PART I

Foundational Principles

1

Crime, Punishment and Human Rights

This chapter has a number of objectives: first, to introduce the student to the criminal law and its sources; second, to examine the relationship between criminal law and morality; third, to see what effect the European Convention for the Protection of Human Rights and Fundamental Freedoms (commonly referred to as the European Convention on Human Rights or ECHR), now embodied in the Human Rights Act 1998 (HRA 1998), portends for the substantive criminal law of England and Wales; fourth, to identify the connection between national criminal law and European Community law; fifth, to explore the legal consequences that can flow from a criminal conviction; and finally, to introduce two methodologies for analysing a criminal law. The first of these methodologies focuses on the generic elements of a crime without relation to any specific crime. This is a very traditional approach which will serve as the foundation for the discussion of *actus reus, mens rea* and causation in Chapters 2 and 3. The second methodology shows how to break down any criminal offence into its constituent elements. This is an exercise that both prosecutors and defence lawyers will go through in an individual case: the prosecution, because it must prove each and every element of the crime beyond reasonable doubt and therefore needs to know the elements of the crime; a defence lawyer, because the lawyer knows that the jury will have to acquit if a reasonable doubt with regard to *any* of the elements can be established in the jurors' minds. The two approaches are not mutually exclusive, and conscientious lawyers – and students – will use the two in tandem.

SECTION 1: CRIMINALISATION

A: Introduction

There are three critical stages in the *criminalisation* process. First, Parliament determines what conduct will be made criminal. This is the most important stage of the process for there will be no criminal charge, no prosecution and no punishment if conduct has not been made criminal. In the second, or *grading* stage, offences are fitted within a general scheme of crimes that reflect their relative seriousness. This generally involves setting a punishment for violation of each law. The severity of the punishment indicates the seriousness that Parliament has attached to the offence. So, for example, because murder and manslaughter are deemed more serious offences than theft and criminal damage, a greater maximum sentence can be imposed for their commission. Finally, courts will interpret the words of the statute and apply the law in practice.

In England and Wales, the responsibility for the criminalisation process is shared by Parliament and the courts. Originally the courts determined what was and was not a crime. The criminal offences they established are known as common law crimes. While most common law crimes have since been replaced by statute, a few, most notably murder and manslaughter, retain their original common law definition. But even where a common law crime has been replaced by statute, the judges may look to common law decisions to determine the meaning of undefined terms in the statute. Even as basic a term as *intent* may draw its meaning from common law decisions.

While Parliament enacts laws, the responsibility for interpreting these laws rests with the judiciary. By giving a term in a statute a broad or narrow interpretation, the courts can in effect determine the reach of the law. In this process the judges are not bound by the meaning which Parliament may have intended (even if this could somehow be ascertained with certainty).

In respect of punishment in the event of a conviction, Parliament and the courts again share responsibility. Parliament originally will set the minimum and maximum penalty for an offence. Often only a maximum sentence will be specified, although increasingly there are exceptions from this general practice (see, e.g., Crime (Sentences) Act 1997). Within the range of punishments set by Parliament, courts will determine what sentence is appropriate in a particular case. The one notable exception occurs with respect to murder, where the courts are required to impose a mandatory life sentence.

B: The decision to make conduct criminal

The most fundamental decision in criminal law relates to what conduct should be made criminal. From this decision all else flows. Despite the critical nature of the criminalisation decision, relatively little attention has traditionally been paid to it, either by Parliament or in Criminal Law courses. General criteria for determining what to criminalise are rarely set out formally. Often a criminal statute is precipitated by some widely publicised incident involving harm to society. The statute is a response to a public outcry that 'something be done' and is enacted with the aim both of deterring similar conduct in the future and ensuring that, if the conduct does recur, it will not escape punishment. Sometimes the criminal law is coopted to help solve social problems, such as drug addiction or prostitution. Too often, unfortunately, principle seems to play at best a secondary role. Some offences – such as murder, rape and theft – everyone would agree should be criminal (although the precise boundaries may be a matter of dispute), but what to add to this foundation is often controversial. What actually happens is that Parliament tends to add layer upon layer of crimes to the core. The reverse process of decriminalisation (the removal of existing offences from the rolls of the criminal law) is far more infrequent. The result may be, in the words of one commentator, a 'crisis of overcriminalisation'. See Kadish, 'The Crisis of Overcriminalization' (1958) 374 Annals 157.

NOTES AND QUESTIONS

1. Crime is often said to be on the increase, but what does this mean? To some extent an increase in crime merely reflects an increase in the number of criminal laws. In theory we could 'solve' the 'crime problem' by doing away with all criminal laws. But this is not suggested seriously (although Marxist philosophy did envisage an ultimate utopia in which criminal law would be unnecessary). Why not? If criminal laws were to be eliminated, with what might they be replaced in order to protect the citizenry from harm?
2. Is it better to err on the side of over- or under-inclusiveness when it comes to criminalisation? If too broad a spectrum of human behaviour is made illegal, the inevitable result will be that many citizens will find themselves ensnared in the net of the criminal law, with the concomitant stigma of a criminal conviction. Is this desirable? The criminal law is a last, rather than a first, resort, to be employed only when all other means of addressing the social problem at issue have been exhausted. See D. Husak (2007).
3. Is a practical solution to over-criminalisation to have a large number of criminal offences on the books but to enforce only the most important of them? The law on the books would stand as a statement of the principles and values for which the society stands, and as a safety net to allow prosecutions in egregious cases. The decision not to prosecute would protect citizens who commit technical offences but who are not morally blameworthy. The prosecutor could be given discretion to proceed with formal charges only in those cases where the defendant's blameworthiness was manifest. What are the merits and demerits of such an approach?

If the criminalisation process is to become more rational and less haphazard, the challenge facing law-makers is to develop general criteria and principles which can be employed in determining whether or not to make conduct criminal. Legislators are not necessarily averse to a principled approach. In response to a question from Lord Dholakia, Lord Williams of Mostyn, the then Minister of State at the Home Office, indicated that it was the Labour Government's policy that offences 'should be created only when absolutely necessary', and that:

> In considering whether new offences should be created, factors taken into account include whether:
> — the behaviour in question is sufficiently serious to warrant intervention by the criminal law;
> — the mischief could be dealt with under existing legislation or by using other remedies;
> — the proposed offence is enforceable in practice;
> — the proposed offence is tightly drawn and legally sound; and
> — the proposed penalty is commensurate with the seriousness of the offence.
>
> The Government also takes into account the need to ensure, as far as practicable, that there is consistency across the sentencing framework.
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> (HL Deb, vol. 602, WA 57 (18 June, 1999) quoted in Ashworth, 'Is the Criminal Law a Lost Cause' (2000) 116 LQR 225 at p. 229, who questions whether these criteria are followed in practice.)

What are arguably needed are general principles of inclusion and exclusion, i.e., principles which would advise the law-maker as to what should be made criminal (e.g., actions which cause or threaten physical harm to others should be made criminal) and principles that counsel against criminalisation (e.g., it is inadvisable to criminalise conduct which is approved of and engaged in by the vast majority of the citizenry). The following is an attempt by one noted criminologist to identify such principles:

N. Walker, *Crime and Criminology*

(1987)

(i) Objectives of the criminal law

Is it possible to discuss the proper content of the criminal law in general terms? If the contents of criminal codes are examined with a sociological eye, no fewer than fourteen different objectives can be discerned:

(a) the protection of human persons (and to some extent animals also) against intentional violence, cruelty, or unwelcome sexual approaches;
(b) the protection of people against some forms of unintended harm (for example from traffic, poisons, infections, radiation);
(c) the protection of easily persuadable classes of people (that is, the young or the weak-minded) against the abuse of their persons or property (for example by sexual intercourse or hire-purchase);
(d) the prevention of acts which, even if the participants are adult and willing, are regarded as 'unnatural' (for example incest, sodomy, bestiality, drug 'trips');
(e) the prevention of acts which, though not included under any of the previous headings, are performed so publicly as to shock other people (for example public nakedness, obscene language, or heterosexual copulation between consenting adults);
(f) the discouragement of behaviour which might provoke disorder (such as insulting words at a public meeting);
(g) the protection of property against theft, fraud, or damage;
(h) the prevention of inconvenience (for example the obstruction of roads by vehicles);
(i) the collection of revenue (for example keeping a motor car or television set without a licence);
(j) the defence of the State (for example espionage or—in some countries—political criticism);
(k) the enforcement of compulsory benevolence (for example the offence of failing to send one's children to school);
(l) the protection of social institutions, such as marriage or religious worship (for example by prohibiting bigamy or blasphemy);
(m) the prevention of unreasonable discrimination (for example against ethnic groups, religions, the female sex);
(n) the enforcement of the processes regarded as essential to these other purposes (for example offences connected with arrest, assisting offenders to escape conviction, and testimony at trials).

(ii) Moral limits

Now and again there have been attempts to formulate what might be called 'limiting principles', which declare that the criminal law should *not* be used for certain purposes, or in certain circumstances.

