

## **The need to kill off zombie law: indecent assault, where it went wrong and how to put it right**

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### **Summary**

The law on indecent assault is currently misunderstood leading to substantial injustice for some abused as children. The first half of the article explores the nature and causes of these misunderstandings, discussing particularly the true nature of touching for indecent and common assaults. In the second half the article argues that despite a correction of the law being necessarily retroactive in effect it is not just permissible but necessary to make that correction.

### **Article**

In 1950 an adult man told a nine year old girl to touch his penis. She complied. Upon these facts, in the case of *Fairclough v Whipp*<sup>1</sup>, Lord Goddard CJ in the Divisional Court held that although this was 'disgusting', it was not an indecent assault and the man's conviction for that offence was quashed.

The principles from the decision – that (1) instructing V to touch D's genitals

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<sup>1</sup> *Fairclough v Whipp* (1951) 35 Cr. App. R. 138 DC.

is not an indecent assault, and (2) neither is it an indecent assault if V complies – are still applied, most recently in 2015 by the Court of Appeal in *Dunn*<sup>2</sup>. This article argues that the decision in *Fairclough*, together with three other decisions in the 1950s involving commands by adults to children to touch the adults’ genitals (*Beal v Kelley*<sup>3</sup>, *Burrows*<sup>4</sup>, *DPP v Rogers*<sup>5</sup>), were wrongly decided in relation to (1) the meaning of touching, (2) the requirement of ‘hostility’ as an element of assault, (3) the role of consent in indecent assaults of children and (4) the role of unlawfulness in assault. When these errors are understood the *Fairclough* line is left unsupported and conduct in the paradigm situation– where adult D commands child V to make contact with his/her genitals and also where V does as instructed – is properly classified as an indecent assault (by assault or battery respectively).

This wrong turn in the law of indecent assault is not a matter of purely historical interest but a continuing problem for the courts. Although all conduct which could be charged as indecent assault must have occurred prior midnight on 30<sup>th</sup> April 2004,<sup>6</sup> allegations concerning historical sexual abuse are being made in ever increasing numbers.<sup>7</sup> There is no reason to think that

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<sup>2</sup> *Dunn* [2015] EWCA Crim 724 CA

<sup>3</sup> *Beal v Kelley* (1951) 35 Cr. App. R. 128 DC.

<sup>4</sup> *Burrows* (1951) 35 Cr. App. R. 180 CCA.

<sup>5</sup> *DPP v Rogers* (1953) 37 Cr. App. R. 137 DC.

<sup>6</sup> When ss. 14 and 15 of the Sexual Offences Act 1956 was repealed by the Sexual Offences Act 2003, sch 7 (Sexual Offences Act 2003 (Commencement) Order 2004, SI 2004/874, art 2).

<sup>7</sup> Reporting rates for historical and current offending have been increasing since 2012, with the increase in reporting becoming more pronounced in 2015. Office for National Statistics, “Crime in England and Wales, Year ending September” (Office for National Statistics, 2015) *Office for National Statistics online*, <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandand>

this trend will change in the immediate future<sup>8</sup>; those who suffered from sexual offending as children may take many years to come forward, particularly in familial cases where the desire to avoid family breakup or upset may lead people not to complain until some family members have died. The paradigm situation has been partially covered, since 1<sup>st</sup> January 1961, by the Indecency with Children Act 1960 (IWCA) s.1 offence of committing an act of gross indecency with or towards a child. This article will explain why the IWCA is really no answer to the error at the heart of the *Fairclough* line and argue that the Court of Appeal must confront and correct the mistakes in the *Fairclough* line and accept that conduct in the paradigm situation constitutes indecent assault. Finally, the article contends that despite the retrospective nature of such a decision, it is the only proper decision which the appellate courts can take in this situation.

## **Indecent assault**

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*wales/yearendingseptember2015#sexual-offences* [Accessed 12 April 2016] pp.49-50; Office for National Statistics, "Crime Statistics, Focus on Violent Crime and Sexual Offences, 2013/14" (Office for National Statistics, 2015) Chapter 1, *Office for National Statistics online*, <http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/focus-on-violent-crime-and-sexual-offences-2013-14/rpt-chapter-1.html?format=print> [Accessed 7 January 2016], Section 9. The term 'historical' is used to describe conduct which occurred one year or more before the date of report to the police, so some of the 'historical' offending will be under the SOA 2003, but there will still be a number of allegations which predate the SOA 2003.

<sup>8</sup> The Office for National Statistics suggests that the ever increasing number of reports of sexual offences is due to both better police procedures and the recent reports, investigations and inquiries. Although Operations Yewtree and Midland may have come to an end, the Independent Inquiry into Child Sexual Abuse is likely to continue for a number of years and cover the whole country, with six regional offices (Office for National Statistics, "Crime in England and Wales, Year ending September" (Office for National Statistics, 2015) *Office for National Statistics online*, <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingseptember2015#sexual-offences> [Accessed 12 April 2016] p.50).

It is common ground that indecent assault is common assault (assault or battery) aggravated by the element of indecency.<sup>9</sup> The paradigm situation is unarguably indecent (as was accepted in *Fairclough*). The errors appear when the cases consider the nature of assault in this context and it is important to understand first how and why the *Fairclough* cases were decided as they were. The four cases were decided between 1951 and 1953<sup>10</sup> and the very brief judgments were all given by Lord Goddard CJ.

In *Beal*, the first of the cases, a fourteen year old boy (V) alone in a wood with D (an adult male) was asked by D to hold and rub D's exposed penis. V refused and turned away whereupon D caught hold of him and pulled him back. Lord Goddard characterised the situation thus: "[t]here, at any rate, was the assault, a hostile act, because the act was against the boy's will." Thus, because, and only because, of the grab to V, this was an indecent assault (by battery).<sup>11</sup> Had V simply complied or had D not grabbed him in a "hostile" manner, there would have been no indecent assault, as was Lord Goddard's conclusion in *Fairclough* itself, decided just weeks later. In *Fairclough* Lord Goddard made clear that in his view assault involved typically "a threatening

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<sup>9</sup> See *Beal v Kelley* (1951) 35 Cr. App. R. 128 DC, quoting with approval from *Archbold* (32<sup>nd</sup> ed) 1067, *DPP v Rogers* (1953) 37 Cr. App. R. 137 DC and Lord Griffiths in *Court* [1988] 1 A.C. 28 HL, 33.

<sup>10</sup> The cases concern the earlier version of indecent assault found in the Offences against the Person Act 1861 ss.52 and 62 to which consent could not be pleaded where V was aged under 16 (Criminal Law Amendment Act 1922 s.1). The joint effect of these provisions is the same as the offences of indecent assault against males and females under SOA 1965 ss.14 and 15 respectively.

<sup>11</sup> Although in *DPP v Rogers* he states that *Beal* involved an assault rather than a battery, this must be an error as it was his view that D taking V's arm and pulling V towards him constituted the offence.

gesture or a threat to use violence made against a person” and concluded that “I cannot hold that an invitation to touch the invitor can amount to an assault on the invitee... [i]t seems to me that there must be an act done to a person”.<sup>12</sup> This belief that there must be an act and it must be “done” to V permeates all four of the decisions.

Although there is no mention in *Fairclough* of a need for hostility, the need for it is implicit in that decision, following so quickly after Lord Goddard required hostility in *Beal*. Lord Goddard himself referred to *Fairclough* two months later in *Burrows* (on very similar facts to *Fairclough*) as authority for the requirement of hostility<sup>13</sup> when he stated firmly that in the absence of a threat or “a hostile act against” the child, there was no indecent assault.<sup>14</sup> In the final case of *Rogers*, V’s father led her upstairs and commanded her to masturbate him on two occasions, a command with which she complied, although she did not want to. Lord Goddard’s view was that neither occasion amounted to an indecent assault because there was no “compulsion” or hostility (“a threat or gesture which could be taken as a threat”). Hostility was clearly seen by Lord Goddard as a requirement of assault and conduct which might amount to an assault would not do so if it was not hostile.

