Macaulay's Penal Code, Adam Smith and the Jurisprudence of Resentment

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MACAULAY’S PENAL CODE, ADAM SMITH AND THE JURISPRUDENCE OF RESENTMENT

Conference Paper: Delivered at the Conference on the Legal Histories of the British Empire, National University, Singapore, July 2012

Abstract:

The ‘offences affecting the human body’ in Chapter 16 of the Indian Penal Code were shaped by Thomas Macaulay’s distinctive vision of the moral principles that should constrain criminal liability for unlawful homicide and lesser offences of causing harm. Though the general structure of Macaulay’s Draft Penal Code owes much to Bentham, the offences affecting the human body display far closer affinity with the jurisprudence of Adam Smith’s *Theory of the Moral Sentiments*. The offences proposed in the Draft Code were radically different from the corresponding offences against the person in English statutory and common law. Though Macaulay’s provisions did not survive unscathed when the Indian Penal Code was enacted in 1860, those radical differences from English law were not eliminated. Two principles in particular distinguish the Indian offences affecting the human body: first, the ‘correspondence principle’ - that fault rather than results should determine criminal responsibility for causing injury or death; and, second, the ‘comparative fault principle’ – that fault on the part of the victim can extenuate the offender’s crime. Macaulay’s Draft Code offences affecting the human body were an idealistic experiment that anticipated campaigns for criminal law reform in the late 20th century in the United States and Australia. From an immediate, pragmatic point of view however, the Indian experiment was an instructive failure. The effect of Macaulay’s reform of the offences of affecting the human body was to exacerbate Indian disaffection with British justice and precipitate a constitutional conflict between the British colonial administration in India and its judiciary.
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The Indian Law Commission presented its Draft Penal Code to the Governor General in Council of India in October 1837. Thomas Babington Macaulay, who presided over the Commission, was effectively the sole author of the Draft Code, its accompanying Report and a substantial commentary entitled Notes on the Indian Penal Code.¹ The doctrinal innovations proposed in the Draft Code were radical for their time. They anticipate some central and contested issues of criminal law theory in the late 20th and early 21st century.

Macaulay’s Draft Code was enacted in 1860 after a protracted process of review which resulted in loss or compromise of some of the more radical of his innovations.² Modern discussion has tended to obscure his originality by disregarding³ or eliding⁴ the differences between his Draft Code and its eventual

¹ The Report, Draft Code and Notes are printed in the following publication: A Copy of the Penal Code Prepared by the Indian Law Commissioners and Published by Command of The Governor-General of India in Council (Hertford: Printed by Stephen Austin, Fore Street, Booksellers to the East India College, 1851, i-xxi, 1-198); hereafter cited generally as ‘Draft Penal Code’ and, when particularity is necessary, as ‘Report’, ‘Draft Code’ or ‘Notes’.

² Eric Stokes, The English Utilitarians in India (Clarendon Press, Oxford, 1959) 224 who provides the most authoritative account of the genesis of the Indian Penal Code. For an excellent, recent overview of sources, see Barry Wright, ‘Macaaulay’s Indian Penal Code: Historical Context and Originating Principles’ Chapter 2 in Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform (edited, Wing-Cheong Chan, Barry Wright, Stanley Yeo, Ashgate, 2011).

³ Ibid, 262: ‘It would be tedious and irrelevant to narrate the alterations and modifications made to Macaulay’s draft.’

⁴ See, in particular, the succession of critical discussions of Macaulay’s Code in: K J M Smith, ‘Macaulay’s ‘Utilitarian’ Indian Penal Code: An Illustration of the Accidental Function of Time, Place and Personalities in Law Making’, ch 10 in Legal History in the Making, edited W M Gordon & T D Fergus, Hambledon Press 1991, 145-64; Lawyers, Legislators and Theorists (Clarendon Press, Oxford, 1998) and K J M Smith, R Cocks, W Cornish, Volume XIII, The Oxford History of the Laws of England (Oxford University Press, 2010), ‘Criminal Law’, 1-464. For the most part, Smith’s discussion of Macaulay Draft Penal Code is based not on Macaulay’s original, but on provisions only to be found in the Indian Penal Code of 1860. Of the works cited, Lawyers, Legislators and Theorists provides the most comprehensive account and the references that follow are restricted to this text. In each of the following instances critical comment about Macaulay’s draft is misdirected. [141-2] Section 304 of the Macaulay Code did impose liability for negligent homicide; for reasons unknown the provision was omitted from the 1860 IPC. It was restored without alteration as s304A, at the initiative of James Fitzjames Stephen. The suggestion in KJM Smith’s discussion that Macaulay was influenced by Bentham in his omission of liability for negligent homicide is accordingly unfounded. [142-3] Section 26 of the Macaulay Code, which defines ‘voluntarily’, does not extend to include having ‘reason to believe’ an effect to be likely. That was a later addition. [143] Nor is Macaulay’s use of ‘voluntarily’ confined to ‘aggravated assaults’; see, for example, ss402, 403. [151] Section 294, which defines the elements of murder, is not wider than the definition of murder in R S Wright’s Draft Jamaican Criminal Code – the definitions are identical in scope. [221] Section 67 of the Macaulay
issue in the Indian Penal Code of 1860. This essay is an exploration of several of the more challenging among Macaulay’s proposals. The discussion will be primarily concerned with the Draft Code. Points of difference between the Draft and the Indian Penal Code of 1860 will be noted when relevant but not discussed in detail.

Modern scholars tend to accept Jeremy Bentham’s boast that he would be the ‘dead legislative of British India’. Eric Stokes, whose account of Bentham’s influence is generally accepted as authoritative, asserts that Bentham provided the ‘design and informing spirit’ of the Code. Macaulay acknowledged his debt to Bentham. His influence was general, however, rather than specific. The formulation of offences and the structure of the Code bear a family resemblance, but no more than a family resemblance, to the prescriptions for codification in Bentham’s works.

Code does not set out a ‘knowledge based’ test of insanity. That was a later addition. [237] Section 297 of the Macaulay Code, which defines provocation, evinces no ‘doubt’ concerning the person of ‘ordinary temper’. That criterion, which was an intrinsic element of the Macaulay formulation of the provocation defence was, however, omitted from the IPC definition of provocation. [266, 271, 377] Macaulay’s Code contains no general attempt provision. Chapter XXIII: ‘Of Attempts to Commit Offences’ made its first appearance in the Indian Penal Code of 1860. Smith’s comment that Macaulay failed to heed Bentham’s warning on the indeterminacy of the proximity requirement in the law of attempts, and his other comments on Macaulay’s Code in relation to attempts, are accordingly unfounded.


Eric Stokes, above n???, 225. And further, in the same vein, 229, 233.

Several of Bentham’s texts were available and known to Macaulay. These would have included: An Introduction to the Principles of Morals and Legislation (1789) and Etienne Dumont’s French translations of various of Bentham’s manuscripts. These include: Traites De Legislation Civile Et Penale (1802), which did not appear in English translation until after Macaulay’s death (Theory of Legislation, translated Robert Hildreth 1864, edited CK Ogden 1931) and Theorie des Peines et des Recompences (1811). An English edition of the latter work appeared in 1830 under the title, The Rationale of Punishment (Robert Heward, London, 1830, edited James RT McHugh, Prometheus, 2009). Macaulay was fluent in French and familiar with the Dumont editions: See the tribute to Dumont and Bentham in Thomas Babington, Lord Macaulay, The Miscellaneous Writings of Lord
I will say little of Bentham’s contribution; it is admirably discussed in readily available sources. My concern is with the particular rather than the general, with doctrine rather than structure, for it is here that the radical nature of Macaulay’s contribution to criminal law theory is most apparent. It is here, too, that the philosophical differences between Bentham and Macaulay are most apparent. Macaulay’s admiration for Bentham was qualified. He distinguished between Bentham the ‘jurist’, for whom his admiration was unbounded, and Bentham the philosopher, whose ‘moral speculations’ he rejected.

In his authoritative biography of Macaulay, John Clive provides a summation that provides my starting point in this essay:

[It] would be false to label Macaulay, even in his character as a penologist, as merely a disciple of Bentham. His imagination and his sense of concretion – conjoined as always – infused marrow into the dry bones of Bentham….If one were to characterise Macaulay in terms of his work in India, it would have to be as one of the last representatives of the Scottish school. In matters of moral philosophy, Macaulay was far closer to Adam Smith than he was to Benthamite utilitarianism and it is Adam Smith’s work, in particular his Theory of Moral Sentiments, which will provide the framework for discussion of the Draft Code. I should say at once that Macaulay made no reference to Adam Smith in his Notes or in other documents relating to the Code: footnoting was not the custom of the times. But Macaulay was familiar with the Wealth of Nations;

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9 Ibid, 473.

he held Smith in high regard and, omnivorous reader that he was, we may assume that he was familiar with the *Theory of Moral Sentiments* as well; it was no less famous. Six editions of the *Theory* were published during Adam Smith’s lifetime, the first in 1759 and the last in 1790, the year of his death. Smith always considered it the better book.\textsuperscript{11}

Macaulay began work on the Draft Criminal Code with the reflection, in a letter to his friend Thomas Ellis, that it was ‘one of the finest employments of the intellect’ that he could conceive. His contempt for the ‘mere technical study of the law’ increased as the work proceeded.\textsuperscript{12} Criminal law and the ‘principles of penal jurisprudence’, more than any other area for reform, had long ‘attracted the attention of philosophers’ and ‘still excites so general an interest among reflecting and reading men’.\textsuperscript{13} So far as the Draft Code is concerned I can claim no more than affinities, resemblances and congruence of principles between Macaulay and Smith. They were alike in the historical and literary cast of their minds, alike in their acceptance of the emotional springs of moral judgement and alike in their rejection of the utilitarian felicific calculus as a criterion of moral evaluation.\textsuperscript{14} Macaulay might have stepped from the pages of the *Theory of Moral Sentiments* as an exemplary protagonist in his sense of honour, his self regard, his habit of

\textsuperscript{11} John Rae, *Life of Adam Smith* (Macmillan, 1895) 436.

\textsuperscript{12} The Letters of Thomas Babington Macaulay, Volume 3, January 1834-August 1841, Edited Thomas Pinney, 152

\textsuperscript{13} John Clive, above n????, 436, quoting from Board’s Collections, Vol. 1555 (1835-7), No63507

internal dialogue and his 'particular awareness of people’s psychological and emotional states'.

Liability for omissions is an immediate and obvious example of their congruence in matters of principle. Macaulay, like Adam Smith, distinguished between obligations to refrain from doing injury and obligations of positive benevolence which he considered to be only rarely appropriate as subjects for enforcement by criminal law. Bentham envisaged a far more activist role for government. The extended discussion of the question of liability for omissions in Macaulay’s Notes on the Code concluded that criminal liability should not be imposed, no matter how terrible the consequences of a failure to act, unless the person breached a duty positively imposed by law. In Macaulay’s conception of a completely codified system of laws, that legal duty could only be found in statute. Here, as elsewhere, Macaulay departed from the Benthamite utilitarianism of Edward Livingston’s draft code for the State of Louisiana, which proposed criminal liability for failures of benevolence.

In the concluding pages of the *Theory of Moral Sentiments* Adam Smith foreshadowed a book on ‘natural jurisprudence’ which would express ‘a theory of general principles which ought to run through and be the foundation of the laws of all nations” and complete a trilogy that would provide an integrated presentation of his philosophies of economics, ethics and jurisprudence. He did not live to

15 John Clive, above n???. See, in particular, Ch9, ‘TBM and Tom’ and 251-5, 457, 459.
16 Macaulay, Notes, above n???, 408: ‘We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstance which marks them out as peculiarly fit objects of penal legislation.’ On Adam Smith and liability for omissions, see Knud Haakonssen, above n???, 85-6.
17 *Theory of Legislation*, above n???, ????
19 TMS, VII. iv. 37.
complete the projected work and gave strict instructions to his friends to destroy his manuscripts after his death.\textsuperscript{20} Student notes of his lectures on jurisprudence, given at the University of Glasgow in 1762-3 and 1763-4 do survive. They were discovered more than a century after his death and not published in their entirety until 1982.\textsuperscript{21} For the most part the lectures are conventional in their detailed account of 18\textsuperscript{th} century Scottish and English law and provide few indications of the nature of the projected work on natural jurisprudence. For my purposes, the \textit{Theory of Moral Sentiments} provides a sufficient guide.\textsuperscript{22} This essay is an extended speculation on the theme that Macaulay's Draft Code and its accompanying Notes might be read as an epitome of Adam Smith's never completed work on the general principles of natural jurisprudence.

