything the person does in the belief that the child has
attained the age of sixteen.*

*(3) It is a defence to a charge under this section that the
accused, being a parent, guardian or person having custody of the child, or
a person who believes on reasonable grounds that he or she has a right to
possession or continued possession of the child, did not intend to deprive
others having rights of guardianship or custody in relation to the child of
those rights.*

*(4) It should be a defence to a charge under S.1(B) that the
accused has been unable to communicate with the requisite persons, having
taken all reasonable steps, but believes that they would all consent if they
were aware of all the relevant circumstances."*

*The offence should be triable either way and, as under present law, be punishable
on conviction on indictment by 7 years imprisonment. In order to prevent against
inappropriate prosecutions in cases of family abduction, however, it should be
provided that prosecutions be brought only by or with the consent of the D.P.P.*

Hostage-taking

9.352 The *International Convention against the Taking of Hostages* is one of a number of United Nations Treaties concerned with specific types of transnational terrorist acts, such as the hijacking or sabotage of aircraft, attacks on heads of State or government or on diplomats, and the hijacking of ships. Each of these Conventions is designed to provide a mechanism for cooperation as between States so as to ensure the effective prosecution and punishment of such transnational offences, principally by the creation of an obligation on the State Party in which such offenders are apprehended to either prosecute them or extradite them for trial to another State Party.

9.353 The Hostages Convention was adopted by resolution of the U.N. General Assembly in December 1979 and subsequently opened for signature. It entered

into force on 3 June 1983. Ireland has not yet signed the Convention.

9.354 In this connection, while the Commission does not propose to undertake a complete examination of the measures necessary to secure the State's compliance with its international obligations under the Convention, in particular in relation to extradition, the creation of an offence of hostage-taking in Irish law, as necessitated by the Convention, would provide for an additional serious offence against the liberty of the person which it is appropriate to consider in the present context.

9.355 Articles 1 and 2 of the Convention provide as follows:

- "1. 1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the 'hostage') in order to compel a third party, namely, a State, an international intergovernmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.
2. Any person who:
 - (a) attempts to commit an act of hostage-taking, or
 - (b) participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purposes of this Convention.
2. Each State Party shall make the offences set forth in Article 1 punishable by appropriate penalties which take into account the grave nature of those offences."

9.356 The offence described in Article 1(1) comprises the following elements:

- a seizure or detention of any person; and
- a threat to kill, injure or continue to detain such person (the hostage)
- in order to compel a third party
- to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.

9.357 The Convention offence appears to extend only to cases of seizures or

detentions effected by the use or threat of force. The Convention offence is complete only on the communication of the particular threat and must be made for the purposes of coercing a third party.

9.358 Sections 1 and 2 of Article 5 of the Convention require an extension of the criminal jurisdiction of each State Party in respect of the offences of hostage-taking, attempted hostage-taking and complicity in hostage-taking created by Article 1 when they are committed:

- in its territory or on board a ship or aircraft registered in the State;
- by any of its nationals;
- in order to compel the State to do or abstain from doing any act; or
- by an alleged offender found within the territory of the State in circumstances where the State does not extradite him or her to another State Party to the Convention.

9.359 In addition, State Parties are allowed a discretion as to the extension of such jurisdiction:

- over stateless persons who have their habitual residence in the State; and
- in respect of offences committed against their own nationals.

9.360 Article 5(3) nevertheless provides that the Convention does not exclude any criminal jurisdiction exercised in accordance with international law. This is included so as to facilitate the creation of an offence of universal jurisdiction for what may be characterised as an international crime similar to murder, hijacking, piracy, slavery, genocide and torture. In this connection, whereas the extension of criminal jurisdiction necessitated by the Convention would be sufficient to cover most cases of hostage-taking, it may be thought desirable to extend such jurisdiction to all acts of hostage-taking, irrespective of the nationality of the offender and of the country where the offence is committed.

9.361 It has been seen that this is the jurisdiction created in s.1 of the *English Taking of Hostages Act, 1982*, as restated in clause 82 of the English Draft Code.¹⁸⁹ Moreover, the Commission has already recommended that consideration be given to the creation of universal jurisdiction in respect of the offence of torture, considered above. *Similar considerations would weigh in favour of the creation of such jurisdiction in respect of hostage-taking and we so recommend. For example, it would facilitate the prosecution of an alleged offender who could not be extradited to a non-Convention country. As a safeguard, all prosecutions could be made subject to the consent of the D.P.P.*

189 *Supra*, Chapter 3.