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<sup>12</sup> At p.140.

<sup>13</sup> In *Burrows*. Lord Mustill in *R v Brown* [1994] 1 A.C. 212 HL, 260 cited *Fairclough* as the first of the line of cases which required hostility for an assault.

<sup>14</sup> At p.182.

Although he accepted in *Fairclough* that an indecent assault cannot be defended by reliance on the child's consent, Lord Goddard considered that the assault had to be established first, seemingly making the child's consent relevant when deciding whether a common assault had occurred. In *Rogers*, he found that for indecent assault there needed to be "evidence show[ing] that what was being done was really done against the will of the child" noting that although V had not wanted to do as her father instructed her "she made no objection or resistance and no force was used". Her submission meant that he considered what had happened to be not truly against her will and thus no offence. In *Beal* he had also made the comment that "[i]t does not matter that the boy could not give consent; the act was in fact against his will". Despite repeated statutory prohibitions on the legal recognition of consent to indecent assault by those aged under 16,<sup>15</sup> Lord Goddard gives the child's consent and his/her will legal standing in this line of cases.

Finally, in *Rogers* Lord Goddard noted that in the absence of evidence that the conduct was against the child's will there was no offence as "[h]ere no force was used and nothing was done except what any father may do".<sup>16</sup> This approach was picked up in some later cases to prevent what looked like indecent assaults from being unlawful.

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<sup>15</sup> SOA 1956 ss.14(2) and 15(2). Prior to that the Criminal Law Amendment Act 1922 s.1 and before that the Criminal Law Amendment Act 1880 s.2 (under 13's).

<sup>16</sup> At pp.139-140. It should be noted that the report at [1953] 1 W.L.R. 1017 is rather shorter and omits the words "Here no force was used and nothing was done except what any father may do". It is not known whether the Criminal Appeal Reports writer made a mistake in noting the judgment or whether the court thought better of the words and had them excised from the ICLR report.

What it means to touch

As “the least touching of another...is battery”,<sup>17</sup> the definition of touching is vital to understanding both indecent assault by battery and apprehended immediate battery (i.e. assault). Lord Goddard CJ’s view in *Fairclough* that an invitation cannot amount to an assault reflected what he clearly believed was the orthodox view, as he noted that “[i]t is unnecessary to go into any old learning on what constitutes an assault”. It is submitted, however, that Lord Goddard was wrong, as an invitation to V (and particularly a command, which is what occurred in *Fairclough*, and the other three cases, rather than the invitation in itself) can amount to an assault upon V. Similarly, a complied-with instruction to V to touch D can amount to a battery upon V.

If D brings about contact between V and something else, that constitutes a battery, even if V is the one who is moving; touching does not have to take the definition of “bring[ing] the hand etc into contact with [something]” but can and does take the definition of “bring[ing] two things into mutual contact”.<sup>18</sup> This has been accepted not just in hypothetical situations such as D digging a pit for V to fall into<sup>19</sup> or D breaking the ice in front of V who is skating on a

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<sup>17</sup> *Cole v Turner* (1704) 87 Eng Rep 907, 6 Mod 149 and Blackstone, *Commentaries*, Book 3, Chapter 8.

<sup>18</sup> Concise Oxford Dictionary, 8<sup>th</sup> ed (Oxford: OUP, 1992), p.1289.

<sup>19</sup> *Clarence* (1888) 22 Q.B.D. 23 CCR, 36 (Wills J), 45 (Stephen J). Case since overruled on a different point.

frozen pond<sup>20</sup> but more importantly in the cases of *Martin*<sup>21</sup> (D barred the doors of a theatre and shouted 'fire' leading to V fracturing his skull as V fell on the stairs making for the exit), *DPP v K*<sup>22</sup> (foolish school boy K poured acid into the upturned vent of a hand drier and when V later switched the drier on he was sprayed with the acid) and *Santa-Bermudez*<sup>23</sup> (D said he had "no sharps" about his person when asked by PC V before she searched him, but PC V then pricked herself on one of the syringes he in fact had in his pocket). In all these cases V is the proximate cause of the contact but it is D who is culpable in bringing it about.

It might be countered that an act by D is required for an assault and a command cannot be an act. However that only makes sense if words cannot constitute an assault, and that belief is no longer correct (if it ever was).<sup>24</sup> D's culpability is in violating the principle that "every man's person [is] sacred"<sup>25</sup> (or take the more modern approach that D is violating V's personal autonomy) by bringing about the contact between V and something else whether by placing his hand on V, throwing something at V, placing a trap

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<sup>20</sup> C.S. Kenny and G.G. Phillips *Outlines of Criminal Law* 15<sup>th</sup> edn (Cambridge: CUP, 1947), p.176, attributed to J. Stephen *Digest of Criminal Law* 7<sup>th</sup> edn (London: Sweet & Maxwell 1926), Art. 340, n.3.

<sup>21</sup> *Martin* (1881) 8 Q.B.D. 554 CCR. Although the court in *Martin* did not specifically find that there was a battery to support the conviction under s.20 Offences against the Person Act 1861, that was the implication and accords with the view of Wills J in *Clarence* (1888) 22 Q.B.D. 23 CCR which considered *Martin*.

<sup>22</sup> *DPP v K* (1990) 91 Cr. App. R. 23 DC.

<sup>23</sup> *Santa-Bermudez* [2003] EWHC 2908 (Admin); [2004] Crim. L.R. 471.

<sup>24</sup> *Ireland; Burstow* [1998] A.C. 147 HL.

<sup>25</sup> Blackstone, *Commentaries*, Book 3, Chapter 8.



for V or using words to bring about the contact, without V's free, informed and legally-recognised, consent.

This approach is also supported by some pre-1950s indecent assault decisions. Most indecent assault cases of this period give little or no details of the contact involved between the parties and none of those before 1900 is of any assistance. The first relevant case is *Hare*<sup>26</sup> from 1934 where D (who was female) had "instigated and induced" a 12 year old boy to have sexual intercourse with her on three occasions. She was convicted of indecent assault and appealed on the basis that the offence (then under s.62 of the OAPA) could only be committed by a male as it was in that part of the OAPA which dealt with "unnatural offences or offences of a sodomitical character". The Court of Criminal Appeal disagreed and upheld the conviction. Bearing in mind that sexual intercourse was viewed at this time as something done by a male to a female, there was no issue raised about whether the conduct in itself could found the offence, despite it being an act done by V to D; there is no mention in the report of D doing anything extra to V, the allegation being limited to instigating and inducing. This suggests that the meaning of touching contended for earlier was used in this case: D was guilty because she brought about the mutual contact between herself and V and that contact was indecent. *Hare* was followed in *Police v Marchant*<sup>27</sup> and *Boxer*,<sup>28</sup> the latter

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<sup>26</sup> *Hare* [1934] 1 KB 354 CCA.

<sup>27</sup> *Police v Marchant* (1938) 2 J Crim L 324, Colchester magistrates court.

<sup>28</sup> *Boxer* (1944) 4 J Crim L 168, Mr W Blake Odgers KC in the North London Police Court, decision upheld by the appeal committee of the quarter sessions.

involving the paradigm situation as child V complied with D's instruction to touch D's genitals. There is also support for this understanding of touching in one of Lord Goddard's own judgments: the 1952 case of *Rolfe*,<sup>29</sup> decided in the middle of the *Fairclough* line by the Court of Criminal Appeal. In that case D and V (adults, male and female respectively) were alone in a train compartment and D exposed his penis and moved towards V "inviting her to have connection with him". The Court found that this did amount to an indecent assault, expressly noting that there need not be contact for an indecent assault. The only justification for the difference between *Rolfe* and the *Fairclough* line was D's motion towards V having exposed himself, making this an act rather than simply words. That justification falls away now that words can constitute an assault; an invitation to make contact can be enough, depending on the circumstances.

