Two Theories of Criminal Law

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I. INTRODUCTION

EVEN as an undergraduate many years ago, I was fascinated by the question: What is "the logical status and significance of a legal statement"? An answer, which attracted then and still attracts now, though not without significant qualification, is that the shape or structure of a legal statement is that of a normative conditional proposition: "If A is, then B ought to be." This is what Golding felicitously called "the canonical form of a [Kelsenian] norm."

Here "A"—the antecedent clause (or factual protasis)—represents a fact or, more usually, a cluster of facts \((a + b + c)\) and "B" (the normative apodosis) represents the legally determined consequence attributed, ascribed, or imputed to these facts. Kelsen summarised this, alliteratively, as "Condition, copula, consequence." This promises a "scientific" approach to law and a sound basis for legal knowledge. But the promise remains unfulfilled.

It all seemed so very simple then. Law could be reduced to a set or system of normative conditionals exhibiting exclusively factual antecedent clauses. This schema appeared apt to describe and deliver all or any of the content of any legal system. It offered a truly general theory of law. In particular, so it seemed, it was peculiarly apt for the description and delivery of the content of criminal law. So the first easy step in making "pure theory" practical was to apply the Kelsenian construct to the criminal law of England and Wales. But alas, this happy pilgrim was repeatedly dragged down by the uncharted evaluative undercurrents of the common law, which proved extraordinarily resilient and resistant to "scientific" efforts to crib, cabin, and confine it in an alien format that did not merely reproduce its content in a convenient form but seriously distorted...
and denatured its subject matter.\textsuperscript{3}

II. THE SCIENTIFIC STRUCTURE OF LAW AND THE EVALUATIVE APPROACH

There is considerable support for an "analytical" approach that conceives criminal law as susceptible in principle to reduction to the fixed form, "If A is, then B ought to be." For obvious reasons, such a conception is very popular with those committed to the codification of criminal law even though this approach seems to diminish and "flatten the complex moral terrain of the criminal law."\textsuperscript{4} It seeks necessary and sufficient conditions for the implementation of the legally defined consequence. There is also an "evaluative" approach, which insists that any formulations in rule-like statements are "inherently corrigible, for it is always possible that they might be improved upon as accurate statements, or require modification as what they describe changes."\textsuperscript{5} On this latter approach the legal proposition does not purport to establish necessary and sufficient conditions for the implementation of the legally defined consequence.

A primary distinction in the nature of legal propositions is between those that at least aspire to closure ("If A is, B ought to be, full stop") and those that concede or celebrate open-endedness ("If A is, B ought to be, unless . . ."). The first approach purports to privilege certainty and the second seeks justice in the sense of fairness, rationality, and fit, especially as to the outcome of individual cases. This calls for applied moral reasoning and not mere deductive or mechanical rule application. In particular, the evaluative version of the legal proposition does not purport exhaustively, or at all, to determine the conditions of its own application. Indeed, "the successful functioning of a legal system depends upon repeated acts of human judgment at every level of the system."\textsuperscript{6} The first version is categorical and closed. The second is presumptive, inherently corrigible, and subject to defeasance.\textsuperscript{7}

A secondary distinction is that no element of value features in the protasis of the analytical version of the legal proposition. In principle, it is a value-neutral datum projecting into consciousness and is normatively inert. By contrast, the protasis of the evaluative version is not similarly purely factual. It contains covert or overt values and calls forth and requires moral judgment for understanding and application. This can be illustrated by the common law approach to consent or to causation in the criminal law. As will be seen, the common law treats both as more than mere factual conditions. The judgment that is called forth "must be exer-
cised by human beings for human beings. It cannot be built into a computer.\textsuperscript{78}

Thirdly, the evaluative approach of the common law emphasises its customary nature as "a body of practices observed and ideas received over time by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the \textit{rational} determination of disputes litigated before them, or by them on behalf of clients, and in other contexts."\textsuperscript{9} These received ideas determine \textit{proper} practice and are necessarily and irreducibly evaluative. A distinction similar to the one I seek to draw has been much better drawn by Lon Fuller, who distinguishes made law and implicit law.\textsuperscript{10} He observes that many intellectual disputes rest on an undisclosed preference for one or other form of law as paradigmatic. For Fuller, one of the shortcomings of legal positivists in general (his specific example is John Austin, though Jeremy Bentham might have been more convincing)\textsuperscript{11} is a strong preference that all law be made-law or be made to fit into the made-law paradigm. Thus, Austin famously treated the common law as the circuitous command of the sovereign, which distorted it by forcing it into an ill-fitting and uncomfortable shape. Moreover, Austin also wanted to represent even the common law in a form that disregarded its goodness or its badness. But values are embedded in the common law legal proposition, and these values are grounded in practice. Thus, to treat the common law as a set of written and closed rules is to distort, denature, and destroy. Whereas this is true of common law in general, it is particularly well illustrated by the "moral complexities at the heart of the criminal law."\textsuperscript{12}

\section*{III. DISHONESTY AND THE LAW COMMISSION}

To illustrate the point I turn to a recently published Report of the English Law Commission that states:

Traditionally, crimes consist of objectively defined conduct or events (external elements) and mental states (fault elements), subject to circumstances of justification or excuse (such as self defence or duress). In general the fact-finders' task is (a) to determine what happened, (b) to determine what the defendant's state of mind was, and (c) to apply those facts to the definition of the crime in question, to see whether each of the external elements and fault elements have been

\begin{itemize}
  \item \textsuperscript{8} Fuller, \textit{supra} note 6, at 59.
  \item \textsuperscript{9} Simpson, \textit{supra} note 3, at 20 (emphasis added).
  \item \textsuperscript{10} See Fuller, \textit{supra} note 6, at 64-82.
  \item \textsuperscript{11} Austin was less opposed to judicial legislation than was Bentham: "Notwithstanding my great admiration for Mr. Bentham, I cannot but think that, instead of blaming judges for having legislated, he should blame them for the timid, narrow, and piecemeal manner in which they have legislated . . . ." John Austin, \textit{The Province of Jurisprudence Determined} 191 (Isaiah Berlin et al. eds., The Noonday Press 1954) (1932).
  \item \textsuperscript{12} Horder, \textit{supra} note 4, at 255.
\end{itemize}
In other words, by this so-called traditional approach, crimes are exhaustively defined with reference to a cluster of factual definitional elements that can (and should) be reduced to written rule-like formulations. Accordingly, a code of criminal law would provide exclusive and exhaustive definitions of all offences.

