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# Fair Labelling in Criminal Law

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'Fair labelling' has become common currency in criminal law scholarship over recent decades, but the principle's scope and justification has never been analysed in detail. Basic questions remain unanswered, such as who these 'labels' are intended for and whether they assume the same importance in respect of both offences and defences. This article traces the intellectual history of the principle and examines its possible justifications in respect of offence labelling, noting that labelling is important in two distinct senses: that of description, and that of differentiation. It goes on to sketch out some considerations which are of importance in the principle's application, before concluding with a discussion of its applicability to defences.

## INTRODUCTION

In August of 2006, it was reported that the Attorney-General's office had 'no idea' how many criminal offences existed under English law, in response to a claim that over 3,000 criminal offences had been created by legislation from May 1997 onwards, when the current Labour government had come to power.[1]

The fact that there are probably over 10,000 different criminal offences in English law[2] raises obvious concerns about the extent of criminalisation, but it also raises a less obvious question – that of taxonomy. Is criminal behaviour so complex and multi-faceted that it must be subdivided and classified in such detail? And what purpose does such detailed classification serve?

The number of criminal offences is not, it should be clear, an inevitable consequence of the breadth of the criminal law. The level of subdivision found in English criminal law is in significant contrast to that found north of the Border, perhaps because of the historic lack of legislative intervention in Scots criminal law.[3] For example, part 1 of the Sexual Offences Act 2003 contains 55 substantive offences, whereas Part 3 of the (unofficial) Draft Criminal Code for Scotland[4] would create only 12 – even though both criminalise a broadly similar

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[1] N. Morris, 'Blair's 'frenzied law-making' has created a new offence for every day spent in office', *The Independent,* August 16, 2006, 2.

[2] In 1980 a special committee appointed by JUSTICE compiled an 'incomplete' list of over 7,200 criminal offences in English criminal law, suggesting it was 'probable that a complete list might contain far more than that'. See JUSTICE, *Breaking the Rules* (London: Justice, 1980) para 2.18.

[3] See C. H. W. Gane, 'Criminal Law Reform in Scotland' (1998) 3 *Scottish Law and Practice Quarterly* 101.

[4] The Draft Code, although based on the existing Scots law, is not intended as an exact restatement. See E. Clive, P. Ferguson, C. Gane and A. McCall Smith, *A Draft Criminal Code for Scotland with Commentary* (Edinburgh: Scottish Law Commission, 2003) 3.

range of conduct.[5] Scotland has a single offence of assault, whereas England has a bewildering array of offences against the person – some common law, some statutory – including assault, battery, and the various offences contained in the Offences Against the Person Act 1861. The same might previously have been said about offences of deception where Scots law has long had a single, general offence of fraud,[6] in comparison to the eight offences of deception that were recognised by English law under the Theft Acts 1968 and 1978 (and the common law offence of conspiracy to defraud).[7] Following concerns that the eight statutory offences were unduly complex and hindered effective prosecutions,[8] however, they have been abolished and replaced with a single offence of fraud.[9] By contrast, the recent proposals of the Law Commission for England and Wales on homicide would subdivide homicide into the three separate categories of first degree murder, second degree murder and manslaughter, rather than the present two tier structure of murder and manslaughter alone.[10]

It is not only the level of subdivision of offences that can differ considerably between jurisdictions. There are numerous examples in England and Scotland of offences that are defined in substantially the same way and encompass broadly the same range of conduct but are simply called by a different name. To name but a few: manslaughter in England would be culpable homicide in Scotland; handling stolen goods would be reset; blackmail would be extortion.

It is these issues of taxonomy – the naming and classification of offences – that we intend to examine in this paper. It should be made clear at the outset that our concern does not extend to whether a particular type of behaviour should be criminalised at all.[11] This paper starts from the assumption that there is a particular sub-set of behaviour that should be deemed criminal, but questions instead how such behaviour should be designated and classified.

Criminal lawyers have sometimes been accused of paying undue attention – particularly in the teaching of criminal law – to questions of classification or designation, as opposed to more fundamental issues of criminalisation or punishment.[12] But such attention has generally been descriptive and unreflective. The need to distinguish between different degrees of homicide has admittedly received some discussion, but the proper extent of differentiation between other criminal offences has generally not been examined in the same level of detail. It has, however, become common for criminal lawyers to at least identify the taxonomical problem, by reference to what has been called the 'principle of fair labelling'. It is the aim of this paper to subject the principle of fair labelling to a detailed and critical examination, focussing in

[5] For further discussion of the comparison, see E. Clive, 'Drafting the Law on Sexual Offences: a Comparison of the Draft Criminal Code for Scotland and the Sexual Offences Act 2003' 2006 JR 55.
[6] There are, however, numerous statutory provisions – mostly of UK-wide application – which create offences analogous to fraud, and overlapping with the general offence (see, eg, *Hamilton v Byrne* 1997 SCCR 547). Most of these are very narrow in their sphere of operation. See generally G. H. Gordon, *The Criminal Law of Scotland* (Edinburgh: W. Green, 3rd ed, 2002, by M. G. A. Christie) chap 19.
[7] The common law offence was preserved by s 5(2) of the Criminal Law Act 1977.
[8] See Law Commission, *Fraud* (Law Com No 276, 2002).
[9] Fraud Act 2006, s 1. Although s 1 of the 2006 Act creates a single offence of fraud, it can be committed in three different ways, set out in ss 2-4 (fraud by false representation, fraud by failing to disclose information, and fraud by abuse of position). It can therefore, like manslaughter or culpable homicide, be classified as a 'differentiated offence' (the term suggested by V. Tadros, 'Rape Without Consent' (2006) 26 OJLS 515).
[10] Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) para 1.67.
[11] For a general exposition of the minimum requirements that behaviour should satisfy in order to fall within the ambit of the criminal law see, eg, A. Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 LQR 225; D. Husak, 'The Criminal Law as Last Resort' (2004) 24 OJLS 207.
[12] See P. Alldridge, 'What's Wrong with the Traditional Criminal Law Course?' (1990) 10 LS 38, 39.

particular on the various justifications that have been advanced for the principle and establishing which – if any – are convincing. It is then, on the basis of this examination, that some implications for issues of taxonomy in the criminal law will be identified.

## FAIR LABELLING: A BRIEF HISTORY

The principle of fair labelling in the criminal law can be traced back to Andrew Ashworth, writing in 1981.[13] In an essay entitled 'The Elasticity of *Mens Rea*', the primary focus of which was the issue of transferred intent, Ashworth noted that although the criminal law *could* operate with only a very small number of offences, with moral culpability reflected in sentencing, 'we shrink from this in the belief that the label applied to an offence ought fairly to represent the offender's wrongdoing'.[14] He termed this principle 'representative labelling'.[15] The term 'fair labelling' appears to have first been used by Glanville Williams, in a response to Ashworth written a year later entitled 'Convictions and Fair Labelling',[16] and it is this term that has come to be the generally accepted one, even by Ashworth himself.[17] Williams did not dispute the basic principle of fair labelling but instead disagreed with some of Ashworth's conclusions on how it should be applied to cases involving transferred intent.

The principle of fair labelling now appears in Ashworth's *Principles of Criminal Law* (and indeed other texts on criminal law)[18] as one of a number of principles relating to the conditions for liability with which, in his opinion, the criminal law of any jurisdiction should comply.[19] The concern of fair labelling, Ashworth states:

> is to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking.[20]

In his original paper on representative labelling, Ashworth did not elaborate on the principle at any great length, understandably, given that the main concern of the paper was not the principle itself, but transferred intent. Neither did Williams in his reply, again because the

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[13] Although for a similar argument made in a paper published in 1978, albeit one that does not use either of the terms 'fair labelling' or 'representative labelling', see D. A. Thomas, 'Form and Function in the Criminal Law', in P. R. Glazebrook (ed), *Reshaping the Criminal Law* (London: Stevens, 1978), 21. Here, Thomas argued for narrowly defined offences (as opposed to broadly defined offences encompassing a wide range of conduct) on the basis that this minimises judicial discretion in sentencing.

[14] A. Ashworth, 'The Elasticity of *Mens Rea*' in C. F. H. Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworth, 1981) 45, 53.

[15] *ibid* 53.

[16] G. Williams, 'Convictions and Fair Labelling' (1983) 42 CLJ 85. Williams thought that fair labelling was a better term chiefly because 'representative' can also refer to the few standing for the many (85).

[17] See A. Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 5th ed, 2006) 88. Although *cf.* S. Shute and J. Horder, 'Thieving and Deceiving: What is the Difference?' (1993) 56 MLR 548, 550; J. Horder, 'Rethinking Non-Fatal Offences Against the Person' (1994) 14 OJLS 335, 339; W. Wilson, 'Murder and the Structure of Homicide', in A. Ashworth and B. Mitchell (eds), *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000) 21, 22.

[18] See, eg, A. P. Simester and G. R. Sullivan, *Criminal Law: Theory and Doctrine* (Oxford: Hart, 3rd ed, 2007), where it is discussed in the context of 'values to which the law should aspire' (21, 30) and J. Herring, *Criminal Law: Texts, Cases and Materials* (Oxford: Oxford University Press, 2nd ed, 2006), where it is cited as one of five 'principles' of criminal law (19).

[19] Ashworth, n 17 above, 88-90 (fair labelling). For the other principles, see 85-92.

[20] *ibid* 88.

primary focus of his paper lay elsewhere. In *Principles of Criminal Law*, there is a more detailed consideration of the issue, but, as even Ashworth himself would most likely accept, it is not examined in any great depth.[21] This would not be at all problematic if the principle had been given detailed consideration elsewhere, but it has not. It does seem that the papers written by Ashworth and Williams and the discussion in Ashworth's *Principles of Criminal Law* still contain the most comprehensive account of fair labelling's importance and underlying rationale.[22]

That is not to say that the principle of fair labelling has been neglected – far from it. It has been utilised either to justify or to criticise all sorts of proposals and arguments such as: retaining separate offences of murder and manslaughter[23] (or, in Scotland, murder and culpable homicide);[24] distinguishing between first and second degree murder and including killing under provocation and diminished responsibility within the latter;[25] distinguishing theft from obtaining property by deception;[26] rejecting a general offence of dishonesty;[27] distinguishing between first and second degree rape;[28] distinguishing between rape and other serious sexual offences;[29] classifying non-fatal offences against the person according to the nature of the injury suffered[30] and/or the *mens rea* of the perpetrator;[31] the creation of a series of new crimes consisting of multiple wrongdoing;[32] and the creation of a new offence of domestic abuse.[33]

Indeed, while this is not by any means true of all of the sources referred to above, the importance of fair labelling has sometimes been assumed to be self-evident, and fair labelling has been invoked without any consideration of its underlying principles, something that we ourselves have been guilty of on a number of occasions.[34]