There are three further arguments against an understanding of touching for indecent and common assault which involves simply bringing V and something else into contact. The first argument is based on *Innes v Wylie*,<sup>30</sup> that D cannot commit a battery by being passive and obstructing V like an inanimate object. This use of *Innes* is not justified. The contended principle is derived from the direction given by Lord Denman CJ to a jury in the circumstance of a clear factual dispute where, on D's version, he was not

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<sup>29</sup> *Rolfe* (1952) 36 Cr. App. R. 4 CCA.

<sup>30</sup> *Innes v Wylie* (1844) 1 C. & K. 263; 173 Eng. Rep. 803 QB. See C.S. Kenny, *Outlines of Criminal Law*, 11<sup>th</sup> edn (Cambridge: CUP, 1917), p.176 and G. Williams, *Textbook of Criminal Law* 2<sup>nd</sup> edn (London: Stevens & Sons, 1983), p179.

doing anything to V, but barring his way as V pushed and shoved him.<sup>31</sup> That would not be a battery on any definition of the offence and, crucially, there was no instruction by D to V to touch D. In any event, since the acceptance that an assault may be committed by words alone, *Innes* is a matter of legal history.

The second argument is that V's decision to do as he is told is a break in the chain of causation, as with the heroin addict's decision to take the drug supplied to him by D in *Kennedy (No. 2)*.<sup>32</sup> This, goes the argument, is also a demonstration of V's consent to the touch and so this cannot be a battery because his action is voluntary; it is free, deliberate and informed. But V's actions are not taken to break the chain of causation begun by D in all circumstances. Where V's actions are not informed (as in *K* and *Santana-Bermudez*) they are accepted as having been caused by D. Where they are informed, but not free, they similarly do not break the chain of causation, as with the fleeing theatregoer in *Martin* or the terrified woman in *Roberts*<sup>33</sup> jumping from a moving vehicle to escape D. Where D's assault or battery has led to V doing an act which caused V injuries, D is responsible for V's injuries as long as V's actions were reasonably foreseeable, his/her actions not being free. Although *Roberts* involved the question of causation of injuries, there is no reason why this approach should not be used when it is not the injuries

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<sup>31</sup> *Innes v Wylie* was a civil matter and V was in fact the plaintiff, but the terms D and V are used here for consistency.

<sup>32</sup> *Kennedy [No.2]* [2007] UKHL 38; [2008] 1 A.C. 269.

<sup>33</sup> *Roberts* (1971) 56 Cr. App. R. 95 CA.

but the touch which is caused by V's actions, as in *Martin*.<sup>34</sup> If D's instruction to V is in a situation in which V is not in a position to resist – as, for instance, child V alone with adult D – V's compliance with D's command is not a break in the chain of causation but simply another link in it. Further, and importantly for the paradigm situation, where V is a child and the act is indecent V's consent is irrelevant in any event (see below) and thus cannot be a break in the chain of causation.

The third argument is that a battery must involve a direct application of force by D upon V.<sup>35</sup> This is an unsatisfactory approach as it sets up a requirement of directness which is not, in fact, a requirement at all; this approach does not explain cases like *K* and so requires a separate ragbag category of indirect touching to cover the “booby-trap” situations.<sup>36</sup> A preferable approach would be to abandon the categories of indirect/direct application of force and focus instead on whether D caused V to come into contact with D (or an object) better reflects the case law, and the mischief which the offence of battery has

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<sup>34</sup> The notion that D's threats (or deceit) can overcome V's will appears in modern statutory sexual offences in the offence under s.4 of the Sexual Offences Act 2003 of causing sexual activity without consent, an example of which can be seen in *Bingham* [2013] EWCA Crim 823; [2013] 2 Cr. App. R. 29.

<sup>35</sup> See, for instance: G. Williams, *Textbook of Criminal Law* 2<sup>nd</sup> edn (London: Stevens & Sons, 1983) p.179; Law Commission, *Criminal law, A criminal code for England and Wales* (HMSO 1989), Law Com. No. 177, Vol.1 Draft Criminal Law Bill cl 75; Law Commission, *Legislating the criminal codes: Offences against the person and general principles* (HMSO 1993), Law Com. No. 218, Cm.2370, Appendix A, Draft Criminal Law Bill, Cl. 6.

<sup>36</sup> Unfortunately this approach can be seen in the work of the Law Commission: Law Commission, *Draft Criminal Law Bill* (HMSO 1989) cl 75; Law Commission *Legislating the criminal codes: Offences against the person and general principles* (HMSO 1993), Law Com. No. 218, Cm.2370, Appendix A, draft Criminal Law Bill, para. 18.7 and Cl. 6; Law Commission, *Reform of Offences against the Person: A Scoping Consultation Paper* (HMSO 2014), Law Com. Consultation Paper No. 217, para. 2.13. Law Commission, *Reform of offences against the person* (HMSO 2015), Law Com. No. 361, HC Paper No.555, is silent about the ‘booby trap’ situations.

always existed to address. If D brings about the contact between V and something else, that is sufficient; there is no logical reason for drawing the boundary of battery so as to protect the pit-digging, acid-pouring or command-giving D. It follows that D's injunction to V may amount to an assault.

Expressly in *Beal*, *Fairclough* and *Burrows* (and implicitly in *Rogers*) the court required an act done by D to V for indecent assault. Once touching is understood as bringing V and D (or something else) into mutual contact, it is starkly apparent that the *Fairclough* line is inconsistent with the decisions which pre and post date it.

#### Hostility, consent and unlawfulness

The *Fairclough* line required not just the act of D moving towards V to make contact for an assault, but that such act was 'hostile'; without hostility the conviction in *Beal* would not have stood, despite actual contact by D moving towards V. The absence of hostility in *Fairclough*, *Burrows* and *Rogers* was a basis for there being no indecent assault in those cases: "unless there is a hostile act, there cannot be an assault".<sup>37</sup> The meaning of hostility, however, varies between the cases, sometimes undefined<sup>38</sup> but in other cases used to

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<sup>37</sup> *Burrows* (1951) 35 Cr. App. R. 180 CCA, 182.

<sup>38</sup> *Burrows* (1951) 35 Cr. App. R. 180 CCA and *Rolfe* (1952) 36 Cr. App. R. 4 CCA.

denote a threat<sup>39</sup> or an act done against V's will.<sup>40</sup> Hostility is a curious requirement as indecent assaults may as easily involve extremely affectionate behaviour (in D's view) as threats or violence. There is no justification in the pre-1950s case law on indecent assault for hostility as an element of the offence. Despite some later indecent assault cases following the *Fairclough* line,<sup>41</sup> the Court of Appeal in *Sutton*<sup>42</sup> limited the requirement of hostility to those cases which involved touching which was not in itself indecent and then in 1981 Lord Lane CJ provided a clear and unequivocal view in *Faulkner v Talbot*,<sup>43</sup>

“[a]n assault is any intentional touching of another person without the consent of that person and without lawful excuse. It need not necessarily be hostile or rude or aggressive, as some of the cases seem to indicate.”<sup>44</sup>

The Court of Appeal in *Thomas*<sup>45</sup> and the House of Lords in *Court*<sup>46</sup> approved Lord Lane's formulation. This current conclusion as to the non-role of hostility in indecent assault is at odds with the *Fairclough* line. There are also

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<sup>39</sup> *Rogers* (1953) 37 Cr. App. R. 137 DC. In *Fairclough* itself there is no mention of hostility, but the judgment refers to the need for a threat of violence and as discussed in n.13 above, the case has been taken to be authority for the requirement of hostility.

<sup>40</sup> *Beal* (1951) 35 Cr. App. R. 128 DC.

<sup>41</sup> For example *Mason* (1969) 53 Cr. App. R. 12 (first instance, Veale J), *Upward* 7 October 7, 1976 (unreported) (first instance, Wien J).

<sup>42</sup> *Sutton* (1977) 66 Cr. App. R. 21 CA.