This scientific approach runs into difficulties where, as with all the major Theft Act offences in England and with common-law conspiracy to defraud, dishonesty features as a defining element because dishonesty is an irreducibly moral or evaluative concept. This threatens the codification project at its very core because it precludes a wholly legislated criminal law. Of course, sophisticated advocates of a codified criminal law appreciate that exhaustive definition of defences would inevitably lead to a "dreaded conflict" between the requirements of the criminal law and "the moral feelings of the public . . .[and the] result would be eminently unsatisfactory" according to that great judge Stephen J., the author of the Draft Code of 1879. But, as the concept of dishonesty illustrates, it is rather difficult to sustain the necessary bright line between definitional and defence elements. Insofar as one treats dishonesty as a "negative" or defence element like "just excuse," the Law Commission saw virtue in the argument that "what may constitute a just excuse is so context-dependent that exhaustive definition must necessarily limit the range of circumstances which might excuse." The Law Commission concluded: "Therefore, if an exhaustive definition of ‘just excuse’ or ‘dishonesty’ were incorporated into the law, there would inevitably be examples of behaviour which were legally dishonest, but which fact-finders would characterise as morally blameless." But the Law Commission recognises that dishonesty is a “positive” or definitional element at least in respect to theft and that being so, it appears, perhaps inadvertently, to have compromised the understanding that whereas common law defences could be retained under a code, common law offences would

14. As Horder notes, this approach is characterised by "a whole hearted commitment to an entirely legislated criminal law." Horder, supra note 4, at 233.
17. By “negative” the Law Commission means one of two things: (a) part of the mens rea, not the actus reus; and (b) that which rebuts the inference that conduct was unlawful. Law Commission No. 276, supra note 13, para. 5.12 & n.10.
19. Law Commission No. 276, supra note 13, para. 5.5.
20. By “positive” the Law Commission means one of two things: (a) part of the actus reus; and (b) that which alone makes criminal conduct otherwise lawful (or that which does all the work). Id. para. 5.12 & n.10.
Moreover, and in any event, even with the newly proposed fraud offence in respect of which the Law Commission makes a plausible but not compelling case for treating dishonesty as a "negative" or defence element, it acknowledges, as it must, that "[w]henever dishonesty is in issue, the Crown must prove that the defendant was dishonest." It rather seems that the Law Commission may be attempting simultaneously to sustain both the "analytical" and the "evaluative" approach to criminal law, although an important part of that classification is that the two approaches are incommensurable in the sense that the inherently evaluative doctrines and principles of the common law cannot be reduced without remainder into the fact-based format so favoured by an extreme (and arguably implausible) version of exclusive legal positivism. Remarkably, for so acute a commentator on the common law, even Maine thought otherwise: "As soon as the Courts at Westminster Hall began to base their judgments on cases recorded . . . the law which they administered became written law . . . . It is written case-law, and only different from code-law because it is written in a different way." But the common law does not become "written law" simply by virtue of law reports coming into existence. Moreover, much depends on what is read into "written in a different way." If the common law is written up in the form of open-ended defeasible normative propositions, its essential nature may be preserved. If, however, an attempt is made to write up the common law in the canonical form of a norm, it is distorted, denatured, and destroyed. Famously, because the common law would not fit into his theory, Bentham chose to abolish it, believing that the smallest scrap of unwritten law incurably corrupts the whole. Conceived of as a body of rules, the common law was, for Bentham, unreal, imaginary, and chimerical. The Law Commission, however, appears to recognise the merits of the common-law approach and accepts both that "it would not be possible to define dishonesty exhaustively" and that "specific defences would not be able to cover every situation," at least without convicting some morally blameless individuals (which the Law Commission rightly wishes to avoid). This shows a tolerance of common law thought-ways and practices not always exhibited by codifiers and implicitly concedes what Savigny taught long ago: Codification, for all its aspirations and pretensions,

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23. Law Commission No. 276, supra note 13, para. 9.3.
24. Id. para. 5.12.
29. Law Commission No. 276, supra note 13, para. 5.16.
30. Id. para. 5.17.
cannot entirely, if at all, abolish history, ethics, and sociology.\textsuperscript{31}

IV. IS DISHONESTY “UNUSUAL”?

The Law Commission was pleased to regard dishonesty as “an unusual element because it necessitates a moral as well as a factual enquiry,”\textsuperscript{32} but it undermines its own claim by immediately drawing an analogy with “gross negligence” where “the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.”\textsuperscript{33} This, too, requires the tribunal of fact to make a moral judgment. Other specific instances, such as the remarkable case of Tan, can be found.\textsuperscript{34} Miss Tan (by name, nature, and complexion) had advertised in contact magazines as follows: “Humiliation enthusiast, my favourite pastime is humiliating and disciplining mature male submissives, in strict bondage, lovely tan coloured mistress invites humble applicants, T.V., C.P., B., D., and rubber wear, 12 p.m. to 7.00 p.m. Mon. to Fri.”\textsuperscript{35} The law report records that the “services provided ... were of a particularly revolting and perverted kind” and elaborates on the nature of these services and of the equipment deployed.\textsuperscript{36} Because of the quaint arithmetic of the criminal law of England and Wales, Miss Tan could not be charged with running a brothel because she was the one and only prostitute working at the premises. Accordingly, she was charged with and convicted of keeping a disorderly house, which was explained to the jury in the following terms: A single prostitute who provides services in private premises to one client at a time without spectators is guilty of the common-law offence of keeping a disorderly house if it is proved that the services provided are of such a nature and are conducted in such a manner that their provision “amounts to an outrage of public decency or ... is otherwise calculated to injure the public interest so as to call for condemnation and punishment.”\textsuperscript{37} But that, like dishonesty and gross negligence, explicitly calls forth a moral judgment from the tribunal of fact.