The oldest seems to be

(A) Prohibitions should not be included in the criminal law for the sole purpose of ensuring that breaches of them are visited with retributive punishment.

Some years later, Bentham's *An Introduction to the Principles of Morals and Legislation* (1789) stated three more limiting principles. The first was

(B) The criminal law should not be used to penalise behaviour which does no harm.

In his phraseology, punishment was groundless when, on the whole, there was no evil in the act. It is a principle to which everyone would give general assent, and would agree that it was the reason why we do not use the law to discourage bad manners or bad art. Nevertheless there would be many disagreements over other sorts of conduct. The idea of prohibiting bad art by law sounds ridiculous, but one of the things which town and country planning legislation tries to control is bad architecture, and anyone who flouts it can suffer heavy penalties.

Another of Bentham's principles was

(C) The criminal law should not be used to achieve a purpose which can be achieved as effectively at less cost in suffering.

. . . A better formulation of the principle would be

(CC) The criminal law should not be used where measures involving less suffering are as effective or almost as effective in reducing the frequency of the conduct in question.

Bentham's third principle was

(D) The criminal law should not be used if the harm done by the penalty is greater than the harm done by the offence.

For in such cases punishment would be 'unprofitable' when the felicific balance sheet was added up. The difficulty about this principle is that it requires us to weigh, let us say, the unhappiness caused by bad architecture against the unhappiness caused by a large fine. Since the two sorts of unhappiness are inflicted on different people we cannot simply leave it to individual choice, as we do when we ask someone whether he would rather be fined or pull his new house down. The difficulty of choosing between incommensurables is one of the weaknesses of Benthamism which have been exploited by its opponents.

(E) The criminal law should not be used for the purpose of compelling people to act in their own best interests.

Mill himself recognised that there should be exceptions to this rule. 'Despotism', he thought, 'is a legitimate mode of government in dealing with barbarians provided that the end be their improvement'; and he took much the same view of the upbringing of children. So far as children were concerned, therefore, he would not have said that his principle ruled out compulsory benevolence such as enforced attendance at school.

(iii) Pragmatic limits

The principles which Beccaria, Bentham, and Mill formulated were moral prescriptions, which said that the penal system *ought* not to attempt this or that task. Other writers, however, were pursuing a more pragmatic line of thought and asking what the law could reasonably be expected to achieve. This is how Montesquieu approached the subject in *The Spirit of the Laws*. He recognised that prohibition by law can be carried further in some societies than in others, but thought that in any kind of society there were areas of conduct (which he called 'les moeurs et les manières') in which it was most unwise to use the law in the hope of effecting changes.

[T]his principle might read

(F) The criminal law should not include prohibitions which do not have strong public support.

The principle has its own weaknesses—such as the difficulty of measuring public opinion in a morally pluralistic society . . . . its justification is not self-evident, and it raises the question 'Why not?' . . .

(iv) A positive justification?

The thoroughgoing pragmatist, however, is one who abandons the defensive approach. Instead of merely setting up warning notices in the form of limiting principles which try—not very practically—to indicate to legislators where they should stop, he asks why the onus of proof should

not lie on those who want to extend the scope of the criminal law. They should, on this view, be required to show why it is desirable. Shifting the burden of proof in this way has obvious difficulties. The very diversity of functions to which I have already drawn attention makes any attempt to approach the problem in this way sound naïve. Nevertheless, if an institution is as costly—whether in terms of economic resources or of human happiness—as the penal system undoubtedly is, it seems more realistic to ask for positive justifications whenever it is to be used against a given sort of conduct....

Something like a non-moralistic justification was offered by Sir Patrick (now Lord) Devlin, in his well-known lecture on *The Enforcement of Morals*, where he said

> The State must justify in some other way [than by reference to the moral law] the punishment which it imposes on wrongdoers and a function for the criminal law independent of morals must be found. This is not difficult to do. The smooth functioning of society and the preservation of order require that a number of activities should be regulated.

[T]he need to ensure 'the smooth functioning of society' must, after all, be the main justification for the parts of the criminal code which are concerned with the protection of health, the collection of revenue, and the defence of the realm—objectives (b), (i), and (j) in my list. Most, though probably not all, of the other prohibitions can be regarded as necessary for 'the preservation of order', to the extent at least that if they were not enforced on some occasions there would be disorder. Not all thefts or damage would provoke public disturbances; some victims, for example, would be afraid to retaliate. But some would not, and their methods of protecting themselves or avenging their losses would lead to breaches of the peace. The same is true of intentional violence against the person or unwelcome sexual advances. The prohibition of these can be justified because they are classes of actions of which by no means all, but a substantial number, would provoke disorder.

Nevertheless, there are some prohibitions which it is not very plausible to justify in this way. The obvious examples are in my group (d), which consists largely of sexual behaviour that has come to be regarded as 'unnatural', and is prohibited by many criminal codes even if it takes place in private, and between participants who are adult, sane, and under no coercion or inducement other than their own desires....

(v) Pragmatism versus morality

One interesting feature distinguishes the pragmatist's approach which I have just been discussing from the moralist's approach. Suppose that both are agreed in disapproving very strongly of some type of conduct. For the pragmatist the question is simply whether on balance anything useful would be achieved by invoking the criminal law against it. The moralist, however, seems to agonise in a special way over this step. He may be willing to see all sorts of other steps taken to reduce the frequency of the conduct—education, propaganda, restriction of opportunities—and yet may consider it morally wrong to use the criminal law in the campaign.

It is hard to see, however, what it is that in the moralist's eyes distinguishes the criminal law. It may of course be simply that he regards its penalties as excessively severe; but that is not an essential feature of the criminal law. Would he still object if a fine were the maximum penalty for whatever conduct is in question? He might still object that the criminal law seeks to *compel* whereas other techniques of social control work by persuasion or indoctrination. This seems an undeniable distinction, which appeals to one's instinctive dislike of being ordered to do something, even if it is in one's interests.

It raises two questions, however. Are all other techniques of social control less objectionable morally than the compulsion of the criminal law? Is one-sided indoctrination—for example against birth control or abortion—any better? The second question is whether a strong and sincere belief in the harmfulness—or sinfulness—of the conduct does or does not create a duty to do what one can to prevent it, short of doing even greater harm. Whether or not one takes sides on this issue, it is clear that the moralist has a choice between three positions, two simple and one complex:

(a) he may hold sincere and well-defined views about the wrongness of conduct and yet think it wrong to try to influence the behaviour of others by *any* means (a very rare position);

(b) may on the other hand think it justifiable, even obligatory, to seek to influence the behaviour of others by *any* means (a fairly rare position);
(c) he may take position (b) but with a difference, regarding *some* means as unacceptable (the commonest position of the moralist).

Note that (c) involves ruling out certain *means*, not certain types of conduct. The difficulties for the moralist of drawing distinctions between types of conduct which he may or must seek to eliminate and those which he should not have already been shown to be insuperable, if not in theory, at least in practice. It is the techniques about which he has to worry. So far as the use of the criminal law is concerned, he has to decide whether, with all its crudities and undesirable side-effects, it is less acceptable than say, one-sided moral indoctrination.

■ NOTES AND QUESTIONS

1. Are there other objectives which might be added to Walker's list? Some which might be subtracted? Other 'principles' which rationally bear on the decision to criminalise or decriminalise?
2. In 1962 the American Law Institute promulgated a Model Penal Code, which, although not binding, has served as a frequent starting point for American states considering reform of their criminal law. The Code identifies the following purposes of criminal law:
   (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
   (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
   (c) to safeguard conduct that is without fault from condemnation as criminal;
   (d) to give fair warning of the nature of the conduct declared to be an offence;
   (e) to differentiate on reasonable grounds between serious and minor offences.
3. Having identified general criminalisation principles, it is useful to try to apply these to specific cases. This exercise can reveal deficiencies or oversights in the principles and criteria, and contribute to the task of fine tuning. By going back and forth between specific case examples and generalised criteria, one may be able to reach what the legal philosopher John Rawls has referred to as a state of 'reflective equilibrium', whereby both are in balance, the criteria and principles yielding what seems to be the 'right' result in respect to the examples.
   Should the following conduct be made criminal?
   (a) failure to wear a seat belt while driving an automobile;
   (b) cruelty to animals;
   (c) industrial pollution;
   (d) abortion;
   (e) insider dealing (profiting on the stock exchange by exploiting possession of information acquired by virtue of one's position in a company);
   (f) ticket touting (offering to sell a ticket to a theatrical or sporting event at a price above the face value of the ticket);
   (g) public drunkenness;
   (h) racially offensive speech.
4. Should characteristics of the victim affect the decision to make conduct criminal? For example, should it matter whether the victim is an adult or a child or a member of a particular race or religion? A particularly vulnerable person? Are

some persons, such as law enforcement officers or political leaders, deserving of greater protection from the law because of their role in society?