<sup>43</sup> See *Faulkner v Talbot* (1981) Cr. App. R. 1 DC.

<sup>44</sup> See *Faulkner v Talbot* (1981) Cr. App. R. 1 DC, 7 (Lord Lane CJ).

<sup>45</sup> *Thomas* (1985) 81 Cr. App. R. 331 CA (Crim Div), 334.

<sup>46</sup> *Court* [1989] A.C. 28 HL, 41-42 (Lord Ackner).

common assault decisions which refer to hostility as an element of the offence right into the current century. There is clearly inconsistency, but which is the preferable approach? The case law on common assault uses 'hostility' in three specific ways, and it is submitted that none of them add a separate requirement to common assault and none of them justify finding that the paradigm situation must involve hostility to amount to an indecent assault.

First, there is the use of hostility as a signifier of unlawfulness (for example, "the least touching of another in anger is a battery"<sup>47</sup>) but there is no concomitant finding that there could not be a common assault in the absence of such anger or ill will (for example in *Rosinski*<sup>48</sup> where a doctor's lies about his medical intentions turned an examination into a common assault with no need for anger or ill will, and *Coney*<sup>49</sup> where Hawkins J differentiates between a "hostile fight begun and continued in anger" and a prize fight but finds both to be batteries).

Second, there is hostility as a descriptor, used for conduct which is done without V's consent.<sup>50</sup> This adds nothing to the definition of common assault (which is already understood as requiring an absence of consent) but it is potentially misleading in the paradigm situation as a child (under 16) cannot

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<sup>47</sup> *Cole v Turner* (1704) 87 Eng Rep 907, 6 Mod 149, Court of King's Bench. See also *Coney* (1882) 8 Q.B.D. 534 CCR, 539 (Cave J) and 553 (Hawkins J).

<sup>48</sup> *Rosinski* (1824) 168 Eng. Rep. 1168, 1 Mood. 26 CCR.

<sup>49</sup> *Coney* (1882) 8 Q.B.D. 534, 553 CCR.

<sup>50</sup> *Brown* [1994] 1 A.C. 212 HL, at 280 (Lord Slynn).

give legally-recognised consent to an indecent assault.<sup>51</sup> The mistake made by Lord Goddard in *Fairclough* of requiring the establishment of an assault (with its absence of consent) before considering indecent assault<sup>52</sup> is brought into sharp focus here. Lord Goddard's approach was misconceived as there is no question of fact related to consent – beyond the child's age – involved in indecent assault of a child, as Lord Lane CJ in *Faulkner* recognised (“touching to which the boy could not in law consent and therefore did not consent”<sup>53</sup>): once there is indecency, consent is irrelevant.

Lord Goddard's reliance in *Beal* on the need for D's act to be against V's will<sup>54</sup> is also flawed. It is submitted that *Beal* was not a considered attempt by the then Lord Chief Justice to consider will and consent separately, but evidence of a desire to circumvent the statutory prohibition on legal recognition of a child's consent. The argument for separation of will and consent might be made by those seeking to uphold the *Fairclough* line, however, so the argument should be met; rape was after all originally described as being against the woman's will rather than without her consent.<sup>55</sup> It was, however, resolved in the nineteenth century that rape was properly understood to be an act against V's consent rather than against her will<sup>56</sup> and there is no reason to

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<sup>51</sup> SOA 1956 ss.14(2) and 15(2). Prior to that the Criminal Law Amendment Act 1922 s.1 (which was the relevant provision at the time of the *Fairclough* cases).

<sup>52</sup> See *Fairclough* at p.140.

<sup>53</sup> *Faulkner v Talbot* (1981) 74 Cr. App. R. 1 DC, 7-8 (Lord Lane CJ).

<sup>54</sup> *Beal v Kelley* (1951) 35 Cr. App. R. 128 DC, 129.

<sup>55</sup> See Matthew Hale, *Pleas of the Crown* (first published 1736) Vol. 1, 628 and Coke, *Institutes of the Lawes of England* (first published 1628-1644) Vol. 3, 60.

<sup>56</sup> *Camplin* (1845) 169 Eng. Rep. 163, 1 Den. 89 and *Fletcher* (1859) 169 Eng. Rep. 1168, Bell C.C. 63.



think that indecent assault should be treated differently to rape in this regard. To conclude otherwise would not only be illogical but require the assumption that Parliament, in repeatedly barring defence reliance on a child's consent,<sup>57</sup> was still leaving the door open to consideration of the child's will. If will and consent were considered separately for children this would create a difference between child and adult sexual offences, as there is no suggestion of revisiting the role of will in adult offences. There is no justification for, or merit in, finding that an indecent assault must be against V's will as well as done without his/her consent.

In *Rogers*, Lord Goddard required not just that the act was against the child's will but also that that this unwillingness was *demonstrated*.<sup>58</sup> This is in direct opposition to acceptance from the nineteenth century onwards that submission can be unwilling and thus does not necessarily exonerate the defendant, although it may be evidentially relevant in determining whether there was consent.<sup>59</sup> Lord Goddard's reliance upon submission as preventing the offence from being made out here cannot be supported; the proper conclusion is that where V is a child his/her ostensible consent, demonstrated or otherwise, to an indecent assault is irrelevant and can have no proper part

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<sup>57</sup> The first such statutory bar is found in the Criminal Law Amendment Act 1880 s.2 (under 13's) repeated in the Criminal Law Amendment Act 1922 s.1 (extended to under 16's) and finally repeated in SOA 1956 ss.14(2) and 15(2).

<sup>58</sup> *DPP v Rogers* (1953) 37 Cr. App. R. 137 DC, 140.

<sup>59</sup> *Day* (1841) 173 Eng. Rep. 1026, 9 C. & P. 722, *Camplin* (1845) 169 Eng. Rep. 163, 1 Den. 89 and *R v Nichol* (1807) 168 Eng Rep 720, Russ & Ry 130.

of the reasoning in determining whether or not D's conduct constitutes the offence, as the later cases of *McCormack*<sup>60</sup> and *Faulkner*<sup>61</sup> held.

The third use of "hostility" in the case law is as a descriptor, denoting conduct which is outside the generally acceptable standards of modern society ("every laying on of hands is not a battery; for the party's intention must be considered: for people will sometimes by way of joke, or in friendship, clap a man on the back" <sup>62</sup>). This use of the term was adopted by Lord Goff in his analysis of hostility in *Collins v Wilcock*<sup>63</sup> and *F v West Berkshire Health Authority*<sup>64</sup> using the term for "a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life" which prevented such conduct from constituting common assault. <sup>65</sup> (This is perhaps better understood as an exception for conduct within "generally acceptable standards" whether or not the conduct is an everyday occurrence and this will be term used for this exception in this article.<sup>66</sup>) This exception goes beyond consent, express or implied, as it applies to those, like children,

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<sup>60</sup> *McCormack* [1969] 2 Q.B. 442 CA (Crim Div). A similar decision was reached in *Kallides* unreported 11 November 1976 CA (Crim Div) referred to in *Sutton* (1977) 66 Cr. App. R. 21 CA (Crim Div).

<sup>61</sup> *Faulkner v Talbot* (1981) 74 Cr. App. R. 1 DC.

<sup>62</sup> *Williams v Jones* (1736) Cas T Hard 299, 301, 95 Eng Rep 193, Court of Common Pleas, 194 (Lord Hardwicke CJ). See more recently *B(MA)* [2013] EWCA Crim 3; [2013] 1 Cr. App. R. 36 CA (Crim Div) and *Brown* [1994] 1 A.C. 212 HL, at 244 (Lord Jauncey).

<sup>63</sup> *Collins v Wilcock* [1984] 3 All E.R. 374 DC.

<sup>64</sup> *F v West Berkshire Health Authority* [1990] 2 A.C. 1 HL.

<sup>65</sup> *Collins v Wilcock* [1984] 3 All E.R. 374 DC, 378.