V. THE MORAL COMPLEXITY OF “CONSENT”

Indeed, the criminal law of England and Wales more generally reveals the same pattern of requiring moral judgment from the tribunal of fact as, for example, with “consent.” I turn to Lord Mustill’s provocative and

\textsuperscript{32} Law Commission No. 276, supra note 13, para. 5.1 (emphasis added).
\textsuperscript{33} The King v. Bateman, 19 Crim. App. R. 8, 11-12 (1925).
\textsuperscript{34} Regina v. Tan, 1983 Q.B. 1053 (C.A.).
\textsuperscript{35} Id. at 1058.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 1061.
intriguing judgment in *Brown*\(^{38}\) in which he considers questions of law and policy relating to consent and violence arising in the context of homosexual sadomasochism in private between consenting male adults who had been convicted on charges under the Offences Against the Person Act 1861.\(^{39}\) He says "this is a case about the criminal law of violence. In my opinion it should be a case about the criminal law of private sexual relations, if about anything at all."\(^{40}\) He states that he need not spend time on the details of the bizarre sexual conduct of the co-defendants, nor need I, but he correctly reports that the prosecution responded to this conduct in three ways:

(1) that which fell squarely within the legislation governing sexual offences, including keeping a disorderly house and publishing an obscene article, were dealt with as such. Lord Mustill sagely observes that "[t]he pleas of guilty to these counts . . . might be regarded as dealing quite comprehensively with those aspects of . . . sexual conduct which impinged directly on public order";\(^{41}\)

(2) private acts, not necessarily the most disgusting, which were prosecuted under the Offences Against the Person Act 1861; and

(3) private acts, including the most disgusting, which were not prosecuted at all. Lord Mustill observed:

If repugnance to general public sentiments of morality and propriety were the test, one would have expected proceedings in respect of the most disgusting conduct to be prosecuted with the greater vigour. Yet the opposite is the case. Why is this so? Obviously because the prosecuting authorities could find no statutory prohibition apt to cover this conduct.\(^{42}\)

Indeed, going further, Lord Mustill concludes that the Offences Against the Person Act 1861 was chosen as the basis for the relevant counts in the indictment only because no other statutory or common law offence could be found that could conceivably be brought to bear. These charges under the Offences Against the Person Act 1861 seemed "so inapposite" to Lord Mustill that they "cannot be upheld unless the language of the statute or the logic of the decided cases positively so demand . . . [but] the language of the statute is opaque and the cases few and unhelpful."\(^{43}\)

As to the relationship between violence and consent, Lord Mustill says that he was attracted by an analysis on the following lines. First, construct a continuous spectrum of the infliction of bodily harm, with killing at one end and a trifling touch at the other. Second, with the help of reported cases, identify the point ("the critical level") on this spectrum at which consent ordinarily ceases to be an answer to a prosecution for in-

\(^{38}\) Regina v. Brown, 1 A.C. 212 (H.L. 1994).
\(^{39}\) Id. at 256-75.
\(^{40}\) Id. at 256.
\(^{41}\) Id. at 257
\(^{42}\) Id.
\(^{43}\) Id. at 258.
flicting harm. Lord Mustill quickly saw that “this analysis is too simple . . . [because] there are certain types of special situation”\textsuperscript{44} that do not fit, "for example surgical treatment which requires a degree of bodily invasion well on the upper side of the critical level will nevertheless be legitimate if performed in accordance with good medical practice and with the consent of the patient. Conversely, there will be cases in which even a moderate degree of harm cannot be legitimated by consent,”\textsuperscript{45} for example, settling a dispute by means of a “square go.”\textsuperscript{46} That being so, the third stage is to identify the special situations by reference to the decided cases. Fourth, one must then decide whether the case in point either falls directly or by close analogy within one of these special situations. If “yes,” that determines the outcome irrespective of “the crucial level”; if “no,” then “the crucial level” is determinative. With exemplary intellectual honesty, Lord Mustill admits:

For all the intellectual neatness of this method I must recognise that it will not do, for it imposes on the reported cases and on the diversities of human life an order which they do not possess . . . all or almost all the instances of the consensual infliction of violence are special. They have been in the past, and will continue to be in the future, the subject of special treatment by the law.\textsuperscript{47}

And there are other objections to any general theory of consent and violence (“it is too simple to speak only of consent, for it comes in various sorts”). First, there is an express agreement to the infliction of the injury that was in the event inflicted. Second, there is express agreement to the infliction of some harm, but not to that harm that in the event was actually caused. Third, there is express consent not to the infliction of harm, but to engagement in an activity that creates a risk of the harm that was in the event suffered. Fourth, express consent not to the infliction of harm, but to engagement in an activity that creates a risk of harm other than the harm that was actually suffered. To these four, can be added four more “where consent is not express but implied.”\textsuperscript{48} Lord Mustill defends his multiplication:

These numerous categories are not the fruit of academic over-elaboration, but are a reflection of real life. Yet they are scarcely touched on in the cases, which just do not bear the weight of any general theory of violence and consent.

Furthermore, when one examines the situations which are said to found such a theory it is seen that the idea of consent as the foundation of a defence has in many cases been forced on to the theory, whereas in reality the reason why the perpetrator of the harm is not liable is not because of the recipient’s consent, but because the perpetrator has acted in a situation where the consent of the recipient

\textsuperscript{44} Id.
\textsuperscript{45} Id. at 258-59.
\textsuperscript{47} Brown, 1 A.C. at 259 (emphasis added).
\textsuperscript{48} Id.
forms one, but only one, of the elements which make the act legitimate.\textsuperscript{49}

Accordingly, Lord Mustill,

[M]ust accept that the existing case law does not sustain a step-by-step analysis of the type proposed above. This being so I have considered whether there is some common feature of those cases in which consent has been held ineffectual whose presence or absence will furnish an immediate solution when the court is faced with a new situation. The only touchstone of this kind suggested in argument was the notion of “hostility”. . . . Nevertheless I cannot accept it as a statement of the existing law which leads automatically to a conclusion on the present appeals. Hostility cannot, as it seems to me, be a crucial factor which in itself determines guilt or innocence, although its presence or absence may be relevant when the court has to decide as a matter of policy how to react to a new situation.\textsuperscript{50}