C: Morality and the criminal law

What is the relationship between morality and criminal law? Obviously not all criminal offences involve immoral conduct (e.g., illegal parking), and not all immoral conduct is criminal (e.g., adultery), but often the two overlap. One of the most controversial of criminalisation issues is whether Parliament may (should?) make illegal conduct which is immoral but not directly harmful to the participants or third parties. The topic gave rise to a famous debate between Lord Devlin, one of the most prominent and well-respected judges of his era, and Professor H.L.A. Hart, whom many would regard as the foremost British legal philosopher of the twentieth century. The specific issue which triggered the Hart–Devlin debate was whether consensual homosexual conduct between adults should be decriminalised, as recommended in 1957 by the Wolfenden Committee Report on Homosexual Offences and Prostitution (Cmnd. 247) and subsequently implemented in the Sexual Offences Act 1967. The starting point for the Wolfenden Committee was that the function of the criminal law was to:

> preserve public order and decency, ... protect the citizen from what is offensive and injurious and ... provide sufficient safeguards against exploitation or corruption of others, particularly those who are specially vulnerable because they are young, weak in body or inexperienced or in a state of special physical, official or economic dependence.

P. Devlin, *The Enforcement of Morals* (1965)

...I have framed three interrogatories addressed to myself to answer:

1. Has society the right to pass judgement at all on matters of morals? Ought there, in other words, to be a public morality, or are morals always a matter for private judgement?
2. If society has the right to pass judgement, has it also the right to use the weapon of the law to enforce it?
3. If so, ought it to use that weapon in all cases or only in some; and if only in some, on what principles should it distinguish?

I shall begin with the first interrogatory and consider what is meant by the right of society to pass a moral judgement, that is, a judgement about what is good and what is evil. The fact that a majority of people may disapprove of a practice does not of itself make it a matter for society as a whole. Nine men out of ten may disapprove of what the tenth man is doing and still say that it is not their business. There is a case for a collective judgement (as distinct from a large number of individual opinions which sensible people may even refrain from pronouncing at all if it is upon somebody else's private affairs) only if society is affected. Without a collective judgement there can be no case at all for intervention....

This view—that there is such a thing as public morality—can ... be justified by *a priori* argument. What makes a society of any sort is a community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals. Every society has a moral structure as well as a political one: or rather, since that might suggest two independent systems, I should say that the structure of every society is made up both of politics and morals....

The institution of marriage is a good example for my purpose because it bridges the division, if there is one, between politics and morals. Marriage is part of the structure of our society and it is also the basis of a moral code which condemns fornication and adultery. The institution of marriage would be gravely threatened if individual judgements were permitted about the morality of adultery; on these points there must be a public morality. But public morality is not to be confined to those moral principles which support institutions such as marriage. People do not think of monogamy as something which has to be supported because our society has chosen to organise itself upon it; they think of it as something that is good in itself and offering a good way of life and that it is for that reason that our society has adopted it. I return to the statement that I have already made, that society means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.

…I believe that the answer to the first question determines the way in which the second should be approached and may indeed very nearly dictate the answer to the second question. If society has no right to make judgements on morals, the law must find some special justification for entering the field of morality: if homosexuality and prostitution are not in themselves wrong, then the onus is very clearly on the lawgiver who wants to frame a law against certain aspects of them to justify the exceptional treatment. But if society has the right to make a judgement and has it on the basis that a recognised morality is as necessary to society as, say, a recognised government, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence. If therefore the first proposition is securely established with all its implications, society has a prima facie right to legislate against immorality as such.

…Society is entitled by means of its laws to protect itself from dangers, whether from within or without. Here again I think that the political parallel is legitimate. The law of treason is directed against aiding the king's enemies and against sedition from within. The justification for this is that established government is necessary for the existence of society and therefore its safety against violent overthrow must be secured. But an established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions…. There are no theoretical limits to the power of the State to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against immorality….

…[T]his brings me to the third question—the individual has a *locus standi* too; he cannot be expected to surrender to the judgement of society the whole conduct of his life. It is the old and familiar question of striking a balance between the rights and interests of society and those of the individual…. While every decision which a court of law makes when it balances the public against the private interest is an *ad hoc* decision, the cases contain statements of principle to which the court should have regard when it reaches its decision. In the same way it is possible to make general statements of principle which it may be thought the legislature should bear in mind when it is considering the enactment of laws enforcing morals.

I believe that most people would agree upon the chief of these elastic principles. There must be toleration of the maximum individual freedom that is consistent with the integrity of society…. The principle appears to me to be peculiarly appropriate to all questions of morals. Nothing should be punished by the law that does not lie beyond the limits of tolerance. It is not nearly enough to say that a majority dislike a practice; there must be a real feeling of reprobation. Those who are dissatisfied with the present law on homosexuality often say that the opponents of reform are swayed simply by disgust. If that were so it would be wrong, but I do not think one can ignore disgust if it is

deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached. Not everything is to be tolerated. No society can do without intolerance, indignation, and disgust; they are the forces behind the moral law, and indeed it can be argued that if they or something like them are not present, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice . . . .

. . . [M]atters of this sort are not determined by rational argument. Every moral judgement, unless it claims a divine source, is simply a feeling that no right-minded man could behave in any other way without admitting that he was doing wrong. It is the power of a common sense and not the power of reason that is behind the judgements of society . . . .

The limits of tolerance shift. This is supplementary to what I have been saying but of sufficient importance in itself to deserve statement as a separate principle which law-makers have to bear in mind . . . .

The last and the biggest thing to be remembered is that the law is concerned with the minimum and not with the maximum; there is much in the Sermon on the Mount that would be out of place in the Ten Commandments. We all recognise the gap between the moral law and the law of the land. No man is worth much who regulates his conduct with the sole object of escaping punishment, and every worthy society sets for its members standards which are above those of the law. We recognise the existence of such higher standards when we use expressions such as 'moral obligation' and 'morally bound'. The distinction was well put in the judgement of African elders in a family dispute: 'We have power to make you divide the crops, for this is our law, and we will see this is done. But we have not power to make you behave like an upright man.'

. . . The criminal law is not a statement of how people ought to behave; it is a statement of what will happen to them if they do not behave; good citizens are not expected to come within reach of it or to set their sights by it, and every enactment should be framed accordingly.

The arm of the law is an instrument to be used by society, and the decision about what particular cases it should be used in is essentially a practical one . . . .

The part that the jury plays in the enforcement of the criminal law, the fact that no grave offence against morals is punishable without their verdict, these are of great importance in relation to the statements of principle that I have been making. They turn what might otherwise be pure exhortation to the legislature into something like rules that the law-makers cannot safely ignore. The man in the jury box is not just an expression; he is an active reality. It will not in the long run work to make laws about morality that are not acceptable to him.

This then is how I believe my third interrogatory should be answered—not by the formulation of hard and fast rules, but by a judgement in each case taking into account the sort of factors I have been mentioning. The line that divides the criminal law from the moral is not determinable by the application of any clear-cut principle. It is like a line that divides land and sea, a coastline of irregularities and indentations. There are gaps and promontories, such as adultery and fornication, which the law has for centuries left substantially untouched. Adultery of the sort that breaks up marriage seems to me to be just as harmful to the social fabric as homosexuality or bigamy. The only ground for putting it outside the criminal law is that a law which made it a crime would be too difficult to enforce; it is too generally regarded as a human weakness not suitably punished by imprisonment. All that the law can do with fornication is to act against its worst manifestations; there is a general abhorrence of the commercialisation of vice, and that sentiment gives strength to the law against brothels and immoral earnings. There is no logic to be found in this. The boundary between the criminal law and the moral law is fixed by balancing in the case of each particular crime the pros and cons of legal enforcement in accordance with the sort of considerations I have been outlining. The fact that adultery, fornication, and lesbianism are untouched by the criminal law does not prove that homosexuality ought not to be touched. The error of jurisprudence in the Wolfenden Report is caused by the search for some single principle to explain the division between crime and sin. The Report finds it in the principle that the criminal law exists for the protection of individuals; on this principle fornication in private between consenting adults is outside the law and thus it becomes logically indefensible to bring homosexuality between consenting adults in private within it. But the true principle is that the law exists for the protection of society. It does not discharge its function by protecting the individual from injury, annoyance, corruption,

and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies....

I return now to the main thread of my argument and summarise it. Society cannot live without morals. Its morals are those standards of conduct which the reasonable man approves. A rational man, who is also a good man, may have other standards. If he has no standards at all he is not a good man and need not be further considered. If he has standards, they may be very different; he may, for example, not disapprove of homosexuality or abortion. In that case he will not share in the common morality; but that should not make him deny that it is a social necessity. A rebel may be rational in thinking that he is right but he is irrational if he thinks that society can leave him free to rebel.