<sup>66</sup> *F v West Berkshire Health Authority* [1990] 2 A.C. 1 HL, 16 and 17.

who cannot lawfully give their consent,<sup>67</sup> as long as the context of D's conduct genuinely comes within generally acceptable standards.

It is obviously correct that not all contact between D and V in circumstances of indecency will necessarily be an indecent assault. Fear of making the offence too wide led to the *Fairclough* line's requirement of hostility both in the paradigm situation (as in *Rogers* with Lord Goddard obviously keen not to criminalise fathers who put their arms round their daughters) and outside it (as in *Williams v Gibbs*<sup>68</sup> where D was acquitted of indecent assaults committed when drying children after swimming, apparently on the basis of *Rogers*). Although *Williams* was a strange decision even at the time, the case of *Sutton*<sup>69</sup> shows the problem with using hostility to avoid feared over-criminalisation. In that case D took pornographic photographs of naked young boys but was acquitted of indecent assault as he only touched the boys to show them how to pose. *Sutton* involves a fundamental misunderstanding of the exception, caused perhaps by using the label "hostile" to denote conduct not covered by it. Once the label is put aside and the focus turned to considering whether the exception for conduct within generally acceptable standards really applies in the situation in *Sutton*, the analysis is straightforward. This can be seen using the example of D washing a child in the bath. This conduct is capable of coming within the exception for generally accepted conduct. Obviously, this exception is not based upon the child's

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<sup>67</sup> *F v West Berkshire Health Authority* [1990] 2 AC 1, HL, 72 (Lord Goff).

<sup>68</sup> *Williams v Gibbs* [1958] Crim. L.R. 127 DC (Lord Goddard CJ, Devlin and Pearson JJ).

<sup>69</sup> *Sutton* (1977) 66 Cr. App. R. 21 CA.

consent (even a child being washed against his or her will is generally not the victim of an assault, common or indecent), but it will depend on context (D using washing a child in the bath as an excuse to rub the child's genitals for sexual gratification would not fall within generally acceptable standards and thus would be an offence whereas D just washing the child would).<sup>70</sup> In *Sutton* the contact is capable of coming within the exception – moving the children to indicate poses – but the context of that contact – the children being naked and the movement being to enable indecent photographs to be taken for pornographic use – means that it cannot possibly in fact be encompassed by the exception.

It is submitted that any reference to hostility in indecent, or common, assault is misplaced as the plethora of definitions lead to a lack of consistency and clarity in the law.<sup>71</sup> None of the definitions add a new and necessary element to assault and they are particularly inapposite in the paradigm situation. Importantly for a criminal law term, no non-lawyer could be expected to make sense of it, and even lawyers and judges appear to be misled by its many and varied meanings. It is best set aside together with any idea that the child's will or consent is relevant to indecent assault. The exception for conduct within generally acceptable standards can thus be applied without any taint of "hostility".

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<sup>70</sup> See *Court* [1989] 1 A.C. 28 HL.

<sup>71</sup> The authors of *Smith & Hogan* have not, since the start of that textbook's existence, been in favour of the hostility requirement in common or indecent assault and have been consistently critical of *Brown* and now also *R v B(MA)* in this respect. See most recently D. Ormerod and K. Laird, *Smith & Hogan's Criminal Law* 14<sup>th</sup> edn (Oxford: OUP, 2015) p.708-9.

## Indecent assault in the paradigm cases

The *Fairclough* line is at best permeated by a set of legal errors and misunderstandings and at worst manifestations of the belief that children should resist the indecent attentions of adults, even when they are very young, or alone with the adult, or that adult is their father. Whatever the reason, the line stands in sharp contrast to the approach in *Rolfe* and is an unsupportable approach. On the basis of the discussion above, a proper understanding of indecent assault law in the paradigm case can be summarised thus:

- An instruction to child V to touch adult D's genitals is in itself an indecent assault, if the child apprehends that that contact will take place.
- If V complies with the instruction, that is an indecent assault even though V moves towards D.
- There is no requirement of movement by D towards V (or indeed any physical act by D).
- There is no requirement of any threat, ill will or malevolence on the part of D.
- If D is acting out of affection for V, D's instruction and V's compliance with it are still capable of constituting offences by D.
- V's consent or will in relation to the invitation/conduct is irrelevant.

- The exception for generally accepted conduct will save D's instruction if the context means that the command and any compliance with it are not in fact indecent (for example, where D is instructing V to rub ointment into D's genitals because he cannot and there is no-one else who is present and able to do so).

With the errors of law understood it is possible and, it is submitted, necessary, to correct the erroneous *Fairclough* principles and bring them in line with the rest of the cases on indecent and common assault by giving effect to the points listed above.

### **Can and should indecent assault be changed retrospectively?**

When Parliament has intervened, should judges refuse to do so?

The Court of Appeal stated, when endorsing *Fairclough* in *Dunn*, that there was "nothing to justify our contradicting Parliament's premise [in enacting the IWCA] and overturning what has been settled law since *Fairclough*". As examined above, the law is not quite settled and the *Fairclough* principles are not correct, but can it be right then not to correct the *Fairclough* line because of Parliament's intervention? When the marital rape exemption – another common law rule applied to what had become a statutory offence<sup>72</sup> – fell to be

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<sup>72</sup> Rape having been a common law offence which fell within the statutory ambit in the Sexual Offences Act 1956 and was then defined in the Sexual Offences (Amendment) Act 1976.

considered by the House of Lords in *R v R*<sup>73</sup>, that was certainly the view of some of those who criticised their Lordships' decision to abolish the exemption,<sup>74</sup> although Parliament's failure to fully correct the law, was suggested as a reason *to* intervene by Padfield.<sup>75</sup> It is submitted that Padfield's approach makes more sense. Parliamentary intervention has no magical effect; the nature of any intervention is key as not all interventions are of equal type or importance, but must be seen in their practical context.

With indecent assault, in distinction to rape, there has been no statutory definition of the offence and the common law rule being applied was really the definition of assault which remains (in its definition at least) common law. Parliament's intervention was to create the IWCA following the Criminal Law Revision Committee's (CLRC) First Report, issued in 1959, which advised the Home Secretary to seek to legislate so that any person who committed an act of gross indecency with or towards a child of under fourteen (or incited such a child) would be guilty of an offence.<sup>76</sup> The result was the IWCA offence in those terms. Parliament's reliance on the CLRC report was in itself not wholly justified. The CLRC's report is very brief, just three pages long. Its terms of reference were

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<sup>73</sup> *R v R* [1992] 1 A.C. 599 HL.

<sup>74</sup> Marianne Giles, "Judicial law-making in the criminal courts: the case of marital rape" [1992] *Crim. L.R.* 407; Michael Jefferson, "The Marital Rape Exception" (1991) 55(3) *J. Crim. L.* 357.

<sup>75</sup> Nicola Padfield, "Judicial law-making" [1992] *Crim. L.R.* 860 (in response to Giles' article).

<sup>76</sup> Criminal Law Revision Committee, *First Report (Indecency with Children)* (HMSO 1959).

“to consider ‘what alterations to the criminal law should be made to provide for the punishment of a person who, without committing an assault, invites a child to handle him indecently or otherwise behaves indecently towards a child’”.

It is strange, perhaps due to deference to the Lord Chief Justice and his decisions, that it did not consider whether any alterations were in fact necessary, whether such an invitation was in fact at an assault, and instead simply accepted that there was a gap in the law.<sup>77</sup> The cases were not without criticism even in the 1950s; the enticingly entitled Criminal Law Review article “The Criminal Law and the Woman Seducer” in 1956 had analysed the decisions and concluded that they were in error.<sup>78</sup> As the CLRC’s report was inevitably going to be relied upon by Parliament, it is all the more unfortunate that the committee did not take a more questioning approach. Having erroneously concluded that there was a gap in the law, the CLRC then failed to adequately fill the perceived gap, suggesting only an offence to cover those aged 13 or under as children aged 14 and 15 were “sufficiently protected by the existing provisions as regards sexual offences” and there was only a need “to protect children who are incited to do indecent things the nature of which they do not fully understand”,<sup>79</sup> not to protect children generally from sexual abuse; ‘knowing’ children did not merit protection. As a result the IWCA

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<sup>77</sup> Criminal Law Revision Committee *First Report (Indecency with Children)* (HMSO 1959), [3].