So Lord Mustill simply cannot extract any general theory of consent and violence from the case law and “can see no alternative but to adopt a much narrower and more empirical approach.”\textsuperscript{51} This narrower and more empirical approach involves a detailed consideration of the following: death, maiming, prize-fighting, sparring and boxing, contact sports, surgery, lawful correction, dangerous pastimes, bravado, mortification, rough horseplay, prostitution, and fighting. He prefers “to address each individual category of consensual violence in the light of the situation as a whole. Sometimes the element of consent will make no difference and sometimes it will make all the difference. Circumstances . . . alter cases.”\textsuperscript{52}

By way of brief comment, this dissenting minority judgment might encourage us not to seek any general theory of consent and violence at all, but, in so far as we persist in seeking some such general theory, at the very least, we may have to be satisfied with a theory that does not fit all the cases perhaps on the grounds that some cases, such as Brown itself, are wrongly decided. But Lord Mustill’s analysis poses a deeper challenge in that it suggests that the notion of “consent” (which is clearly a definitional element in rape and perhaps in assault) turns out on close analysis to be very similar to “just excuse,” which I once described as “so context-dependent that any exhaustive definition must necessarily limit”\textsuperscript{53} and, I now add, distort. As already noted, the Law Commission is currently of the view that “dishonesty” is a similarly context-dependent concept, incapable, at least without distortion, of exhaustive definition.\textsuperscript{54}

Further, and importantly, Lord Mustill’s judgment rather suggests that the relationship of consent and violence is in practice so very complex,

\begin{enumerate}
\item[49.] Id.
\item[50.] Id. at 260-61.
\item[51.] Id. at 261.
\item[52.] Id. at 270.
\item[53.] Tur, supra note 18, at 80.
\item[54.] LAW COMMISSION No. 276, supra note 13, paras. 5.5, 5.15, 5.17.
\end{enumerate}
and subtle, that it cannot readily, if at all, be reduced to simple general statements in the canonical form of a closed Kelsenian norm. That presents a very serious challenge to the codification project in that what we have is a series of special situations—indeed a "codeless myriad of precedent . . . [and a] wilderness of single instances"—wherein there is no discernible general theory of consent and violence. How could we ever produce a code that satisfactorily preserves the values and policies embedded in the existing law if these values are so contextual or situation specific as to defy inclusion in the conceptual apparatus favoured, perhaps required, by the codifiers? The alternative is not to seek to base a new code on a few (or many) old cases but to start anew from principle—*ab ovo*, as Bentham put it—although the difficulty with that is there are no universally accepted principles to provide a starting point, and even if there were, the devil is in the detailed application. From Lord Mustill's analysis, it appears that the moral complexities of "consent" defeat reduction to the canonical form of a closed Kelsenian norm.

There are also some technical difficulties. For example, a question that anyone attempting to codify the criminal law of England and Wales must face is whether "consent" (or its absence) is an external matter of defence or an internal matter of definition, especially if offences call sternly for exhaustive and exclusive definition but the open-endedness of common law defences (and judicial creativity) must morally be preserved. It is clear historically that "injuries short of maims are not criminal at common law unless they are assaults, but an assault is inconsistent with consent." This suggests that where there is genuine free and informed consent, as there undoubtedly was on the facts of *Brown*, no one can be convicted of assault. It therefore follows that no one can be convicted of an aggravated assault, such as assault causing actual bodily harm. However, the majority of the House of Lords took the opposite, "illogical" view, which suggests that consent is not entirely secure as a definitional element even of assault but that it functions as definitional or defensive depending on circumstances and context. But so greatly to contextualise the definition of assault runs counter to a series of desiderata, not least fair warning and maximum certainty, and calls into question what academic lawyers are doing when they are doing criminal law. Is legal education solely a matter of applied moral philosophy and subjective belief, or is there a body of objectively valid knowledge to be communicated?

In addition, there are complex serious questions about the scope of consent: How far does it extend? This is particularly important in rape

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57. See Andrew Ashworth, **Principles of Criminal Law** 76 (2d ed. 1995); *Re Dawson's Settlement*, 1 W.L.R. 1456 app. (1966) (stating there a "special need for certainty in the criminal law").
where the divisibility of consent can be an issue. Moreover, consent falls to be distinguished from "submission." These and other moral complexities indicate that consent is a context-dependent notion that may be difficult to define exhaustively. Indeed, for one astute commentator, the meaning of consent in rape "remains a legal mystery" although she supposes, perhaps optimistically, that a "solution . . . would be the enactment of a comprehensive definition of consent," which is precisely what Lord Mustill's later analysis calls into question. More generally, consent is not universally treated as a defence in English criminal law. For example, it is a criminal offence to do bodily harm to a person, and the consent of the victim is irrelevant. Similarly, the offence of attempting to have carnal knowledge of a girl under the age of ten years may be committed even if the girl consents to the acts done. By statute, "a girl under the age of sixteen cannot in law give any consent" that would prevent an act being an indecent assault although women under sixteen can give consent for medical treatment, including prescription of contraceptives, without parental consent if considered by the prescribing doctor to be sufficiently mature. Again, consent, save under limited conditions determined by statute, is irrelevant to charges of buggery. All of this points to the moral complexity of consent and adds weight to Lord Mustill's penetrating and challenging analysis.

Finally, this part of the discussion raises for consideration the question whether consent in assault and in inflicting injury, either non-serious or serious, is defence only or definitional. Is every inter-personal bump on a crowded train an assault subject to the defence of implied consent, or is it no assault at all? Some commentators take comfort from the inclusion of the word "unlawful" within the definitional elements of assault. But this is either circular or an empty slot to be filled as the situation morally requires. Perhaps there is a general exception from the ambit of assault for "all physical contact which is generally acceptable in the ordinary conduct of daily life" although some think my grabbing his arm to attract his attention is a paradigmatic assault. Both reading meaning out of or into "unlawful" or delimiting what is "generally acceptable" seem to call

63. See, e.g., The Queen v. Beale, 1 L.R.-C.C.R. 10 (1865).
64. Sexual Offences Act, 1956, 4 & 5 Eliz. 2, c. 69, § 14(2) (Eng.).
66. Criminal Justice and Public Order Act, 1994, c. 33, § 143(1) (Eng.) (amending the Sexual Offences Act, 1956, 4 & 5 Eliz. 2, c. 69, § 12(1)).
67. ASHWORTH, supra note 57, at 326.
for some degree of moral judgment from the tribunal of fact. So long as there is room for any doubt on the location of consent in relation to the definition of assault, the suggestion that offences should be exhaustively defined in a code but that defences should be left open to development by common-law judges may be meaningless simply because the division between defence and definitional elements is not clear cut in a number of common offences, including assault and infliction of injury. In seeking to codify, there is a grave risk of distorting the situation-specific values that are lurking inside a concept such as “consent.” It seems difficult therefore to start from the common law and end up with a code because the common-law conception of law is irreducibly “evaluative” whereas the conception of law favoured by codifiers is crisply “analytical.” This difficulty endures even if the location of consent in definition or defence is a non-problematic given: It is not so much the presence of defences that thwarts the endeavour to reduce the criminal law to the canonical form of a closed Kelsenian norm but the presence of open-endedness in common law principles and doctrines whether located in definitions or in defences.