A man who concedes that morality is necessary to society must support the use of those instruments without which morality cannot be maintained. The two instruments are those of teaching, which is doctrine, and of enforcement, which is the law. If morals could be taught simply on the basis that they are necessary to society, there would be no social need for religion; it could be left as a purely personal affair. But morality cannot be taught in that way. Loyalty is not taught in that way either. No society has yet solved the problem of how to teach morality without religion. So the law must base itself on Christian morals and to the limit of its ability enforce them, not simply because they are the morals of most of us, nor simply because they are the morals which are taught by the established Church—on these points the law recognises the right to dissent—but for the compelling reason that without the help of Christian teaching the law will fail.

H. L. A. Hart, *Law, Liberty, and Morality*

(1963)

Both in England and in America the criminal law still contains rules which can only be explained as attempts to enforce morality as such: to suppress practices condemned as immoral by positive morality though they involve nothing that would ordinarily be thought of as harm to other persons....

I shall start with an example stressed by Lord Devlin. He points out that, subject to certain exceptions such as rape, the criminal law has never admitted the consent of the victim as a defence. It is not a defence to a charge of murder or a deliberate assault, and this is why euthanasia or mercy killing terminating a man's life at his own request is still murder. This is a rule of criminal law which many now would wish to retain, though they would also wish to object to the legal punishment of offences against positive morality which harm no one. Lord Devlin thinks that these attitudes are inconsistent, for he asserts of the rule under discussion, 'There is only one explanation,' and this is that 'there are certain standards of behaviour or moral principles which society requires to be observed'....

But this argument is not really cogent, for Lord Devlin's statement that 'there is only one explanation' is simply not true. The rules excluding the victim's consent as a defence to charges of murder or assault may perfectly well be explained as a piece of paternalism, designed to protect individuals against themselves.... [P]aternalism—the protection of people against themselves—is a perfectly coherent policy. Indeed, it seems very strange in mid-twentieth century to insist upon this, for the wane of laissez faire since Mill's day is one of the commonplaces of social history, and instances of paternalism now abound in our law, criminal and civil. The supply of drugs or narcotics, even to adults, except under medical prescription is punishable by the criminal law, and it would seem very dogmatic to say of the law creating this offence that 'there is only one explanation,' namely, that the law was concerned not with the protection of the would-be purchasers against themselves, but only with the punishment of the seller for his immorality. If, as seems obvious, paternalism is a possible explanation of such laws, it is also possible in the case of the rule excluding the consent of the victim as a defence to a charge of assault. In neither case are we forced to conclude with Lord Devlin that the law's 'function' is 'to enforce a moral principle and nothing else'....

According to the moderate thesis, a shared morality is the cement of society; without it there would be aggregates of individuals but no society. 'A recognised morality' is, in Lord Devlin's words,

'as necessary to society's existence as a recognised government,' and though a particular act of immorality may not harm or endanger or corrupt others nor, when done in private, either shock or give offence to others, this does not conclude the matter. For we must not view conduct in isolation from its effect on the moral code: if we remember this, we can see that one who is 'no menace to others' nonetheless may by his immoral conduct 'threaten one of the great moral principles on which society is based.' In this sense the breach of moral principle is an offence 'against society as a whole,' and society may use the law to preserve its morality as it uses it to safeguard anything else essential to its existence. This is why 'the suppression of vice is as much the law's business as the suppression of subversive activities'....

Lord Devlin appears to defend the moderate thesis. I say 'appears' because, though he says that society has the right to enforce a morality as such on the ground that a shared morality is essential to society's existence, it is not at all clear that for him the statement that immorality jeopardises or weakens society is a statement of empirical fact. It seems sometimes to be an *a priori* assumption, and sometimes a necessary truth and a very odd one. The most important indication that this is so is that, apart from one vague reference to 'history' showing that 'the loosening of moral bonds is often the first stage of disintegration,' no evidence is produced to show that deviation from accepted sexual morality, even by adults in private, is something which, like treason, threatens the existence of society. No reputable historian has maintained this thesis, and there is indeed much evidence against it. As a proposition of fact it is entitled to no more respect than the Emperor Justinian's statement that homosexuality was the cause of earthquakes. Lord Devlin's belief in it, and his apparent indifference to the question of evidence, are at points traceable to an undiscussed assumption. This is that all morality—sexual morality together with the morality that forbids acts injurious to others such as killing, stealing, and dishonesty—forms a single seamless web, so that those who deviate from any part are likely or perhaps bound to deviate from the whole. It is of course clear (and one of the oldest insights of political theory) that society could not exist without a morality which mirrored and supplemented the law's proscription of conduct injurious to others. But there is again no evidence to support, and much to refute, the theory that those who deviate from conventional sexual morality are in other ways hostile to society.

There seems, however, to be central to Lord Devlin's thought something more interesting, though no more convincing, than the conception of social morality as a seamless web. For he appears to move from the acceptable proposition that some shared morality is essential to the existence of any society to the unacceptable proposition that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society. The former proposition might be even accepted as a necessary rather than an empirical truth depending on a quite plausible definition of society as a body of men who hold certain moral views in common. But the latter proposition is absurd. Taken strictly, it would prevent us saying that the morality of a given society had changed, and would compel us instead to say that one society had disappeared and another one taken its place. But it is only on this absurd criterion of what it is for the same society to continue to exist that it could be asserted without evidence that any deviation from a society's shared morality threatens its existence.

It is clear that only this tacit identification of a society with its shared morality supports Lord Devlin's denial that there could be such a thing as private immorality and his comparison of sexual immorality, even when it takes place 'in private,' with treason. No doubt it is true that if deviations from conventional sexual morality are tolerated by the law and come to be known, the conventional morality might change in a permissive direction, though this does not seem to be the case with homosexuality in those European countries where it is not punishable by law. But even if the conventional morality did so change, the society in question would not have been destroyed or 'subverted'. We should compare such a development not to the violent overthrow of government but to a peaceful constitutional change in its form, consistent not only with the preservation of a society but with its advance.

...A very great difference is apparent between inducing persons through fear of punishment to abstain from actions which are harmful to others, and inducing them to abstain from actions

which deviate from accepted morality but harm no one. The value attached to the first is easy to understand; for the protection of human beings from murder or violence or other forms of injury remains good whatever the motives are by which others are induced to abstain from these crimes. But where there is no harm to be prevented and no potential victim to be protected, as is often the case where conventional sexual morality is disregarded, it is difficult to understand the assertion that conformity, even if motivated merely by fear of the law's punishment, is a value worth pursuing, notwithstanding the misery and sacrifice of freedom which it involves . . . Lord Devlin assumes that the society to which his doctrine is to apply is marked by a considerable degree of moral solidarity, and is deeply disturbed by infringements of its moral code. Just as for Lord Devlin the morality to be enforced by law must be 'public', in the sense that it is generally shared and identifiable by the triple marks of 'intolerance, indignation, and disgust,' so for Stephen 'you cannot punish anything which public opinion as expressed in the common practice of society does not strenuously and unequivocally condemn . . . To be able to punish a moral majority must be overwhelming'. It is possible that in mid-Victorian England these conditions were satisfied in relation to 'that considerable number of acts' which according to Stephen were treated as crimes merely because they were regarded as grossly immoral. Perhaps an 'overwhelming moral majority' then actually did harbour the healthy desire for revenge of which he speaks and which is to be gratified by the punishment of the guilty. But it would be sociologically naïve to assume that these conditions obtain in contemporary England at least as far as sexual morality is concerned. The fact that there is lip service to an official sexual morality should not lead us to neglect the possibility that in sexual, as in other matters, there may be a number of mutually tolerant moralities, and that even where there is some homogeneity of practice and belief, offenders may be viewed not with hatred or resentment but with amused contempt or pity.

In a sense, therefore, Stephen's doctrine, and much of Lord Devlin's, may seem to hover in the air above the *terra firma* of contemporary social reality: it may be a well-articulated construction, interesting because it reveals the outlook characteristic of the English judiciary but lacking application to contemporary society . . . .

■ NOTES AND QUESTIONS

1. Is Hart correct when he asserts that there is no such thing as a moral consensus? Are moral judgements like tastes in food, there being no right or wrong but only personal preferences?
2. If society does have a common morality, how is its content to be ascertained? What is Devlin's answer? Of what relevance might be an opinion poll? What if it turns out that popular opinion is based on stereotypes?
3. Is the State not entitled to show moral leadership such that, irrespective of the views of the majority, certain values are appropriately underpinned through coercive law? See Wilson (2011) 2.2.
4. Of what relevance are the practical problems that might arise from trying to enforce a law? For example, may not the law as a practical matter be powerless to enforce a prohibition against homosexual conduct? The conduct typically occurs in private, the participants are not about to report their activities to the police, the authorities may be unwilling to spare the resources necessary to conduct an investigation on the ground that there are more pressing offences to be investigated, and there is something terribly unseemly about, for example, spying on a men's toilet in order to catch violators. Should such considerations be taken into account in making the criminalisation decision? If the government decides to prohibit an activity, does it thereby commit itself to whatever resources may be necessary to enforce its law?

SECTION 2: WHAT IS A CRIME?