<sup>78</sup> A. N. Mackesey, “The Criminal Law and the Woman Seducer” [1956] *Crim. L.R.* 456 and 529, although the criticism relies on ‘passive’ battery which ignores the role of D’s instruction to V and is thus easier to refute.

<sup>79</sup> Criminal Law Revision Committee *First Report (Indecency with Children)* (HMSO 1959), [9].



offence only covered children aged under 14 (an age limit which was only raised to 16 in 2001<sup>80</sup>). Parliament's intervention was thus based on errors and outdated views of child protection which were contrary to Parliament's own previously expressed views (in 1880, 1921 and 1956) that children aged under 16 could not legally consent to indecent behaviour not a particularly good reason not to correct the errors in the *Fairclough* cases.

The effect Parliament's intervention in the form of the IWCA offence and the *Fairclough* principles, is that D will escape liability where: (1) D is convicted of indecent assault and the Court of Appeal allows an appeal on the basis of *Fairclough* (as in *Dunn*); or (2) or where the conduct took place prior to 2001 and the child was aged 14 or 15<sup>81</sup>. Even where the IWCA offence does apply, for conduct prior to 1997 it generally provides a significantly lower maximum sentence than does indecent assault.<sup>82</sup> For juries the IWCA offence provides unnecessary and complicating extra law when such conduct could be covered by the more straightforward offence indecent assault. Parliament's

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<sup>80</sup> Criminal Justice and Court Services Act 2000 s.39.

<sup>81</sup> A case involving this situation formed the basis of a query from a practitioner colleague in 2015 which led to this paper being written. Mistakes are often made at first instance because of the anomalous situation of 14 and 15 year olds not being covered by the IWCA offence, see for example *R v O(D)* [2014] EWCA Crim 2202; [2015] 1 Cr. App. R. (S.) 41 where an IWCA conviction was quashed as V might have been 14 when the conduct occurred.

<sup>82</sup> The maximum sentence for the IWCA offence was two years until 1997 when it was increased to ten years (by the Crime (Sentences) Act 1997 s.52), in line with indecent assault. Indecent assault has carried the ten year maximum sentence for boys since 1957 and for girls since 1985 (amendment under the Sexual Offences Act 1985 s.3(3)) (see SOA 1956 s.37 and Sch.2, paras.17 and 18). Before 1985 indecent assault on a girl aged under 13 carried a maximum sentence of five years (although the maximum sentence for indecent assault on a girl aged 14 or 15 was two years).

intervention is no reason not to correct the *Fairclough* errors; indeed Parliament has compounded the errors rather than correcting them.

Should judges intervene at all?

There are those who would argue that as a matter of principle, the courts should not engage in judicial law-making, irrespective of any prior Parliamentary intervention.<sup>83</sup> Judicial law-making is a broad category of activity, however and it is submitted that it is sometimes part of the responsibility of the judiciary to make law. Creating or abolishing offences is unacceptable to not just some academics but now also the courts.<sup>84</sup> At the opposite end of the scale is the situation where a court must interpret words within a statute or apply the law to a novel situation. In so doing the judiciary must be careful to apply principle rather than just their own moral view,<sup>85</sup> but it is submitted that to avoid making any decision in such cases would be an abdication of judicial responsibility. *R v R* could be seen as adding to the category of acceptable judicial law-making the need to respond to a social changes, but this runs the obvious risk of being led by judicial moral

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<sup>83</sup> A.T.H. Smith, "Judicial Law Making in the Criminal Law (1984) 100 L.Q.R. 46, Andrew Ashworth, "Interpreting criminal statutes: a crisis of legality?" (1991) 107 L.Q.R. 419, Marianne Giles, "Judicial law-making in the criminal courts: the case of marital rape" [1992] Crim. L.R. 407, Lord Walker of Gestingthorpe, "How far should judges develop the common law?" [2014] C.J.I.C.L. 124, Alan Patterson, "Decision-making in the UK's top court" [2014] C.J.I.C.L. 77.

<sup>84</sup> *Kneller v DPP* [1973] A.C. 435 HL and *Jones et al* [2006] UKHL 16; [2007] 1 A.C. 136 [60]-[62].

<sup>85</sup> Marianne Giles's reply to Nicola Padfield's response to her criticism of *R v R* [1992] Crim. L.R. 680, A.T.H. Smith, "Judicial Law Making in the Criminal Law (1984) 100 L.Q.R. 46, 149 and Andrew Ashworth, "Interpreting criminal statutes: a crisis of legality?" (1991) 107 L.Q.R. 419, 445-448.

assumptions rather than principle. There are interlinked arguments against seeing *R v R* in such simple terms, though. Women's rights are fundamental human rights and not the subject of societal whim or change, although the tendency of some to recognise those rights may wax and wane as society changes. Women have not suddenly become considered the equal of men as part of fashion, men and women *are* equal. To hold otherwise is not merely unacceptable in light of some changeable modern standard, it is simply and fundamentally wrong. The fact that courts had repeatedly presumed that the exemption existed as women could not withdraw their consent whilst married did not mean that they were right; the Emperor did not suddenly become clothed because enough people, however erudite, thought he was. As Lord Judge CJ details in *R v C* (applying *R v R* to conduct in the 1970s) it is a gross oversimplification to say that women were once the chattels of their husbands and "Hale's unqualified statement that a wife could not retract her consent to sexual intercourse was [legally] wrong".<sup>86</sup> *R v R* should thus not be seen as an example of changing the law on the basis of societal changes but an example of correcting a law which is simply wrong, an approach which has been accepted since at least the *Practice Statement (Judicial Precedent)*<sup>87</sup> and which recently received the ringing endorsement of the Supreme Court in *Jogee*:

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<sup>86</sup> *R v C* [2004] EWCA Crim 292; [2004] 1 W.L.R. 2098 [10] – [17].

<sup>87</sup> *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234; (1986) 83 Cr. App. R. 191 HL (and applicable to the Supreme Court).

“As to the argument that even if the court is satisfied that the law took a wrong turn, any correction should now be left to Parliament, the doctrine of secondary liability is a common law doctrine (put into statutory form in section 8 of the 1861 Act) and, if it has been unduly widened by the courts, it is proper for the courts to correct the error.”<sup>88</sup>

This is closely analogous to the *Fairclough* situation. For the judiciary to fail to correct errors made by the judiciary is an abdication of judicial responsibility. Were a case like *Dunn* to come before the Court of Appeal again, it is submitted that the conviction of D for indecent assault in the paradigm situation should be upheld on the basis that the decision in *Fairclough* and the allied cases were wrong in law.

Should any change be retroactive?

The final issue to be considered is how such a decision of the Court of Appeal could and should take effect. Due to the repeal of the offence of indecent assault in 2004<sup>89</sup>, such a decision would, by the normal operation of the common law, affect the conduct in that particular case, and all other conduct which might amount to an indecent assault, all of which would have taken

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<sup>88</sup> *Jogee* [2016] UKSC 8 [85]. The case does not stand alone, for example *R v Howe* [1987] 1 A.C. 417 (HL). See discussion in Ben Juratowitch, *Retroactivity and the Common Law* (London: Hart Publishing 2008) pp.191-192.