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[21] It is discussed in what is the equivalent of two pages of text (*ibid* 88-90).
[22] See also C. M. V. Clarkson, *Understanding Criminal Law* (London: Sweet and Maxwell, 4th ed, 2005), 9-12.
[23] C. M. V. Clarkson, 'Context and Culpability in Involuntary Manslaughter', in Ashworth and Mitchell, n 17 above, 133, 141-142; Wilson, n 17 above, 22-24; Law Commission, *A New Homicide Act for England and Wales?* (CP No 177, 2005) paras 1.45-1.46.
[24] *Report on Insanity and Diminished Responsibility* (Scot Law Com No 195, 2004) para 3.49.
[25] As proposed by the Law Commission. See the consultation paper (n 23 above) and the resulting report (n 10 above). For criticism, also on the basis of fair labelling, see O. Quick and C. Wells, 'Getting Tough With Defences' [2006] Crim LR 514, 516; V. Tadros, 'The Homicide Ladder' (2006) 4 MLR 601, 615-617; A. Ashworth, 'Principles, Pragmatism and the Law Commission's Recommendations on Homicide Law Reform' [2007] Crim LR 333, 339; R. Taylor, 'The Nature of 'Partial Defences' and the Coherence of Second Degree Murder' [2007] Crim LR 345, 354.
[26] C. M. V. Clarkson, 'Theft and Fair Labelling' (1993) 56 MLR 554, 554; Shute and Horder, n 17 above, 550, 553. *Cf.* P. R. Glazebrook, 'Revising the Theft Acts' [1993] CLJ 191; P. R. Glazebrook, 'Thief or Swindler: Who Cares?' [1991] CLJ 389.
[27] Law Commission, n 8 above, para 5.35.
[28] H. Power, 'Towards a Re-definition of the *Mens Rea* of Rape' (2003) 23 OJLS 379, 401.
[29] Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (London: Home Office, 2000) para 2.9.1; Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences* (DP No 131, 2006) para 4.13, 4.17; Law Reform Commission of Victoria, *Discussion Paper on Rape and Allied Offences: Substantive Aspects* (LRVC No 2, 1986), 51.
[30] Horder, n 17 above, 345-347.
[31] *ibid* 345-347.
[32] B. Mitchell, 'Multiple Wrongdoing and Offence Structure: a Plea for Consistency and Fair Labelling' (2001) 64 MLR 393, 412.
[33] V. Tadros, 'The Distinctiveness of Domestic Abuse: a Freedom-Based Account', in R. A. Duff and S. P. Green (eds), *Defining Crimes* (Oxford: Oxford University Press, 2005) 119, 132.
[34] J. Chalmers and F. Leverick, *Criminal Defences and Pleas in Bar of Trial* (Edinburgh: W. Green, 2006) paras 3.03, 5.31, 10.02, 10.24, 11.01 and 11.20; F. Leverick, *Killing in Self-Defence* (Oxford: Oxford University Press,

The aim of this paper is to rectify our previous omissions and to consider in more detail some of the questions whose answers we have previously taken for granted. Why *does* fair labelling matter so much? What are its underlying justifications? Are they convincing? What implications does the principle have for the criminal law? Is its ambit solely restricted to criminal offences, or does it have any application to defences? To what audience(s) are labels addressed?

It is to these issues that the paper now turns. Although, as we noted at the outset, the sheer number of criminal offences which currently exist gives rise to fair labelling issues, our concern at this stage is merely to attempt to establish such general principles as may underpin the concept of fair labelling. Accordingly, the following discussion is concerned only with what might be regarded as 'core' criminal offences. We would not, at this stage, rule out the possibility that fair labelling might operate differently in respect of certain types of offences such as regulatory crimes.

## WHAT IS LABELLING?

Labelling is defined in the *Oxford English Dictionary* as "to describe or designate …; to set down in a category".[35] Thus, taken at its broadest, to label might mean simply to describe without any accompanying element of categorisation. It is not impossible to imagine a system of criminal law that operated on this basis. The defendant's conduct could simply be set out in narrative form in an indictment and recorded in the same way on conviction. There would, of course, have to be a mechanism for arguing that the facts libelled did not disclose a criminal offence (or possibly that some of them were extraneous and prejudicial), but that would not affect the principle. A jury could be invited simply to delete any parts of the narrative not proven beyond a reasonable doubt, subject again to any claims that the verdict returned disclosed no crime. Indeed, Scots law seems formally to endorse the "narrative" approach, as there is express statutory provision to the effect that no label (*nomen juris*) need be specified in an indictment – it is sufficient that the facts libelled constitute a crime.[36]

Such a system would, of course, be close to unworkable in practice. Efficiency inevitably triumphs over comprehensiveness, which is why in Scots law "most modern indictments do contain what amounts to a *nomen juris*, and convictions are still normally regarded as convictions for named offences".[37] Given that some offenders have very extensive criminal records, the sheer volume of information generated would make decision making for those needing to utilise the information incredibly time consuming. Furthermore, avoiding the use of offence names would undermine comparative justice by making it more difficult to ensure

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2006), 174; J. Chalmers, 'Just an Expert Group That Can't Say No: Reforming Corporate Homicide Law' (2006) 10 Edin LR 290, 291.

[35] Oxford English Dictionary online, at http://dictionary.oed.com/cgi/entry/50128515 (last visited 6 November 2007).

[36] Or complaint (the equivalent document in summary procedure): Criminal Procedure (Scotland) Act 1995 Sched 3 para 2. Although in principle it was necessary to specify the *nomen juris* in the "major premise" of the indictment prior to the Criminal Procedure (Scotland) Act 1887, it seems to have been possible even then to charge an "innominate offence" by simply summarising the salient facts in place of such a label: *Charles Costello* (1882) 4 Coup 602.

[37] Gordon, n 6 above, xi. As such, schedules of previous convictions will not set out previous indictments at length, but will instead be comprised primarily (if not exclusively) of details such as offence names and the sentences imposed.

that like cases were treated alike. Likewise, in relation to statutory offences, the absence of any indication of the statutory provision concerned could mean that the defendant did not receive fair notice of the possible penalties and might cause later difficulties in establishing the range of sentences open to the court.[38]

But, questions of workability aside, would the narrative approach constitute "labelling"? On a very broad definition of the term it would – a description has been attached to the offender's behaviour. On a narrower definition – whereby labelling is understood to require an element of both description *and* categorisation – it would not. This paper proceeds on the basis that labelling is more than simply describing and also involves an element of categorisation – of grouping like with like.

If labelling is conceived of as at least in part a process of categorisation, however, it could be said to operate on both a macro and micro level. At a macro-level, most systems of criminal law – either formally or informally – group individual offences into broader categories. The Model Penal Code, for example, formally divides offences into five families (those involving danger to the person; against property; against the family; against public administration and against public order and decency). The families are further subdivided before the level of the individual offence is reached – "offenses involving danger to the person", for example, is subdivided into "criminal homicide"; "assault; reckless endangering; threats"; "kidnapping and related offenses; coercion" and "sexual offenses", and individual offences are explicitly named.[39] The particular groupings will differ depending on the code concerned, although a significant degree of similarity is to be expected: it is difficult to imagine a sensible scheme classifying rape alongside embezzlement, for example. Such categorisation allows for efficient draftsmanship: definitions which are common to a group of offences can be conveniently located in a manner which is both accessible and avoids unnecessary repetition.[40] The grouping of offences might also be helpful for procedural and sentencing reasons – indicating which convictions should result in inclusion on the sex offenders register, for example.[41] Thus even uncodified systems tend to group offences informally for such purposes, but such groupings are, in the context of the criminal law as a whole, unsystematic, overlapping and non-exhaustive.

Our concern, however, does not lie at the macro-level of categorisation. Indeed, it might be doubted whether this really has much to do with labelling at all. Our concern is at a micro-level – with the way in which the range of behaviour that is deemed to be "criminal" is divided into individual offences *and* the names or shorthand descriptions that are attached to these offences for recording purposes.

This leads us on to a distinction to which we return throughout this paper: that between differentiation and description. It might be thought that the language of "labelling" could refer only to the description attached to the offender's conduct, but in fact one of the considerations which is often taken to underpin fair labelling is the need to differentiate between different forms of wrongdoing. This could be achieved without labels in the usual

[38] Thus despite the rule that no *nomen juris* need be specified in a Scottish indictment or complaint, it appears that it is nevertheless necessary to specify the statute concerned in charging a statutory offence: *Hastie v Macdonald* (1894) 6 Adam 505.
[39] Model Penal Code, arts 210-213.
[40] See, eg the definitions of "sexual intercourse" and "deviate sexual intercourse" in art 213.0 of the Model Penal Code.
[41] See further below, n 104 and accompanying text.

sense, but instead by reference to section numbers in a code or statute, which might itself attach no "label" to the offender's conduct, but simply set forth a definition of an offence. That would provide a basis for criminal justice professionals, at least, to sensibly interpret an defendant's criminal record, but might be of little practical use to the general public.

To use a crude metaphor, differentiation refers to the box in which the offender is placed, while description refers to what is written on the side of the box. We do not mean to suggest that these two senses are entirely separable – in practice, for example, a description of conduct as manslaughter draws explanatory value from the fact that it has in some way been differentiated from murder. Ideally, however, and particularly in areas where the criminal law's structure may be less well understood by the general public, descriptive labels should be intelligible on a freestanding basis.

## WHY DOES LABELLING MATTER?

A further preliminary question is whether the label attached by the state to an offender's conduct matters at all. The answer to this is that labelling of criminal offences clearly does matter to *some* extent. We have already seen that it would be impractical to operate a purely descriptive system of criminal law whereby the offender's conduct is set out in narrative form without any attempt to categorise. At the other extreme, the criminal law could dispense with description entirely, convicting offenders merely of 'an offence', and leaving all the work to be done in sentencing, regardless of whether the conduct in question involved killing, sexual assault or shoplifting. But this would be equally impractical and no rational system of criminal law could operate in this manner. Quite apart from the fact that the severity of sentencing is a very blunt tool for assessing the level of a person's wrongdoing, it may also paint an inaccurate picture – a sentence may, for example, be substantially aggravated or mitigated as a result of factors which are unrelated to and tell us nothing about the offence itself or the offender's culpability.

Given that a criminal record has a well-documented deleterious effect on employability and earning power,[42] it would clearly be unfair on an offender for her criminal record to misrepresent her wrongdoing. Employers likewise would seem to have a legitimate interest in knowing whether a prospective employee has a criminal record,[43] and are surely entitled to know at least whether her crime was broadly one of dishonesty, violence, sexual misconduct, or merely a minor public order offence. Such knowledge may, indeed, be essential in order to comply with statutory obligations such as those under the Protection of Children Act 1999,[44] and it is possible that the employer's knowledge might be relevant to future questions of vicarious liability.[45]

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[42] See the studies cited by H. Lam and M. Harcourt, 'The Use of Criminal Record in Employment Decisions: the Rights of Ex-offenders, Employers and the Public' (2003) 47 *Journal of Business Ethics* 237, 242.

[43] At least within the limits established by the Rehabilitation of Offenders Act 1974.

[44] Or, in Scotland, the Protection of Children (Scotland) Act 2003.

[45] See *Mattis v Pollock* [2003] 1 WLR 2158, *per* Judge LJ at [30], where some weight appears to be placed on the defendant's knowledge of a bouncer's prior violent conduct (in this case, during the course of his employment) in approaching the issue of vicarious liability. Knowledge (or lack of knowledge) of a prior criminal record would be of clearer relevance if it were alleged that the employer was personally liable in negligence as a result of the decision to employ or deploy the employee: on the difficulties with such claims, see F. D. Rose, 'Liability for an Employee's Assaults' (1977) 40 MLR 420, 435.

Even in this broad sense, the law sometimes fails. An example is the Scottish case of *HM Advocate v Forbes*,[46] where the accused[47] was alleged to have broken into a flat with the intent to rape the occupant (he had removed his clothing and was carrying a tube of cream and a garment fashioned as a hood). Although Forbes was charged initially with 'housebreaking with intent to rape', the appeal court held that no such crime was recognised by Scots law, and that the appropriate charge was one of breach of the peace.