The Draft Code chapters containing offences ‘relating to religion or caste’ [ch 15]; offences ‘affecting the human body’ [ch 18]; defamation [ch 25] and offences of ‘intimidation, insult and annoyance’ [ch 26] will provide the primary area for discussion. Taken together, these chapters set out a compendious code of offences against the person that went well beyond 19\textsuperscript{th} century English statutory or common law both in the sophistication of its provisions and in its extensions of criminal liability beyond the infliction or threat of physical injury to less tangible harms.

I will begin with a summary account of Adam Smith’s extensive discussion of resentment and justice in the \textit{Theory of Moral Sentiments}. This provides the foundation for the ensuing discussion of Macaulay and his Draft Code. It will be

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\item \textsuperscript{20} John Rae, above n???; Ian Ross, \textit{The Life of Adam Smith} (Clarendon Press, Oxford, 1995) 404-6.
\item \textsuperscript{22} For reconstructions, see Knud Haakonsen, above n????? and Knud Haakonsen, ‘What Might Properly Be Called Natural Jurisprudence?’, Ch 9 in \textit{Adam Smith} (Ashgate, 1998); David Lieberman, ?????? in ??????? (Edited Knud Haakonsen, ?????) ?????.
\end{itemize}
argued that the ‘irascible passion’ of resentment, which is central to Adam Smith’s account of moral and legal blameworthiness, provides the underlying principle of moral coherence in Macaulay’s offences against the person. Adam Smith thought unrestrained anger was the most ‘detestable’ of passions. But resentment, when appropriately guarded and limited, was a ‘generous and noble’ passion. Resentment, when excited by a serious wrong, will justify informal retaliation against the wrongdoer or formal punishment by the state for wrongdoing. Such expressions of resentment, when appropriately limited, may be necessary, just and even praiseworthy:

[W]e admire that noble and generous resentment which governs its pursuit of the greatest injuries, not by the rage which they are apt to excite in the breast of the sufferer, but by the indignation which they naturally call forth in that of the impartial spectator; which allows no word, no gesture, to escape it beyond what this more equitable sentiment would dictate; which never, even in thought, attempts any greater vengeance, nor desires to inflict any greater punishment, than what every indifferent person would rejoice to see executed.

There are several things to say in these preliminaries about the preceding quotation, which combines a number of themes from the Theory of Moral Sentiments in what is, for Smith, an unusually compact formulation. I will leave, for the moment, his reference to the ‘nobility’ of appropriate expressions of resentment. The reference to ‘generosity’ acknowledges the fact that resentment is often felt and expressed on behalf of others who have been the victims of wrongdoing. Smith’s counterpointing of ‘vengeance’ and ‘punishment’ distinguishes implicitly between reactive retaliation by a victim of wrongdoing and the infliction of punishment by a court. The significant thing, however, is that private vengeance or criminal punishment can each amount to an appropriate return for wrongdoing when they match the sympathetic indignation of the

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23 Adam Smith, TMS, above n?.
‘impartial spectator’, who is Adam Smith’s best known contribution to moral theory.\(^{25}\) When criminal penalties for wrongdoing are in question Smith believed that the degree of resentment that would be felt by an impartial spectator is the only ‘precise and distinct measure’\(^{26}\) of a proportionate and justifiable return for the wrong. When criminal punishment is in question, the court (ideally) takes the role of the impartial spectator in determining the penalty for the offence. The occasions when private vengeance is appropriate or acceptable are, of course, far more restricted.

Smith argued that a primary object of the law relating to offences against the person is to provide a lawful expression of the victim’s justifiable sense of resentment against the offender for the infliction of harm.\(^{27}\) He remarked that ‘mercy to the guilty is cruelty to the innocent’.\(^{28}\)

A modern criminal law theorist, John Gardner, characterises the lawful expression of resentment by criminal punishment of wrongdoers as the ‘displacement function’ that constitutes a ‘central pillar of the criminal law’s justification’.\(^{29}\) It was a central consideration for Macaulay, for whom the Penal Code was to be an instrument for keeping the peace among the diverse communities of colonists and colonised in India.\(^{30}\) The law relating to offences against the person has other objects of course: the ripple effects of harms inflicted on immediate victims extend to an indefinite class of others who will be

\(^{25}\) See, for example, Amartya Sen, *The Idea of Justice* (Allan Lane, Penguin Books, 2009) \\
\(^{26}\) *TMS*, above n????, VII.i.1.49. The ‘precise and distinct measure’ is discussed, A L Macfie, *The Individual in Society: Papers on Adam Smith* (George Allen and Unwin, London, 1967) 82-6 \\
\(^{27}\) *TMS*, above n????, VII. iv.36: In the absence of law, ‘civil society would become a scene of bloodshed and disorder, every man revenging himself at his own hand, whenever he fancied he was injured.’ \\
\(^{28}\) *TMS*, ?????? \\
\(^{30}\) See Macaulay’s Notes on the Code, J F Stephen and Adam Smith.
affected in various ways by the commission of the offence. Punishment of offenders allays public anger and fear and satisfies public concern that justice be done.\(^{31}\) But it is the displacement of the immediate victim’s feeling of justifiable resentment that is the important thing for present purposes. The criminal process expresses what Smith called the “sympathetic indignation’ of the community on behalf of the victim.\(^{32}\) The displacement function has two complementary effects. First, criminal proceedings against the wrongdoer will tend to avert the possibility that the victim, their family or others will take the law into their own hands and exact private vengeance. Second, formal punishment of the wrongdoer provides a reaffirmation of the victim’s rights and status in the community as against the wrongdoer.

Macaulay proposed three significant innovations in criminal law doctrine that can be illuminated by consideration of the *Theory of Moral Sentiments*. The first was his extension of the law of offences against the person to include injuries to reputation, social and religious sensitivities. The second was his acceptance of the ‘correspondence principle’ between fault and result in the formulation of offences against the person and the third was his extension of the partial defence of provocation to the offences of causing physical harm to the person. Summary descriptions of these innovations follow. They will be discussed in detail after a more extended consideration of the affinities between Macaulay and Adam Smith.

1. **Extension and reform of the law of offences against the person.** In these offences there is a victim who has suffered a wrongful physical, psychic or social injury inflicted by an offender. The Draft Code provisions extend beyond

\(^{31}\) See Jeremy Bentham, “????? on ‘secondary harms’?????\n
\(^{32}\) *TMS, ????*” ‘As the greater and more irreparable the evil that is done, the resentment of the sufferer runs naturally the higher; so does likewise the sympathetic indignation of the spectator....’ Cf RA Duff’s point that a criminal prosecution is undertaken in the name of ‘The People’.
physical injuries or harms to include wrongs against reputation and religious and social sensitivities. Justifiable resentment plays a significant structural role in the formulation of these offences. They were intended to displace private vengeance for injury or affront by the promise of state sanctioned penalties for the wrongdoer. The emphasis throughout is on the requirement of a wrongful injury to the victim. If the infliction of physical harm was precipitated by provocation, the criminal liability of the offender is reduced to a lesser grade of offending. The same emphasis on wrongful injury is apparent in Macaulay’s formulation of the offence of defamation, which departed from precedent. In English law, he wrote, ‘the essence of the crime of private libel consists in its tendency to provoke a breach of the peace’, regardless of the truth or falsity of the defendant’s imputations. In the Draft Code, however, truth is an absolute defence, for the victim’s outrage in response to a truthful imputation is without justification.

2. **Correspondence principle:**34 fault and result must correspond: Macaulay believed that there was a fundamental difference between criminal responsibility for harm caused intentionally or knowingly and harm caused unwittingly. The Draft Code draws the distinction with incisive clarity. Though criminal responsibility can be imposed for death or injury resulting from a negligent failure to realise risks and take precautions these offences of negligence are of a quite different and lesser order of seriousness from those that require proof of intention or knowledge with respect to death or injury.

3. **Provocation and comparative fault:** In the offences of causing physical harm, an insult, attack or other violation of law or mores by the victim that provoked the offender to retaliate can reduce the grade of the offence. Unlike common

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law, which restricts provocation to murder, Chapter XVIII of the Draft Code recognises provocation as partial defence of general application to the ‘offences affecting the human body’.

In retrospect, the Draft Code offences against the person can be seen as a radical and experimental revision of English statutory and common law conceptions of criminal responsibility for causing harm. To speak of an ‘experiment’ suggests that it might be possible to determine whether the experiment could be counted as a success or failure. Legal reforms rarely offer the possibility of definitive evaluation of the results of innovation. There are, however, grounds for believing that some of the experimental outcomes of his innovations would have disappointed Macaulay’s expectations – could he have projected himself into the future. These will be discussed briefly in the conclusion. His projected reforms of the offences of causing death or injury, which were intended to minimise the distinctions between the British and their colonial subjects in the criminal law, were to provide a focus for bitter resentment against palpable inequality and injustice in their application and administration.

**ADAM SMITH**

The *Theory of Moral Sentiments* is a richly discursive book which reached its final form over four decades of reflection and revision between the first edition in 1859 and the sixth, in 1890. The summary selection and paraphrase of passages in the *Theory* that follows will not do justice to the nuances and layered complexity of Smith’s discussion. It will serve, however, to illuminate some underlying themes in Macaulay’s Draft Code. There are three topical areas for consideration. The first is Smith’s discussion of sympathy, resentment and the impartial spectator, introduced earlier. The second topic is the effect of fortune or misfortune on the moral and legal evaluation of wrongdoing and Smith’s
discussion of the ‘equitable maxim’ that results shouldn’t count when blameworthiness is in issue. The third is the great divide that Smith discerned between the two areas of criminal law that he called ‘laws of justice’ and ‘laws of police’. The word ‘police’, in Smith’s usage, referred to the laws that regulate the civil and administrative life of a city or nation. Laws of police were distinguished from ‘laws of justice’ which punished those who inflicted injuries on their fellows or violated their rights.\(^{35}\) It is here, in his explication of the laws of justice, that Smith deployed the concepts of sympathy, resentment and the impartial spectator.

**Sympathy, Resentment and the Impartial Spectator**

Sympathy, in the sense of ‘fellow feeling’, is the natural foundation of moral approbation and moral condemnation in Adam Smith’s philosophy. The word is used in its broadest connotation: ‘sympathy’ extends beyond pity or compassion for suffering. It includes ‘our fellow feeling with any passion whatever’:\(^{36}\) ‘In every passion of which the mind of man is susceptible, the emotions of the bystander always correspond to what, by bringing the case home to himself, he imagines should be the sentiments of the sufferer.’\(^ {37}\) The careful qualification of Smith’s account is significant. Sympathy with any complex expression of emotion by another will always involve an exercise of moral imagination on the part of the observer, who must ‘bring the case home to himself’ and imagine what ‘should be’ the sentiments of the person observed. That discriminating exercise of imagination is most apparent when anger is the object of observation: ‘The furious behaviour of an angry man is more likely to exasperate us against himself than against his enemies.’\(^ {38}\) Only if it becomes apparent that he had adequate


\(^{36}\) *TMS*, I.i.1.5. See Knud Haakonssen, above n????, 51, on the Adam Smith’s usage of the term.

\(^{37}\) *TMS*, I.i.1.4.

\(^{38}\) Ibid, I.i.1.7.
provocation will another’s anger enlist the sympathetic indignation of the observer.