9.362 As under the English Draft Code, and as with the offence of torture, no specific provision need be made for separate offences of attempted hostage-taking or complicity in hostage-taking, though this may be desirable in scheduling the offences for the purposes of extradition.

Obstruction

9.363 Offences against liberty in Irish law which do not involve a total restraint of the liberty of the person are the offences of wilfully obstructing or preventing the free passage of any person on any public street or road, contrary to s.13(3) of the *Summary Jurisdiction (Ireland) Act, 1851*,¹⁹⁰ and of exposing anything for sale upon or so as to hang over any carriageway or footway under s.17 of the *Dublin Police Act, 1842*.

9.364 As a matter of principle, however, there may be no need for such offences. If a person uses or threatens force to obstruct a person's free passage, there may be an assault or a threatened breach of the peace; and if no such force is threatened, as, for example, in the case of barriers being erected across the street, this would constitute an offence of obstruction under s.98 of the *Road Traffic Act, 1961*, which extends also to pedestrians, or under bye-law 70 of the *Dublin Traffic Bye-laws 1976*.¹⁹¹ Having regard to these provisions, *the Commission recommends that s.13(3) of the 1851 Act be repealed without replacement*. For the same reasons, we do not consider it necessary to make specific provision for the lawful use of force to pass a person whom the actor believes to be purposely or knowingly obstructing him or her from going to a place the actor may lawfully go, as under s.306(6) of the Model Penal Code.¹⁹²

190 *Supra*, Chapter 2.

191 *See Report on Offences Under the Dublin Police Acts and Related Offences* (LRC 14-1985), para. 4.12.

192 *Supra*, Chapter 7.

CHAPTER 10: SUMMARY OF RECOMMENDATIONS

A. *Crimes Of Violence And Endangerment*

1. Sections 18, 20, 42, 46 and 47 of the 1861 Act should be repealed.
(Para. 9.44)

2. The offences of assault and battery at common law should be abolished, and replaced by a single statutory offence of assault, defined as follows:

"(1) A person is guilty of assault who, without lawful excuse, intentionally or recklessly -

- (a) causes physical hurt, or directly or indirectly applies force to or causes an impact on the body of another; or
- (b) causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact,

without the consent of the other.

- (2) For the purposes of subs.(1)(a), "force" includes

- (a) application of heat, light, electric current or any other form of energy, and
- (b) application of matter in solid, liquid or gaseous form."
(Para. 9.52)

3. Assault should be triable summarily only, and be punishable by a maximum penalty of six months imprisonment or a fine of medium

gravity or both. It should be possible to prosecute up to twelve months after the offence is committed. (Para. 9.59)

4. An offence of intentional or reckless assault causing harm should be created, punishable on conviction on indictment by a maximum penalty of 5 years imprisonment or a fine of £5,000 or both or on summary conviction to imprisonment for one year or a fine of (the maximum available for a summary offence) or both. (Para. 9.63)

5. An offence of intentional or reckless assault causing serious harm should be created, punishable by a maximum penalty of imprisonment for life or a maximum fine of £100,000 or both. (Para. 9.63)

6. Serious harm should be defined as "injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the mobility of the body as a whole or of the function of any bodily member or organ". (Para. 9.66)

7. Without prejudice to any other method of proof, the Commission would recommend that a provision similar to that in section 10 of the *Misuse of Drugs Act, 1984*, be made for proof of harm or serious harm by a doctor's certificate.

(Para. 9.71)

8. Section 16 of the 1861 Act should be repealed. The following offence of threatening to kill or cause serious harm, triable either way and punishable on conviction on indictment by 7 years imprisonment, should be enacted:

"A person is guilty of an offence who makes to another a threat to kill or cause serious harm to that other or a third person, intending that other to believe that it will be carried out."

Serious harm should be defined as in recommendation 6.