But if we accept that labelling matters at least to some degree, what is *fair* labelling? How narrow does the categorisation of offences need to be in order to be 'fair'? What does fairness mean in this context? Could we, as Paul Robinson has suggested,[48] define offences in the broadest of terms (for example 'injury to a person'[49] or 'damage to or theft of property'[50]) and leave the majority of work to be done at the sentencing stage? Or would we lose something of importance to the criminal law by doing so?

In attempting to address some of these questions, it may be productive to start by considering in more detail why labelling matters. In his original exposition of the concept in 1982, Ashworth himself said very little about why labelling is important. He dealt with the issue only towards the end of his paper and stated that, while it might be assumed that at the time of the court hearing the police, offenders, court officials and so on will be aware of the circumstances of any offence, and will not judge it purely by its legal label:

> [O]nce the label is entered on the person's criminal record the passage of time will dim recollections of the precise nature of the offence and may result in the label being taken at face value. Both out of fairness to the individual and in order to ensure accuracy in our penal system, therefore, the legal designation of an offence should fairly represent the nature of the offender's criminality.[51]

In *Principles of Criminal Law*, Ashworth is more expansive, noting essentially two reasons why fair labelling is important, namely 'proportionality' and 'maximum certainty'.[52] In the section headed 'proportionality', it becomes clear during the course of the discussion that the main concern is actually fairness to offenders. The point being made under the heading 'maximum certainty' is less clear, but Ashworth touches upon the importance of legal definitions reflecting 'common patterns of thought in society' (although without really explaining why this matters) and the argument that broad labels give too much discretion to sentencers and to officials charged with enforcing the law.[53] All of these themes are explored in more detail below.

## WHY IS LABELLING IMPORTANT?

### Fair labelling acts as a check on sentencing discretion

[46] 1994 JC 71. See J. Ross, 'Housebreaking With Intent' 1994 SLT (News) 315.
[47] "Accused" is the Scottish equivalent of the English term "defendant". We use the latter term throughout this paper except where we are specifically referring to Scottish cases or procedure, and do likewise with the terms "complainant" (English) and "complainer" (Scottish).
[48] P. H. Robinson, *Structure and Function in Criminal Law* (Oxford: Clarendon Press, 1997), 183.
[49] *ibid* 186.
[50] *ibid* 188.
[51] Ashworth, n 14 above, 56.
[52] Ashworth, n 17 above, 88-89.
[53] *ibid* 89.

One argument that has been used for fair labelling is that broad offence labels can give too much discretion to sentencers. Ashworth himself makes this argument in *Principles of Criminal Law*[54] and the point has also been made by Clarkson,[55] who argues that the present offence of manslaughter in English law fails to distinguish sufficiently between different degrees of blameworthiness, placing too much power to decide the fate of the offender in the hands of sentencers.

It might be said straight away that this is only a concern if allowing sentencers broad discretion is thought to be undesirable. But then it could be that what is really the issue here is that, as Thomas puts it, if offence labels are too broad 'the sentencer will be left to determine for himself some facts which are critical to sentence' and is 'unnecessarily given authority which would be better placed with the jury and the defendant is deprived to a significant extent of the procedural protections of the trial process', such as 'the full protection of the formal indictment, the rules of evidence and proof beyond reasonable doubt'.[56] This may well be a valid point, but it is not one that is necessarily going to be addressed by fair labelling.

For one thing, the protections that Thomas refers to are more theoretical than real, given that the vast majority of defendants plead guilty and do not go through a trial process at all.[57] But aside from this, the argument has less force in jurisdictions which operate relatively flexible sentencing regimes. English criminal law, to the extent that it is based on statute, at least prescribes maximum penalties for many offences, but in Scotland the vast majority of the criminal law is found in the common law and has no maximum penalties attached, and so the subdivision of substantive offences often has no effect on the maximum sentence permitted.

Where maximum penalties are prescribed, the breadth of the offence is an important factor: the broader the range of conduct caught by a particular offence, the less useful the maximum penalty will be as a guide for sentencers. Here, fair labelling is important in the sense of differentiating between different types of criminal conduct. Controlling sentencing discretion is not, however, a core justification for the principle of fair labelling.[58] It cannot, for example, itself explain the need to differentiate between different offences which carry the same range of available penalties. Furthermore, if excessive discretion in sentencing is felt to be a problem, there are ways of tackling it that do not engage any labelling issues.[59]

**Fairness to the offender**

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[54] *ibid* 90.
[55] Clarkson, n 23 above, 142.
[56] Thomas, n 13 above, 34.
[57] Although they remain available, to a limited extent, via the mechanism of – in England – a *Newton* hearing (*R v Newton* (1982) 77 Cr App R 13) or – in Scotland – a proof in mitigation (see R. M. White, 'What Happens After a Guilty Plea? A Gap in the Study of Criminal Procedure' 1995 JR 465).
[58] Something that is implicitly recognised by Antony Duff, who, in arguing that the law's definition of offences should reflect a difference between attacks and endangerments, deals with labelling and sentencing as separate issues (R. A. Duff, 'Criminalizing Endangerment' in Duff and Green, n 33 above, 43, 57).
[59] In England and Wales, guidelines are now issued by the Sentencing Advisory Panel, whose guidelines on sentencing for rape, for example, suggest certain maximum sentences for different kinds of rape, without ever suggesting that the different types of rape should be given different names.

A more productive line to pursue in considering why labelling is important may be to consider issues of fairness to the offender. One of the justifications for the principle offered by Ashworth is that '*[f]airness* demands that offenders be labelled and punished in proportion to their wrongdoing'.[60] As Jeremy Horder puts it:

> [W]hat matters is not just that one has been convicted, but *of what* one has been convicted. If the offence in question gives too anaemic a conception of what that might be, it is fair neither to the defendant, nor to the victim.[61] For the wrongdoing of the former, and the wrong suffered by the latter, will not have been properly *represented* to the public at large.[62]

This line of argument is also adopted by Justice for Women, who in their response to the Law Commission's Discussion Paper on Partial Defences, suggest that women who appeal against murder convictions after killing violent partners are motivated to do so as much by the sense of unfairness they feel at being labelled 'murderers' as by the hope of a sentence reduction.[63] Quick and Wells take up this point in relation to the Law Commission's proposals to include within the definition of second degree murder those who have killed under diminished responsibility or provocation,[64] questioning whether such individuals 'deserve' to be labelled in this way.[65] Similarly, defendants may be particularly keen to avoid pleading guilty to a racially aggravated offence primarily in order to avoid the "racist" tag, rather than being motivated by sentencing considerations.[66]

This does raise the question though of exactly *why* it is so unfair to label offenders in a particular way. Clearly punishing offenders disproportionately to their degree of wrongdoing does them an injustice, but this is not the issue here. Why does it matter so much what the offence is called, as long as the degree of punishment is not excessive? The answer may well be that it matters for a number of inter-linked reasons, all of which relate to the communicative function of the offence name. These are considered below.

**The symbolic function of offence labels: communication to the public**

One reason why it might be unfair to label an offender in a particular way is because the offence name has a symbolic function[67] or, as Mitchell and Tadros have both described it, a

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[60] Ashworth, n 17 above, 88-89, emphasis added.
[61] Issues of fairness to the victim are considered separately below.
[62] Horder, n 17 above, 351, emphasis in original. See also Williams, n 16 above, 85.
[63] Justice for Women, *Law Commission Consultation Paper 173: Partial Defences to Murder. Response from Justice for Women* (2004), at www.jfw.org.uk/JFW%20Response%20to%20Law%20Commission%20Paper%20173.doc (last visited 6 November 2007).
[64] Law Commission, n 10 above, para 2.70.
[65] Quick and Wells, n 25 above, 517. See also Tadros, n 25 above, 615-617; Ashworth, n 25 above, 339; Taylor, n 25 above, 354.
[66] See E Burney and G Rose, *Racist Offences – How is the Law Working?* (Home Office Research Study 244, 2002), 91. In Scotland, guidance has been issued to procurators fiscal stating that, if a plea of guilty under deletion of an allegation that the offence is racially aggravated is tendered, the plea may only be accepted if there is insufficient evidence to prove the allegation: I. Clark and S. Moody, *Racist Crime and Victimisation in Scotland* (Edinburgh: Scottish Executive, 2002), 36. This may be seen as an attempt to avoid the accuracy of the labelling process being subverted.
[67] Horder, n 17 above, 351; Clarkson, n 26 above, 555.

'declaratory' function.[68] It can symbolise the degree of condemnation that should be attributed to the offender and signals to society how that particular offender should be regarded.[69] If the name of the offence does not accurately reflect the degree or nature of the wrongdoing, then the offender could be unfairly stigmatised. As Simester and Sullivan have put it:

> The criminal law speaks to society as well as wrongdoers when it convicts them, and it should communicate its judgment with precision, by accurately naming the crime of which they are convicted.[70]

The symbolic function of the offence name has been cited as a reason why it is appropriate to retain a distinction between murder and manslaughter (in Scotland, culpable homicide) and not, as has sometimes been suggested,[71] merge the two into a single offence of criminal homicide. The Criminal Law Revision Committee, for example, in its report on the penalty for murder, concluded that a separate offence of murder should be retained because 'the stigma, which in the public's mind, attaches to a conviction of murder rightly emphasises the seriousness of the offence'.[72] In the most recent review of the law on homicide, the Law Commission expressed the same view, stating that it would be wrong to merge murder and manslaughter into a single offence because '[i]t would very likely be seen as a signal that the law did not regard murder as a specially significant or uniquely grave crime. It is wrong to give out such a signal.'[73]

This was also one of the reasons why, in its recent review of the law on sexual offences, the Scottish Law Commission concluded that rape should be retained as an offence separate from other forms of sexual assault, stating that the label 'rape' has 'an important role in expressing social disapproval of a certain sort of sexual wrong'.[74]

As a justification for fair labelling, this may well have some force but it raises two questions. The first is why it matters so much that an offender's wrongdoing is 'fairly' represented to the public. The answer may be simply that truth is intrinsically valuable, but if a more instrumental justification is sought it may lie in the value of reputation, the importance of which is indicated by the fact that the law recognises a wrong of defamation. In *Reynolds v Times Newspapers*,[75] Lord Nicholls described reputation as 'an integral and important part of

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[68] Mitchell, n 32 above, 398; Tadros, n 25 above, 618. See also Law Commission, n 8 above, para 5.35 and the Constitutional Court of South Africa, in *Masiya v DPP*, 10 May 2007, case CCT 54/06, unreported, para 44.
[69] Ashworth describes this as the 'public communication' function of fair labelling: n 17 above, 89.
[70] Simester and Sullivan, n 18 above, 30.
[71] L. Blom-Cooper and T. Morris, *With Malice Aforethought: A Study of the Crime and Punishment for Homicide* (Oxford: Hart, 2004), 175; *Hyam v DPP* [1975] AC 55, *per* Lord Kilbrandon at 98.
[72] Criminal Law Revision Committee, *Twelfth Report: Penalty for Murder* (Cmnd 5184, 1973) para 6. See also their later report, which expresses the same view: Criminal Law Revision Committee, *Fourteenth Report: Offences Against the Person* (Cmnd 7844, 1980) para 15.
[73] Law Commission, n 23 above, para 2.31. A similar concern is expressed in the Law Commission's subsequent report: n 10 above, para 2.19.
[74] Scottish Law Commission, n 29 above, para 4.16. See also J. Temkin, *Rape and the Legal Process* (Oxford: Oxford University Press, 2nd ed, 2002), 178; D. Warburton, 'The Rape of a Label: Why it Would be Wrong to Follow Canada and Have a Single Offence of Sexual Assault' (2004) 68 *Journal of Criminal Law* 533, 542. These concerns did not prevent the label rape from being abandoned in Canadian criminal law in favour of a single offence of sexual assault (found in ss 271-273 of the Canadian Criminal Code), an issue that is considered below.
[75] [2001] 2 AC 127.

the dignity of the individual'.[76] Gibbons has referred to the social advantages that a good reputation brings, including 'friendship and association, respect and admiration, and being part of a group or community'.[77] It is precisely these values that the wrong of defamation is designed to protect and it does so wherever a statement[78] 'lowers the claimant in the estimation of reasonable, right thinking members of society, or causes such citizens to shun or avoid the claimant'.[79]

But defamation and unfair labelling are not the same thing, because defamation necessarily involves the communication of information about an individual that is *untrue*.[80] This may sometimes be the case with respect to offenders. The offender who is incorrectly labelled as having committed a sexual offence when she has actually committed an offence against property may justifiably be aggrieved at the wrong done to her reputation. As Gibbons puts it, 'it is reasonable … to expect that social judgments are based on an adequate factual foundation'.[81] Even where the information communicated is not incorrect but is simply vague or lacking in detail, there is the possibility that vagueness might encourage speculation and false assumptions. Thus fair labelling in this context may simply mean the communication of information that does not create a false or misleading impression of the nature or magnitude of the offender's wrongdoing or encourage an inaccurate conclusion to be drawn.