VI. THE MORAL COMPLEXITY OF “CAUSATION”

The Law Commission’s suggestion that dishonesty is “unusual” in that it calls on the fact-finder to make moral decisions\(^70\) is further called into question by an analysis of common-law “causation,” which features as a definitional element in a significant number of crimes. Causation in criminal law is a complex notion in that it involves a form of sequenced, two-tiered reasoning. First, there is what may be called “factual causation” and, second, there is so-called “legal causation.” Factual causation is akin to the general scientific notion of what constitutes the, or a, cause of an event and is sometimes referred to as “but-for causation” or *a causa sine qua non*, meaning that the consequence would not have occurred but for the accused’s conduct. In one case a man put potassium cyanide into his mother’s drink with the intention of causing her death.\(^71\) However, she died of a heart attack before she had consumed more than about a quarter of the drink.\(^72\) Here the son’s conduct was not a factual cause of death and the son could not be and indeed was not convicted of his mother’s murder because he had not caused her death. Of course he was charged with and convicted of attempted murder.\(^73\) “Legal causation” adds an overriding condition of defeasance such that not every factual cause is a legal cause. The *locus classicus* is found in a passage in Professor Glanville Williams’s magisterial textbook:

When one has settled the question of but-for causation, the further test to be applied to the but-for cause in order to qualify it for legal recognition is not a test of causation but a moral reaction. The ques-

\(^{70}\) Law Commission No. 276, *supra* note 13, para. 5.1.
\(^{72}\) *Id.* at 128.
\(^{73}\) *Id.* at 124.
tion is whether the result can fairly be said to be imputable to the defendant . . . . If the term "cause" must be used, it can best be distinguished in this meaning as the "imputable" or "responsible" or "blamable" cause, to indicate the value-judgment involved.74

This has the obvious effect of fudging questions of fact and questions of value in that there is an implicit and sometimes explicit invitation to the jury to deploy the notion of "cause" functionally and morally for the attribution of responsibility and guilt and not exclusively analytically as a finding of fact. Thus, "moral instinct" is deployed to qualify "common sense" notions of but-for factual causation.75 "Causation" in law is therefore "like a portmanteau—there are two meanings packed into one word."76

Notwithstanding this duality, juries are frequently told that "causation" is wholly a matter of common sense. Thus, "'[c]ause' means nothing philosophical or technical or scientific. It means what you twelve men and women sitting as a jury would regard in a commonsense way as the cause."77 Where "the restoration of health [can] no longer be achieved, there is still much for a doctor to do, and he [is] entitled to all that is proper and necessary to relieve pain and suffering even if measures he [takes] may incidentally shorten life."78

[N]o people of common sense would say "Oh, the doctor caused her death." They would say that the cause of death was the illness or the injury, or whatever it was, which brought her into the hospital, and the proper medical treatment that is administered and that has an incidental effect on determining the exact moment of death is not the cause of death in any sensible use of the term.79

Some lawyers have found this evaluative approach difficult to accept: "[C]ause is an objective phenomenon; a matter of fact."80 However, the evaluative approach is well established and illustrated in cases where a victim of violent crime dies after receiving medical attention that may be thought to have broken the chain of causation between the original assault and the ultimate death. The criminal law of England and Wales is very unsympathetic to any such argument,

[Hold[ing that the accused's] acts did not need to be the sole or even the main cause of death, it being sufficient that his acts contributed significantly to that result, and that even though negligence in the [medical] treatment of the victim was the immediate cause of his death, [the jury] should not regard it as excluding the responsibility

74. GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 381 (2d ed. 1983).
75. Id. at 385.
79. Tur, supra note 77, at 78.
of the accused unless the negligent treatment was so independent of
his acts and in itself so potent in causing death that they regarded the
contribution made by his acts as insignificant.\textsuperscript{81}

Only in the most remarkable and rare case will medical treatment
break the chain and then it must be “palpably wrong.”\textsuperscript{82}

VII. EVALUATIVE STRANDS IN “INTENTION,” DOUBLE
EFFECT, AND “UNLAWFUL”

In \textit{Airedale N.H.S. Trust v. Bland}, Lord Goff referred to what he was
pleased to call:

\textit{[T]he established rule that a doctor may, when caring for a patient
who is, for example, dying of cancer, lawfully administer painkilling
drugs despite the fact that he knows that an incidental effect of that
application will be to abbreviate the patient’s life. Such a decision
may properly be made as part of the care of a living patient, in his
best interests; and, on this basis, the treatment will be lawful. More-
over, where the doctor’s treatment of his patient is lawful, the pa-
tient’s death will be regarded in law as exclusively caused by the
injury or disease to which his condition is attributable.}\textsuperscript{83}

This is exactly the rule that also applies in cases of assaults leading to the
death of the victim where better or more appropriate or earlier medical
treatment would have saved the victim’s life. This is a neat illustration of
the law’s preference for more than one argument leading to the same
conclusion. A doctor who knows that an “incidental effect” of the medi-
cation prescribed is to accelerate death may escape criminal liability be-
cause this is a non-attributable consequence under the benign umbrella of
the doctrine of double effect.\textsuperscript{84} But such a doctor may also escape crimi-
nal liability when the medical treatment factually causes death because
(by an almost willfully perverse legal fiction) when medical treatment is
within the range of medically proper treatment, the death is \textit{exclusively}
attributed to the pre-existing injury or illness. These two escapes some-
times merge into each other in legal arguments actually deployed in
courts; but, they are logically distinct: the doctrine of double effect is
scalar and proportional;\textsuperscript{85} the argument from legal causation is polar and
absolute. Moreover, the argument from legal causation is most effective
when the doctrine of double effect is most implausible.