(Paras. 9.72-9.73)

9. The offence under s.7 of the *Conspiracy and Protection of Property Act, 1875*, should be triable either way and the penalty increased to a maximum of 5 years and a £5,000 fine when prosecuted on indictment and the maximum District Court penalties when prosecuted summarily. The offence should be shorn of unnecessary specificity such as the reference to hiding tools or clothes. (Para. 9.76)

10. The following offence of harassment, triable summarily only and punishable by a fine of low-to-medium gravity, should be enacted:

"Every person who harasses another by persistently following, watching or besetting him or her in any place, by use of the

telephone or otherwise shall be guilty of an offence.

For the purposes of this section a person harasses another when his or her acts seriously interfere with another's peace or privacy."
(Para. 9.78)

11. This proposed offence should be subject to the requirement that the defendant's conduct was without lawful authority or reasonable excuse.
(Para. 9.78)
12. No separate offence relating to "terroristic threats" should be enacted.
(Para. 9.85)
13. Section 23 of the 1861 Act should be repealed without replacement.
(Para. 9.87)
14. Section 24 of the 1861 Act should be repealed. The following offence, triable either way and punishable on conviction on indictment by imprisonment for 3 years, should be enacted:
 - "(1) A person is guilty of an offence who intentionally or recklessly gives to or causes to be taken by another without his or her consent any substance which the person knows to be capable of interfering substantially with the other's bodily functions.
 - (2) For the purposes of this section, a substance capable of inducing unconsciousness or sleep is capable of interfering substantially with bodily functions."
(Paras. 9.92-9.93)
15. Sections 21 and 22 of the 1861 Act, and s.3(3) of the *Criminal Law Amendment Act, 1885*, as amended by s.8 of the *Criminal Law (Amendment) Act, 1935*, should be repealed without replacement.
(Para. 9.96)
16. No separate offence relating to infecting with disease should be enacted.
(Para. 9.102)
17. Sections 36-37 and 39-41 of the 1861 Act should be repealed without replacement.
(Para. 9.107)
18. We revive the recommendations contained in our *Report on Offences Under the Dublin Police Acts and Related Offences* that the existing offences of assault on a policeman or other peace officer should be replaced by a new offence for which knowledge that, or recklessness as to whether, the victim was a peace officer and was acting in the execution of duty would be required. A defendant wishing to deny

knowledge or recklessness regarding the fact that the peace officer was acting in the execution of duty would have to adduce sufficient evidence that he or she believed that the peace officer was not acting in the execution of duty to raise an issue on the matter (i.e. there would be an evidential, but not a persuasive, burden on the defendant). The maximum penalty for the new offence should be, in the event of conviction on indictment, imprisonment for two years and/or a fine and, in the event of summary conviction, imprisonment for six months and/or a fine of £500. The offences of resistance, to or wilful obstruction of, a peace officer in the execution of duty should be subject to the same requirements as to knowledge or recklessness, and should be triable summarily only. The maximum penalty for those offences should be a fine of £200 and/or three months imprisonment. It should be possible to prosecute within 12 months for these offences. The term "peace officer" should include members of the Garda Síochána, prison officers, members of the Defence Forces, sheriffs and traffic wardens. Consideration might also be given to the extension of this term to include firemen and ambulancemen, whose social functions may also legitimately be the subject of greater protection for the purposes of the criminal law. (Paras. 9.115-9.116)

19. Section 38 of the 1861 Act should be repealed. (Para. 9.117)
20. Section 19 of the 1861 Act should be repealed without replacement. (Para. 9.122)
21. A person who causes serious bodily harm to another with the other's consent shall be guilty of an offence unless that harm is inflicted:
 - (a) with the purpose of benefitting another person, or
 - (b) in pursuance of a socially beneficial function or activity,and, in either case, having regard to the intended beneficial purpose, function or activity, the infliction of that harm was reasonable. (Para. 9.140)
22. For the purposes of assault and of all other acts of violence or endangerment to which consent can be given, a simple statutory definition of consent should be adopted. This should provide that consent is a defence to any such charge where it is freely given by a competent, informed person either expressly or by reasonable implication and not obtained by force, threat or deceit. (Para. 9.143)
23. The Commission considers that the common law powers of arrest in respect of an actual or threatened breach of the peace, together with the offences of affray and causing injury, and those relating to the possession

and use of firearms and offensive weapons, provide adequate protection both for the parties who enter into such fights and for the public in general. To extend the law relating to consensual fighting any further would, in the opinion of the Commission, be unwarranted.