<sup>89</sup> When ss. 14 and 15 of the Sexual Offences Act 1956 was repealed by the Sexual Offences Act 2003, sch 7 (Sexual Offences Act 2003 (Commencement) Order 2004, SI 2004/874, art 2).

place in the past.<sup>90</sup> This has often been understood as the declaratory theory; the idea that the court would be stating what the law is and what it has always been rather than changing it.<sup>91</sup> The theory is subject to academic criticism, although some support it, if only to limit the powers of the judiciary<sup>92</sup>. It is submitted that the declaratory theory, a legal fiction perhaps necessary when the common law rather than statute was the source of the majority of criminal law, is no longer necessary to explain the effect of judicial decisions; better to face the truth that judges do sometimes make law and that law is applied retrospectively than hide behind a fiction.

It has already been accepted by the House of Lords, Supreme Court and Privy Council that the declaratory theory is a fiction, that judges do, within limits, change the law and such decisions might or might not have retrospective effect,<sup>93</sup> although there is a presumption that decisions will take effect retrospectively<sup>94</sup>. Putting aside the declaratory theory does not mean that

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<sup>90</sup> Common assault would also be affected by such a decision, but that would be in relation to both past and future conduct, so the concentration in this article is on indecent assault to deal squarely with the issue of retroactivity.

<sup>91</sup> A classic explanation is seen in *Willis & Co. v Baddeley* [1892] 2 QB 324 CA, 326: "There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable".

<sup>92</sup> For an example of criticism see Peter Mirfield, "A challenge to the declaratory theory of law" (2008) 124 L.Q.R. 190. For a defence of the theory see Allan Beever, "The Declaratory Theory of Law" (2013) 33(3) O.J.L.S. 421.

<sup>93</sup> *Kleinwort Benson v Lincoln City Council* [1999] 2 A.C. 1 (HL), *Miller v Dickson* [2001] UKPC D4; [2002] 1 W.L.R. 1615 [35], *In re Spectrum Plus Ltd (in liquidation)* [2005] UKHL 41; [2005] 2 A.C. 680, *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49; [2007] 1 A.C. 558 [23], *International Energy Group Ltd v Zurich International plc* [2015] UKSC 33; [2015] 2 W.L.R. 1471 [53], *Ramdeen v Trinidad and Tobago* [2014] UKPC 7; [2015] A.C. 562 [90] (per Lord Mance and Lord Sumption) and *Hunte v Trinidad and Tobago* [2015] UKPC 33 [76]. See also Tom Bingham in *The Rule of Law* (London: Allen Lane, 2010).

<sup>94</sup> *Ferguson v Trinidad and Tobago* [2016] UKPC 2 [24].

judicial decisions cannot have retrospective effect, it is to admit that that retrospective effect is a retroactive changing of the law rather than a statement of what the law in fact was at the time.<sup>95</sup> That retroactive change may be justified, or sometimes, not. The decision as to whether a particular decision should be of retroactive effect is one which needs to be reached as a result of a balancing exercise, weighing the important but competing principles at play. It is submitted that in the *Fairclough* situation that balancing exercise should come down in favour of retroactive effect, but to explain this the principles involved must be considered.

The Rule of Law and art.7(1) of the European Convention on Human Rights (ECHR) both provide strong arguments against criminal legal changes having retrospective effect. The Rule of Law has been tackled by some of the most eminent legal thinkers, but remains a concept easier to cite than to comprehensively define.<sup>96</sup> This is not the place for a full discussion of the Rule of Law, but it is submitted that the core of the Rule of Law is sufficiently clear. The principle of non-retrospectivity is not fundamental to the Rule of Law but is instead an effect of the central tenets of accessibility, ascertainability and certainty: it is generally difficult to argue that a law with retrospective effect is

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<sup>95</sup> "Retrospective" referring to all ways in which current changes apply to the past and "retroactive" meaning only where the law of the past is declared to be changed: see the helpful discussions of these terms in Ben Juratowitch, *Retroactivity and the Common Law* (London: Hart Publishing 2008) ch. 1, especially pp.6-9.

<sup>96</sup> See for instance A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 8<sup>th</sup> edn (London: Macmillan, 1915), Lon Fuller, *The Morality of Law* 2<sup>nd</sup> revised edn (New Haven; Yale University Press, 1969), Joseph Raz "The Rule of Law and its Virtue" in *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), H.L.A. Hart *The Concept of Law*, 2<sup>nd</sup> edn (Oxford: Clarendon Press, 1994) and Tom Bingham in *The Rule of Law* (London: Allen Lane, 2010).

accessible or ascertainable at the time of D's conduct, when that conduct occurred before the law comes into being, and this undermines certainty. This is not to say that a legal decision should not ever be of retrospective effect, or, more specifically, be retroactive. None of these principles require that there is any more than a presumption against retrospectivity as there may be situations where other factors and principles come into play. Hart's view was that the presumption did not even apply in relation to "hard cases... which the law has left incompletely regulated".<sup>97</sup> The House of Lords, and now the Supreme Court, recognised in the Practice Statement that whilst certainty is important in criminal law, it might nevertheless be right to depart from previous decisions retroactively.<sup>98</sup> If there is only a presumption against retrospectivity, this begs the question of what might rebut that presumption. In this respect the human rights framework and approach assists.

Although art.7(1) of the ECHR is in stark terms:

"No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

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<sup>97</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> edn (Oxford: Clarendon Press, 1994) p.276 (in postscript response to Dworkin).

<sup>98</sup> *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234; (1986) 83 Cr. App. R. 191 HL (and applicable to the Supreme Court).

its application is more nuanced, allowing for “an inevitable element of judicial interpretation... elucidation of doubtful points and... adaptation to changing circumstances” and taking into account that in the UK “progressive development of the criminal law through judicial law making is a well-entrenched and necessary part of legal tradition.”<sup>99</sup> This is in accordance with the principles considered above.

Art. 7(1) ECHR is also subject to art. 7(2):

“This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations”.

This has been found by UK courts to justify looking at D’s conduct and determining whether a reasonable person in a civilised country would consider it unlawful.<sup>100</sup> However, the travaux préparatoires for the ECHR indicate that art.7(2) was inserted at the request of the UK government to avoid any suggestion that the ECHR impugned the validity of the judgments

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<sup>99</sup> *S.W. v U.K.* (1995) 21 E.H.R.R. 363 [36]. See also *Kononov v Latvia* (2010) 52 E.H.R.R.21 [185] and *Maktouf v Bosnia and Herzegovina* (2014) 58 E.H.R.R. 11 [72].

<sup>100</sup> *R v C* [2004] EWCA Crim 292; [2004] W.L.R. 2098 [24] per Lord Judge CJ and *Dyer v Watson* [2002] UKPC D1; [2004] 1 A.C. 379 PC (Scotland) [49] per Lord Bingham.



of the Nuremberg Tribunals<sup>101</sup> and the European Court has occasionally noted this in the context of war crimes cases before it.<sup>102</sup> That is not to say that the UK courts' interpretation of art.7(2) is wrong. It is strongly arguable that the UK courts' interpretation is preferable. Intentionalism is only one tool of interpretation<sup>103</sup> and where it is used it must be used carefully, with consideration for the context and limits of the travaux préparatoires. The ECHR was intended to recognise and guarantee minimum rather than aspirational standards.<sup>104</sup> If the Nuremberg Tribunals were not unlawful that would be due to underlying principle, rather than art.7(2) itself having retrospective effect<sup>105</sup> and the UK decisions do no more than recognise that underlying principle. The conduct would have to be of a particularly heinous kind to come within this underlying principle, however, to avoid the charge that a court was simply turning its own morality into law. For example, Lord Judge CJ may well have been overstepping the mark when in 2004 he asserted that the marital rape exemption did not apply in any civilised country,<sup>106</sup> as,

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<sup>101</sup> Travaux Préparatoires to the Convention, document number DH(57)6 p.4 available online at [http://www.echr.coe.int/Documents/Library\\_TravPrep\\_Table\\_ENG.pdf](http://www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf) [Accessed 14 April 2016].

<sup>102</sup> *Kononov v Latvia* (2010) 52 E.H.R.R.21 [185] – [186] and *Maktouf v Bosnia* (2014) 58 E.H.R.R.11 [72] – [73].