A third means to the same end is provided by the circumstance that
whereas the jury is entitled to “find” intention where there is evidence of
virtual certainty of consequences, logically it is also entitled \textit{not} to “find”

\textsuperscript{82} See Regina v. Jordan, 40 Crim. App. R. 152 (1956); Richard H.S. Tur, \textit{Just How
\textsuperscript{84} See Anthony Arlidge Q.C., \textit{The Trial of Dr. David Moor}, CRIM. L. REV. 31, 38
intention.\textsuperscript{86} So here, too, in respect of what is widely regarded as quintessentially a question of fact—What did the accused actually intend?—the tribunal of fact is covertly invited to make a moral judgment such that whatever the actual subjective intention of the accused may have been, and to do so in order to exculpate a doctor whose pain killing drugs also killed the patient on a murder charge, by “finding” that there was no intention in law. Even more obviously, the concept of advertent recklessness includes a moral dimension because it requires not only that the accused knowingly took a risk but that the risk was unjustified in the context according to ordinary social standards.\textsuperscript{87} This “exerts a significant background influence . . . [and involves] an evaluation of the nature of the activity and the degree of the risk.”\textsuperscript{88} Here, too, the tribunal of fact may apply moral values to override a finding of fact.

A fourth means deploys the presence of “unlawful” within the definitional elements of a crime. Thus some include “unlawful” as part of the definition of assault\textsuperscript{89} and for others “the mens rea [of murder] is the intention un lawfully to kill or do serious bodily harm.”\textsuperscript{90} But at least two views run the other way: Both the Court of Appeal and the House of Lords held that the word “unlawful” in section 1(1) of the Sexual Offences (Amendment) Act 1976 “adds nothing . . . and should be treated as being mere surplusage.”\textsuperscript{91} One explanation for this radical divergence of opinion is that the different views reflect different conceptions of law: those who see “unlawful” as surplusage assume the correctness of the analytical approach; those who would include “unlawful” among the definitional elements of an offence presuppose the evaluative approach as valid. But it is then incumbent on the latter group to give some guidance as to what “unlawful” means. 	extit{Prima facie}, its inclusion in the definitional element of an offence is circular and senseless. Certainly murder is unlawful killing, but that is a conclusion, not a premise. To have sense, we need to know the factual components that constitute the offence. If not circular and senseless, the term seems empty of any recognisable content and merely provides a space for strong judicial discretion. There is a passage in a famous Scottish poem where the eponymous hero has come upon a coven of witches and warlocks dancing to the Devil’s bagpipes in a church around whose walls the dead stood upright in their open coffins holding candles by which the hellish contents of the holy table were

\begin{itemize}
\item \textsuperscript{86} Peter Mirfield, Letter to the Editor, \textit{Intention and Foresight of Virtual Certainty}, \textit{Crim. L. Rev.} 246 (1999).
\item \textsuperscript{87} \textit{MODEL PENAL CODE} § 2.02(2)(e) (1962) (stating that recklessness is conscious disregard of a “substantial and unjustified risk”).
\item \textsuperscript{88} \textit{ASHWORTH, supra} note 57, at 184-85 (citing D.J. Galligan, \textit{Responsibility for Recklessness}, \textit{31 CURRENT LEGAL PROBS.} 55, 70 (1978)).
\item \textsuperscript{89} See, e.g., Regina v. Williams, 78 Crim. App. R. 276 (1983); \textit{ASHWORTH, supra} note 57, at 326.
\item \textsuperscript{90} Biggs, \textit{supra} note 80, at 56 (emphasis added); see also Beckford v. The Queen, 1988 A.C. 130 (P.C. 1987).
\end{itemize}
plainly visible. There is a long and detailed catalogue in the poem and the passage concludes with a line hinting at even more and worse: "[w]hich even to name wad be unlawful." 92 I have long pondered what the poet might have meant one to understand by "unlawful"; it seems to me that he may well have intended one to read that as contrary to the moral law or contrary to natural law. That would provide both sense and content. But if that is the meaning to be attributed to "unlawful" or to "without lawful excuse" as these phrases occur in statutory and common law definitions or partial definitions of offences, then it is clear that the fact-finder is called on again also to make a moral judgment.

It is, of course, possible to unpick at least some of these examples. Some of the specific cases might attract constitutional objections in a legal system more enlightened than that of England and Wales. Consent might be defined in a tolerably non-evaluative way as "voluntary agreement by a person who understands the nature and consequences of what he or she is agreeing to. Silence is not consent, unless such silence is understood to be consent by prior agreement among the persons involved." 93 The duality of the common-law notion of causation might be denounced as manifestly irrational. There are certainly experienced and astute academic criminal lawyers in England who think it troubling that dishonesty is left open-ended and undefined and that it does all the work in some criminal offences. 94 But the issue is not whether the common law deploys embedded evaluations. Manifestly it does. Such embedded and covert evaluations are highly characteristic of the common law. That is not controversial. What is in issue is what response the presence of such embedded values ought to draw from those contemplating codification; in particular: Must codified criminal law be less morally nuanced or ethically sensitive than its common law counterpart? One objection to codification is precisely that such is the probable or certain result of codification.

VIII. FOUR KINDS OF CODIFICATION

The challenge to the codification project presented by the embedded and covert evaluations that characterise the common law and the criminal law of England and Wales should not lead to the absurd conclusion that one simply cannot codify the criminal law. Codes of criminal law are familiar features of legal systems around the world. Nonetheless, the special challenges that embedded evaluations present require a review of the forms that codification might take. The first of four models of codification is the most extreme; it is the Justinianic, Benthamite, Napoleonic,

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French style. This is a radical, revolutionary, rationalist, non-technical code addressed to the populace at large and entirely new. Thus:

Justinian, when he promulgated the *Corpus Juris Civilis*, sought to abolish all prior law. . . . Similarly, the French, when they codified their law, repealed all the prior law in areas covered by the codes. . . . Justinian and the French sought to destroy prior law for different but analogous reasons: Justinian sought to re-establish the purer law of an earlier time, the French to establish an entirely new legal order. In both cases the aims were essentially utopian. . . .