(Para. 9.147)

24. The following additional provisions relating to consent to injury should be adopted:

(a) "Every person is protected from criminal responsibility for causing harm or serious harm to another where such harm is inflicted during the course of, and in accordance with the rules of any *bona fide* sporting activity. (Para. 9.159)

(b) "Every medical practitioner or a person assisting the practitioner at his or her direction who administers to any person any therapeutic treatment, including any ancillary medical procedures, necessary to save the life or preserve the health of such person when it is not reasonably possible to obtain consent to such procedures in the usual way shall have no responsibility under the criminal law in respect of any injury that may result to such person from such treatment."

(Para. 9.171)

25. We recommend that legislation be introduced similar to s.8 of the English *Family Law Reform Act, 1969*, providing for the consent to medical treatment of persons who have attained the age of 16.

(Paras. 9.166-9.167)

26. Consideration should be given, in consultation with the Department of Labour and in the light of the provisions of the *Safety, Health and Welfare at Work Act, 1989*, to the repeal and revision of the offences provided for in the *Children's Dangerous Performances Act, 1879*, the *Employment of Children Act, 1903*, and the *Prevention of Cruelty to Children Act, 1904*.

(Para. 9.176)

27. No specific provision should be made for a complete or partial defence of provocation.

(Para. 9.177)

28. No general offence of causing injury by negligence should be enacted. Nor should constructive liability be imposed for non-fatal injuries arising from the commission of an unlawful act.

(Paras. 9.178-9.179)

29. There is no need to provide for the offences of heedlessly causing harm or heedlessly causing serious harm.

(Para. 9.180)

30. The common law defences of necessary defence should be abolished, and replaced by a new statutory defence to the use of force as set out

in the Report. (Para. 9.183)

31. The power of any court to pass a sentence of whipping should be abolished. The following provision should be enacted:

"No person shall be sentenced by a court to whipping; and so far as any enactment confers power on a court to pass a sentence of whipping it shall cease to have effect."

Section 4(1)(d) of the *Summary Jurisdiction over Children (Ireland) Act, 1884*, and Rules 72 and 73 of the 1947 *Rules for the Government of Prisons* should be repealed accordingly. (Para. 9.198)

32. The common law defences of reasonable and moderate chastisement of apprentices and of mariners should be formally abolished. There is no need to make specific provisions in this connection for the preservation of order or discipline on any vessel or aircraft. (Para. 9.199)
33. The law should be clarified so as to remove any existing immunity in teachers from criminal prosecution for assaults on children. (Para. 9.205)
34. Whereas it would be premature to abolish at once the common law privilege of chastisement of children, appropriate steps should be taken to prepare the public, by way of re-education and information, for such abolition. (Para. 9.214)
35. Section 27 of the 1861 Act should be repealed without replacement. (Para. 9.216)
36. The penalties for the offences of cruelty under s.12 of the *Children Act, 1908*, should be increased to 7 years imprisonment and/or a £7,000 fine for prosecution on indictment and the maximum District Court penalties for summary prosecution. (Para. 9.216)
37. We recommend the creation of a specific offence of endangering children in one's care irrespective of the creation of a general offence of endangerment. (Para. 9.217)
38. Sections 26 and 73 of the 1861 Act and s.6 of the *Conspiracy and Protection of Property Act, 1875*, should be repealed without replacement. (Para. 9.219)
39. Consideration should be given by the Department of Health, in its current review of mental health legislation, to the retention of an offence of cruelty to persons suffering from mental disorder, as provided for in s.253 of the *Mental Treatment Act, 1945*, as amended by s.35 of the *Mental Treatment Act, 1961*. (Para. 9.223)

40. No specific provision should be made in the present context for offences of causing harm to unborn children. (Paras. 9.226-9.227)

41. The following offence of endangerment, triable either way and punishable on conviction on indictment by imprisonment for 5 years, should be enacted:

"A person is guilty of an offence who intentionally or recklessly engages in conduct which creates a substantial risk of death or serious harm to another person." (Paras. 9.244-9.245)

42. Sections 32, 33 and 34 of the 1861 Act should be repealed. The following offence of endangering transport, triable either way and punishable on conviction on indictment by imprisonment for 7 years, should be enacted:

"(1) A person is guilty of an offence who -

- (a) intentionally places any dangerous obstruction upon a railway, road, waterway or aircraft runway, or interferes with any machinery, signal, equipment or other device for the direction, control or regulation of traffic thereon, or interferes with any conveyance intended to be used thereon; and
- (b) is aware that injury to the person or damage to property may be caused thereby, or is reckless in that regard.