A: Relevant considerations

How can one tell whether or not one is dealing with a 'crime'? This is a critical question because it will determine not only the potential consequences of failing to abide by the relevant law, but also the procedures which will be followed if there is to be a trial. Indeed, the latter point was given prominence by Glanville Williams in his conception of a crime as an act capable of being followed by criminal proceedings (Williams, 'The Definition of Crime' [1955] *Current Legal Problems* 107). A more subtle analysis is given by Lamont:

G. Lamont
(2007) Oxford Journal of Legal Studies 609

There are many answers to the question 'what is a crime?' To a practising lawyer, a crime is anything prohibited under the criminal law—the criminal law being that branch of law dealing with state punishment. Yet, as many legal commentators point out, not all state punishments are part of the criminal law—civil penalties and civil contempt of court are just two examples. A more accurate test of the scope of the criminal law lies in its adjectival incidents, i.e. in the distinctive ways in which criminal *proceedings* differ from civil proceedings. Briefly put, a legal prohibition is a criminal prohibition when it is subject to criminal proceedings. What characterizes proceedings as criminal are such things as the type of bodies having jurisdiction over the matter (the Crown Court, magistrates courts), the manner in which the proceeding can be commenced (charge, information), the rules of evidence employed (standard of proof, rules on admissibility), and the types of outcome to which the proceeding may give rise (conviction, sentence). The scope of the criminal law can only be set in adjectival terms because there is simply too much variety in the content of those things subject to criminal prohibition. Almost anything can be prohibited under the criminal law, and so there is no substantive unity of the kind found, for example, in contract law.

Another answer to 'What is a crime?' is provided by criminologists. They emphasize the need for a broader, social context. Crimes are not simply artificial creations of the law, like a *cestui que trust*, or a negative covenant. Instead, criminal law has a crucial social dimension. A successful prosecution does not simply result in a defendant being held liable for the breach of a legal prohibition—instead she is *convicted* of committing a *crime*—she is found *guilty* of the *charge* against her. These are socially expressive terms. The criminal law serves an important condemnatory function in social life—it marks out some behaviour as specially reprehensible, so that the machinery of the state needs to be mobilized against it. An account of crime that restricted its attention to the doctrinal analysis of lawyers, then, would miss out on a crucial dimension that helps to explain both the social significance of liability and the use made by the state of criminal liability.

Under the jurisprudence of the European Court of Human Rights (ECtHR) (whose decisions must be taken into account by national courts under the HRA 1998), one must determine whether an offence or charge is criminal in order to determine what procedures will be applied. In making this determination, a court is not bound by the label or characterisation placed on the misconduct by Parliament. (See below, Chapter 11)

Benham v *United Kingdom*

(1996) 22 EHRR 293, ECtHR

On 1 April 1990 Mr Benham became liable to pay a community charge of £325. Since he did not pay it, on 21 August 1990 the Poole Magistrates' Court ordered the issue of a liability order, entitling Poole Borough Council ('the charging authority') to commence enforcement proceedings against him.

Mr Benham did not pay the amount owed, and bailiffs visited his parents' house (where he was living), but were told that he had no goods of any value there or elsewhere which could be seized by them and sold in order to pay the debt.

Under Regulation 41 of the Community Charge (Administration and Enforcement) Regulations 1989 if a person is found to have insufficient goods on which to levy outstanding community charge the charging authority may apply to a magistrates' court for an order committing him to prison. On such an application being made, the court must inquire in the presence of the debtor as to his present means and also whether his failure to pay which led to the liability order being made was due to wilful refusal or culpable neglect.

The charging authority applied for such an order, and on 25 March 1991 Mr Benham appeared at the Poole Magistrates' Court for the inquiry required by the Regulations.

He was not assisted or represented by a lawyer, although he was eligible for 'Green Form' legal advice and assistance before the hearing, and the magistrates could have made an order for Assistance by Way of Representation ('ABWOR') if they had thought it necessary.

The magistrates found that Mr Benham, who had 9 '0' level General Certificates of Secondary Education, had started a Government Employment Training Scheme in September 1989, but had left it in March 1990 and had not worked since. He had applied for income support, but had been turned down because it is not payable to those who are voluntarily unemployed, and he had no personal assets or income.

On the basis of this evidence, the magistrates concluded that his failure to pay the community charge was due to his culpable neglect, 'as he clearly had the potential to earn money to discharge his obligation to pay'. Accordingly, they decided that he ought to be sent to prison for thirty days unless he paid what was owing.

Mr Benham was taken to Dorchester Prison on the same day.

...

The applicant, with whom the Commission agreed, argued that the proceedings before the magistrates involved the determination of a criminal charge for the purposes of Article 6(3)(c). He referred to the facts that what was in issue was not a dispute between individuals but rather liability to pay a tax to a public authority, and that the proceedings had many 'criminal' features, such as the safeguards available to defendants aged under 21, the severity of the applicable penalty and the requirement of a finding of culpability before a term of imprisonment could be imposed. Furthermore, it was by no means clear that the proceedings were classified as civil rather than criminal under the domestic law.

The Government argued that Article 6(3)(c) did not apply because the proceedings before the magistrates were civil rather than criminal in nature, as was borne out by the weight of the English case-law. The purpose of the detention was to coerce the applicant into paying the tax owed, rather than to punish him for not having paid it.

The case-law of the Court establishes that there are three criteria to be taken into account when deciding whether a person was 'charged with a criminal offence' for the purposes of Article 6. These are the classification of the proceedings under national law, the nature of the proceedings and the nature and degree of severity of the penalty.

As to the first of these criteria, the Court agrees with the Government that the weight of the domestic authority indicates that, under English law, the proceedings in question are regarded as civil rather than criminal in nature. However, this factor is of relative weight and serves only as a starting-point.

The second criterion, the nature of the proceedings, carries more weight. In this connection, the Court notes that the law concerning liability to pay the community charge and the procedure upon non-payment was of general application to all citizens, and that the proceedings in question were brought by a public authority under statutory powers of enforcement. In addition, the proceedings had some punitive elements. For example, the magistrates could only exercise their power of committal to prison on a finding of wilful refusal to pay or of culpable neglect.

Finally, it is to be recalled that the applicant faced a relatively severe maximum penalty of three months' imprisonment and was in fact ordered to be detained for thirty days.

Having regard to these factors, the Court concludes that Mr Benham was 'charged with a criminal offence' for the purposes of Article 6(1) and (3). Accordingly, these two paragraphs of Article 6 are applicable ....

■ NOTES AND QUESTIONS

1. Of the three criteria identified in *Benham* as bearing on whether there is a criminal offence at issue, why is the characterisation of the offence by Parliament not given more weight? Why is the penalty accorded so much weight? In respect of the penalty, should the critical factor be the potential penalty to which the defendant could have been subjected or the actual penalty imposed in the case?
2. The importance that attaches from a determination that a defendant has been charged with a *criminal* offence is that the fair trial provisions of Article 6 of the ECHR must be observed. The criminal defendant is entitled to the presumption of innocence, prompt notice of the charges, adequate time and facilities for the preparation of a defence, legal assistance and the right to an interpreter if needed, the right to compel the attendance of witnesses and to cross-examine witnesses, and the right to be tried by an independent and impartial tribunal at a public hearing held within a reasonable time of the offence. Included in the right to legal assistance is the right to a free lawyer if required by the defendant's financial circumstances and the interests of justice.

B: Civil v criminal law

What are the differences between a civil suit and a criminal prosecution? Bearing in mind that the same facts can give rise to criminal liability, civil liability or both, let us examine the differences that typically will follow depending on whether a criminal prosecution or a civil action is brought.

Example

An absent-minded professor, while driving his automobile out of the university parking lot, hits a student. The student suffers serious injuries. There is, however, some question whether either the student or the professor was paying close attention to what the other was doing.

(i) Generally

Civil law is concerned with private rights; criminal law is concerned with public wrongs. Civil law is also primarily concerned with compensating the injured victim; criminal law is concerned with condemning and punishing the guilty

	Civil	*Criminal*
Initiator of suit	student	DPP, CPS
Victim	student	State
Title of case	Student v Professor	R v Professor
Fault standard	negligence	recklessness
Damage	harm to claimant	harm to State
Burden of proof	balance of probabilities	beyond reasonable doubt
Procedures	no jury; differing rules of evidence	jury possibility in serious cases
Remedies/sanctions	damages	fine/imprisonment/community service
Goal	compensate victim	punish offender

offender, and deterring others who would commit the offence. Both aim to redress past harms and shape future behaviour.

(ii) Who decides to bring the action?

In civil cases, it is for the victim to decide whether or not to bring suit. No State authority can force the victim to do so. In our example, a decision by Student to curry favour with Professor by not suing him might be considered crass but it would nonetheless be legally permissible. In criminal law, on the other hand, the decision to proceed is made by the State in its various guises. The police will decide whether to investigate, and thereafter whether to arrest or caution the offender or take no further action. The prosecutor, either the Director of Public Prosecutions (DPP) or, more typically, the Crown Prosecution Service (CPS), will decide whether formal charges should be brought. Technically, the desires of the victim are irrelevant to this decision, although often they may be taken into account as a practical matter.