<sup>103</sup> In relation to international treaties, see art.32 of the Vienna Convention on the Law of Treaties.

<sup>104</sup> As noted in *Dyer v Watson* [2002] UKPC D1; [2004] 1 A.C. 379 PC (Scotland) [48] and [49] per Lord Bingham.

<sup>105</sup> It was clearly the intention of those drafting the ECHR that it should be of prospective effect only, see Travaux Préparatoires to the Convention, document number CDH(70)10 p.8 available online at [http://www.echr.coe.int/Documents/Library\\_TravPrep\\_Table\\_ENG.pdf](http://www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf) [Accessed 14 April 2016].

<sup>106</sup> *R v C* [2004] EWCA Crim 292; [2004] W.L.R. 2098 [24].

for instance, Turkey and South Korea (to name but two states) had not at that stage criminalised marital rape.<sup>107</sup>

That is not to say that the heinous nature of the conduct is irrelevant. It is submitted that it is part of the balancing exercise a court must perform when determining whether a particular instance of retrospective law-making is justified. V's right not to be subjected to heinous conduct, and to expect the state to deal with such conduct appropriately, may weigh heavily against D's right not to be retroactively criminalised. It was recognised by the European Court of Human Rights in *MC v Bulgaria*<sup>108</sup> that the state's positive obligation under art. 8 extends to "penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim".<sup>109</sup> The court noted that "[c]hildren and other vulnerable individuals, in particular, are entitled to effective protection".<sup>110</sup> By failing to correct erroneous case law and enable prosecution for the appropriate, and more serious, offence of indecent assault, it can be argued that the state is failing in its positive obligations under art. 8 to protect the child Vs.<sup>111</sup> It is submitted

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<sup>107</sup> Both states now do criminalise marital rape. In relation to Turkey see United Nations Press Release, "Anti-Discrimination Committee takes up Situation of Women in Turkey" 21 January 2005 online at <http://www.unis.unvienna.org/unis/pressrels/2005/wom1480.html> [Accessed 5 May 2016] and in relation to South Korea see Yonhap News Agency, "Top court recognises marital rape as crime for the first time" online at <http://english.yonhapnews.co.kr/national/2013/05/16/3/0302000000AEN20130516003100315F.HTML> [Accessed 5 May 2016].

<sup>108</sup> *MC v Bulgaria* (2005) 40 E.H.R.R. 20 European Court of Human Rights

<sup>109</sup> *Ibid* [166].

<sup>110</sup> *Ibid* [150].

<sup>111</sup> See a similar argument raised against the decision in *R v J* [2004] UKHL 42; [2005] 1 A.C. 562 in Jonathan Rogers, "Fundamentally objectionable" (2007) 157 N.L.J. 1252 although there the argument is put in terms of deterrence which is ultimately unsuccessful as all conduct to which the case applied was in the past.

that just as a conviction passed upon D under mistaken old law must be corrected when it comes before the courts<sup>112</sup> so a mistaken aspect of the law which leads to injustice for V must be corrected when V's allegation is tried.<sup>113</sup>

The determination as to whether retroactive change is justified has also been suggested to depend upon whether the change could have been foreseen with appropriate legal advice.<sup>114</sup> This is a hypothetical approach and as such should be viewed with some suspicion. It relies on the presumption against retrospectivity being based on actual reliance by D on the current state of the law, but D will rarely have consulted a lawyer before embarking on his/her conduct. When the presumption is understood as a part of the Rule of Law requirement of ascertainability it is more properly seen as being based on D's right to rely on the law being capable of ascertainment at the time of his/her conduct.<sup>115</sup> But an ascertainable law is not necessarily one that is correct or justified. It is submitted that where the law is wrong, it does not matter whether a hypothetical lawyer if hypothetically consulted would have spotted this error. There is a duty on the courts to correct their errors and this must be weighed against the right of D to have ascertainable law.

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<sup>112</sup> As in the case of *Caley-Knowles* [2006] EWCA Crim Div 1611; [2007] 1 Cr.App.R. 13. The appellate courts are, however, keen to prevent such cases coming before them, as most recently expressed by the Supreme Court in *Jogee*.

<sup>113</sup> A point made forcefully by Baroness Hale in her dissenting speech in *R v J* [2004] UKHL 42; [2005] 1 A.C. 562.

<sup>114</sup> *S.W. v U.K.* (1995) 21 E.H.R.R. 363 [48] and *R v C* [2004] EWCA Crim 292; [2004] W.L.R. 2098 [18] – [21].

<sup>115</sup> See the helpful discussion in Ben Juratowitch, *Retroactivity and the Common Law* (London: Hart Publishing 2008) ch. 3.

Continuing to apply the *Fairclough* line to past indecent assault cases does in fact not achieve the Rule of Law aim of certainty in the criminal law. The indecent assault cases of *McCormack*, *Faulkner*, *Thomas* and *Court* are inconsistent with the *Fairclough* line. The *Fairclough* line is not even applied consistently at first instance. For example, ex-headmistress Anne Lakey's 2015 convictions for indecent assaults in the 1980s appear to have been based purely upon her having sexual intercourse with two boys aged under 16 rather than any extraneous activity on her part.<sup>116</sup> In *Dunn* itself D was originally prosecuted for and convicted of indecent assault for instructing V to masturbate him. If reports of sentencing appeals are examined, a number of cases can be found where there are convictions upon indecent assault counts which involve the paradigm situation, where V has complied with D's invitation or injunction to masturbate or perform oral sex on him.<sup>117</sup> Leaving *Fairclough* alone perpetuates inconsistency as well as inaccuracy and injustice.

Such a retroactive decision would not be a first in relation to prosecutions under the repealed SOA 1956. In *R v J* in 2004 the House of Lords showed itself willing to change the law relating to indecent assault in favour of D concluding that charging indecent assault to avoid the time bar on unlawful sexual intercourse (which had until the House of Lords' ruling been a

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<sup>116</sup> The Telegraph "Headteacher was 'sexual predator' who exploited her situation" (9 June 2015) [telegraph.co.uk, http://www.telegraph.co.uk/news/uknews/law-and-order/11661679/Headteacher-was-sexual-predator-who-exploited-her-situation.html](http://www.telegraph.co.uk/news/uknews/law-and-order/11661679/Headteacher-was-sexual-predator-who-exploited-her-situation.html) [Accessed 7 December 2015].

<sup>117</sup> *Clifford* [2014] EWCA Crim Div 2245; [2015] 1 Cr. App. R. (S.) 32 (in relation to counts 3, 5 and 6), *Zaid S* [2005] EWCA Crim 733 and *Attorney-General's Reference (No. 39 of 2003)* *Michael Wheeler* [2003] EWCA Crim 3068; [2004] 1 Cr. App. R. (S.) 79.

common prosecution approach) was an abuse of process, despite all conduct thus affected having already taken place.<sup>118</sup> To then refuse to make a change which properly protects Vs is unjustified and would, again, constitute an abdication of judicial responsibility.

Following this examination of the competing rights, interests and principles at play in the balancing exercise to determine whether the law should be changed retroactively, against such change stand the needs for ascertainability, accessibility and certainty in the law giving rise to a rebuttable presumption against retroactive change. In favour of this change stand V's right to protection of his/her art.8 rights from D's actions by the state prosecuting D's breaches of V's rights and the heinous nature of D's conduct. Looking at the system more broadly, against the Rule of Law principles mentioned must be weighed the importance of the law being not just certain but also right, the need for consistency across the law rather than conflicting lines of authority and the duty these needs place upon the courts to correct judicially-created errors.

The *Fairclough* line of authority might be equated to a form of 'zombie law' – dead but still walking about and causing trouble. Killing it off would be a very specific, and it is submitted beneficial, type of judicial law-making.

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<sup>118</sup> *R v J* [2004] UKHL 42; [2005] 1 AC 562.

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