(2) In this section -

- (a) "conveyance" means any conveyance constructed or adapted for the carriage of a person or persons or of goods by land, water or air;
- (b) "waterway" means any route upon water regularly used by any conveyance." (Paras. 9.247-9.248)

43. Section 31 of the 1861 Act should be repealed. The following offence, triable summarily only and punishable by a fine of medium-to-maximum gravity and/or imprisonment for 6 months, should be enacted:

"A person is guilty of an offence who intentionally or recklessly causes any device known to create a substantial risk of death or serious harm to be placed on his or her property or allows such a device to remain thereon." (Para. 9.250)

44. Section 17 of the 1861 Act and s.9 of the *Conspiracy and Protection of*

Property Act, 1875, should be repealed without replacement.

(Para. 9.250)

45. We recommend that a provision such as the following on omissions and duties be adopted:

"(1) A person who without lawful excuse omits to perform any of the duties mentioned in this section shall be guilty of an offence if such omission causes the death of, or serious harm to, or the detention of any person to whom such duty is owed, or if it endangers the life or permanently injures the health of any person.

(2) A person is under a duty to do an act where there is a risk that the death of, or serious harm to, or the detention of, another person will occur if that act is not done and that person -

- (a) (i) is the spouse or a parent or guardian or a child of; or
- (ii) is a member of the same household as; or
- (iii) has undertaken the care of

the person endangered and the act is one which, in all the circumstances, including age and other relevant personal characteristics, he or she could reasonably be expected to do; or

- (b) has a duty to do the act arising from -
 - (i) the tenure of a public office; or
 - (ii) any enactment; or
 - (iii) a contract, whether with the person endangered or not."

(Para. 9.252)

46. The common law offence of public nuisance should be abolished without replacement, subject to a proviso that such abolition does not affect any existing power of a public authority to take steps to abate such nuisances or other conduct injurious to public health. (Para. 9.266)

47. Subject to the extension of the Road Traffic Acts to cover driving in "private" places, s.35 of the 1861 Act and s.53(5) of the *Road Traffic Act, 1961*, should be repealed without replacement. (Para. 9.271)

48. Sections 28, 29, 30, 64 and 65 of the 1861 Act which deal with explosives offences should be repealed. (Para. 9.276)

49. In that a separate, self-contained code exists for firearms offences, we make no recommendations in respect of firearms except that s.14(15) of the *Dublin Police Act, 1842*, should be repealed without replacement in

view of the enactment of s.8 of the *Firearms and Offensive Weapons Act, 1990*.
(Paras. 9.277-9.278)

50. The common law offence of affray should be abolished and replaced by the following statutory offence, triable either way and punishable on conviction on indictment by imprisonment for 5 years and/or a fine:

"(1) Where two or more persons intentionally or recklessly use or threaten unlawful violence against each other, and their conduct is such as would cause a person of reasonable firmness present at the scene to fear for his or her own or another person's safety, each of those persons commits the offence of affray.

(2) A person who uses or threatens unlawful violence against another may be guilty of affray notwithstanding that the violence used or threatened against him or her is lawful.

(3) For the purposes of this section a threat cannot be made by words alone but should relate to conduct."
(Paras. 9.301-302)

51. A new statutory offence of torture, should be enacted. Consideration should also be given, in consultation with the Department of Foreign Affairs, to the ratification of the United Nations *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.
(Para. 9.307)

B. Crimes Against Personal Liberty

52. The felony of kidnapping should be repealed and the felony of false imprisonment should be defined as follows:-

"(1) A person is guilty of false imprisonment who intentionally or recklessly takes or detains or otherwise restricts the personal liberty of another without that other's consent.

(2) In this section, a person acts without the consent of another if the person obtains the other's consent by force or threat of force, or by deception causing the other to believe that he or she is under legal compulsion to consent."