(iii) Title of case

A criminal case is brought in the name of the Crown (*R* v *Defendant*), while a civil case is brought in the name of the injured party (*Claimant* v *Defendant*). The title of the case illustrates an important theoretical point about who is considered to be the aggrieved party. In our example it is Student who has been injured, but the titular victim in a criminal case is the State. Because the victim in the civil suit is the claimant, his negligence may be a relevant legal consideration. But in the criminal case the victim is the State; the contributory negligence of the person injured is irrelevant (although where the victim is largely at fault, the defendant may be able to argue that the victim's negligence was the *legal cause* of the injury).

(iv) Fault

Criminal law is primarily, although not exclusively, concerned with moral fault and blameworthiness. Civil law is more concerned with victim compensation. One consequence is that the legal system makes it easier for a civil claimant to recover than it does for the Crown to obtain a criminal conviction. In our example, Student will succeed in his civil suit if he can establish that Professor was negligent. To secure a conviction in a criminal court, the Crown will have to establish more than mere negligence, probably reckless or intentional misconduct.

(v) Damage

The goal of civil law is to provide compensation to an injured victim; in our example, if Student had not been injured, either physically or psychologically, there would be little point in a civil suit. In criminal law, however, it is not necessary that any person be injured. In our example Professor could be prosecuted for dangerous or careless driving even if he was fortunate enough to avoid hitting anybody. If he had intentionally tried to run down Student but failed, he could be charged with attempted murder.

(vi) Burden of proof

Another manifestation of the greater rigour demanded in criminal law is the higher burden of proof placed on the Crown. In order to secure a criminal conviction, the prosecution must establish its case by proof beyond reasonable doubt. In order to prevail in his civil case, Student would need only to establish his case by a balance of probabilities. Thus if a court or jury were to conclude that a defendant had probably committed the wrongful act alleged, but still had some reasonable doubts, it could return a verdict for a claimant in the civil case but would have to acquit in the criminal prosecution. Before imposing the stigma and sanctions (including imprisonment) of a criminal conviction, society wants to be sure that it is doing the right thing.

(vii) Difference in procedures

Beside the burden of proof, procedures are generally stricter in criminal cases than in civil cases. Again, the concern with the consequences of getting it wrong inclines the law to err on the side of caution in criminal cases. Rules of evidence differ, with the rules in criminal trials on the whole being more stringent. Furthermore, the defendant facing a serious criminal charge has the right to a jury trial. Jury trials are permitted in only a very small category of civil cases, and as a practical matter are extremely rare. In addition, the right of the State to appeal against a jury acquittal in a criminal case is more restricted than is the right of an unsuccessful civil claimant to appeal.

(viii) Remedies and sanctions

One of the key features which distinguishes criminal from civil law is the penalty attached to a verdict against the defendant. The criminal defendant can be sent to jail. In a civil case, the defendant will usually only have to pay money damages; the defendant's liberty is not in jeopardy. The amount of damages in a civil case is determined by the extent of the harm to the victim. The harm to the victim is not necessarily a critical variable in determining the length of sentence imposed on the convicted criminal defendant. Note that while one of the primary goals of both systems is to deter future would-be wrongdoers, civil damages may not be a sufficient deterrent to wealthy defendants. In these cases criminal sanctions may have greater effect. On the other hand, for many crimes the penalty is a relatively minor fine, but civil damages can run high if the victim has suffered serious injuries. In cases where corporate fault has resulted in, for example, an aeroplane crash, the civil penalty may be far in excess of the criminal fine. The two sets of remedies, in any event, are not mutually exclusive. In our example Professor can be made to

pay damages in civil court and be sent to prison if convicted in a criminal trial. A feature of contemporary coercive law is the development of civil/criminal hybrid procedures such as ASBOs.

C: The sources of the criminal law

(i) The common law

Originally, the criminal law was developed by the courts. The courts set out general principles of criminal liability, established the specific elements of offences, and determined what defences should be permitted. This so-called 'common law' was not contained in any code or statute book but had to be distilled from the opinions of the courts. Today the common law of crimes has been largely, but not completely, displaced by statute. *But*:

(a) Certain crimes, most notably murder and manslaughter, have never been defined in statute. One needs to look at common law decisions in order to determine the elements of these crimes. Likewise, many defences have never been reduced to statute and retain their common law meaning.
(b) Often Parliament will use a term in a statute without defining it. There is, interestingly, no statutory definition of even such basic criminal law terms as 'intent' or 'recklessness'. On the other hand, there may be a well-settled meaning of the term in judicial decisions. It may have been Parliament's intent to preserve that meaning, in which case the judicial decisions will need to be consulted in order to determine that meaning. In the case of terms that are not given specific definition by Parliament, judges may resort to common law cases for guidance or may utilise techniques of interpretation embodied in common law decisions.
(c) Some common law crimes may still be in force:

Shaw* v *Director of Public Prosecutions
[1962] AC 220, House of Lords

The appellant published a booklet, the Ladies' Directory, of some 28 pages, most of which were taken up with the names and addresses of prostitutes; the matter published left no doubt that the advertisers could be got in touch with at the telephone numbers given and were offering their services for sexual intercourse and, in some cases, for the practice of sexual perversions. The appellant's avowed purpose in publication was to assist prostitutes to ply their trade when, as a result of the Street Offences Act 1959, they were no longer able to solicit in the street. The prostitutes paid for the advertisements and the appellant derived a profit from the publication. The appellant pleaded not guilty to an indictment charging him with (1) conspiracy to corrupt public morals in that he conspired with the advertisers and other persons by means of the Ladies' Directory and the advertisements to debauch and corrupt the morals of youth and other subjects of the Queen; (2) living on the earnings of prostitution contrary to s. 30 of the Sexual Offences Act 1956; and (3) publishing an obscene article contrary to s. 2 of the Obscene Publications Act 1959.

At the trial evidence was given by prostitutes that they had paid for the advertisements out of their earnings, that the advertisements were good at bringing clients in, and as to the ages of the persons resorting to them and the meaning of abbreviations and expressions in the advertisements; they also gave evidence of the practices in which they indulged and there was evidence by the police as to objects found at their addresses. The summing-up gave no direction to the jury as to the relevance of the appellant's honesty of purpose. The jury convicted the appellant. He appealed, on the ground, *inter alia*, that there was no such offence at common law as the conspiracy alleged.

VISCOUNT SIMONDS: My Lords, . . . the first count in the indictment is 'Conspiracy to corrupt public morals,' and the particulars of offence will have sufficiently appeared. I am concerned only to assert what was vigorously denied by counsel for the appellant, that such an offence is known to the common law, and that it was open to the jury to find on the facts of this case that the appellant was guilty of such an offence. I must say categorically that, if it were not so, Her Majesty's courts would strangely have failed in their duty as servants and guardians of the common law. Need I say, my Lords, that I am no advocate of the right of the judges to create new criminal offences? I will repeat well-known words:

> Amongst many other points of happiness and freedom which your Majesty's subjects have enjoyed there is none which they have accounted more dear and precious than this, to be guided and governed by certain rules of law which giveth both to the head and members that which of right belongeth to them and not by any arbitrary or uncertain form of government.

These words are as true today as they were in the seventeenth century and command the allegiance of us all. But I am at a loss to understand how it can be said either that the law does not recognise a conspiracy to corrupt public morals or that, though there may not be an exact precedent for such a conspiracy as this case reveals, it does not fall fairly within the general words by which it is described . . . . The fallacy in the argument that was addressed to us lay in the attempt to exclude from the scope of general words acts well calculated to corrupt public morals just because they had not been committed or had not been brought to the notice of the court before. It is not thus that the common law has developed. We are perhaps more accustomed to hear this matter discussed upon the question whether such and such a transaction is contrary to public policy. At once the controversy arises. On the one hand it is said that it is not possible in the twentieth century for the court to create a new head of public policy, on the other it is said that this is but a new example of a well-established head. In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for . . . .

■ NOTES AND QUESTIONS

1. May only the courts repeal a common law crime which they created? Or should Parliament be able to do so? If Parliament fails to do so, should its inaction be taken as implicit approval of the common law crime?
2. After *Shaw* the question that remained was whether courts could create new common law crimes. The issue was addressed in *Knuller* v *Director of Public Prosecutions* [1973] AC 435, where the House of Lords purported to limit the judiciary's power to create new common law crimes. One might question whether it really matters, however, given the breadth of many of these offences. Take, for instance, the common law crime of 'outraging public decency', considered in the next case.

R v *Gibson and Another*

[1991] 1 All ER 439, Court of Appeal

The first defendant exhibited at an exhibition in a commercial art gallery run by the second defendant a model's head to which were attached earrings made out of freeze-dried human foetuses. The exhibit was entitled 'Human Earrings'. The gallery was open to, and was visited by, members of the public. The defendants were charged with, and convicted of, outraging public decency contrary to common law.