Martha Nussbaum, one of a number of legal theorists who have drawn on the *Theory of Moral Sentiments*, emphasises the cognitive content of our emotional responses:

> Emotions are not mindless surges of affect, but, instead, intelligent responses that are attuned both to events in the world and the person’s important values or goals. They both contain appraisals of items in the world and invite the appraisal of others.\(^\text{39}\)

Measured resentment is an appropriate response to unfairness or injustice. That is not to say, of course, that it is the only appropriate response: submission may be advisable on occasion and it is sometimes admirable to turn the other cheek. But injustice will often require an expression of resentment. David Hume imagined a society in which there were, intermingled with the population, rational creatures so lacking in strength or assurance as to be ‘incapable of all resistance’ and unable, no matter how they were provoked, of making us ‘feel the effects of their resentment’. Hume thought we would be bound to treat these gentle creatures humanely, but argued that they could have no claim to justice: ‘our intercourse with them could not be called society, which supposes a degree of equality, but absolute command on the one side, and servile obedience on the other.’\(^\text{40}\)

Adam Smith, in more discursive mode, writes that the ‘man who underrates himself’ will generally suffer at the hands of others, ‘all the injustice


which he does to himself, and frequently a great deal more.\textsuperscript{41} Quite apart from
the criminal law, substantial areas of our relationships with our fellow citizens are
governed by formal or informal conventions, breach of which will elicit appropriate
expressions of resentment. The sympathetic involvement of spectators is often
an element of these informal enforcement systems. So, for example, a public
violation of conventions about racist speech and other forms of denigration is
likely to elicit the sympathetic indignation of those who are not directly affected.
Similarly, informal rules about queuing for access or entry are maintained, in
many societies, by the expectation that queue jumping will elicit expressions of
resentment.\textsuperscript{42}

Sympathy and antipathy, approbation and disapprobation are measured by the
responses of the impartial spectator, who has two personae. The first is the
internal invigilator who informs the agent's own moral imagination. In later
editions of the \textit{Theory}, this internal invigilator is transformed into the voice of
conscience.\textsuperscript{43} I have little to say of the impartial spectator in the guise of an
internal invigilator. It is the impartial spectator's evaluation of wrongdoing by a
wrongdoer that matters for the purposes of the criminal law. This is an evaluation
made from an 'objective' standpoint.\textsuperscript{44} When informal social sanctions are in
question, appropriate expressions of resentment are guided by standards of
propriety. When punishment for a crime is to be determined by a court, the

\textsuperscript{41} TMS, VI, iii, 52 [261].
\textsuperscript{42} See the classic study by S Milgram, J Liberty II, R Toledo and J Blacken, 'Response to Intrusion in
\textsuperscript{43} TMS III.1.6 ‘When I endeavour to examine my own conduct, when I endeavour to pass sentence
upon it, and either to approve or condemn it, it is evident that, in all such cases, I divide myself, as it
were, into two persons; and that I, the examiner and judge, represents a different character from that
other I, the person whose conduct is examined into and judged of. The first is the spectator, whose
sentiments with regard to my own conduct I endeavour to enter into, by placing myself in his situation,
and by considering how it would appear to me, when seen from that particular point of view. The
second is the agent, the person whom I properly call myself, and of whose conduct, under the character
of a spectator, I was endeavouring to form some opinion. The first is the judge; the second the person
judged of.’ See D D Raphael, \textit{The Impartial Spectator} (OUP, 2007), 32-51, for an authoritative
account of the metamorphoses of Adam Smith’s impartial spectator as internal invigilator.
\textsuperscript{44} There is an illuminating discussion of the ‘positional objectivity’ of the impartial spectator in
Amartya Sen, above n?????, Ch 7 ‘Position, Relevance and Illusion’. [Location 2850-3]
The impartial spectator, whose evaluative judgements are made from an external, objective vantage point, is the embodiment of a practical standard of conduct for the guidance of ordinary people. Conscience may demand far more of the agent, and God will certainly do so. Smith distinguishes an ideal of ‘complete propriety and perfection...in comparison with which the actions of all men must for ever appear blameable and imperfect.’ Less is expected of ordinary humanity by the

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45 The Australian Commonwealth Criminal Code invokes several ‘impartial spectators’ for evaluative purpose. There is the ‘reasonable adult’ whose putative reactions determine whether material transmitted over a telecommunications link is ‘offensive’ (473.4 Determining whether material is offensive). Closely related is the ‘reasonable person’ who is the measure of ‘menacing, harassing or offensive’ communications (474.14 Using a carriage service to menace, harass or cause offence). Dishonesty is determined by reference to the putative reactions of the ‘ordinary person’ (see, for example, 130.3 Dishonesty).

46 Draft Code, cl.73.
impartial spectator, who embodies ‘the idea of that degree of proximity or distance from this complete perfection which the actions of the greater part of men commonly arrive at.’ Much of the charm and continuing interest of the Theory of Moral Sentiments is to be found in Smith’s social commentary on the differences between that pragmatic standard and the demanding standard of ideal moral propriety.

Human Justice and the ‘Equitable Maxim’

The gulf between the ideal and the real world of ordinary humanity reappears in Smith’s discussion of the ‘equitable maxim’ that consequences ‘ought to have no influence on our sentiments, with regard to the merit or propriety of [a person’s] conduct’. The maxim, he asserts, is self evident in its justice and it is, moreover, universally acknowledged. In the real world however, consequences do matter and they often determine our judgements of the merit or demerit of an agent’s conduct. Smith goes on to provide an extended discussion of the profound effect of this ‘irregularity of sentiment, which everybody feels’ on judgements of merit and of blameworthiness. Merit and praise for successful endeavours can be ignored for present purposes. With regard to wrongdoing, Smith distinguishes two effects of this ‘irregularity’ which have particular relevance to the discussion of Macaulay’s Draft Code to follow. The first is the excess of resentment felt, even by an impartial spectator, for accidental harms: ‘we generally enter so far into the resentment of the sufferer, as to approve of his inflicting a punishment upon the offender much beyond what the offence would appear to deserve, had no such unlucky consequence followed from it.’

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47 TMS 1.1.5.9, p26.
48 Ibid, II.iii.3.2, para 5 [105]
49 Ibid, II.iii.intro.3, para 6. [93]
50 See George Sher, Who Knew? Responsibility Without Awareness, 137-44 [Check] (Oxford University Press, 2009) on asymmetry in the conditions for praise and blame
51 TMS, II.iii.2, para 7. [102]
same irregularity is found in the ‘laws of almost all nations’, which fail to
distinguish between punishment for gross negligence and punishment for harm
that was ‘really intended’:\textsuperscript{52}

Nothing…would appear more shocking to our natural sense of equity, than to bring
a man to the scaffold merely for having thrown a stone carelessly into the street
without hurting any body.\textsuperscript{53}

If the stone should strike and injure or kill a passerby, however, behaviour which
was merely ‘thoughtless and insolent’ is often taken to be equivalent to ‘malicious
design’ and liable to the severest punishment.\textsuperscript{54}

Jerry Evensky argues that the \textit{Theory of Moral Sentiments} is animated by Smith’s
optimistic belief that there is a process of evolutionary development in which
morality and law tend to converge towards a ‘perfect world where only intentions
matter’.\textsuperscript{55} There is certainly an aspirational tendency in Smith’s moral philosophy,
towards a fusion of morality and law. In such a polity, a person would incur
liability for consequential harms only if they were ‘someway or other intended,
or…at least, show some… disagreeable quality in the intention of the heart, from
which he acted.\textsuperscript{56} Neither in the \textit{Theory of Moral Sentiments} nor in his \textit{Lectures
on Jurisprudence} does Smith attempt a systematic dissection of that
‘disagreeable quality in the intention of the heart’. He does distinguish, however,

\textsuperscript{52} Ibid, II. iii.2, para 8. [102-3]
\textsuperscript{53} Ibid.
\textsuperscript{54} The ‘irregularity of sentiment, which everybody feels’ has a second consequence which is the subject
of extended discussion in the \textit{Theory of Moral Sentiments}. Criminal liability for harms commonly
distinguishes between ‘inchoate’ offences of attempt, conspiracy and the like and the ‘completed’
offence when the harm is inflicted. But why, asks Smith, do we distinguish in this way between the
attempt and the complete offence? The offender’s ‘real demerit…is undoubtedly the same in both
case, since his intentions were equally criminal; and there is in this respect, therefore, an irregularity in
the sentiments of all men, and a consequent relaxation discipline in the laws of, I believe, all nations, of
the most civilized, as well as of the most barbarous’. See TMS II, iii. 2, para 4 [100-1]. Discussion of
the relationship between this aspect of Smith’s ‘equitable maxim’ and Macaulay’s idiosyncratic
treatment of the law of criminal attempts in his Draft Code must await another occasion.
\textsuperscript{55} Jerry Evensky, \textit{[Check – Location 970-75]} Adam Smith’s Moral Philosophy (Cambridge
University Press, 2005). See also, on the same point, Knud Haakonssen, \textit{The Science of A Legislator:
The Natural Jurisprudence of David Hume and Adam Smith}, 66 (Cambridge University Press, 1981);\textsuperscript{56}

\textsuperscript{56} Ibid, II.iii.intro, para 3. [93]. Elsewhere in TMS, Smith makes it clear that the infliction of harm
without fault does beget responsibility to make atonement and, in appropriate circumstances,
compensate the victim of faultless harm: Ibid, II.iii, para 5 [107].
between ‘negligence’ and ‘intention’ and argued that the criminal law should not punish negligent harms with the same severity as intentional harms. That distinction, which runs counter to popular sentiments, was to be one of the most radical features of Macaulay’s Draft Code.

**Laws of Justice and Laws Of Police**

Adam Smith’s account of justice is squarely based on the expression of appropriate resentment for wrongful injury:

> the violation of justice is injury: it does real and positive hurt to some particular persons, from motives which are naturally disapproved of. It is, therefore, the proper object of resentment, and of punishment, which is the natural consequence of resentment.

The sympathetic indignation of the impartial spectator provides the measure of punishment for injustice. It is otherwise, however, when infractions of laws of police are punished. Laws of police regulate governmental administrative functions, revenue, defence, commerce, agriculture, manufactures…&c. Laws of police are promulgated and punishments exacted in ‘the general interest of society, which, we imagine, cannot otherwise be secured’.

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57 Ibid.  As one might expect, Smith attempts a more careful delineation of varieties of fault in the *Lectures on Jurisprudence* (Edited RL Meek, DD Raphael & PG Stein, Oxford University Press, 1978) ii.88-92 [103-5]: 475-6. See, too, the notes on the offence of murder 110-16; 477-8. The discussion is infected, however, by the characteristic obscurity of the common law the nature of the fault required for murder. See, for example, ibid, 111: ‘Murder, strictly speaking, is where one kills another of set purpose, having lain in wait for him. But all homicide which proceed[s] from an evil intention where there was ill will before is also accounted murder.’

58 *TMS* II.i.5.

59 The distinction between laws of justice, based on resentment for wrongdoing and laws of police, based on utility, is disputed by Ralph Lindgren, ‘Adam Smith’s Treatment of Criminal Law’, in RP Malloy & Jerry Evensky (eds), *Adam Smith and the Philosophy of Economics* (Kluwer, Netherlands, 1995), 63, 67-72. Lindgren argues that the conflict between the ‘equitable maxim’ and the irregularity of sentiment that makes responsibility depend on outcome, shows that Smith’s attempt to elevate a ‘resentment analysis’ of punishment over a ‘utility analysis’ failed. Lindgren is in error, however, when he equates ‘resentment analysis’ which depends on the sympathetic indignation of the impartial spectator, with applications of the ‘equitable maxim’. The equation is not supported by the text of the *Theory of Moral Sentiments* in which the impartial spectator represents the imperfect best that can be expected of the great majority of humanity, whose reactive judgements fall short of the equitable maxim and divine justice [105]: ‘That the world judges by the event, and not by the design, has been in all ages the complaint, and is the great discouragement of virtue.’

60 The scope and extent of ‘laws of police’ are not precisely formulated by Adam Smith. I follow Kau Haakonssen, above n???, 96, in grouping these functions together in apposition to ‘laws of justice’.