The ideology of the French codification accurately reflects the ideology of the French revolution.95

Only an exaggerated rationalism can explain the belief that history can be abolished by repealing a statute, yet the optimistic assumption of the time was that by reasoning from basic principles established by natural law thinkers, one could derive a legal system that would meet the needs of the new, revolutionary society. Although one cannot simply abolish the legal culture and thought-ways of a community, the fiction was certainly maintained by many jurists in France for several decades after the enactment of the Code Napoleon (i.e. the French Civil Code of 1804) that history was irrelevant to interpretation and application of the Code.

Consistent with its Utopian aspirations, one of the objectives of the French Revolution was to make lawyers unnecessary. There was a desire for a legal system that was simple, non-technical, and straightforward—one in which the obscurities and technicalities, often blamed on the legal profession, could be avoided. One way to do this was to state the law clearly in a straightforward fashion so that the ordinary citizen could read the law and understand his rights and obligations without having to consult lawyers. The French Civil Code was envisaged as a kind of popular book that could be put on the shelf next to the family Bible in every household; as a handbook for citizens, rather like the “small paperback” that Canadian citizens can buy for C$25 and contains everything one needs to know about the substantive criminal law in Canada.96 Indeed, some of the revolutionaries were so disillusioned with judicial law making disguised as interpretation that they sought, somewhat absurdly, to deny judges even the power to interpret legislation. But if the code was to be lawyer-proof and judge-proof, it had to be a comprehensive and exhaustive source of all law. It had to be complete, clear, and coherent. So the attempt was to construct a code with no gaps (to stop judges filling them). There could be no conflict in the provisions (to stop the judges exercising a creative choice). Nor could there be any ambiguities (for the same reason). So the radical separation of powers, whereby the legislature only made law and the judiciary only applied law, demands a comprehensive,


clear, and coherent code. Meanwhile the optimistic rationalism insisted
that the task could be done. But given the recognition by the English
Law Commission that common law defences are to be preserved, this
cannot be a model for codifying the Criminal Law of England and Wales,
even though this model has furnished much of the rhetoric that is
deployed to defend and advance the codification project.

On the basis of persuasive, even compelling arguments, Professor J. C.
Smith concludes:

The new draft Criminal Code which, it is hoped, will, in due course
provide definitions of all offences known to the law, would leave in
existence any power the courts now have "to determine the exist-
ence, extent or application of any rule of the common law" which
justifies or excuses the doing of an otherwise criminal act . . . . [So]
under the Code common law offences would disappear but com-
mon law defences, to this extent, would be retained.97

Thus, to such a persuasion any (morally) acceptable Criminal Code
would not seek exclusively and exhaustively to define circumstances of
justification or excuse, that is, circumstances that defeat the normal legal
attribution of legal consequences to the legally defined fact patterns. But
if the moral sentiment of the public is a source, then the code is not ex-
haustive and judges will have a creative role in that they must marry the
provisions of the code and the (changing) moral sentiments of the public.
Such a code is not one that seeks to abolish history; rather it is a code that
consolidates past experience and seeks to tap into the historic values of a
community and is thus more Germanic than French.

The second of four models of codification is indeed the Germanic style
associated with the Savignyan and the Historical School, celebrating tra-
dition and culture, and addressed to a professional elite. (The German
Civil Code of 1896 (effective in 1909) was historically oriented, scientific,
and professional.)98 Much of the responsibility for the difference be-
tween French and German approaches rests with Savigny, perhaps the
single most famous thinker in the history of European codification. Of
course, there was much interest in codification in Germany and the Na-
poleonic Code (1804) was much admired. There were advocates strongly
urging that Germany follow France's lead. Savigny prevented this by ar-
uing his powerfully persuasive "Volksgeist thesis": Unless a code corre-
sponded to the spirit of a people, it could not be successfully
implemented. This in turn was closely linked to the historical school in
jurisprudence whose main tenets include the notion that the law of a peo-
ple is an historically determined product of that people's development
and not something to be gleaned from the rationalistic principles of natu-
ral law and imposed from above. Consequently, a thorough study of ex-
isting German law and of its historical development was the necessary
prelude to effective codification. Under Savigny's influence, German

97. SMITH, supra note 15, at 5-6.
98. MERRYMAN, supra note 95, at 31.
scholars turned their attention to an intensive study of legal history. Savigny's idea was that by this study one would glean the historically derived principles that were an essential part of the law of a people. These principles, rather than the \textit{a priori} rationalist principles of natural law, would then be the basis for a code that grew out of its own culture. In this way, Savigny, as has often been remarked, delayed codification in Germany for a century (i.e. French Civil Code 1804; German Civil Code of 1896, effective 1909).

Finally, the Germans were convinced that it was neither possible nor desirable to rid the world of lawyers though Adolf Hitler, apparently, had different ideas: "I shall not rest content until every German sees that it is a shameful thing to be a lawyer."\textsuperscript{99} The idea that law could be clearly and simply stated so that it could be understood and applied by everyone was expressly rejected. The German view was that lawyers would be needed to interpret and apply the law and, accordingly, that the code should be prepared to be responsive to the needs of those trained in the law. Thus the German Civil Code of 1896 is the very antithesis of revolutionary. It was not intended to abolish prior law and substitute a new legal system. The idea was to codify emergent historical principles gleaned from painstaking historical study of German law and culture. Here there are no \textit{a priori} assumptions about man's nature and fundamental human rights; rather, there is a painstaking historical and empirical study of existing German law and its rational reconstruction in the form of a code, which is not conceived of or intended to be a textbook for the layman. Rather it is a tool to be used chiefly or solely by those trained in the profession of law. Professionals may more readily understand that the simple propositions of the code are to be read subject to wider legal and social values. In principle, therefore, such a code could be constructed in a way that allows current legal and social values to feature in legal reasoning so as to defeat the plain meaning of the text where circumstances morally call for it.

Beyond these two classical models of codification there are two others that must be mentioned in the context of an Anglo-American law but do not greatly contribute to the reaching of a conclusion. A third style of code is the English consolidation style, which is technical, legislative, and essentially gathers together in one consolidated statute legislation previously enacted in piecemeal fashion over many years. Such a "code," if code it is at all, does not purport to be an exhaustive and exclusive source of all law, is not founded in either rationalist or historical principles, and is not aimed specifically at a universal audience. It is neutral as to whether current legal or social values can override the plain words of the written law.