LORD LANE CJ: The article in question was one of 41 items which had been selected for display out of a much larger number by Sylveire. It was exhibit number 9, and was described in the catalogue as 'Human Earrings'.

Although it was not suggested that Sylveire had taken active steps to publicise this particular exhibit, there was no doubt that the more people who attended the gallery, the better pleased Sylveire would be, and the greater would be the likelihood of selling exhibits.

Now by leave of this court these two men appeal against their convictions.

...

The first ground is that the prosecution were precluded from proceeding on count 1, on which the appellants were eventually convicted, by s. 2(4) of the Obscene Publications Act 1959. That subsection reads as follows:

> A person publishing an article shall not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offence that the matter is obscene.

The first question to decide then is whether there is an offence at common law of outraging public decency. The answer to that question is to be found in the speech of Lord Simon of Glaisdale in the well-known case of *Knuller (Publishing Printing and Promotions) Ltd* v *DPP* [1972] 2 All ER 898 at 935:

> Fourthly, my noble and learned friend, Lord Morris of Borth-y-Gest, in [*Shaw* v *DPP*] [1961] 2 All ER 446 at 467, where, though there was no count of conspiracy to outrage public decency, most of the cases were reviewed, said: 'The cases afford examples of the conduct of individuals which has been punished because it outraged public decency...' And my noble and learned friend, Lord Reid, though dissenting on the main issue, said ([1961] 2 All ER 446 at 460): 'I think that they [the authorities] establish that it is an indictable offence to say or do or exhibit anything in public which outrages public decency, whether or not it also tends to corrupt and deprave those who see or hear it.'

...Mr Worsley points out, and points out correctly, that the object of the common law offence is to protect the public from suffering feelings of outrage by such exhibition. Thus, if a defendant intentionally does an act which in fact outrages public decency, the public will suffer outrage whatever the defendant's state of mind may be. If the defendant's state of mind is a critical factor, then, he submits, a man could escape liability by the very baseness of his own standards.

...The authorities on the question of exhibition outraging public decency are few and far between. One of the very few which it has been possible to trace is *R* v *Crumden* (1809) 2 Camp 89. That was a case where a gentleman was bathing in the nude at Brighton. It is a brief report, and M'Donald CB said (2 Camp 89 at 90):

> I can entertain no doubt that the defendant, by exposing his naked person on the occasion alluded to, was guilty of a misdemeanour. The law will not tolerate such an exhibition. Whatever his intention might be, the necessary tendency of his conduct was to outrage decency, and to corrupt the public morals. Nor is it any justification that bathing at this spot might a few years ago be innocent. For any thing that I know, a man might a few years ago have harmlessly danced naked in the fields beyond Montague house; but it will scarcely be said by the learned counsel for the defendant, that any one might now do so with impunity in Russell Square. Whatever place becomes the habitation of civilized men, there the laws of decency must be enforced.

> The defendant was found guilty; and when he was brought up for judgment, the Court of KB expressed a clear opinion, that the offence imputed to him was a misdemeanour, and that he had been properly convicted.

The result, in our judgment, seems to be this. First of all the requirements with regard to *mens rea* should be the same in this offence as they are in the cognate offence of obscene libel. That is borne out by what Lord Scarman said in *R* v *Lemon* [1979] 1 All ER 898. If that is so, then the decision of the House of Lords in *R* v *Lemon*, albeit by a majority, indicates that the submissions of the prosecution in this case are to be preferred to those of the appellants'.

One turns then to examine in a little more detail the speeches of their Lordships in that case. They are most conveniently summarised by Lord Russell of Killowen, where he said, in his usual trenchant and felicitous language ([1979] 1 All ER 898 at 921):

> So I return to the question of intent. The authorities embrace an abundance of apparently contradictory or ambivalent comments. There is no authority in your Lordships' House on the point. The question is open for decision. I do not, with all respect to the speech of my noble and learned friend, Lord Diplock, consider that the question is whether this is an offence of strict liability. It is necessary that the editor or publisher should be aware of that which he publishes. Indeed that was the function of Lord Campbell's Act (Libel Act 1843), which assumed the law to be that an intention in the accused to blaspheme was not an ingredient of the offence, since it removed by statute a vicarious liability for an act of publication done by another without authority. Why then should this House, faced with a deliberate publication of that which a jury with every justification has held to be a blasphemous libel, consider that it should be for the prosecution to prove, presumably beyond reasonable doubt, that the accused recognised and intended it to be such or regarded it as immaterial whether it was? I see no ground for that. It does not to my mind make sense: and I consider that sense should retain a function in our criminal law. The reason why the law considers that the publication of a blasphemous libel is an offence is that the law considers that such publication should not take place. And if it takes place, and the publication is deliberate, I see no justification for holding that there is no offence when the publisher is incapable for some reason particular to himself of agreeing with a jury on the true nature of the publication.

Moreover, *R* v *Lemon*, as will have been clear from the passages which we have cited, was an allegation of an outrage on the public on a religious basis rather than a general basis, which is the case in the instant appeal. But outrage it certainly was, and the same considerations in logic should apply to this case as applied to the religious outrage in *R* v *Lemon*. That is the submission to us this morning of Mr Worsley, and we find that a cogent argument.

The result is this. Those passages, and the argument of Mr Worsley to which I have just made reference, lead us to the conclusion that, where the charge is one of outraging public decency, there is no requirement that the prosecution should prove an intention to outrage or such recklessness as is submitted by Mr Robertson. If the publication takes place, and if it is deliberate, there is, in the words of Lord Russell—no justification for holding that there is no offence when the publisher is incapable for some reason particular to himself of agreeing with the jury on the true nature of the publication.

...

■ NOTES AND QUESTIONS

1. It is said that hard cases make bad law. What does this mean? Do *Shaw* and *Gibson* illustrate the point? Do common law crimes provide judges (who have been described as middle-aged, middle-class and middle-minded) a means of punishing conduct of which they personally disapprove?
2. Some would argue that common law crimes serve as a safety net in which to catch those individuals who violate society's norms but not its statutory criminal law. What are the dangers in having this safety net?

3. For individuals to obey the State's criminal law, they must first know what it is that the law forbids. Do common law crimes such as conspiring to corrupt public morals or outrage public decency provide 'fair notice' to ordinary citizens of what is legal and what is illegal?

Article 7 of the ECHR provides that no one shall be convicted of a criminal offence which was not an offence at the time of its commission. Do common law crimes violate Article 7? See Chapter 11.

Gay News Ltd and Lemon v *United Kingdom*

(1982) 5 EHRR 123, European Court of Human Rights

The applicants, who are respectively the publisher and the responsible editor of a journal for homosexuals, were found guilty of the common law offence of blasphemous libel in connection with the publication of a certain poem. They complain that this conviction amounted to an unjustified interference with their freedom of expression as guaranteed by Article 10 of the Convention. They further claim that the publication of the poem amounted to an exercise of their right to freedom of thought and religion within the meaning of Article 9 of the Convention, and that the interference with this right was likewise unjustified. Apart from the argument that the restriction imposed on them was not necessary in a democratic society for any of the legitimate purposes enumerated in the above two Convention Articles, the applicants submit in particular that their conviction was based on legal principles which had not existed, or at least had not been defined with sufficient clarity, at the time of the commission of the offence. In this respect they claim that the restriction was not 'prescribed by law' as required under paragraph (2) of Articles 9 and 10, and they allege in addition a violation of Article 7 of the Convention. The applicants finally complain that they have been discriminated against, contrary to Article 14 of the Convention, in the exercise of their freedom under Articles 9 and 10 of the Convention.

...

In the present case, the parties are first of all in disagreement as to whether the criminal offence of blasphemous libel was defined with sufficient certainty in the common law principles which were applied by the courts. The existence of the offence, i.e. the fact that it has not fallen in *desuetudo*, is apparently no longer challenged even by the applicants themselves. But they contend that essential elements of the offence, in particular the principle of strict liability (i.e. the necessity to prove only the intent to publish but not the intent to blaspheme), had not been laid down in pre-existing rules of law but were developed by the courts only in the course of the proceedings in their own case. In this connection it is alleged that even the majority of the House of Lords itself recognised the law-making function of its decision when it took up this particular issue. The Government, on the other hand, denies that the courts, including the House of Lords, created new law in this case when they applied a standard of strict liability. They merely clarified the existing law and in doing so based themselves on established case law without departing from the views expressed in recent leading textbooks.

The Commission first observes that not only written statutes but also rules of common or other customary law may provide a sufficient legal basis both for restrictions of fundamental rights subject to exception clauses such as the one contained in Article 10(2) of the Convention, and for the criminal convictions envisaged in Article 7 of the Convention. The problem in the present case therefore does not reside in the fact that the offence of blasphemous libel was not a statutory, but a common law offence.

The crucial point is rather one of the certainty of the law, and the functions of the courts in clarifying or developing vague legal provisions or concepts. This problem was also considered in the *Sunday Times* case both by the Commission and the Court (see European Court of Human Rights A30 (1979)). In paragraph 49 of its judgment, the Court said the following:

> In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to

have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

...