61 *TMS* II.ii.3.11.
Of this kind are all the punishments inflicted for breaches of what is called either civil police, or military discipline. Such crimes do not immediately or directly hurt any particular person; but their remote consequences, it is supposed, do produce, or might produce, either a considerable inconveniency, or a great disorder in the society.\textsuperscript{62}

The severity of punishment for breach of these laws of police is not measured by the sympathetic indignation of the impartial spectator or considerations of personal desert, but by utility or necessity. Penalties may be of a severity disproportionate to the individual responsibility of the offender or to any harm that could have resulted from the offender’s breach of the law. Smith instances the case of the military sentinel who will be shot for falling asleep at his post.\textsuperscript{63} The impartial spectator would consider the sentinel to be an unlucky victim of a severity in punishment that could be justified only by unavoidable necessity:

> When the preservation of an individual is inconsistent with the safety of a multitude, nothing can be more just than that the many should be preferred to the one. Yet this punishment, how necessary soever, always appears to be excessively severe. The natural atrocity of the crime seems to be so little, and the punishment so great, that it is with great difficulty that our heart can reconcile itself to it. Though such carelessness appears very blameable, yet the thought of this crime does not naturally excite any such resentment, as would prompt us to take such dreadful revenge. A man of humanity must recollect himself, must make an effort, and exert his whole firmness and resolution, before he can bring himself either to inflict it, or to go along with it when it is inflicted by others.\textsuperscript{64}

In a similar fashion, necessity was supposed to justify the extreme severity of the penalties for the offences of counterfeiting coin, which Smith described as a ‘fraud of the most heinous nature and a great affront to the government.’\textsuperscript{65}

\textsuperscript{62} Ibid.

\textsuperscript{63} Discussed Knud Haakonssen, above n????, 117, 121-3; Ralph Lindgren, ‘Adam Smith’s Treatment of Criminal Law’ in Robin P Malloy and Jerry Evensky (eds) Adam Smith and the Philosophy of Law and Economics, 63, 69-70.

\textsuperscript{64} TMS II.ii.3.11.

Adam Smith draws no line of sharp division between resentment and utility as grounds for criminal laws. There are areas of substantial overlap between laws of justice and laws of police, as for example in legislation intended to minimise the risk of unintended injury from the activities of manufacturers, traders and purveyors of personal services. When harm results from breach of a safety requirement and fault can be proved, punishment for a wrongful injury to the victim may be appropriate. Punishment may still be appropriate however, even in the absence of harm to any particular individual, when that would encourage manufacturers, traders and others to take more care to avoid risking harm to others. It was another of Macaulay’s innovations to include in the Draft Code co-ordinated systems of ‘police’ offences ‘affecting the public health, safety and convenience’, in which the essential element is endangerment, and ‘offences affecting the human body’ in which the essential element is the infliction or threatened of physical harm. Writing in 1883, almost half a century after the Draft Code was completed, Stephen considered the offences affecting public safety remarkable by comparison with English law because they penalised ‘mere carelessness…even if no harm is done to anyone’.

MACAULAY’S DRAFT PENAL CODE

He was a child prodigy, born in 1800 into a wealthy evangelical family, who remained a prodigy throughout his life. He read voraciously in 8 languages –

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66 Knud Haakonssen concludes that Smith failed to provide a comprehensive account of the laws of police. See Knud Haakonssen, ‘What Might be Called Natural Jurisprudence?’ in The Origin and Nature of the Scottish Enlightenment. (Edited) R. Campbell and A. S. Skinner (John Donald, Edinburgh, 1982) 167, 170: ‘The fact is that Smith gave a clear normative basis for the laws of justice through his theory of the natural justice contained in the standpoint of the impartial spectator. But he never gave a general theory of utility which could serve the same function for the laws of police, revenue and arms.’

67 J F Stephen, above n???, 310.

68 This summary account of Macaulay’s early life draws on the excellent, standard biography by John Clive, above n???, which provides an engaging account of his career and his intellectual and emotional development. See also the careful reconstruction of the development of Macaulay’s moral philosophy in William Thomas, The Quarrel of Macaulay and Croker (Oxford University Press, 2000) 70-91. Thomas portrays Macaulay, during his early years as a polemicist, as occupying a position marked by tension between his evangelical background and the attractions of utilitarianism. His
Greek and Latin classics; histories, philosophy, poetry and popular novels. His powers of concentration, comprehension and recall were prodigious. Macaulay belonged to that aristocracy among readers who devour books at speed, in many languages, and retain what they read with certainty of remembrance and the capacity for exact quotation. He was equally prodigious in his capacity for administrative paperwork. He never married and his closest emotional relationships were with his sisters – in particular Hannah, who accompanied him to India, and Margaret whose death when he was in India reduced him to extremes of despair. He was generous and in the safety of his family and close friends he was playful, indulgent, amusing and emotionally vulnerable to a marked degree.

We owe the existence of the Draft Penal Code to his need to amass sufficient wealth to provide for his family. Zachary Macaulay, his father, made a considerable fortune in foreign trade and then lost most of it as a consequence of his devotion to the cause of anti slavery and consequential neglect of his business. Macaulay had to assume responsibility for the support of his parents and brothers and sisters relatively early in his life. He gained early recognition as a brilliant journalist and polemicist of unequalled ferocity. That recognition led to the offer in 1830 of a safe Whig seat in Parliament, where he was soon famous for his oratory. In 1833 he accepted an appointment to the East India Board of Control. He went to India in the following year where, as Chair of the Indian Law
Commission, he was responsible for preparation of the draft version of the Indian Penal Code and the accompanying *Notes on the Indian Penal Code*. Though he read for the bar after leaving Cambridge in 1823, he made few efforts to establish a legal practice. Nor did he apply himself to the study of law until he began work on the Draft Code. He returned to England in 1837, having amassed sufficient wealth to ensure comfortable prosperity both for himself and for his family.

The Penal Code was a part only of his projected plan for legal reform in India. It was an element of a projected Benthamite PANOMION, which was to include codes of civil and criminal procedure and of substantive civil law.\(^{70}\) The projected Code of Civil and Criminal Procedure was not completed until many years later, after Macaulay’s death, and his projected reform of the Indian prison system was never implemented. A code of civil wrongs, which owes much to the Penal Code, was drafted by Sir Frederick Pollock and published in 1886, but never enacted.\(^{71}\)

It is important for an understanding of the provisions of the Draft Penal Code to remember that it was meant to form part of a comprehensive scheme for governance of a colony. Only 5 of the 26 chapters deal with offences that are concerned particularly with offences against the person, where resentment for wrongful injury, insult or denigration provides the ground for punishment.\(^{72}\) Most of the Code offences are what Adam Smith would have called ‘laws of police’, rather than ‘laws of justice’. They delineate the elements of crimes that deal, among other subjects, with the administration of government; the conduct of the

\(^{70}\) Eric Stokes, above n??, 227.


\(^{72}\) Chapters XVIII – Of Offences Affecting the Human Body; XIX – Of Offences Against Property; XXV – Of Defamation; XXVI – Of Criminal Intimidation, Insult and Annoyance.
courts; the collection of revenue; regulation of trade, and protection of the integrity of the financial currency and of weights and measures. The diversity and range of offences in the Code and requirements of consistency in terminology required a discriminating vocabulary of fault elements that would be appropriate for this diverse range of offences.\textsuperscript{73} The Code avoids the obscurities ‘malice’ and ‘wilful’ wrongdoing, characteristic of English legislation dealing with offences against the person. The fault elements deployed in the definition of offences are ‘purpose’, ‘intention’, ‘knowledge’, and the compound expression, ‘rashness or negligence’.\textsuperscript{74} There are no definitions of these concepts. It is obvious from the text of the Code, however, that Macaulay envisaged that ‘purpose’, ‘intention’, ‘knowledge’, ‘rashness and negligence’, which are central in the attribution of responsibility for wrongdoing, would bear their common, everyday meanings. The Code does, however, define another compound fault element: ‘A person is said to cause an effect “voluntarily” when he causes it by means whereby he intended to cause it, or by means which...he knew to be likely to cause it.’\textsuperscript{75} The Code uses ‘voluntarily’ in its Aristotelian sense, in which ignorance, mistake or unexpected accident bar the attribution of voluntariness.

Purpose, intention, knowledge, rashness and negligence, and voluntariness, which are deployed consistently throughout the Code, provide a flexible and precise vocabulary of fault elements. Macaulay is more discriminating in this respect than Bentham whose exhaustive analysis of the fault elements conflates

\textsuperscript{73} Code, s2: ‘Every expression which is explained in any part of this Code is used in every part of this Code in conformity with the explanation’.

\textsuperscript{74} The distinction between ‘rash’ and ‘negligent’ conduct has not survived in modern legal usage. The probable source here is J Bentham, \textit{An Introduction to the Principles of Morals and Legislation}, (Edited, Wilfred Harrison, Blackwell, Oxford, 1960), Chapter IX, Of Consciousness, para 12. In summary - a person who is negligent or heedless does not realise that there is a risk; one who is rash adverts to the risk but believes, wrongly for insufficient reason, that it will not eventuate. To the same effect, see John Austin’s \textit{Lectures on Jurisprudence} (Edited Robert Campbell, 3\textsuperscript{rd} ed, 1869) 440-1.

\textsuperscript{75} Code, s26.
intention and knowledge of consequences.\textsuperscript{76} That distinction is essential in formulating regulatory offences where liability will often depend, however, on what the defendant meant to do. In the offences of causing injury, harm caused intentionally and harm caused with the knowledge that it was likely are usually taken to be equivalent in moral and legal blameworthiness. Though malice and wilfulness, those standbys of the English statute book, play no part in defining the offences, Macaulay had no qualms about their descriptive use in his notes and illustrations.\textsuperscript{77} That difference in usage between Macaulay’s informal explanations and the precision of his legislative language is remarkable in its implicit sophistication.

**Proportionate Calibration of Resentment in the Draft Code ‘Offences Affecting the Human Body’**

Adam Smith provided few examples in the *Theory of Moral Sentiments* to illustrate the moderating effect of recourse to the impartial spectator as a ‘precise and distinct measure’ of proportionate punishment. The examples that he did provide are not illuminating, for they reflect the indiscriminate severity of penalties for minor and serious crimes alike in the 18\textsuperscript{th} century. When Macaulay prepared his Draft Code the death penalty was in retreat and he had the advantages of far greater flexibility in the range of available penalties; a colonial arena for experiment and, above all, a structural grammar for codification derived from Bentham. These advantages allowed Macaulay to employ a highly developed legislative technique to mark differences in degrees of criminal responsibility with a precision beyond Adam Smith’s contemplation.\textsuperscript{78}


\textsuperscript{77} And in defining physical elements Contra Lindgren

\textsuperscript{78} See Knud Haakonssen, above n???, 152-3, who emphasises Adam Smith’s preference for common law rather than legislative resolution of complex issues.
The Chapter 18 Offences affecting the human body bear no resemblance in style, content or penalties to English legislation of the period.\textsuperscript{79} The elements of the offences, expressed in simple descriptive terminology, were meant to provide an articulate expression of the degrees of wrongdoing involved in the infliction of physical harm or the threat of such harm. The offences are accompanied by illustrative examples of their potential applications. They are graded in seriousness by specification of their maximum penalties and, occasionally, by a combination of maximum and minimum penalties.\textsuperscript{80} The distinction between the requirements for proof of guilt and the consequential determination of a proportionate penalty an offence is clearly marked. The Code was intended to subject the sentencing discretion of the courts to legislative guidance and limits. For most offences the penalties were to be proportionate to the degree of wrongdoing involved in the offence, quantified in months or years of prison time or fines.\textsuperscript{81} Penalties were meant to be deterrent in virtue of their severity, though severity was not conceived solely in terms of the duration of imprisonment. Macaulay believed that prison time should be stultifying – a literal waste of the offender’s time – and short. So far as their duration is concerned, the maximum penalties are surprisingly modest, when compared with current penalty ranges in Australia, New Zealand, America or the United Kingdom. Indeed, Macaulay envisaged reforms of prison discipline that would enable a reduction in the maximum sentences.\textsuperscript{82} Duration aside, imprisonment was meant to deter by its

\textsuperscript{80} Kadish Livingston – min penalties.
\textsuperscript{81} The exceptions include murder, where the penalty appears to have been meant to mark the horror of the offence and the offence of being a member of a gang of thugs: s311, where the maximum penalty of life imprisonment may have been intended to be incapacitating as well as deterrent.
\textsuperscript{82} Notes, 119-20.
monotony, discipline and loss of sociality.\textsuperscript{83} Flogging and other punishments meant to humiliate or degrade were barred.