The maximum penalty for the offence should remain imprisonment for life.
(Para. 9.334)

53. Sections 53 and 54 of the 1861 Act and s.8 of the *1885 Act* should be repealed without replacement. (Para. 9.337)

54. The Commission recommends that ss.55 and 56 of the 1861 Act and s.7 of the *Criminal Law Amendment Act, 1885*, as amended by s.20 of the *Criminal Law Amendment Act, 1935*, be repealed and that the following offence of abduction be created:

"(1) A person is guilty of an offence who,

(A) without lawful authority or reasonable excuse, intentionally takes or detains a child under the age of sixteen -

(a) so as to remove the child from the lawful control of any person having lawful control of it; or

(b) so as to keep the child out of the lawful control of any person entitled to lawful control of it.

(B) takes, sends or keeps a child (being a child habitually resident in the State) out of the State in defiance of a court order or without the consent of each person who is a parent or guardian of the child or to whom custody has been granted unless the consent of the court was obtained.

(2) A person does not commit an offence under this section by reason of anything the person does in the belief that the child has attained the age of sixteen.

(3) It is a defence to a charge under this section that the accused, being a parent, guardian or person having custody of the child, or a person who believes on reasonable grounds that he or she has a right to possession or continued possession of the child, did not intend to deprive others having rights of guardianship or custody in relation to the child of those rights.

(4) It should be a defence to a charge under S.1(B) that the accused has been unable to communicate with the requisite persons, having taken all reasonable steps, but believes that they would all consent if they were aware of all the relevant circumstances."

(Para. 9.351)

55. Consideration should be given to the creation of an offence of hostage-taking in Irish law and to the ratification of the *International Convention*

Against the Taking of Hostages.

(Para. 9.361)

56. S.13(3) of the *Summary Jurisdiction (Ireland) Act, 1851*, should be repealed without replacement. (Para. 9.364)

APPENDIX A

List of persons from whom submissions were received

Criminal Law Committee, Incorporated Law Society
Mr. Barry Donoghue, Solicitor, Chief State Solicitors' Office
Mr. Justice Seamus Egan, Judge of the Supreme Court
Chief Superintendent Brian Garvey, Garda Síochána
Mr. George Hart, Special Legal Adviser, Department of Justice*
Judge Peter Smithwick, President of the District Court
Mr. Justice Frank Spain, President of the Circuit Court

*In his personal capacity

THE LAW REFORM COMMISSION

Ardilaun Centre
111 St Stephen's Green
Dublin 2

Telephone: 671 5699
Fax No.: 671 5316

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Working Paper No. 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979) [£ 1.00 Net]

Working Paper No. 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (Dec 1979) [£ 1.50 Net]

Second (Annual) Report (1978/79) (Prl. 8855) [75p Net]

Working Paper No. 9-1980, The Rule Against Hearsay (April 1980) [out of print] [photocopy available]
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First Report on Family Law - Criminal Conversation, Enticement and Harbours of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981) [£ 2.00 Net]

Working Paper No. 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (Sep 1981) [£ 1.75 Net]

Fourth (Annual) Report (1981) (Pl. 742) [75p Net]

Report on Civil Liability for Animals (LRC 2-1982) (May 1982) [£ 1.00 Net]

Report on Defective Premises (LRC 3-1982) (May 1982) [£ 1.00 Net]

Report on Illegitimacy (LRC 4-1982) (Sep 1982) [£ 3.50 Net]

Fifth (Annual) Report (1982) (Pl. 1795) [75p Net]

Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983) [£ 1.50 Net]

Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (Nov 1983) [£ 1.00 Net]

Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (Dec 1983) [£ 1.50 Net]

Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (Dec 1983) [£ 3.00 Net]

Sixth (Annual) Report (1983) (Pl. 2622) [£ 1.00 Net]

Report on Nullity of Marriage (LRC 9-1984 (Oct 1984) [£ 3.50 Net]

Working Paper No. 11-1984, Recognition of Foreign Divorces and Legal Separations (Oct 1984) [£ 2.00 Net]

Seventh (Annual) Report (1984) (Pl. 3313) [£ 1.00 Net]

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Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12-1985) (June 1985) [£ 2.00 Net]

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