The second question concerns the *manner* in which the communication process operates. The issue here is not information provided to specific agencies through the medium of the offender's official criminal record, but how information is communicated to the public. As we have already seen, it has been argued that fair labelling is important for the purpose of indicating to 'society' the appropriate degree of condemnation to be attached to the offender. But where this argument has been made, it has generally been made without considering how this communication process operates[82] and it certainly cannot be assumed that the process is a straightforward one.

The public are likely to receive information about offenders in one of two ways: either by being present at an offender's trial or by receiving information via the media.[83] The first of these possibilities is the least likely to occur in practice. Members of the public do not routinely attend criminal trials unless they are involved in the offence in some way, either as a victim or a witness. What is far more likely is that the outcome of any criminal trial is communicated to the public via newspapers, television, news websites or other media. The difficulty here is that there is no guarantee that media reports will be accurate. The media may not use the correct legal term for the offence, or even if it is used, it could be a side issue if the crime reported is sensationalised in some way. This is a point made by Blom-Cooper and Morris about the word murder, which has come to be used in the media to report any incident of violent death, notwithstanding that a court may subsequently decide that manslaughter or culpable homicide is a more appropriate label.[84]

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[76] At 201.
[77] T. Gibbons, 'Defamation Reconsidered' (1996) 16 OJLS 587, 590.
[78] Or other type of communication, such as a picture.
[79] J. Murphy, *Street on Torts* (Oxford: Oxford University Press, 12th ed, 2007), 515.
[80] See, eg, *M'Pherson v Daniels* (1829) 10 B&C 263; *Peters v Bradlaugh* (1888) 4 TLR 414.
[81] Gibbons, n 77 above, 593.
[82] Nobles and Schiff have criticised legal philosophers for neglecting precisely this issue: see R. Nobles and D. Schiff, 'Communicating Moral Responsibility Through Criminal Law' (2006) 26 OJLS 207, 217.
[83] Or perhaps second hand, from someone who has either attended the trial or received information directly from media reports.
[84] Blom-Cooper and Morris, n 71 above, 57.

Indeed, even attempts by the media correctly to represent offence labels can be misleading. This is apparent from the attempts of various media organisations to report the prosecution of defendants who have passed on the HIV virus to a sexual partner. In England and Wales, defendants have been prosecuted under section 20 of the Offences Against the Person Act 1861, which provides that 'whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person' shall be guilty of an offence. Although 'maliciously' connotes intention in ordinary usage – the *Oxford English Dictionary* defines malice as '[t]he intention or desire to do evil or cause injury to another person'[85] – the offence under section 20 only requires proof of recklessness.[86] The use of the word 'maliciously' in the statute may well be a significant factor in the repeatedly inaccurate media reports of convictions under section 20, which have described the cases concerned as involving 'deliberate infection' when nothing of the sort has been admitted or proved in any prosecution to date.[87]

A related question is how informative offence labels are where the relevant offence is a statutory one, an issue raised by Eric Clive in the context of a comparison between the Scottish Draft Criminal Code[88] and the English Sexual Offences Act 2003. Clive was one of the authors of the Scottish Code and notes that he and his co-authors decided to give names to all of the offences in the Code, on the basis that this would be 'an aid to transparency, record-keeping and reporting at all stages of the criminal process'.[89] The Sexual Offences Act, however, does not name offences. It is only the section heading that indirectly indicates a name. The actual sections refer to 'an offence under this section'. Even rape is not named, except by inference from the heading in the Act. Technically offenders convicted of rape are actually guilty of an offence under section 1 of the Sexual Offences Act 2003, which tells the public very little of value. Now it may be that this is a problem in theory only, because in practice the offence is always referred to as 'rape' on the basis of the section heading in the statute. But some of the other section headings in the Sexual Offences Act 2003[90] (and indeed other statutes[91]) are more cumbersome and in the interests of brevity may well come to be known only by their section numbers.

None of this, of course, is to suggest that the underlying justification of fair labelling in terms of communicating to the public is a flawed one. Instead, it highlights the importance of

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[85] Oxford English Dictionary online, at http://dictionary.oed.com/cgi/entry/00300421 (last visited 6 November 2007).

[86] Moreover, it need only be shown that D was reckless as to the possibility of *some* physical harm – not necessarily *grievous* bodily harm – to the victim. See *R v Mowatt* [1968] 1 QB 412; *R v Rushworth* (1992) 95 Cr App R 252; *R v Pearson* [1994] Crim LR 534.

[87] A search of the UK Newspapers Database on Lexis reveals around 100 newspaper reports where the phrase 'deliberately infected' has been used in reporting such cases. This cannot be entirely attributed to the statutory language, however, as around 10 newspaper reports referring to the first UK conviction for the reckless transmission of HIV – that of Stephen Kelly, who was convicted under Scots law of culpable and reckless injury in February 2001 – also use the phrase 'deliberately infected'. Significantly, however, no contemporaneous report of Kelly's conviction appears to contain this error, which is principally found in articles written some time later that refer back to the case.

[88] Clive *et al*, n 4 above.

[89] Clive, n 5 above, 61.

[90] For example s 17: Abuse of position of trust: causing or inciting a child to engage in sexual activity.

[91] Such as the Offences Against the Person Act 1861, ss 18 and 20, where the relevant sidenotes are 'Wounding, or causing grievous bodily harm with intent to do grievous bodily harm, or to resist apprehension' and 'Inflicting bodily injury with or without a weapon'. (Sidenotes became headings in 2001 due to a change in legislative practice: see *R v Montila* [2004] 1 WLR 3141, *per* Lord Hope of Craighead at [31].)

paying attention to the manner in which these labels are communicated and reported. In order to avoid the nature of the offender's wrongdoing being misrepresented or misunderstood, it is desirable that labels should be simple, informative terms that convey the essential nature of the wrongdoing (or at least do not misrepresent it or encourage misunderstanding).

**Communication to offenders**

It has been suggested that another reason why labelling is important is that it communicates something of value not just to the public, but also to the offender. Simester and Sullivan have argued that the law should make clear 'what sort of criminal each offender is' and should 'communicate this to the defendant, so that he may know exactly what he has done wrong and why he is being punished, in order that his punishment appears meaningful to him, not just an arbitrary harsh treatment'.[92]

But this is not a particularly convincing justification for fair labelling. If one is to 'educate' offenders in this way, the offence name itself is unlikely to be of much significance. What might be more effective (if indeed there is any educative benefit to be gained here at all) is the magnitude of the sentence and the explanation given by the sentencing judge as to why this was merited. Indeed, if this argument has any force, it is probably in the context of changing the beliefs of those working within the criminal justice system. The creation of a new offence of domestic violence, for example, rather than simply prosecuting acts of domestic violence as assault, might be one way of communicating to criminal justice professionals that such incidents should be taken seriously.

A related argument for fair labelling might be founded on a more basic principle of public law. It might be said that it is important for the offence name to communicate to the defendant the nature of her wrongdoing because the state has no standing to subject her to a criminal trial without giving fair notice of the nature of the allegations against her.[93] But while this is an important principle, it is not a convincing justification for fair labelling in the sense that we are using the term. The same effect can be achieved (indeed probably more effectively) by simply setting out the nature of the allegations in narrative form, as indeed would happen in Scotland in the indictment or complaint. The offence name itself (as long as it does not contradict the narrative) is not necessary to achieve this purpose.

A different type of argument – although still one related to communication to offenders – is that fair labelling might have a deterrent effect. This argument is distinct because here the label is directed towards potential offenders who may (or may not) know full well that a certain type of behaviour is wrong but who might be dissuaded from it because the conduct in question would fall under a particular offence category that would incur greater censure. Thus Mitchell has suggested that:

> The need to recognise distinctions between different offences and degrees of wrongdoing is also significant to offenders in so far as it deters them from causing more harm because it might incur no greater condemnation.[94]

[92] Simester and Sullivan, n 18 above, 31. See also Mitchell, n 32 above, 398.
[93] As is required by article 6(3)(a) of the European Convention on Human Rights.
[94] Mitchell, n 32 above, 398.

Mitchell refers to Ashworth's *Principles of Criminal Law* as the source of this argument and the fourth edition of *Principles* does mention this point. Here, Ashworth suggested that if offence labels are too broad, offenders might 'reason that they might as well be hanged for a sheep as for a lamb' as it will not lead to any greater condemnation.[95] But the point has disappeared from the fifth edition of *Principles* and it is easy to see why. There is little, if any, evidence that potential offenders are deterred even by the severity of sentences, never mind the name of the offence of which they might be convicted. The only factor that has been shown to have even a marginal deterrent effect upon potential offenders is the likelihood of being caught.[96] As Ashworth himself has noted in the context of robbery, many offenders lead chaotic lives and are unlikely to deliberate rationally on either probable penalties or offence names.[97]

**Communication to agencies operating *within* the criminal justice system**

Perhaps a more productive line of argument to pursue is that accurate labelling is important because information about an offender's convictions is necessary to enable fair decisions to be taken by those who are charged with doing so or because this may trigger certain other events. Information about convictions is relevant in a number of contexts, both within and outside the criminal justice system. It is the former that will be examined here first, but we will return to the latter shortly.

The main (although by no means sole) context in which information about previous convictions is important within the criminal justice system is sentencing. The nature and seriousness of any previous offending is something that is – quite correctly – taken into account by sentencers. Thus there is a need for criminal records to capture the essential elements of an offence – whatever these might be – in a form that is useful in this context.

One way of addressing this issue could be to provide sentencing judges with detailed records of the facts and circumstances of all previous offending. But information of this nature is unlikely even to be recorded once an offender is convicted, never mind routinely supplied to sentencers. Lists of previous convictions only contain the name of the offence and the sentence passed. Thus an argument for the importance of fair labelling is that the offence name is normally the only source of information available to sentencers who wish accurately to assess the offender's criminal record.[98]

This is important for two reasons. The first is fairness to the offender. If decisions are to be made about the offender's fate that rely on previous convictions, it is only fair that the information communicated is accurate and sufficiently informative. The second is fairness to the public. If sentencers are to assess the risk posed to society by an offender with a previous

[95] A. Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 4th ed, 2003), 90.
[96] A. von Hirsch, A. E. Bottoms, E. Burney and P-O. Wilstrom, *Criminal Deterrence and Sentence Severity* (Oxford: Hart, 1999); P. H. Robinson and J. H. Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 OJLS 173, S. A. Morrison and I. O'Donnell, *Armed Robbery: A Study in London* (University of Oxford: Centre for Criminological Research, 1994) paras 178-182.
[97] A. Ashworth, 'Robbery Re-assessed' [2002] Crim LR 851-872, 868.
[98] See *ibid* 856; Mitchell, n 32 above, 398; Williams, n 16 above, 85. In *Principles of Criminal Law*, Ashworth does not mention this point, other than making a passing reference to the importance of fair labelling for 'classification in prison' (n 17 above, 89).

criminal record, sufficient information needs to be communicated by that record of the nature of any previous convictions.