Two principles inform the structure and content of the offences affecting the human body. The first, which is familiar in modern criminal law theory, is the ‘correspondence principle’.\textsuperscript{84} The second and less familiar ‘comparative responsibility principle’ I have adopted with some modification from the recent monograph by Professor Vera Bergelson, \textit{Victims’ Rights and Victims’ Wrongs: Comparative Liability in Criminal Law}.\textsuperscript{85} The correspondence principle relates to the fault elements of the offences, while the comparative responsibility principle has to do with the partial defences of provocation, excessive defence, consent and sudden fight, which reduce the grade of the offences. The two principles will be discussed in that order.

\textbf{1. Fault Elements and the Correspondence Principle}

The correspondence principle appears to be bifurcate rather than unitary.\textsuperscript{86} When criminal liability is imposed for causing harm, the first branch of the principle requires proof of fault with respect to harm of that degree and kind. The second, supplementary branch is a consequence of the fact that criminal fault can take a variety of forms. In many jurisdictions distinctions are nowadays drawn

\textsuperscript{83} Cf Kadish on the comparative severity of Macaulay. Abandoned in the IPC – see Barnes Peacock
\textsuperscript{86} Cf Andrew Ashworth, Andrew Ashworth, \textit{Principles of Criminal Law} (5\textsuperscript{th} edition, Oxford University Press, 2009) ?????, \textit{see 4ed 300ff, 199ff and} – 88: ‘Not only should it be established that the defendant had the required fault, in terms of \textit{mens rea} or belief, it should also be established that the defendant’s intention, knowledge, or recklessness related to the proscribed harm.’ See – Ashworth’s reservations about liability for negligence and his recounting of the doubts over manslaughter.
between offences of intentional, reckless and negligent harm.  The second branch of the correspondence principle requires the maximum penalty for the offence to be commensurate with the degree of the offenders’ fault in causing that harm.

Macaulay stated the principle in the introductory Report to the Code:

“If there be any distinction which more than any other it behoves the legislator to bear constantly in mind, it is the distinction between harm voluntarily caused and harm involuntarily caused. Negligence, indeed, often causes mischief, and often deserves punishment. But to punish a man whose negligence has produced some evil which he never contemplated as if he had produced the same evil knowingly, and with deliberate malice, is a course which, so far as we are aware, no jurist has ever recommended in theory, and which we are confident that no society would tolerate in practice.”

The implications of Macaulay’s formulation might not be immediately apparent to a modern reader for whom ‘involuntary conduct’ might be taken to mean ‘unwilled’ bodily movement. It will be recalled, however, that voluntariness in the Code refers to the effects or results of willed actions. A result is said to have been caused ‘voluntarily’ when it was either intended to occur or known to have been a likely consequence of intentional conduct. For Macaulay the requirement of ‘voluntariness’ was convenient shorthand to express the Code principle that there is no difference in culpability between conduct that was intended to cause or threaten harm and conduct that was accompanied by knowledge that harm was likely. They are taken to be equivalent in terms of the seriousness of the offender’s wrongdoing.

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87 See for example the Model Criminal Code …which provides a template for legislation in several Australian jurisdictions.
88 Report, above n????, x.
89 Draft Code, ss25, 26.
90 Notes, 121: ‘In general we have made no distinction between cases in which a man causes an effect designedly, and cases in which he causes it with a knowledge that he is likely to cause it. If, for example, he sets fire to a house in a town at night, with no other object than that of facilitating a theft, but being perfectly aware that he is likely to cause people to be burned in their beds, and thus causes the loss of life, we punish him as a murderer’. That is not to say, however, that the Code invariably conflates intention and knowledge of likelihood when criminal liability depends on proof of an incriminating result of conduct. See, for example, the provisions of Ch 15 ‘Of Offences Relating to Religion and Caste’, in which results requiring proof of intention and results requiring proof of
In his Report on the Code, Macaulay singled out for scathing condemnation the Bombay criminal code which permitted courts to impose the same penalty for injuries without regard to whether they were caused intentionally or resulted from a ‘culpable disregard’ for the risk of causing that harm.\(^91\) Absence of that intention or knowledge is not, however, a ground for complete absolution from criminal responsibility. Macaulay departed from existing common law and statutory models and made provision for lesser offences of causing harm by ‘rash or negligent’ conduct.

Macaulay's distinction between offences of causing harm ‘voluntarily’ and causing harm by rash or negligent conduct was implemented with consistent logical rigour in the offences affecting the human body. The Draft Code is remarkable for its adherence to Adam Smith's equitable maxim that harms that were 'someway or other intended' should be distinguished from harms caused by gross negligence, a maxim that he asserted the laws of 'almost all nations' failed to observe.\(^92\)

The offences affecting the human body are graded in seriousness in four dimensions: (1) the seriousness of the harm inflicted; (2) whether the harm was inflicted ‘voluntarily’ rather than by conduct that was merely rash or negligent; (3) the presence or absence of aggravating elements and (4) the presence or absence of an extenuation of the offence. I will ignore for the moment the extenuations, which will be considered in their relation to the comparative

\(^{91}\) Report, x.

\(^{92}\) Ibid, II. iii.2, para 8. [102-3]
responsibility principle. The table that follows sets out the correlations of harm, fault and penalty in the Draft Code offences. Culpable homicide, which will be discussed separately, has been omitted from the table as have some of the aggravated offences.

<table>
<thead>
<tr>
<th>HARMS AND ENDANGERINGS</th>
<th>PENALTY: FOR HARM OR DANGER THAT WAS INTENDED OR KNOWN TO BE LIKELY</th>
<th>PENALTY: FOR HARM RESULTING FROM NEGLIGENCE/RASHNESS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cause death*3</td>
<td>Death/Life in prison [Murder]</td>
<td>Death – 2 years max*4</td>
</tr>
<tr>
<td>Endanger death*5</td>
<td>7 years min – Life max</td>
<td>No offence*6</td>
</tr>
<tr>
<td>Aggravated grievous hurt</td>
<td>1 year min – 14 yrs ma</td>
<td>Grievous hurt - 6mths*7</td>
</tr>
<tr>
<td>Cause ‘grievous hurt’*8</td>
<td>6mths min – 10yrs max</td>
<td>Grievous hurt - 6mths*9</td>
</tr>
<tr>
<td>Endanger grievous hurt*10</td>
<td>3 mths min – 5yrs max</td>
<td>No offence</td>
</tr>
<tr>
<td>Aggravated cause hurt</td>
<td>3 years max</td>
<td>No offence</td>
</tr>
<tr>
<td>Cause ‘hurt’</td>
<td>1 year max</td>
<td>No offence</td>
</tr>
<tr>
<td>Assault (and battery)</td>
<td>3 months</td>
<td>No offence</td>
</tr>
<tr>
<td>Assault (threat)</td>
<td>1 month</td>
<td>No offence</td>
</tr>
</tbody>
</table>

The inclusion of liability for negligent harms short of death was itself remarkable. To this day, English statute law does not include an offence of general application for causing injury by gross negligence.101 These offences of negligent harm are closely related to the Chapter XIV Offences Affecting the Public Health, Safety

*3 Sections 294, 295, 297
*4 Section 304
*5 Sections 308, 320, 309
*6 Note however that Chapter XIV, Of Offences Affecting The Public Health, Safety and Convenience includes a substantial number of offences of engaging in conduct which is ‘so rash or negligent as to indicate a want of due regard for human life’. These are punishable by six months imprisonment or fine.
*7 Section 327.
*8 Sections 319, 326
*9 Section 327.
*10 Sections 329, 326.
and Convenience, nine of which impose criminal liability for endangering life by rash or negligent conduct involving vehicles, vessels, explosives...&c. These are ‘police’ offences in Adam Smith’s terminology. Each of the endangering offences is punishable by a maximum term of 6 months imprisonment. Consistent with Macaulay’s correspondence principle, the penalties for the offences of negligent harm and negligent endangering are closely bunched and separated by a wide margin from the corresponding penalties for offences of voluntary harm or voluntary endangering.\textsuperscript{102}

The more radical innovation, however, was the absence of any provision for constructive liability for unlawful homicide or causing harm short of death. Charles Sprengell Greaves’ 1843 edition of Russell on Crime provides a succinct account of constructive liability for murder and manslaughter:

\textbf{[W]here death ensues from an act done in the prosecution of a felonious intention, it will be murder; but a distinction is taken in the case of an act done with the intent only of committing a bare trespass; as if death ensues from such act, the offence will be only manslaughter. Thus, though if A shoot at the poultry of B, intending to steal them, and by accident kill a man, it will be murder; yet, if he shoot at them wantonly, and with any such felonious intention, and accidentally kill a man, the offence will be only manslaughter.}\textsuperscript{103}

There is no recognition of constructive liability for homicides and lesser offences in the Draft Code. An offender who caused death in the course of a rape, robbery or assault would not be guilty of murder or culpable homicide unless the offender intended death or knew it to be likely. Such an offender might not escape entirely from responsibility for the death. If intention or knowledge could not be established, the circumstances would be likely to provide grounds for a conviction of the lesser offence of causing death by rash or negligent conduct. The 2 year

\textsuperscript{102} J.F Stephen, A History of the Criminal Law of England, (vol 3) (London: Macmillan and Co, 1883), 310 remarks of these provisions that they are ‘highly characteristic of the Code. Its authors have throughout been much impressed with the theory that neither the motive nor the result, but the intention of an act ought to be the measure of its criminality’.\textsuperscript{103} C S Greaves, Russell on Crime (2ed, London, 1843) Volume 1, 637. See, too, Notes, 166, which quote Blackstone and proceed to a spirited defence of the rejection of the common law of unlawful homicide.
maximum penalty for that offence is lenient, however, when compared with the mandatory penalty for murder and the maximum penalty of 14 years imprisonment for culpable homicide. Such an offender would be convicted of the rape or robbery and the negligent homicide and sentenced to cumulative terms of imprisonment.

The correspondence principle is equally applicable in the lesser offences. There are no equivalents for offences of ‘malicious’ injury, familiar in English law, in which constructive liability can be imposed for unexpected harms. Liability is incurred for causing harm only if a requisite fault element for that harm, whether of intention, knowledge or negligence, can be established.

Macaulay’s rejection of the English law of constructive liability was carefully considered; it was the subject of an extended justification in his Notes on the Code.104 The Draft Code anticipates the reform programme of the ‘subjectivist’ legal theorists of the latter half of the 20th century who sought, with mixed success, to eliminate constructive liability for murder, manslaughter and non fatal offences against the person.105 By comparison with current law in most jurisdictions, the Draft Code is remarkable in the extent of its adherence to Adam Smith’s equitable maxim.

The Draft Code suffered many changes when it was enacted as the Indian Penal Code of 1860. Some of Macaulay’s more radical reforms were compromised or

104 Notes, 165-7.
105 Adherence to the correspondence principle in English criminal law theory has waxed and waned over the last half century. The scholarly literature is extensive. See, for example, Andrew Ashworth, Principles of Criminal Law (5th edition, Oxford University Press, 2009) 232, who provides a lucid summary account of the case for adherence to the principle. See also, A. Ashworth, ‘A Change of Normative Position: Determining the Contours of Culpability in Criminal Law’ (2008) 11 New Crim. L. R. 232 in response to critics. The revisionist case is discussed in the editors’ introductory essays and succeeding chapters in: Rethinking English Homicide Law (edited, Andrew Ashworth & B Mitchell, 2000, Oxford University Press); Criminal Liability for Non Aggressive Death (edited CMV Clarkson & Sally Cunningham, 2008 Ashgate).
eliminated. The definition of ‘voluntariness’ with respect to consequences was diluted by the addition of an objective element.\textsuperscript{106} His elegantly simple formulation of the fault element of murder was transformed by amendment to near incomprehensibility.\textsuperscript{107} As we shall see, however, the underlying structure of the offences affecting the human body was preserved remarkably intact. No provision was made in the Indian Penal code for constructive liability in the unlawful homicides or the lesser offences of causing harm.