A fourth approach is the American Model Penal Code ("MPC"), which involves the restatement of an area of law. It is advisory only and pro-

\textsuperscript{99} KENNETH R. REDDEN & ENID L. VERON, MODERN LEGAL GLOSSARY 572 (1980).
vides guidance that states may, but need not, adopt. Whereas that may provide a model for attempts to harmonise criminal law in Europe or in Australia, it may have only a limited contribution to make to resolving the conundrums of the codification of the criminal law of England and Wales. Indeed, it may be altogether too rigidly structured. Consider the defence of necessity. According to Glanville Williams, "[t]he peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any . . . precision . . . [i]t is in reality a dispensing power exercised by the judges where they are brought to feel that obedience to the law would have endangered some higher value."¹⁰⁰ This is a highly defeasibilist approach to necessity and empowers the judge to defeat the normal attribution of the legally defined consequences even though all the conditions determined in the protasis are present. The MPC is much more exclusive. The harm is limited to those situations where "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and . . . a legislative purpose to exclude the justification claimed does not plainly appear."¹⁰¹ The final clause may well be effective to take away the apparently wide and subjective exculpatory condition in the main part. Certainly a Scottish Court was worried recently about the apparent breadth of the excuse:

[T]he formulation of the defence of necessity in the American Law Institute’s Model Penal Code suggesting that it was available where the actor believed that the evil sought to be avoided was greater than that sought to be prevented by the law defining the offense charged appeared to suffer from a number of defects, produced an element of personal belief rather than objective reasonableness, defined the test in terms of comparative evil without apparent regard to the quality of the conduct threatened, appeared to justify a crime carried out to prevent another crime whenever the threatened crime involved a greater harm, and did not seem to require immediacy in any way . . . .¹⁰²

The approach in the English courts, adopted in the Scottish case, is that the jury should be directed to determine two questions:

[F]irst, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation, he had good cause to fear that otherwise death or serious physical injury would result; and . . . if so, whether a sober person of reasonable firmness, sharing the characteristics of the accused, would have responded to that situation by acting as the accused had acted?¹⁰³

If the answer to both these questions was "Yes," then the defence of necessity was established.¹⁰⁴ It appears that the MPC provision is too

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¹⁰¹. Model Penal Code § 3.02 (1962).
¹⁰⁴. Id.
readily satisfied but that moral consideration may be wholly foreclosed by statute, whereas the English approach is embedded in current social morality. If so, the Model Penal Code does not match the ethical sensitivity of the common law.

IX. CONCLUSION

An obvious question is: What style of code is appropriate to the Criminal Law of England and Wales? This question rightly assumes that a code of criminal law is appropriate. Even staunch defenders of the common law recognise that it “is not an apt instrument of social order . . . where the task is that of declaring what acts shall be treated as crimes.”105 Indeed “its criminal branch has never formed one of the proudest chapters in the common law.”106 Given the embedded evaluations that characterise the common law in general and the criminal law in particular, and the acceptance by the Law Commission (in agreement with the views of Stephen, J. and Professor Smith) that exhaustive and exclusive definition would inevitably and unjustly lead to the conviction of the morally blameless, it appears that the Justinianic, Benthamite, Napoleonic model is wholly inappropriate. But that is what I have called the “analytical” model, only writ large. Perhaps the Law Commission should adopt the Germanic cultural model instead and take embedded evaluations seriously as a widespread and characteristic feature of the law and not at all “unusual.” But that recognition carries with it a further question about the appropriate structure of the legal proposition for a culturally rooted, ethically sensitive code. How might one combine the Benthamite merits of definitional rigour and clarity with the Germanic sensitivity to culture and value? My own answer to this leads into my synthesist approach to law, which I call “defeasibilism.”107 This approach holds that the shape of the legal proposition is an open-ended defeasible normative conditional. In other words, the normal attribution of a legally determined consequence to a legally determined cluster of facts (If A is, B ought to be) does not come equipped with a full-stop but is open-ended and susceptible of being overridden for good reason (If A is, B ought to be, unless . . .”). But the difference is not merely one of punctuation. This approach calls for a radical but rational reconstruction of the legal materials in a way that honours but does not obsess on Benthamite definitional rigour. It also honours embedded evaluations whilst seeking to put them firmly in their proper place, as an occasional moral override and not as a first opaque port of call. In this model, “causation” should lose its portmanteau character and be deployed as a wholly factual definitional element; but there should be a facility to recognise that notwithstanding that, for example, a doctor has factually caused death, knowing that death is virtually certain, there are overriding (moral) reasons why he should

105. Fuller, supra note 6, at 152-53.
106. Id. at 153.
107. Tur, supra note 7, at 355.
not be charged or convicted of murder. The point of this conceptual re-
structuring is to preserve definitional rigour for the wide range of normal
situations and to allow override for good and transparent reason where
the circumstances are in some significant sense out of the ordinary. Over-
riding values and cultural practices can be, and are, included in codes or
draft codes. Thus, article 242 of the German Civil Code provides that
“the debtor is bound to effect performance according to the requirements
of good faith, giving consideration to common usage” and article 27 of a
draft Australian Contract Code states that “a person may not assert a
right or deny an obligation to the extent that it would be unconscionable
to do so.”¹⁰⁸

An armada of English codifiers have set sail from time to time on great
voyages of discovery without adequate maps or charts. They have not
deployed an adequately sensitive or flexible conception of law. The ana-
lytical model that they have favoured has left the codification project in
the doldrums and at risk of being permanently marooned. A wholly leg-
islated criminal law on this model would be far too thin to reflect the
moral complexities. For example, reverting briefly to “causation,” is the
factual strand or the evaluative override quintessentially the law? Is it
perhaps both? On the analytical approach, it is exclusively the former,
which unduly narrows and impoverishes the concept of law and fits ill
with a codification project that seeks, as Stephen J., Professor Smith, the
Law Commission, and I all do, somehow to incorporate but not freeze
moral values into the criminal code. I conclude that this can be best
achieved by a conception of law as open-ended, defeasible normative,
conditional propositions.

¹⁰⁸. Law Reform Commission of Victoria, An Australian Contract Code,