It was for this reason that the Criminal Law Revision Committee, in their report on offences against the person, recommended that assaulting a police officer be retained as a separate offence to other types of assault.[99] It is also an argument utilised by Mitchell who recommends that particularly serious instances of certain crimes be recorded specifically as aggravated, rather than their seriousness simply being reflected in an increased sentence. He gives the example of burglary where the offender uses a weapon which, in Mitchell's view, should be called 'aggravated burglary … because the possession of the firearm etc. brings a wholly new element of (threatened) harm – the possibility of killing – to the situation'.[100] He also suggests that some of the factors that have been identified by the Court of Appeal as features of the offence of rape that should attract an increased sentence (such as the use of a weapon, subjecting the victim to further sexual indignities), actually bring a new dimension to the offence and should be recorded as 'aggravated rape'.[101]

In Scotland, in the context of assault, this is not far off what would appear on an offender's criminal record. It is common to see offenders convicted of, for example, assault to danger of life, assault to permanent disfigurement, assault to severe injury and so on, although this seems to be confined to assault and possibly simply reflects the fact that, in Scotland, a single offence of assault covers an extremely wide range of conduct, ranging from a mere threat to injure made as a joke[102] through to actual violence that causes very severe injuries.[103]

Mitchell's proposal is merely that the offence is recorded as, for example, 'aggravated rape'. In this sense it is not entirely clear what additional information this would offer to the sentencer, given that the seriousness of any particular instance of rape would normally be reflected in the sentence.[104] But this raises the question of exactly how much information sentencers need in this context. Is a detailed offence name really necessary or is sufficient relevant information provided by the severity of the sentence passed? Does it matter if it is not clear from the name of the offence that an assault or a rape was committed using a weapon, if it is clear that a particularly heavy sentence was given?

Returning to a point made at the start, most people would presumably agree that we cannot abandon labels entirely if information on an offender's past criminal record is to be useful to sentencers. Sentencers do need to know whether any previous convictions are in the same broad general area as the offence for which the offender is being sentenced. But beyond that, what level of information need the offence name convey?

This is a difficult question to answer and it may well be that the answer is different in this context compared to the context of providing information to the public. The public are not

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[99] Criminal Law Revision Committee, *Fourteenth Report*, n 72 above, 171.
[100] Mitchell, n 32 above, 406.
[101] *ibid* 407. Mitchell refers to the sentencing guidelines in *R v Billam* [1986] 1 WLR 349 which were, at the time he was writing, the most up to date guidelines issued by the Court of Appeal on sentencing for rape. They have now been superseded by the guidelines in *R v Millberry* [2002] EWCA Crim 2891 and, in relation to the new sexual offences created in the Sexual Offences Act 2003, *R v Minshull* [2004] EWCA Crim 2673. See also Sentencing Guidelines Council, *Sexual Offences Act 2003: Definitive Guideline* (2007).
[102] *Gilmour v McGlennan* 1993 SCCR 837; *Lord Advocate's Reference (No 2 of 1992)* 1993 JC 43.
[103] For recent examples, see *Black v HM Advocate* 2006 SLT 685; *HM Advocate v Booth* 2005 SLT 337. *Cf.* England and Wales, where a baffling array of both common law and statutory assault type offences exists.
[104] Something Mitchell himself concedes (n 32 above, 410).

legally trained and the main consideration in representing an offence to the public is ensuring that the message conveyed by the offence name fairly and clearly represents what the offender has done in language that minimises the possibility of misreporting by the media or misunderstanding by the audience. Sentencers, on the other hand, are experienced legal professionals who should be more adept at interpreting legal terminology and offences identified only by reference to statutory provisions, and who will also have information about the length of sentence to hand as an indication of the seriousness of the offence in question. The type of information that may be useful here is information about the context in which an offence took place, such as whether an assault was an incident of domestic violence.

Although this discussion has focused on information for sentencing, the question arises in other contexts in which the criminal justice system relies upon information about convictions. Conviction of certain offences, for example, triggers action such as the placing of an offender on the sex offenders' register.[105] Prosecution for certain offences can trigger rights such as the right to make a victim statement[106] or the referral of the alleged victim of the offence to a support agency.[107] It can also trigger certain protections for the complainer at trial, such as a prohibition on cross-examination by the accused in person[108] or a prohibition on admitting evidence of the complainer's bad character.[109] Prosecutors, in deciding whether or not prosecuting a particular case is in the public interest, are entitled to have regard to the nature and extent of the defendant's previous convictions.[110] Likewise, in some circumstances, the defendant's previous convictions are admissible evidence in her trial on a subsequent charge and, as such, can legitimately be taken into account by the judge or jury in reaching a verdict.[111]

These things can only happen if the offence name is sufficiently informative. This may sound unproblematic, but in Scotland, the offence of breach of the peace, for example, covers such a wide range of conduct that it may well not be possible to tell from the name of the offence alone whether the right to make a victim statement or the need to place the offender on the sex offenders register is triggered. The latter outcome, for example, is triggered by, among other things, conviction of an offence where there was 'a significant sexual aspect to the offender's behaviour'.[112] That approach is workable only because the sentencer may be aware of this from having presided over earlier proceedings in the case, or the prosecutor and defence can be expected to have the necessary information readily to hand, and this is a situation where the broad offence label alone does not satisfy fair labelling principles.

In other contexts, the difficulty can be addressed by practical measures: where previous convictions are to be admitted in evidence under English law, the Court of Appeal has said

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[105] See generally Part II of the Sexual Offences Act 2003.
[106] In Scotland, see the Criminal Justice (Scotland) Act 2003, s 14, although no victim statement scheme has been operational in Scotland since the conclusion of a two-year pilot in November 2005.
[107] For example in Scotland alleged victims of certain offences (namely those involving domestic abuse, racial or religious aggravation, sexual offences, those where the alleged victim is a child or those likely to involve a jury trial) are offered the services of the Victim Information and Advice wing of the procurator fiscal's office.
[108] For example, in Scotland, see the Criminal Procedure (Scotland) Act 1995 s 288C, as amended by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002.
[109] For example, in Scotland, see the Criminal Procedure (Scotland) Act 1995 s 274, as amended by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002.
[110] See Crown Prosecution Service, *Code for Crown Prosecutors* (London: CPS, 2004) para 9; Crown Office and Procurator Fiscal Service, *Prosecution Code* (Edinburgh: Crown Office, 2001), 7.
[111] In England and Wales, see s 1 of the Criminal Justice Act 2003.
[112] Sexual Offences Act 2003 Sched 3 s 60.

that the relevant surrounding circumstances can be put before the jury.[113] Similarly, the Judicial Committee has said that because there is no statutory provision in Scotland regulating the contents of an extract conviction, this can be supplemented by information beyond the name of the offence or relevant statutory provision on an *ad hoc* basis if necessary.[114] Depending on the use to which a prior conviction is to be put, it may not be realistic to expect fair labelling to entirely remove the need for such measures, but it may help to minimise the need for reliance on extrinsic material or to avoid the jury being misled where no such material is obtained.

All in all, it might be concluded that there is a convincing justification for fair labelling to be found here. In fairness both to offenders and to others with a relevant interest, such as the public who have a legitimate interest in being protected from dangerous offenders, there is a need for offence labels to convey sufficient information to criminal justice professionals[115] to enable them to make fair and sensible decisions and to ensure that legal consequences that turn on the classification of offences are triggered fairly and effectively. As we have already noted, the specific requirements of fair labelling in this context may well differ from those in other contexts, such as representing the offence to the public at large.

**Communication to agencies operating *outside* the criminal justice system**

Thus far the focus has been on the importance of accurate information provided within the criminal justice system, but this is not the only context in which information about convictions is used. The most obvious example is that of employment. When choosing their employees, employers have a legitimate interest in having at least some information about a candidate's history of offending.[116] The point here is a different one to that made earlier about informing the public. Information provided to employers has a more specific purpose (is this individual, on the basis of her previous criminal activity, a suitable candidate for this specific job?) and is unlikely to suffer from problems of media distortion that affect the manner in which information is conveyed to the public. Employers are likely to receive information directly from the criminal record via disclosure procedures or directly from the offender herself, via compulsory declaration on a job application form.

The argument that fair labelling is important in the context of providing information to potential employers is rarely mentioned,[117] but it may well be one of the most important of all. It is referred to in passing by Simester and Sullivan, who state that:

> The public record matters. While an employer may have few qualms about hiring a convicted fraudster as an orderly in a children's hospital, it would be an entirely

[113] *R v Hanson* [2005] 1 WLR 3169, at [17], where it is said that these will normally be expected to be admitted and that it should be "very rare" for the judge to need to hear oral evidence.
[114] See *DS v HM Advocate* [2007] UKPC D1, *per* Lord Hope of Craighead at [50]-[52]. The term "extract conviction" is used in Scotland on the basis that a formal record of the conviction is, in principle, an extract from the court records.
[115] While jurors cannot readily be described as "criminal justice professionals", it seems appropriate to include them under this heading as they necessarily receive legal advice and direction in the discharge of their functions.
[116] On this point, see text accompanying nn 42-45 above.
[117] Certainly Ashworth makes no reference to it in either 'The Elasticity of *Mens Rea*' or *Principles of Criminal Law*.

different matter to contemplate employing someone who has been in jail for paedophilia.[118]

Providing accurate information to employers matters because of fairness to the offender (who should not be denied an employment opportunity on the basis of vague, inaccurate or misleading records of previous convictions) but also because of fairness to the employer and to the public, who should not have to suffer the adverse consequences of an ex-offender being given a job that is inappropriate, given the nature of her previous offending.