Macaulay cannot have anticipated the consequences of his strict adherence to the correspondence principle and the marked difference in severity between the penalties for voluntary and negligent homicide. These surviving elements of his offences affecting the human body were to become a ground for serious disaffection between the British government and its Indian subjects. That development will be discussed in the concluding sections of this essay.

\textbf{2. Partial Defences and the Comparative Responsibility Principle}

The Draft Code allowed three extenuations or partial defences that reduce murder to a lesser voluntary homicide. They were provocation,\textsuperscript{108} consent\textsuperscript{109} and excessive force in defence of person or property [‘excessive defence’].\textsuperscript{110} Only the first of these extenuated offences is called ‘manslaughter’ in the Draft Code. The others are called ‘voluntary culpable homicide by consent’ and ‘voluntary culpable homicide in defence’. All carry the same maximum penalty of 14 years imprisonment. The Indian Penal Code eliminated the variation in names and

\textsuperscript{106} IPC, s39 39. “Voluntarily” A person is said to cause an effect “voluntarily” when he causes it by means whereby he intended to cause it, or by means which, at the time of employing, those means, he knew or had reason to believe to be likely to cause it.” [Author’s italics]

\textsuperscript{107} Draft Code, s297.

\textsuperscript{108} Ibid, s298. Provision was made in the Draft Code, ss70, 71, 72 for defences of necessity when conduct which causes death or harm is done in good faith and for the benefit of the victim.

\textsuperscript{109} Ibid, s299.
called them all ‘culpable homicide’ and that description will be adopted for convenience of reference and to differentiate the offence from common law manslaughter, which has a far more extended range of applications.

There was another departure from the Draft Code that should be mentioned. The partial defence of consent was originally meant to include a broad range of exculpatory circumstances, extending from instances of consensual euthanasia to cases of death resulting from a duel. When the Code was enacted in 1860, the partial defence of consent was preserved, but death resulting from consensual fighting was distinguished from other circumstances in which the victim consented to death or a risk of death. The IPC has a specific provision for a partial defence of ‘sudden fight’ when death results from tacit or express agreement to engage deadly conflict.\(^{111}\)

The Draft Code and Indian Penal Code are generous, by comparison with other criminal codes, in their provision of partial defences to murder. In each of the partial defences a comparison of their respective roles and responsibility of the offender and victim for death or other bodily harm provides the grounds for reducing murder to culpable homicide. In his Notes on the Code, Macaulay justified the partial defences on one or other or a combination of two distinct grounds. The first was that provision for a partial defence which reduces the grade of an offence may be appropriate when the offender's reasons for taking life have a relevant moral and legal bearing on their criminal responsibility. That seems to have been the ground for the partial defence of consent when the offender terminates the life of another in cases of consensual, intentional euthanasia.\(^{112}\) Second, provision for a partial defence may be appropriate when


\(^{112}\) Notes, 130, 164: ‘[T]he motives which prompt men to the commission of this offence are generally far more respectable than those which prompt men to the commission of murder. Sometimes it is the
wrongful conduct by the victim has a relevant moral and legal bearing on the offender's unlawful response to that conduct. It is clear that Macaulay envisaged a partial defence for the survivor of a duel, though he avoided explicit discussion of that possibility. Had he done so, it is likely that he would have justified the partial defence on the ground that the offender’s criminal responsibility is reduced when the victim is an accomplice, who agreed to engage in an activity in which each endeavoured to inflict a deadly wound on the other.

Macaulay justified the provision of an extenuation for excessive force in self defence on both of the preceding grounds. In cases where a complete defence is barred on the sole ground that the response was excessive, the offender’s laudable motive coupled with the wrongful attack by the victim are grounds for extenuation of murder to culpable homicide. It was provocation, however, that provided him with the opportunity for an extended consideration of the comparative responsibility principle. The partial defence is available when the offender kills or inflicts injury on ‘grave and sudden provocation’. The Draft Code defines provocation as ‘grave’, ‘when it is such as would be likely to move a person of ordinary temper to violent passion’. Various exclusions made it clear that lawful conduct by the victim could never amount to grave provocation, no matter how violent the passion that the conduct of the victim might have aroused in the offender.

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114 See the discussion in Notes, 133, on the right of private defence: ‘[W]e are desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions on the exercise of the right of self defence.’ Ibid, 165: A partial defence of excessive defence should be allowed when ‘the law itself invites men to the very verge of [murder]’. Since s84 of the Draft Code allows a complete or partial defence to be based on a good faith mistake, it might be considered that laudable motive is the central reason for allowing the partial defence.
115 Code, s297.
It is of interest that Macaulay made no provision for extension of the partial defence to a case of mistaken belief in circumstances amounting to grave provocation. It seems likely that his omission to do so was intentional.\textsuperscript{116} That would be consistent with his rejection of duress or necessity as grounds for either a defence or a partial defence when injury or death is inflicted on an innocent person who was not perceived by the offender as a threat. Though there are circumstances of duress or necessity in which an offender may commit an offence for reasons that might provide a morally acceptable ground for complete or partial exculpation, Macaulay concluded there were compelling considerations of legislative policy for leaving such cases to the exercise of executive clemency.\textsuperscript{117}

Provocation is exceptional among the partial defences in the Draft Code.\textsuperscript{118} Unlike excessive defence and sudden fight, provocation had application through the entire range of offences affecting the human body. It was a complete defence to the least among them, the offence of ‘making show of assault’.\textsuperscript{119} Excessive defence and sudden fight are limited in their application to murder. Consent, on the other hand, is a complete defence to all offences less than murder. The table of offences affecting the human body that follows incorporates the harms, fault elements and penalties shown in the preceding table with the addition of the extenuating applications of provocation.

\textsuperscript{116} Compare Code s84, which makes explicit provision for a complete defence when force is used in defence of person or property pursuant to a mistaken perception of a threat.
\textsuperscript{117} Notes, 133-5
\textsuperscript{118} For a more extensive discussion of provocation, see Ian Leader-Elliott, ‘Provocation’, in \textit{Codification, Macaulay and the Indian Penal Code}, edited Wing-Cheong Chan, Barry Wright and Stanley Yeo, Ashgate, 2011), 285.
\textsuperscript{119} Code, s352. The distinction between assault and threatening assault was abandoned in the Indian Penal Code, with the consequence that provocation ceased to be a complete defence. Compare IPC, ss351, 352, 358, which preserved the extenuation but eliminated the possibility of complete exculpation. Provocation is a complete defence to assault and compound offences of assault in both the Queensland and West Australia: see Criminal Code (Qld) ss268, 269; Criminal Code (WA) ss245, 246. Cf Jeremy Horder, \textit{Provocation and Responsibility} (Clarendon Press, Oxford, 1992), 134-6 discussing the possibility of that provocation might provide grounds for complete defence to a charge of simple assault.
There is no requirement of ‘loss of self control’ in the Draft Code formulation of the provocation defence. That was a later innovation, introduced when the Indian Penal Code was enacted in 1860. The partial defence in the Draft Code was not based on incapacity. It was based, rather, on the claim that the conduct of the victim was a grave transgression that gave the offender cause for justifiable

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120 The offences involving harm or threatened harm to the body are divided between the serious offences, which require proof that the harm was caused or threatened ‘voluntarily’ and the two lesser offences which require proof that the harm occurred as a consequence of ‘rash’ or ‘negligent’ conduct. Harms are caused or threatened voluntarily when D intends that harm or knows that it is likely to result: s26.
121 Sections 294, 295, 297
122 Section 304
123 Sections 308, 320, 309
124 Section 327.
125 Sections 319, 326
126 Section 327.
127 Sections 329, 326.
128 It is relevant to note, in relation to the absence of any reference to loss of self control in the definition of provocation, that Macaulay made no allowance in his Code for defects of will falling short of madness and no allowance for coercion of the will when harm is threatened, whether by natural or human agency. These were matters for executive clemency.
resentment. The magnitude of the difference between the maximum penalties for provoked and unprovoked harm is an indication of the potential gravity of provocation in Macaulay’s moral calculus. Common law restrictions on the type of conduct that could amount to provocation were eliminated: Mere words could amount to provocation because ‘passion excited by insult’ is no less entitled to indulgence than ‘passion excited by pain’.\textsuperscript{129}

Neither the Draft Code nor IPC give affirmative examples of conduct that would amount to provocation. Apart from an example of misdirected retaliation the illustrations are all negative, expressing limitations on the partial defence. Macaulay rejected, in particular, the stock example of the husband who killed his wife’s lover because he caught him in the act of adultery. For Macaulay, that particular illustration could not stand for any general principle of extenuation. Such a killing might just as easily amount to a clear case of murder, prompted by ‘mere brutality of nature, or from disappointed cupidity’ rather than feelings of ‘wounded honour or affection’.\textsuperscript{130}

Macaulay’s criterion of gravity – whether the victim’s provocative conduct would put a ‘person of ordinary temper’ into a ‘violent passion’ – is a measure of the victim’s wrongdoing against the offender. The Draft Code reference to the ‘person of ordinary temper’, probably derives from Livingston’s Code.\textsuperscript{131} But he, or she, is a recognisable relative of Adam Smith’s Impartial Spectator, who was also a person of ‘ordinary temper’.\textsuperscript{132} Though the offender who is provoked to kill or inflict harm must be punished for their ‘blameable excess of...feeling’ and consequent resort to violence in response to the provocation, Macaulay lays particular stress on the consideration that such an offender acts from a blameable

\textsuperscript{129} Notes, 162.
\textsuperscript{130} Ibid, 163.
\textsuperscript{131} Livingston Code, Theory of Moral Sentiments, above n????, I.iii.I.8 [45]
excess of an *appropriate* feeling, ‘which all wise legislators desire to encourage’.¹³³ That is congruent with Adam Smith’s assertion that resentment, when it enlists the sympathetic indignation of the impartial spectator, is a passion that can be noble and generous. Provocation is only available as a partial defence when the conduct of the victim was a justifiable cause for resentment.

Macaulay’s rejection of the stock example of the husband who kills his wife’s lover prompted a set of reflections in his Notes on the Code which are remarkable for his fluent command of historical analogies and an exuberant play of allusions over half concealed depths of feeling for his beloved sisters. Why he asks, should provocation be restricted to a husband who kills his wife’s seducer? The same indulgence might be ‘due to the excited feelings of a father, or brother, as those to a husband’:

That a worthless, unfaithful, and tyrannical husband should be guilty only of manslaughter for killing the paramour of his wife, and that an affectionate and high spirited brother should be guilty of murder for killing in a paroxysm of rage the seducer of his sister, appears to us inconsistent and unreasonable.¹³⁴

That unmistakeable personal reference to his sisters is immediately generalised in a swift transition to historical parallels in which civil insurrection might be sparked by a sexual insult or assault. Indecent liberties with a ‘modest female’ may involve no physical injury, pain or danger, ‘yet history tells us what effects have followed from such assaults’:

Such an assault produced the Sicilian vespers. Such an assault called forth the memorable blow of Wat Tyler.¹³⁵

The historical references were carefully calculated. In each of these incidents, sexual liberties taken against a woman of the people is supposed to have

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¹³³ Notes, 162-3.
¹³⁴ Ibid.
¹³⁵ Ibid, 163.
resulted in bloody insurrection against a tyrant.\textsuperscript{136} In his essay on Warren Hastings,\textsuperscript{137} published after his return from India, Macaulay made an explicit connection between cultural denigration and insults to honour or chastity and the risk of Indian insurrection against the British occupation. In the East, he wrote, violations of modesty and insults to caste or religion are ‘intolerable outrages…which can be expiated only by the shedding of blood.’\textsuperscript{138} Macaulay was well aware of the ‘displacement function’ of the criminal law and sought to ensure that an Indian who responded with violence to serious violation of local sensitivities, whether by a compatriot or European, should have the benefit of a partial defence of provocation. To impose the constraints of the English common law of provocation would have been perceived, he argued, as alien and unjust in India:\textsuperscript{139} ‘There is perhaps no country in which more cruel suffering is inflicted and more deadly resentment called forth, by injuries which affect only the mental feelings’.\textsuperscript{140}

The Draft Code included crimes against caste or religion and general offences of insult, annoyance and intimidation. These offences, which had no counterparts in English law,\textsuperscript{141} were equally cognisable as varieties of provocation that might provide a partial defence to murder or lesser crimes of causing injury. Conduct that would deprive a ‘high-born Rajpoot’ of his caste or violate the privacy of a ‘woman of rank’ would be an intolerable provocation that would extenuate a crime of retaliation:

\begin{center}
We are legislating for a country where many men, and those by no means the worst men, prefer death to the loss of caste; where many women, and those by no means the worst women, would consider themselves dishonoured by exposure to the gaze of strangers: and to legislate for such a country as if the loss of caste, or the
\end{center}

\begin{footnotes}
\textsuperscript{136} Cf Elizabeth Kolisky, ‘Crime and Punishment on the Tea Plantations of Colonial India’, Chapter 11 in Martin Dubber & Lindsay Farmer, above n????, 172, 290: ‘When the physical laying of hands on Indians involved sexual assaults, the results were even more inflammatory.’
\textsuperscript{138} Ibid, 202.
\textsuperscript{140} Notes 163.
\textsuperscript{141} See Fitzjames Stephen, above n????.
\end{footnotes}
exposure of a female face, were not provocations of the highest order, would, in our opinion, be unjust and unreasonable.⁴²

There is a seductive quality of bookish innocence about Macaulay’s recourse to Wat Tyler and the Sicilian vespers as supports for an extended partial defence of provocation. It is no coincidence that he was writing his *Lays of Ancient Rome* at the same time as he wrote the Code and its Notes.⁴³ Macaulay’s ‘high born Rajpoots’ and ‘zealous professors’ of Islam can put on, for the purposes of his argument, the raiment of rebellious English peasants, Sicilian patriots or ancient Roman citizens. He supported his provisions on the partial defence of consent with the example of a ‘high born native of India who stabs the females of the family at their own entreaty to save them from the licentiousness of a band of marauders’. That high born Indian patriarch has his Roman counterpart in Macaulay’s narrative poem, *Virginia*, composed during the same period as the Code.⁴⁴ Virginius, an old legionary, stabs his daughter to save her from violation by the tyrant Appius Claudius, so prompting an insurrection by the citizens of Rome and the overthrow of tyranny.

Macaulay was a brilliant outsider, both in his relations to English law and to the communities, Indian and English alike, on which he sought to impose his criminal code. His Draft Code could only have been written by an idealist, whose understanding of the criminal law was informed by a distinctive moral sensibility and a vision of a multicultural society in which all were equals under the law of offences against the person.

**The Draft Code and the Indian Penal Code: Translation and Transition**

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⁴² Notes, 163.
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The Indian Penal Code of 1860 abandoned the elegant simplicity of Macaulay’s definitions of murder and culpable homicide. It will be recalled that both murder and culpable homicide in the Draft Code required proof of an intention to kill or knowledge that death was likely. Culpable homicide was murder extenuated by proof of one of the partial defences. An offender who caused death by conduct that was merely rash or negligent was guilty of a lesser offence of negligent homicide, punishable by two years imprisonment. The Indian Penal Code, as originally enacted in 1860, departed from this simple distinction. It reformulated the fault element for murder;\(^{145}\) inserted what was probably meant to be a different fault element for the offence of culpable homicide\(^ {146}\) and eliminated the offence of causing death by rash or negligent conduct.\(^ {147}\) The latter offence was restored in the following year, however, at Stephen’s initiative and it now appears as the interpolated s304A of the Code.

Though Stephen expressed his admiration for Sir Barnes Peacock, whose Select Committee reduced Macaulay’s Draft Code to acceptable legislative form, he condemned the Select Committee reformulation of the murder and culpable homicide provisions as the ‘weakest’ part of the Code. He thought their structure was defective and the definitions of the fault elements unnecessarily obscure.\(^ {148}\) It would require an extended discussion to clarify the processes by which the Draft Code provisions on homicide were transmuted into their leaden counterparts in the Indian Penal Code. For present purposes it is sufficient to say that these ill wrought provisions were not taken to be significantly different in their

\(^{145}\) IPC, s300.

\(^{146}\) IPC, s299.

\(^{147}\) W R Hamilton, *The Indian Penal Code With Commentary* (Thacker, Spink & Co, 1895) expressed the view that the omission was not by oversight and that liability for homicide was originally meant to be restricted to cases of either murder or culpable homicide. Hamilton’s view on this is entitled to credence: he appears to have had access to the 1856 Report, now lost, of the Select Committee, headed by Sir Barnes Peacock, which was responsible for the final draft of the Code.

\(^{148}\) See Fitzjames Stephen, above n????, ????
effect from the original Macaulay formulations of murder and culpable homicide.\textsuperscript{149}

In his 3\textsuperscript{rd} reading speech to the Legislative Council of India in August 1860 Barnes Peacock, took particular care to placate the concerns expressed by the ‘Christian inhabitants of Calcutta’ and other Europeans about the definition of homicide.\textsuperscript{150} He was concerned that ‘a great deal of misunderstanding seemed to exist’ about the offence of murder. He assured the Council that individuals accused of unlawful homicide would receive ‘far milder’ treatment under the Indian Penal Code than they would under English law. Murder in the IPC required proof, at least, that the act which caused death was done with the intention of causing such bodily injury as would be ‘sufficient in the ordinary course of nature to cause death’. Barnes Peacock went on, with prescience perhaps unwitting, to illustrate the ‘far milder’ effect of the Code with a hypothetical case of death from a ruptured spleen:

For instance, if a man gave a slight blow to another who had a diseased spleen, and who died in consequence of that blow; if he knew that the man was labouring under such a disease, and that the blow was likely to cause his death, he ought to be punished for murder. But if he was ignorant of the man having a diseased spleen and gave him a box on the ear, and death ensued, it would not be right or proper to hang him and this Code therefore made provision accordingly. It was true that a man had no right to jeopardize another’s life, but still he ought not to be punished for murder in respect of an act which he (the Vice President) would not say, might be tantamount to an innocent act, although it was something like it.\textsuperscript{151}

This extraordinary passage is not easy to construe. I will disregard, for the moment, the curious assertion that an assault ‘might be tantamount to an

\textsuperscript{149} Ibid, 313. See, to the same effect, Whitley Stokes, \textit{Anglo Indian Codes} (Clarendon Press, Oxford, 1891) \url{http://www.archive.org/details/angloindiancode02stokgoog}. Sir Barnes Peacock, who presided over the Committee that drafted the provisions, did not agree. See his views in \textit{Queen v. Goraohand Gope} (1866) 5 W. R. Cr. 45, as reported in \textit{Ibra Akanda and Ors. v Emperor} AIR 1944 Cal 339 \url{http://www.indiankanoon.org/doc/1421312/}. With the advantage of hindsight, it is now apparent that Stephen’s analysis of the IPC provisions was oversimplified. For a comprehensive and comparative modern survey, see S Yeo, \textit{Fault in Homicide} (Federation Press, 1997); M Sornarajah, ‘The Definition of Murder Under a Penal Code’ (1994) \textit{Singapore Journal of Legal Studies}, 1.

\textsuperscript{150} A summary of the proceedings of the Select Committee can be found in W R Hamilton, \textit{The Indian Penal Code with Commentary} ????

\textsuperscript{151} Ibid.
innocent act’. The more significant point, for the purposes of this essay, is that there was never any possibility, either in English or Indian law, that death from a mere ‘box on the ear’ could amount to murder in the absence of knowledge that the victim was peculiarly vulnerable. What Barnes Peacock does not say is that this scenario, in which a single blow caused an unexpected death, could not result in any kind of homicide conviction at all under the Indian Penal Code of 1860. The truly radical element in the Code was not the elimination of constructive murder. It was the absence of any equivalent for constructive manslaughter. In English common law an unlawful act – commonly a minor assault – which caused an unexpected death was sufficient for conviction of manslaughter. Barnes Peacock was neither obtuse nor misinformed. He was a distinguished lawyer who was successively Chief Justice of the Supreme Court of India, Chief Justice of the High Court of Calcutta and eventually a member of the Judicial Committee of the Privy Council. He had five years intimate acquaintance with the provisions of the Code. It is at least possible that his account of the homicide of provisions of the Code was a calculated exercise in obscurantism, intended to conceal the extent of the difference between the Code and common law. Stephen addressed the difference with explicit clarity in his History of the Criminal Law, in 1883. In the Code, unlike common law, an unexpected death resulting from a punch, a wrestling throw or a blow with a slight stick is counted as an accident and punishable not as murder or culpable homicide, but as a minor offence of assault or causing hurt. In his view, that was a ‘remarkable’ departure from English law.

152 In its original form, the Indian Penal Code omitted the offence of causing death by rash or negligent conduct. That offence, which now appears as s304A, was added to the Code in 1861. Its application in cases in which unexpected death resulted from assault was uncertain and the penalty, set at a maximum of 2 years imprisonment, was unlikely to be severe.

153 James Fitzjames Stephen, above n????, ???

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Macaulay was prescient in his concern that the provisions of the Code should not provide grounds for resentment by the local population. But Macaulay’s prescience was misdirected. The homicide provisions of Macaulay’s Code were to provide a focus for bitter resentment and political agitation against the British occupation. His adherence to the correspondence and comparative fault principles in the offences affecting the human body made it difficult and often impossible to obtain convictions against Europeans for murder, culpable homicide or serious offences of causing harm when their victims were Indian.

The number of Indians killed during the 19th and 20th century as a consequence of brutality or callous neglect by English soldiers, plantation owners, overseers, merchants and other émigrés is beyond estimation. An even larger number would have been the victims of an attack which resulted in serious injury rather than death. Most of the individuals responsible for these attacks were not prosecuted. Of those who were, most were acquitted or convicted of minor offences, though convictions for murder or a serious offence of causing hurt were not unknown. As a consequence of endemic malaria, many Indians suffered

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157 Lyons Medical Jurisprudence lists hundreds of such cases.
from enlargement of the spleen and liver. An assault on such a person could easily result in haemorrhage and unexpected death. The ‘ruptured spleen defence’ to a homicide charge was notorious in colonial India. Jordanna Bailkin’s study of ‘deadly violence by Britons in India’ begins: ‘One type of case occurred again and again in court records and press reports: a British man kicked (or pushed or struck) an Indian, fatally rupturing the Indian’s spleen’. Her survey concludes:

The ‘ruptured spleen’ defence – a joint project of colonial law and medicine – provided a compelling judicial framework within which Britons could cause the deaths of Indians without being charged with murder.  