Indeed, this is not the only context in which information about previous convictions is used outside the criminal justice system. Quick and Wells, for example, refer to decisions relating to whether an offender is permitted to retain care of her own children. Their concern is that women who have killed their abusive partners may suffer prejudice in this respect if they are labelled as having killed under diminished responsibility.[119]

Once again, the specific requirements of fair labelling in this context may well be distinct from those in other contexts. Unlike those who make decisions within the criminal justice system, employers are unlikely to be legal professionals and thus in ensuring fairness both to offenders and to employers/the public there may be a need for offence labels to avoid confusing 'legal' language or broad terms such as 'breach of the peace' that cover a wide range of conduct. The problem here is less the imprecision of the offence name than the fact that it cuts across what seem to be different categories of conduct. A label such as 'assault' may be unrevealing – particularly in Scots law where it can cover anything from spitting at someone to blocking the air supply of an intensive care patient[120] – but it is probably, especially when taken along with the sentence imposed, enough information to alert an employer to the need to seek further information in appropriate cases. By contrast, an employer is unlikely to realise that a person with a conviction for breach of the peace may have been engaged in anything from voyeurism or kerb-crawling to a public attempt at suicide or playing football in the street at night.[121]

**Fairness to the victim**

A final argument that has been made in relation to fair labelling is one of fairness not to the offender, but to the *victim* of the offence. It is not mentioned by Ashworth at all, but, as we have already noted, Horder has argued that '[i]f the offence in question gives too anaemic a conception of what [one has been convicted of], it is fair neither to the defendant, nor to the victim'.[122]

This was one of the arguments used by the Law Reform Commission of Canada when it recommended that the offence of rape be abolished, with conduct that would previously have been classed as rape being labelled as sexual assault. This recommendation was implemented in Canada in 1983. Prior to the reform, three separate offences of rape, attempt to commit

[118] Simester and Sullivan, n 18 above, 31.
[119] Quick and Wells, n 25 above, 520.
[120] See T. H. Jones and M. G. A. Christie, *Criminal Law* (Edinburgh: W. Green, 3rd ed, 2003), 201.
[121] These are a few of the copious examples from reported cases listed in C. H. W. Gane, C. N. Stoddart and J. Chalmers, *A Casebook on Scottish Criminal Law* (Edinburgh: W. Green, 3rd ed, 2001), 554-555. An offence of "kerb-crawling" – although not named as such, or indeed formally named at all in the legislation – has recently been created by the Prostitution (Public Places) (Scotland) Act 2007.
[122] Horder, n 17 above, 351. See text accompanying n 62 above.

rape and indecent assault existed.[123] These were replaced by three new offences: sexual assault, sexual assault with a weapon, and aggravated sexual assault.[124] In recommending that the specific offence of rape be abolished,[125] one of the arguments used by the Commission was that in being labelled as a victim of rape, victims are unfairly stigmatised:

> This stigma attaches to both victims and offenders. The offender becomes labelled a 'rapist' and the victim sometimes becomes somehow morally suspect even if her complaint is amply proved and vindicated in law. These hard to describe but nonetheless real attitudes constitute that which is said to be the folklore relating to rape.[126]

In the same context, however, precisely the opposite argument has been made – that victims of sexual assaults involving penetration would prefer that the offender is convicted of rape, as a conviction for sexual assault does not adequately reflect the harm that has been suffered. Loh for example has argued:

> The symbolic significance of calling a convicted criminal defendant a 'rapist' rather than 'assaulter' should not be underestimated. What makes non-consensual intercourse criminal is the outrage committed on the victim's personhood, the overwhelming of a victim's autonomy of choice. If it were mainly the physical violence, it would be simply a species of assault. For this reason, many women victims prefer to see their assailants convicted of, say, third degree rape rather than first or second degree assault, even though the penalty for the rape offense is much lower.[127]

Whether victims of serious sexual assault would prefer the crime to be labelled rape or sexual assault is not a question that can be answered without further research; certainly Loh provides no evidence for his assertion that rape is the preferable term. The legislative change in Canada was followed by an increase in the number of reported incidents of sexual assault, which might suggest that the name of the offence and the stigma attached to this could encourage or discourage victims from coming forward. But this has been attributed not to the change of name itself but to the general publicity surrounding the reform process.[128]

The argument that victims have an interest in fair labelling has been made in contexts other than rape. For example, when the Law Commission proposed the classification of killing under provocation or diminished responsibility as second degree murder (as opposed to its present classification as manslaughter), this was strongly supported by groups representing

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[123] In ss 143, 145 and 149 of the Canadian Criminal Code respectively.
[124] See ss 271-273 of the Canadian Criminal Code. For a detailed account of the legislative change, see L. Snider, 'Legal Reform and Social Control: the Dangers of Abolishing Rape' (1985) 13 *International Journal of the Sociology of Law* 337.
[125] The legislative change that eventually took place did not reflect exactly the recommendations of the Law Reform Commission in either their Working Paper or their Report. The Working Paper recommended that rape be replaced by a single offence of sexual assault, with the various graduations of the offence being reflected in sentencing (*Working Paper on Sexual Offences* (WP 22, 1978), 22). The Report recommended replacing the offence of rape with two new offences called sexual interference and sexual aggression (*Report on Sexual Offences* (LRCC 10, 1978), 13-14).
[126] *Working Paper*, n 125 above, 16. See also *Report*, n 125 above, 12.
[127] W. Loh, 'What Has Reform of Rape Legislation Wrought? A Truth in Criminal Labelling' (1981) 37 *Journal of Social Issues* 28, 37.
[128] J. V. Roberts and R. J. Gebotya, 'Reforming Rape Laws: Effects of Legislative Change in Canada' (1992) 16 *Law and Human Behavior* 555.

victims' families.[129] Likewise, Horder has argued that proposals made by the Law Commission (but never implemented) to replace the various offences in the Offences Against the Person Act 1861 with three new offences (intentionally causing serious injury to another, recklessly causing serious injury to another, and intentionally or recklessly causing injury to another) would do great injustice to victims as they do not reflect with sufficient moral weight the harm that has been suffered.[130]

The 'fairness to the victim' argument can, however, be questioned. One might suspect that more important to victims than the name of the offence is whether the offender is convicted at all and the magnitude of the sentence passed. Indeed, there is no guarantee that victims or their families will use or even be aware of the legal term for the offence. But maybe this underestimates victims. Perhaps victims (or at least some victims) do care that the legal record accords with their own perceptions of the nature and seriousness of the harm done to them.[131] Moreover, there may be instances where the offence label is so manifestly out of line with the offender's conduct as to be unfair. Examples might include *HM Advocate v Forbes*,[132] where breaking into a house with the intention of committing rape was labelled a "breach of the peace", or workplace fatalities which are treated as health and safety offences, so that the fact of death is not even technically part of the offence charged.[133]

What is certainly true is that there sometimes exists a tension between the desire of the victim and fairness to the offender. The newly created offences of causing death by careless or inconsiderate driving and causing death by driving whilst unlicensed, disqualified or uninsured are a good illustration of this.[134] Where a road death has occurred in these circumstances, the desire of the victim's family may be to see the fact of the death reflected in the label attached to the offence, as indeed it will be, once these provisions come into force. But it could equally be said that this is unfair to the offender, whose culpability is over-stated.[135] The tension identified here, however, is primarily one of *desire* rather than *interest*. Neither the defendant nor the victim has a legitimate interest to demand anything other than accurate labelling. However, where a range of different labels might be described as "fair", the interests of the defendant and victim may point towards different options within the same range.

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[129] Law Commission, n 10 above, para 2.38. See also the support for this proposal expressed at an earlier stage of the review process by some prosecutors, on the basis that a second degree murder conviction would be more acceptable than a manslaughter conviction to victims' families (see Appendix B of Law Commission, n 23 above, B50).

[130] Horder, n 17 above, 351. See also Simester and Sullivan, n 18 above, 419, who agree with Horder that the proposed offences are too broad but disagree with his suggested alternative approach to nomenclature.

[131] We are assuming here that the label attached to the offender's conduct is the legally correct one. Related problems may arise where plea bargaining or a charging decision means that the offence of which the offender is convicted is not in fact the one which the victim believes she has committed. Similar difficulties arise, although they are even more loosely connected to labelling, where a factual narrative put to the court is not one with which the victim agrees.

[132] 1994 JC 71. See text accompanying n 46 above.

[133] C. Wells, *Corporations and Criminal Responsibility* (Oxford: Oxford University Press, 2nd ed, 2001), 5-8. The point is now, at least in part, addressed by the Corporate Manslaughter and Corporate Homicide Act 2007.

[134] Road Traffic Act 1988 ss 2B (causing death by careless driving) and 3ZB (causing death by unlicensed etc. driving), as inserted by the Road Safety Act 2006. At the time of writing, these provisions were not yet in force.

[135] The new provisions have been criticised on this basis: see S. Cunningham, 'Punishing Drivers Who Kill: Putting Road Safety First?' (2007) 27 LS 288; Editorial, 'Sentencing for Causing Death by Driving Offences' [2007] Crim LR 253.

**The arguments assessed**

Why, then, does labelling matter? The first thing that can be said is that, of the justifications examined above, some of them – the sentencing discretion argument, the educative argument and the deterrence argument – are unconvincing or tangential. Others, while not entirely unconvincing, are insufficiently developed. Clearly labelling raises issues of fairness to the offender but the precise nature of the unfairness concerned needs to be articulated. The interest in question is the offender's legitimate interest in protecting her reputation and on this basis the argument that insufficiently precise labels are unfair to the offender because she will be judged by the public on the basis of the offence name is one that has some force. At the very least, this is a convincing justification for labels that are not inaccurate or potentially misleading.

Another strong justification for fair labelling is that decision makers rely on the offence name and the information it conveys in making decisions about the offender. These might be decisions within the criminal justice system – such as sentencing – or decisions made outside the criminal justice system, such as offers of employment. In both instances, the decision maker uses the offence name to draw conclusions about the nature of the offender's previous criminal behaviour. Information on the length of sentence may or may not be available as an additional source of information (it would be for sentencing decisions, for employment decisions it may not), but while this can tell the decision maker something about offence seriousness, it is not informative about the nature of the conduct. This does matter, for reasons of fairness both to the offender and for public protection, although the degree of information that is necessary to ensure fairness in this respect is another question.

Finally, it has been suggested that the victim (or her family) has a legitimate interest in fair labelling in that she deserves to have her suffering reflected by an offence of appropriate seriousness. But despite this legitimate interest, it would be unfair to the offender if the label over-represented her culpability and unfair to the public if it under-represented it, given that, as we have already seen, decisions about the offender's future role in society may turn on the label. It is surely this that is the primary consideration here.

Thus it can be said that the most convincing argument for fair labelling is that offence names communicate information about the offender to a number of different bodies – the public, agencies operating within the criminal justice system and agencies operating outside the criminal justice system – and that members of these groups may form opinions or make decisions about the offender that turn on the information received. It is also clear, however, that what constitutes 'fair' labelling in each of these contexts may well differ.

Where information is being communicated to agencies and individuals operating outside the criminal justice system, no assumption of legal knowledge can be made. In addition, in the particular context of providing a signal to the public, information is likely to be filtered through media reports, which may distort the accuracy of the message. Fair labelling in this context is labelling that is fair in the *descriptive* sense – the use of simple, informative offence names that convey the essential nature of the wrongdoing and minimise the potential for misrepresentation or misunderstanding. To quote Ashworth's original formulation, 'the label applied to an offence ought fairly to represent the offender's wrongdoing'.[136] What is

[136] Ashworth, n 14 above, 53.

important here is not so much the extent to which offences are differentiated but *the name itself*.

By contrast, in the context of decisions made by legal professionals, some reliance can be placed upon their legal knowledge, making the specific terms used to identify offences of less importance. What is important here is not so much the name itself – the actual wording of the label may be of relatively little importance – but the differentiation between offences. Thus fair labelling in this context takes on a second meaning – labelling that fairly *differentiates* wrongdoing.[137] For example, it was suggested earlier that the 'label' offered by section 20 of the Offences Against the Person Act 1861 may be unfair, in that it is liable to mislead the public as to the culpability of the defendant. But that is of little concern to a prosecutor who subsequently examines an individual's criminal record, as that prosecutor will be well aware of what is meant by section 20 of the 1861 Act.[138] For her purposes, it is the fact that the individual has been deemed to have recklessly – rather than deliberately – caused grievous bodily harm to another that will be crucial. The wording of the 'label' which is used to communicate that fact is of little, if any, importance. For these purposes, the distinctions involved could just as validly be communicated by way of hieroglyphics, leaving aside the inefficiencies involved in such a system.[139] It is differentiation rather than description which is crucial here.

The next section of this paper goes on to examine some of the other considerations that might be taken into account when deciding how to label offences.

## CONSIDERATIONS IN LABELLING OFFENCES

We have already mentioned that one consideration in deciding what to call offences might be the audience to which the label is directed – whether the public at large, legal professionals or employers, for example. But what other considerations might be important? A by no means exhaustive list might include some of the following. It is not our intention at this stage to suggest how these considerations could apply to particular offence categories.

### Particularism versus breadth

Our argument thus far has suggested that broad offence labels pose dangers, and we have given a number of examples of overly broad labels which would appear to run counter to the fair labelling principle. However, it is possible to go too far in the other direction, and this is the danger of particularism – the specification of offences at too high a level of detail. Not only does this over-complicate the law, running the risk of needless arguments over the appropriate charge in respect of indisputably criminal conduct,[140] it also runs the risk that

[137] See Ashworth, n 17 above, 88 (suggesting that fair labelling requires 'that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking').
[138] By contrast, a conviction under section 18 of the 1861 Act may not provide such clear-cut information to legal professionals, because that section encompasses not only intentionally wounding or causing grievous bodily harm, but also doing the same recklessly with the intent to resist or prevent a lawful arrest. It is doubtful whether these two rather different types of conduct are appropriately brought together under the heading of a single offence.
[139] A similar argument would apply in respect of fair labelling as a constraint on the discretion of sentencers, although we have already rejected that as a strong justification for the principle.
[140] Simester and Sullivan, n 18 above, 419.

novel conduct will not be covered at all because offences have been drawn up with too high a degree of specificity.[141]

As an example of particularism Clarkson has used the criminal codes of various US states where homicide offences are categorised very narrowly.[142] In Colorado, for example, there are offences of first degree murder, second degree murder, criminally negligent homicide and manslaughter, as well as more specific offences such as vehicular homicide and first degree murder of a peace officer or a firefighter.[143] Another example might be the Larceny Act 1916, now repealed, which used to contain a multitude of offences of dishonesty classifying offences according to the nature of the property stolen, the identity of the offender and the location in which the offence took place.[144] The Offences Against the Person Act 1861 still includes some remarkably specific offences of assault, including obstructing or assaulting a clergyman or other minister in the discharge of his duties; assaulting a magistrate or other person on account of his preserving a wreck and assaults with intent to obstruct the sale of grain or its free passage.[145]

## Pragmatism

Another issue is one that has been termed 'pragmatism'.[146] It may be that a particular offence category appropriately reflects the nature and seriousness of the offence but that there are still practical reasons for calling it something else. Clarkson gives the example of death by dangerous driving.[147] It may well be that causing death by dangerous driving is as serious as, for example, causing death with a knife (which would be murder or manslaughter). But this does not necessarily mean that the offence of causing death by dangerous driving should be abolished. If it was the case that empirical research showed juries would be unlikely to convict of murder or manslaughter in such cases, there would be a strong case for retaining it.[148] In this context Clarkson argues for the creation of a specific offence of corporate killing on the basis that it has been so difficult to convict companies of manslaughter.[149] Pragmatism has also been used as an argument for the creation of a separate offence of 'date rape', given the low conviction rate in rape trials where the accused and alleged victim were known to each other, but this has not been an argument that has been taken terribly seriously[150] and it needs to be weighed up against other considerations, such as fairness to the public and to the victim. It is unlikely that the pragmatic argument could succeed, as it would simply be inappropriate for the law to lend its authority to such a dubious distinction.[151]

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[141] Williams, n 16 above, 93; Clarkson, n 23 above, 143; Horder, n 17 above, 338. It also raises the possibility that procedural restrictions on the prosecution of one statutory offence may impede the prosecution of the conduct under the heading of another offence: *cf. R v J* [2004] UKHL 42.

[142] Clarkson, n 23 above, 144. For the division of homicide in a variety of jurisdictions, see Law Commission, n 23 above, appendix D.

[143] Colo Rev Stat Ann §18-3-101-107.

[144] See ss 3-18.

[145] ss 36-37 and 39.

[146] Clarkson, n 23 above, 145.

[147] Under the Road Traffic Act 1988 s 1, as substituted by the Road Traffic Act 1991 s 1.

[148] Clarkson, n 23 above, 145.

[149] *ibid* 152.

[150] It was considered by the Scottish Law Commission, who ultimately rejected it. See n 29 above, para 4.13. See also Temkin, n 74 above, 177.

[151] A different conclusion might be reached if it were felt that the distinction were a valid one, which seems to be the position taken in G. Bell, 'Reflection on the Law of Rape' (2002) 47 *Journal of the Law Society of Scotland* 17.

**Public opinion**

A further concern might be ensuring that offence labels reflect public opinion. In this context, Ashworth has suggested that 'where people generally regard two types of conduct as different, the law should try to reflect that difference'.[152] This was the main argument made in England and Wales against merging theft and obtaining property by deception into a single offence[153] – that people generally regard stealing and swindling as different types of conduct and the law should reflect this.[154] It was also the argument made by the Criminal Law Revision Committee in its 1984 report on sexual offences for restricting rape to acts involving penetration of the vagina by the penis.[155] The definition of rape in English law is no longer quite this restrictive but it still does not include penetration by objects, seemingly on the basis that this was not felt to reflect the public understanding of the crime.[156] The Law Commission also utilised this argument in recommending that a new offence of first degree murder be created, on the basis that this would bring the law of homicide 'more into line with public opinion'.[157]

Of course, there are plenty of examples where it might be said that the law is out of step with public opinion. Blom-Cooper and Morris, for example, put the existing law on murder in that category, stating that 'there is a real divergence between the legal definition of murder and what the public believes to be murder', the former being a far wider category than the latter.[158]

But the extent to which public opinion should be reflected in offence labels is not obvious. It would normally be undesirable for the law to be utterly out of step with public opinion, if we want the public to be guided by the law and to treat it with respect. But in many instances public opinion on the appropriate name for an offence is likely to differ.[159] Even where a majority view can be discerned, this does not necessarily mean that it is appropriate to reflect it as in doing so the interests of a minority may be sacrificed. Victor Tadros makes this point in relation to the creation of a separate offence of domestic abuse, arguing that even if a majority of society does not recognise it as being a morally distinct offence, it should nonetheless be recognised as such, in order to protect the vulnerable minority who may be the

[152] Ashworth, n 17 above, 89. See also Wilson, n 17 above, 24; A. P. Simester and G. R. Sullivan, 'On the Nature and Rationale of Property Offences', in Duff and Green, n 33 above, 168, 186.
[153] As the House of Lords effectively did in *Gomez* [1993] AC 422. Gomez was the assistant manager of a shop who persuaded the manager to sell goods to his accomplice and to accept payment by two cheques. Gomez knew the cheques were stolen and worthless. There was no real question that Gomez would have been convicted of obtaining property by deception, but he was charged with theft instead. He was convicted of theft despite the fact that the owner of the property consented to its transfer, a conviction that was overturned on appeal, but restored by the House of Lords.
[154] Criminal Law Revision Committee, *Eighth Report: Theft and Related Offences* (Cmnd 2977, 1966) para 38.
[155] Criminal Law Revision Committee, *Fifteenth Report: Sexual Offences* (Cmnd 9213, 1984) para 2.47.
[156] Home Office, n 29 above, para 2.8.4.
[157] Law Commission, n 23 above, para 2.13.
[158] Blom-Cooper and Morris, n 71 above, 166.
[159] On this, see Mitchell's research into the categorisation of homicide scenarios: B. Mitchell, 'Public Perceptions of Homicide and Criminal Justice' (1998) 38 BJ Crim 453. He concludes (468-469) that the research 'strongly suggests that ordinary people agree with the principle of fair labelling, at least in relation to homicide, that the nature and magnitude of the wrongdoing should be reflected in the recognition of distinct offence categories. Unfortunately, though not unpredictably, the ways in which respondents placed the scenario cards into different piles did not generally provide any really clear indication of how homicides might be categorized or subgrouped.'

subject of such conduct.[160] In some cases – for example, in order to make clear that the law treats 'date rape' as seriously as it does other forms of rape – it may be legitimate for the law to seek to shape public opinion rather than be subservient to it.

**The symbolism of the name itself**

It has already been noted that fair labelling raises issues not just of classification but of the name itself. Thus a further consideration is the language used to describe offences, which can range from purely descriptive terminology, such as the possession offences in the Misuse of Drugs Act 1971,[161] to the highly emotive, such as murder.[162] This could potentially be very significant, not least when the label is represented to those outside the criminal justice system who lack legal knowledge. Certain conduct which would be called 'breach of the peace' in Scotland, for example, could be termed 'voyeurism'[163] or 'harassment'[164] in England, terms which sound altogether more alarming and might have a more detrimental effect on the offender's prospects and reputation.

**The elements of the offence that might be reflected**

If one is going to reject the use of emotive offence names, and label offences in a more straightforwardly descriptive way, the question arises of which elements of the offence should be reflected in that description. Horder has argued that there are three matters that one might want to see reflected in offence terms: 'mode of responsibility, outcome and intentionality'.[165] By mode of responsibility Horder means the manner in which the offence is carried out. Clarkson, writing in the context of homicide, has suggested that the main candidates for inclusion are the 'culpability of the defendant' (ie whether conduct was intentional, reckless, negligent and so on); the 'method of killing' (eg with a car, a weapon, or through torture); and the 'context of killing' (eg driving on road, through an act of terrorism, or a business operation).[166] He concludes that in the context of homicide only culpability and certain contexts are of sufficient moral significance that they should be reflected in offence names.[167] Later he also considers whether the identity of the victim should sometimes be reflected in an

[160] Tadros, n 33 above, 93. It is not clear how the creation of a distinct offence provides additional protection if the conduct concerned was already criminal. It may be that a distinct offence of domestic abuse might help towards this end by shaping public or practitioner opinion, or changing the nature of the evidence brought before the court and thus providing a better basis for sentencing decisions.
[161] Under s 5(1) of the Misuse of Drugs Act 1971, for example, it is an offence 'for a person to have a controlled drug in his possession'.
[162] On which see G. Virgo, 'Back to Basics: Reconstructing Manslaughter' (1994) 53 CLJ 44, who argues in the context of manslaughter that '[t]he very name of the offence may be criticised, since most cases do not involve anything remotely akin to slaughter' (52).
[163] In England, see the Sexual Offences Act 2003, s 67. In Scotland, see, eg, *MacDougall v Dochree* 1992 JC 154; *Bryce v Normand* 1997 SLT 1351.
[164] In England, see the Protection from Harassment Act 1997. In Scotland, see, eg, *McAlpine v Friel* 1997 SCCR 453.
[165] Horder, n 17 above, 341. There is a body of research on perceptions of crime seriousness which might be used to inform this discussion (see, eg, S. Stylianou, 'Measuring Crime Seriousness Perceptions: What We Have Learned and What Else Do We Want to Know' (2003) 31 *Journal of Criminal Justice* 37) – which in itself raises the question of whether labelling should attempt to reflect perceived seriousness or mould such perceptions.
[166] Clarkson, n 23 above, 145.
[167] *ibid* 146.

offence name, although he ultimately rejects this as irrelevant, on the basis that all human life is equally valuable.[168] There are contexts in which the identity of the victim has been reflected in the offence name, though, for example the offences of assaulting police officers or emergency service workers.[169]

**Communicating seriousness and emphasising wrongdoing**

Our discussion so far has treated labelling as a means of accurately describing the offender's wrongdoing (or differentiating it from other forms of wrongdoing), thereby allowing others to make a reasonably accurate assessment of its seriousness. But labelling can also be a means of communicating seriousness *itself*. A full exploration of the ways of doing this is beyond the scope of this paper, but some possibilities may be noted. First, the law might explicitly adopt the language of "degrees" in differentiating between different forms of a crime – not a feature of English or Scots law thus far, but recently advocated by the Law Commission in respect of murder.[170] Secondly, the law might draw on the social significance of existing offence names or concepts, as when the Setting the Boundaries review recommended that oral penetration should be included within the offence of rape because '[f]orced oral sex is as horrible, as demeaning and as traumatising as other forms of forced penile penetration'.[171] Thirdly, the law might track existing concepts such as different forms of *mens rea*: if intention, recklessness and negligence are understood as hierarchical in nature, then including those terms in the offence name may serve as a means of communicating relative seriousness. Fourthly, this might be done by sentencing structures attached to crimes, although the communication process is less direct here and addressed primarily to sentencers rather than the public at large.[172] There would seem no reason, however, why other criminal justice personnel such as prosecutors should not take account of this information in discharging their functions.