The ruptured spleen defence was a source of fierce resentment and disaffection. In 1906, Lala Jaswant Rai, publisher of the Lahore Panjalee and his editor, KE Athavale were convicted of the offence of promoting enmity between ‘two classes of His Majesty’s subjects, viz Europeans and Natives’ and sentenced to two years rigorous imprisonment. The Panjalee had alleged that the courts were biased and permitted European offenders to kill Indians with impunity. The news stories in the Panjalee which led to the prosecution of Rai and Athavale recounted incidents of alleged oppression and murder of Indians by English overseers and police and asked, ‘How many poor Indians have been mercilessly launched into eternity in the past, for being mistaken for bears and monkeys, or for having so-called enlarged spleens?’ Rai and Athavale appealed to the Chief Court, which upheld their convictions but reduced the sentences to six months simple imprisonment and a fine. In a contemporary comment on the case, Sri

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160 Jordanna Bailkin, ‘The Boot and the Spleen: When Was Murder Possible in British India?’ (2006) 48, Comparative Studies in Society and History, 462, 481. Bailkin’s study does not differentiate between murder and lesser homicides. In cases where death from a minor assault was unexpected, murder would not have been an appropriate verdict in any event. In English law a verdict of manslaughter would have been appropriate.
161 IPC, s153A.
162 Jaswant Rai v King Emperor, Criminal Revision No 401 of 1907, Reports of Civil and Criminal Cases Determined by the Chief Court of the Punjab and by the Judicial Committee of the Privy Council
Aurobindo,\textsuperscript{163} editor of Bande Mataram, argued that the prosecution of the editor and publisher of the Panjalee was a futile attempt to contain disaffection and likely only to exacerbate the existing state of enmity between the English and Indian communities.\textsuperscript{164} Aurobindo returned to the problem in a later issue of his journal, describing the likely fine of 50 rupees for an Englishman who kicks a coolie to death as ‘the price which the bureaucracy puts on Indian life or a sort of tax on the luxurious amusement of rupturing Indian spleens’.\textsuperscript{165}

The effects of eliminating constructive liability from the substantive definitions of the offences of unlawful homicide or causing harm should not be overstated. Whatever the formal definitions of the offences, the formal procedural advantages enjoyed by European defendants in the Indian courts and the informal advantages of a shared language and culture, ensured that few were convicted of serious offences and that those who were convicted would receive light sentences.\textsuperscript{166} Many of the cases discussed by Jordanna Bailkin involved allegations of far more serious violence than a wrestling hold, a box on the ears or a single blow with a slight stick. The nature and extent of the fatal violence that could be proved in court hearings must often have fallen far short of reality. Even so, the procedural and cultural advantages enjoyed by European defendants were expressed through the medium of Code provisions which provided the substantive foundations for the ‘ruptured spleen defence’. English common law and statutory offences against the person were far less forgiving when serious injury or death resulted from minor violence.\textsuperscript{167}

\textsuperscript{163} On Sri Aurobindo, see: http://en.wikipedia.org/wiki/Sri_Aurobindo
\textsuperscript{165} Ibid, 342 and see, ibid, 597.
\textsuperscript{166} See Martin Wiener, above n????, 158-61; Elisabeth Kolsky ????? on procedural advantages.
\textsuperscript{167} But see the excellent study by Guyora Binder, ‘The Meaning of Killing’ in Modern Histories of Crime and Punishment (edited, Markus Dubber and Lindsay Farmer, Stanford University Press, Stanford, 2007) 88-114, on the gulf between the theoretical severity of English homicide law and the comparative lenity of its practical applications in the late 19\textsuperscript{th} century.
It appears highly likely that the impediments to conviction for murder, culpable homicide or the more serious offences of causing harm were compounded by the availability of the partial defence of provocation. Though death or injury might have been inflicted intentionally, provocation extenuated guilt of each of the offences affecting the human body, reducing the grade of the offence and dramatically reducing the maximum penalty. The Indian Penal Code, followed Macaulay’s Draft Code and recognised the possibility that insults and offensive gestures might amount to provocation sufficient to extenuate violent retaliation. The position of power and authority enjoyed by most Europeans in relation to most Indians was reflected in the conventions that governed the application of the partial defence of provocation. In an early comment on the Code, Sir Walter Morgan and Arthur McPherson were careful to make the point that the severity of the provocation and its availability as an extenuation of the offender’s guilt, was a function of the relative stations of provoker and provoked:

When the plea of provocation caused by insulting words, signs or gestures is offered in mitigation of homicide, the administrators of the law may properly reject it in one case, and as properly admit it in another, according to the character and condition of the person who offers it….The great mass of the people are accustomed to the use of insulting words and the display of contemptuous gestures. It is notorious that among them this is the most common mode of offering insult. Foul language and indecent gestures, in consequence, lose much of their offensiveness to them. On the other hand, there are doubtless very many persons so sensitive in their feelings that such insults or even an indignity offered by a reflection upon their integrity, an imputation upon their courage…&c, might excite in them sudden and uncontrollable gusts of passion.\(^{168}\)

The asymmetry of the relationship between Indian subjects and colonial masters, on tea plantations, in military garrisons and in other places of employment was calculated to engender abusive responses by Europeans to their rebellious or recalcitrant employees.\(^{169}\) Barnes Peacock’s illustration of a box on the ears that

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\(^{168}\) Walter Morgan and A G Macpherson, above p????, 247.

\(^{169}\) See Jordanna Bailkin, ‘The Boot and the Spleen: When was Murder Possible in British India?’, (2006) 48 Comparative Studies in Society and History, 462, 476, 479; Elizabeth Kolsky, ‘Crime and
results in unexpected death would have been readily understood as a disciplinary blow inflicted on a disrespectful servant. Though the Code provided no leave or licence to use violence against servants, the partial defence of provocation must have provided a convenient rationalisation for the belief that a disciplinary blow was not a serious crime. The colonial courts applied the law in a way that was far removed from Macaulay’s imagination of a code of laws for a community of multicultural equals. In practice, the ‘impartial spectator’ who provided the implicit measure of justifiable resentment was a representative of the dominant culture.

In her study of the ruptured spleen defence, Jordanna Bailkin discusses the tension between colonial administrators, who were concerned by the apparent lenience extended to Europeans who killed Indians, and the colonial judges who insisted that an unexpected death from an act of violence was neither murder nor culpable homicide under the Code. In 1879 that tension precipitated a constitutional crisis between Sir Robert Stuart, Chief Justice of the Allahabad High Court and the Governor General-in-Council. A barrister of the Court, Robert Fuller, angered by the unpunctuality of his carriage driver, struck him with the result that he suffered a fatal rupture of his spleen. The local magistrate convicted Fuller of the minor offence of causing hurt, contrary to s.321 of the Code, and imposed a fine. The High Court reviewed the decision and endorsed the verdict and the penalty. The Governor General in Council responded by publishing in the Gazette of India a censure of the magistrate, an expression of

Punishment on the ‘Tea Plantations of Colonial India’ in Markus Dubber and Lindsay Farmer, above n????, 272, 287-9.
170 Ibid, 487.
171 The constitutional imbroglio is recounted by Sir Orby Howwell Mootham Kt in Allahabad High Court Centenary Publication 1866-1966, http://indialawyers.wordpress.com/allhabad-high-court-centenary-publication-1866-1966/. A comprehensive account of the legal issues in the Fuller Case can be found in the judgement of Robert Stuart CJ in Empress of India v Fox (1880) ILR 2 All 522. The conflicting state of the evidence in the original prosecution; local outrage and administrative concern are discussed in Jordanna Bailkin, ibid, 478-80.
his dissatisfaction with the High Court review of the case and criticism of the Lieutenant Governor for his acquiescence in the proceedings:

The Governor-General in Council cannot but regret that the High Court should have considered that its duties and responsibilities in this matter were adequately fulfilled by the expression of such an opinion. He also regrets that the Lieut.-Governor should have made no enquiry, until directed to do so by the Government of India, into the circumstances of a case so injurious to the honour of British rule, and so damaging to the reputation of British Justice in this country.... It was the plain duty of the magistrate to have sent Mr. Fuller for trial for the more serious offence" (i.e. of culpable homicide).

Sir Robert Stuart CJ protested that this rebuke was an unconstitutional interference with the judicial functions of the Court and asked for the issue to be referred to the Secretary of State for India, Lord Salisbury. He in turn upheld the Governor's censure of the magistrate with the comment that it was essential to assure the community 'that impartial justice had been done', particularly in circumstances where the 'deceased is dependent and helpless and the person causing death belongs to a superior class of society'. He concluded, moreover, that there was no constitutional question of interference with the judicial functions of the Court. If such a question did arise, however, it made no difference, for the Court was not independent of the executive in its exercise of its judicial functions and it was open to the Governor General in Council to intervene by censure or dismissal in circumstances of necessity. In the following year, Chief Justice Robert Stuart responded to this rebuke with an extended justification of the decision in the Fuller Case in *Empress of India v Fox.*172 The case was yet another instance of European brutality leading to fatal rupture of an Indian victim's spleen.

Official concern about the restrictive effect of the homicide provisions of the Indian Penal Code when Europeans killed members of the native population, was not confined to India. The Code had been adopted in the East African states of

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172 *Empress of India v Fox* (1880) ILR 2 All 522.
Kenya, Uganda, Tanganyika and Zanzibar.\textsuperscript{173} The failure of homicide prosecutions and conviction of lesser charges of causing hurt, in cases where European settlers had beaten their employees to death, was a significant reason, among others, for repeal and replacement of the Code in the East African states in the years 1930-34.\textsuperscript{174}

**CONCLUSION: GRATIFYING ‘A NATURAL PUBLIC FEELING’** \textsuperscript{175}

In his reflections on the Indian Penal Code Fitzjames Stephen explained his reasons for reinstating the offence of negligent homicide, which Barnes Peacock had omitted from the 1860 version of the Code. He commences with the remark that mere chance may determine whether some instance of negligent conduct passes without harm or results in death. Though chance determines the outcome, he thought it would be ‘rather pedantic than rational’ to ignore the difference that consequences make when framing offences or imposing punishment: ‘it gratifies a natural public feeling to choose out for punishment the one who actually has caused great harm’.\textsuperscript{176} The point of interest here is not that he disagreed with Barnes Peacock, about the inclusion of an offence of negligent homicide. It is, rather, that he did not take the further step of introducing an offence of constructive manslaughter, so as to gratify the natural public desire for retribution, when unlawful conduct results in unexpected death.


\textsuperscript{174} Ibid, 14. Morris quotes Henry Grattan Bruce, legal advisor to the Colonial Office in 1924 on one such case of ‘accidental’ homicide: ‘I have no hesitation in saying, that under English law the least possible verdict on the facts…would be manslaughter (and might be murder). I do not understand the Indian Code or the remarkable results achieved under it….It reveals a state of affairs which to my mind it is impossible to justify and I am clear that until we sweep away Indian law and substitute English these cases are bound to recur.’


\textsuperscript{176} Ibid, ????. He advanced a second, pragmatic reason for the enactment of the offence of negligent homicide. The offences of Chapter ???which imposed criminal liability for various offences of negligent endangering are not exhaustive in their coverage. The offence of negligent homicide adds the deterrent threat that dangerous conduct will be punished if, by ill fortune, it results in death.
Stephen considered the omission of an offence of constructive homicide ‘remarkable’.\textsuperscript{177} The poised ambiguity of that epithet leaves it open to speculation that he may have agreed with Macaulay and accepted that criminal responsibility for causing death should require proof of fault with respect to death, rather than some lesser harm. It is even possible that Barnes Peacock may have shared that view, though the reports of his views are not particularly coherent. The alternative possibility is that one or both of Stephen and Barnes Peacock framed their legislative strategies on the entirely pragmatic ground that adoption of the English law of constructive manslaughter would be unacceptable to their British compatriots in India. It is quite beyond the scope of this essay to juggle with those possibilities.

What can be said, however, is that Macaulay anticipated, by a century, the protracted and partially successful campaign to eliminate constructive liability for unlawful homicide and lesser offences against the person in Anglophone criminal law.\textsuperscript{178} His contributions to criminal law theory, in this area and in others, have been significantly underrated. In the short run, however, his idealistic experiment failed. If one accepts that the ‘displacement function’ is a central pillar of the criminal law, the Indian Penal Code offences affecting the human body did not achieve their purpose. On the contrary, the Code provisions tended to exacerbate rather than displace the resentment of family members and


\textsuperscript{178} The American Law Institute Model Penal Code (Proposed Official Draft, 1962) does not recognise a category of constructive manslaughter. For a brief standard exposition, see Markus Dubber, \textit{Criminal Law: Model Penal Code} (Foundation Press, NY 2002) 60-82. In Australia, the Commonwealth Criminal Code similarly excludes constructive liability for manslaughter. See, for example, Division 115 \textit{Harming Australians}, 115.2 \textit{Manslaughter of an Australian citizen or resident of Australia}. The provisions of Division 115 were based on the Model Criminal Code, Chapter 5, \textit{Fatal Offences Against the Person}, Discussion Paper, Model Criminal Code Officers Committee (June 1998) 144-55. Compare, however, the most recent UK Law Commission proposals, in which the Commission resiled from earlier views and recommended retention of constructive manslaughter with minor modifications: Report on Murder, Manslaughter and Infanticide (Law Com No 304), Briefing Paper 29, November 2006; discussed, Law Commission, A New Homicide Act for England and Wales? A Consultation Paper (Consultation Paper No177, 2005) 90-2.
communities when European violence resulted in Indian deaths. Nineteenth century India, with its entrenched inequalities and culture of violent oppression in which a significant proportion of Europeans routinely subjected their Indian servants and employees to abuse, injury and death, was a peculiarly inappropriate arena for such a reform.