Occasionally, the state may create offences which do not bring any new behaviour within the ambit of the criminal sanction, but instead simply reclassify existing behaviour. In this context, the label chosen may be designed to communicate to the population at large, or to criminal justice personnel, that certain types of behaviour are to be taken more seriously by the criminal justice system than they have been in the past. One example of this is the introduction in Scotland of a specific offence of assaulting a provider of emergency services.[173] When the new offence was considered by the Justice Committee, it was accepted by the Scottish Executive that this would already constitute an offence under common law and indeed that the maximum penalty available for the new offence was no greater than that already available.[174] The rationale for creating a new statutory offence, however, was to send

[168] *ibid* 146.
[169] Under the Emergency Workers (Scotland) Act 2005 s 1, for example, it is an offence to assault or impede providers of emergency services. Likewise, under the Police (Scotland) Act 1967 s 41(1) it is an offence to assault, restrict, obstruct, molest or hinder a constable or police custody and security officer.
[170] Law Commission, n 10 above.
[171] Home Office, n 29 above, para 2.8.5.
[172] See, eg, Sched 1 of the Draft Criminal Code for Scotland, n 4 above, which allocates all offences to six categories (labelled 'A' to 'F') for sentencing purposes, each category having a different maximum (but no minimum) sentence.
[173] Emergency Workers (Scotland) Act 2005 ss 1-3.
[174] Subject to the statutory maximum penalties for the level of court in which the case was heard.

a message that such behaviour is unacceptable, in the hope that this would have a deterrent effect.[175]

## FAIR LABELLING AND DEFENCES

Thus far the focus has been on fair labelling in the context of offences. A final issue is whether fair labelling has any relevance to *defences*. On one hand it might be said that labelling is irrelevant at this stage as the defendant who has a complete defence is guilty of no crime, so there is nothing to be labelled. But maybe someone who has been subjected to the stresses of a criminal trial, only to be found to have a complete defence, has an even more compelling claim than an offender to be treated fairly in terms of the label attached to her conduct?

Clarkson has argued that fair labelling concerns do not apply to defences. He has suggested that the defences of self-defence, necessity and duress should be brought together under a unified defence (termed 'necessary action') governed by the same rules.[176] He anticipates that an objection to his proposal will be that it violates principles of fair labelling[177] but concludes that fair labelling principles do not apply in this context:

> The principle of fair labelling is primarily concerned with messages to the public in relation to rules of conduct. It is here that offence clarity and reasonable specificity are important. At the adjudication stage the communicative role of the criminal law is less important. Of course, it is part of the function of the law to communicate with wrongdoers themselves so that they can understand the nature of the allegations against them and be in a position to respond to them, and, more importantly here, so that they can know what they can lawfully do … However, at this second stage labels and specificity are less important.[178]

His view is not a universally held one. The Law Reform Commission for Ireland, for example, in the context of considering whether or not duress should be a defence to murder, stated that:

> If it is agreed that a killer who effects a net saving of human life in a situation of severe moral compulsion has done the right thing in the circumstances, then it follows that duress and necessity should be a complete answer to murder; and, on the principle of fair labelling, that the accused is entitled to be acquitted on the grounds of lesser evils rather than duress or necessity simpliciter.[179]

Indeed, we ourselves have relied on the principle of fair labelling in the past to argue for the retention of distinct defences of self-defence, duress (or coercion in Scotland) and necessity, contrary to Clarkson's proposal.[180]

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[175] Justice 1 Committee Official Report, 5 May 2004, col 737.
[176] C. M. V. Clarkson, 'Necessary Action: a New Defence' [2004] Crim LR 81. Chan and Simester have disputed Clarkson's position but without relying on considerations of labelling: W. Chan and A. P. Simester, 'Duress, Necessity: How Many Defences?' (2005) 16 KCLJ 121.
[177] *ibid* 94.
[178] *ibid* 94.
[179] Law Reform Commission for Ireland, *Consultation Paper on Duress and Necessity* (LRC CR 39-2006, 2006) para 1.09.
[180] Chalmers and Leverick, n 34 above, para 3.03.

This is the view that we still hold, although the issue is by no means as straightforward as we once thought. It may be that fair labelling is important in relation to defences but for different reasons to why it is important in relation to offences. Certainly some of the reasons why fair labelling is important for offences do not apply in quite the same way to defences. Previous acquittals are not generally made known to sentencers or employers, for example. But at least some criminal trials that result in acquittals are still reported by the media, which means that the public is receiving a message about the person thus acquitted. It may be that it is only fair to an individual that the nature of her defence is communicated, as this may influence the manner in which she is regarded by the public. It may also be relevant in terms of the individual's own self-respect, as John Gardner has suggested, and regardless of what the public's attitude might be.[181]

In this context, it has sometimes been suggested that there is a hierarchy of defences in terms of those that reflect most favourably on the defendant.[182] At the top of the hierarchy would sit justification defences, such as self-defence, that signify that she did the right thing (or at least did not do the wrong thing). A step down would sit excuse defences, such as superior orders, most instances of duress and necessity and (perhaps) insanity,[183] which signify that she acted unacceptably but cannot be blamed for her behaviour. A step down from that would sit lack of capacity defences such as non-age and a step down from that would sit non-exculpatory defences such as diplomatic immunity. The precise definition of each category and the question of which particular defences fit into which category are issues that have attracted a huge amount of literature, but which lie beyond the scope of this paper.[184] The point is that the defendant may well have a legitimate preference in having her conduct declared to be acceptable rather than, say, unacceptable but excused and if this is so, then the principle of fair labelling does have some application to defences.

Even if Clarkson is correct in arguing that fair labelling is concerned primarily with rules of conduct, we would argue that he is incorrect in his assumption that 'the role of defences relates to matters of adjudication [rather than conduct] in the ascertainment of liability'.[185] That is not correct: justification defences such as self-defence are rules of conduct rather than rules of adjudication,[186] and the difference matters because citizens are entitled to rely on

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[181] J. Gardner, 'The Mark of Responsibility' (2003) 23 OJLS 157; J. Gardner, 'The Gist of Excuses' (1998) 1 *Buffalo Criminal Law Review* 575, 590; J. Gardner, 'In Defence of Defences', in P. Asp, C. E. Herlitz and L. Holmqvist (eds), *Flores Juris et Legum: Festskrift till Nils Jareborg* (Uppsala: Iustus Forlag, 2002), 262.

[182] See Gardner, 'In Defence of Defences', n 181 above and also M. Baron, 'Justifications and Excuses' (2005) 2 *Ohio State Journal of Criminal Law* 387, 389; J. Horder, *Excusing Crime* (Oxford: Oxford University Press, 2004), 99; V. Tadros, 'The Structure of Defences in Scots Criminal Law' (2003) 7 Edin LR 60, 60-61.

[183] Insanity has been variously classified as an excuse defence or a lack of capacity defence. The issue need not concern us here, but is discussed in Chalmers and Leverick, n 34 above, paras 7.03-7.04.

[184] For a detailed discussion, see Chalmers and Leverick, n 34 above, chapter 1 and Leverick, n 34 above, chapter 2.

[185] Clarkson, n 176 above, 94. Clarkson states that this 'can be argued'; his argument thereafter assumes that the argument has succeeded.

[186] The distinction is most clearly made by Robinson, who includes justifications in his 'draft code of conduct' but all other defences in his 'draft code of adjudication': Robinson, n 48 above, 211-239. See also P. Alldridge, 'Rules for Courts and Rules for Citizens' (1990) 10 OJLS 487, 499 (contrasting self-defence and duress). But see M. Dan-Cohen, 'Decision Rules and Conduct Rules: on Acoustic Separation in Criminal Law' (1984) 97 Harv LR 625, 648-649. Dan-Cohen suggests that defences 'seem to belong quite naturally in the camp of decision rules', but his discussion of defences is limited to necessity and duress and, most significantly, does not consider self-defence. *Cf.* J. Horder, 'Criminal Law and Legal Positivism' (2002) 8 *Legal Theory* 221 (criticising the 'guidance view' on which Robinson's distinction rests).

rules of conduct – but not rules of adjudication – in deciding how to act.[187] It may be important, for example, to communicate the fact that when a defendant is acquitted of hijacking because she did so to escape death or serious injury, her acquittal is because of duress, and so future would-be hijackers cannot rely on the court's decision in deciding whether or not to seize control of an aircraft. Although we believe this is sufficient in principle to rebut Clarkson's argument, the trouble is that in practical terms this information tends not to be declared by our criminal justice system, which does not give reasons for acquittals,[188] and the messages involved might in any case be considered too subtle to have much practical effect.[189]

## CONCLUSION

We noted at the outset of this paper that the principle of fair labelling had been widely invoked but never subjected to sustained critical analysis. This may seem counter-intuitive, but it should not be surprising. The principle itself is entirely unobjectionable – as Williams put it, '[n]o-one could argue that unfair labelling is acceptable (apart, of course, from cases where it has to be accepted for practical reasons)'.[190] This means that the principle is employed in argument as a rhetorical device, rather than because anyone has been persuaded as to the merits of fair over unfair labelling.

But the principle's unobjectionability does not mean that its content can be ignored if it is going to continue to be so readily invoked. In this paper, we have attempted to sketch out the issues involved. At this stage, we would reiterate that limited attention has been paid to the question of *to whom labels are addressed*. Broadly speaking, labels are important as being addressed to two different groups of people: the general public (including those who may have close contact with the defendant) and those working within the criminal justice system, but the needs of those two groups are different. At its simplest, the distinction can be put this way – the most important consideration for the first group is *description* of offending, whereas *differentiation* of offending matters most for the second. We have also reviewed considerations which are relevant to labelling decisions, and argued that fair labelling, properly understood, is relevant to defences as well as offences. In many ways, this work is preliminary in nature, but we hope that it paves the way for a fuller understanding of the principle.

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[187] See, eg, Alldridge, n 186 above, 499-501. More pragmatically, the use of the term "necessary action" might confuse the jury in some cases of duress or any instance of the defence founded on a mistake of fact, although it might be possible to avoid this by renaming the proposed defence.

[188] For an argument that it *should* do, see P.H. Robinson, P.D. Greene and N.R. Goldstein, 'Making Criminal Codes Functional: a Code of Conduct and a Code of Adjudication' (1996) 57 *Journal of Criminal Law and Criminology* 304.

[189] *Cf. R v Safi (Ali Ahmed) and others* [2004] 1 Cr App R 14, [32] where the Court of Appeal quashed the defendants' convictions for hijacking because the jury had been misdirected on the defence of duress, but was at pains to point out that the only reason for the appeal succeeding was the misdirection, expressing 'every confidence' that future juries would 'convict in appropriate cases'.

[190] Williams, n 16 above, 86.