The Commission considers that the same principles also apply to the interpretation and application of the common law. While this branch of the law presents certain particularities for the very reason that it is by definition law developed by the courts, it is nevertheless subject to the rule that the law-making function of the courts must remain within reasonable limits. In particular in the area of the criminal law it is excluded, by virtue of Article 7(1) of the Convention, that any acts not previously punishable should be held by the courts to entail criminal liability, or that existing offences should be extended to cover facts which previously clearly did not constitute a criminal offence. This implies that constituent elements of an offence such as, e.g. the particular form of culpability required for its completion may not be essentially changed, at least not to the detriment of the accused, by the case law of the courts. On the other hand it is not objectionable that the existing elements of the offence are clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence.

The Commission notes that the Law Commission has criticised the state of the law of blasphemous libel in particular with regard to its lacking clarity, but it nevertheless considers that the courts in the present case in fact did not go beyond the limits of a reasonable interpretation of the existing law. The House of Lords in particular was aware of the limits of its law-making functions in the area of the criminal law which had been circumscribed in the practice statement of 1966 and put into operation in the case of *Knuller* v *DPP* [1973] AC 435. The courts of all degrees confirmed the continued existence of the offence of blasphemous libel. There was only one point which was not clear, namely the particular requirements as to the *mens rea* of a person who commits this offence. This question was answered in the same way by each of the courts. Despite the admission by the Court of Appeal and the majority of the House of Lords that a point of principle was involved in the determination of this question which required clarification, it is equally clear that the application of a test of strict liability and the exclusion of evidence as to the publisher's and editor's intention to blaspheme did not amount to the creation of new law in the sense that earlier case law clearly denying such strict liability and admitting evidence as to the blasphemous intentions was overruled. By stating that the *mens rea* in this offence did only relate to the intention to publish, the courts therefore did not overstep the limits of what can still be regarded as an acceptable clarification of the law. The Commission further considers that the law was also accessible to the applicants and that its interpretation in this way was reasonably foreseeable for them with the assistance of appropriate legal advice. In conclusion therefore the Commission finds that there is no appearance of a violation of Article 7(1) of the Convention in this case, and the applicants' complaint in this respect must accordingly be rejected as being manifestly ill-founded within the meaning of Article 27(2) of the Convention. From that it follows that the requirement under Article 10(2) of the Convention that any restriction on the freedom of expression must be 'prescribed by law' has also been complied with.

■ NOTES AND QUESTIONS

1. In *R* v *Goldstein* [2003] EWCA Crim 3450, the Court of Appeal recognised the common law offence of public nuisance, rejecting an Article 7 challenge.
2. In most European countries there are neither common law crimes nor statutes but written codes. Unlike statutes, which are adopted piecemeal over time, a code constitutes a comprehensive and integrated expression of the whole of a country's law. Greater consistency in terminology can be achieved than in

statutes passed by different Parliaments at different times. Often the code will go beyond providing a simple catalogue of crimes and defences and include a statement of general criminal law principles. Examples and commentary may also be included.

In 1989 the Law Commission (the official body created by Parliament for promoting the reform of the law in England and Wales in the Law Commissions Act 1965) proposed a draft criminal code for the UK. This draft criminal code has never been enacted. Nonetheless, its provisions will, where appropriate, be referred to in this book because they represent the well-formed views of persons who have given the issues under consideration serious thought and deliberation. The Law Commission has recently revived this project.

3. The Hon. Mrs. Justice Arden has argued that the passage of the HRA 1998 strengthens the case for a criminal code (Arden, 'Criminal Law at the Crossroads: The Impact of Human Rights from the Law Commission's Perspective and the Need for a Code' [1999] Crim LR 439). Why should this be so? You may wish to reconsider this question after reading the section 3 of this chapter on the HRA 1998.
4. To say that the common law has largely been replaced by statute is not to say that judges no longer have a role in the development of the law. It remains the responsibility of courts:
   (a) to interpret the meaning of the terms of the statute;
   (b) to determine what conduct falls within the ambit of the statute and what defences may be raised by way of excuse, justification or mitigation;
   (c) to provide guidance to juries, and in the case of appellate courts, to trial judges; and
   (d) to determine the appropriate sentence, within limits set by Parliament, for those convicted of violating the statute.

(ii) Statutes

Over the years, the responsibility for determining what to make criminal and for defining crimes has shifted from the judiciary to the legislature. There are many reasons for and advantages to this shift. Unlike a court, Parliament is not limited by the facts of a particular case and can consider the global dimensions of a problem. Parliamentary committees will hold hearings, receive the views of others, including expert authorities, and commission studies deemed helpful. They may have a large staff and advisors to assist them. Debates in Parliament may clarify the issues. The resulting law is likely to represent a consensus judgement. Most significantly, perhaps, members of Parliament must periodically face the electorate, which can vote them out of office if dissatisfied with their voting record. Members of Parliament are democratically accountable for their decisions. In contrast, judges are appointed rather than elected. They are not required to submit themselves to the voters for their approval. Judges receive little input in reaching their decisions other than that provided by the lawyers and witnesses in the case. The witnesses, however, are selected by the lawyers. A trial judge is a solitary figure and even an appellate court will usually not consist of more than five members.

Despite the increased role of Parliament in the formulation of the criminal law, one should not underestimate the role of the judiciary. Often terms in a statute

are ambiguous or susceptible to more than one meaning, although it might be noted that seemingly ambiguous terms in one section of a statute may be defined elsewhere in the statute. For example, s. 1 of the Criminal Damage Act 1971 provides that 'a person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence'. The term 'property' in s. 1 is defined in s. 10 of the Act and a partial answer to what is meant by 'without lawful excuse' in s. 1 is provided in s. 5. Also, the meaning of a specific term in an Act sometimes can be found in another statute. For instance, s. 1 of the Criminal Damage Act 1971 seems to imply that the crime has to be committed by a 'person'. But what of a company which has polluted a river? Can it be prosecuted for criminal damage. The company would not seem to be a 'person'. However, the Interpretation Act 1889 (since re-enacted on several occasions) informs us:

INTERPRETATION ACT 1889

2.—(1) In the construction of every enactment relating to an offence punishable on indictment or on summary conviction whether contained in an Act passed before or after the commencement of this Act, the expression 'person' shall, unless the contrary intention appears, include a body corporate.

When a court does have to interpret a term in a statute, how should it go about this task? Over the years many approaches to statutory interpretation have been articulated, and the accumulated rules of statutory construction can now easily fill a textbook. The simplest and earliest approach taken by the courts was to give words in a statute their 'literal' meaning. While arguably encouraging precision in drafting, this approach sometimes could lead to bizarre results and the approach has now fallen out of favour. Today, in interpreting statutes, courts tend to apply one of the following: the 'golden rule', the 'mischief rule', or a 'purposive approach'. The 'golden rule' admonishes judges to give the words of a statute their ordinary meaning unless to do so would lead to absurdity. Under the 'mischief rule', a court will look at the mischief which the statute was designed to eliminate and interpret ambiguous words in light of that mischief. A 'purposive approach' to statutory interpretation is similar and seeks to give ambiguous words in a statute a meaning that is consistent with Parliament's purpose in enacting the statute. The problem is, however, that Parliament rarely speaks with a single voice, and different legislators who voted in favour of a statute may hold different views of what the statute is designed to achieve. Another approach to statutory interpretation, more common in European States than in the courts of England and Wales, is to strive to fit the statute within the whole of the country's legal system. This is sometimes referred to as a 'teleological approach'. It would seem to present a court with the daunting task of making sense of the totality of a country's legal or criminal justice system simply to give meaning to a specific term.

With so many rules of statutory interpretation to choose from, one can understand the cynic's view that a court will select that approach to statutory interpretation that allows it to reach the result that the judges think is most appropriate in the case before the court.

NOTES AND QUESTIONS

1. Historically, judges could not consult Parliamentary debates to determine the objective of a statute (see *Davis* v *Johnson* [1979] AC 264). This position was somewhat relaxed in *Pepper* v *Hart* [1992] 3 WLR 1032, where the House of Lords stated that a court could refer to Hansard if a statute was ambiguous or obscure, or when a particular interpretation might lead to absurdity, as long as the reference was to a statement of a Minister or the promoter of the Bill. The courts are not required to do so, however, if they do not believe it would be helpful. See *R* v *Gomez* [1992] 3 WLR 1067.
2. What is meant by giving the words of a statute their ordinary meaning? Is 'ordinary meaning' to be found in a dictionary, or is it the generally and popularly understood meaning? Sometimes a court will leave the issue of the meaning of a term in a statute to the jury, directing the jury only that it should give the term its 'ordinary meaning'. So, for example, when a defendant is on trial for theft, the responsibility for determining not only whether the defendant has acted 'dishonestly' but also the meaning of dishonest is left to the jury to decide.
3. If a statute is directed at those in a particular trade, should the 'trade usage' meaning of terms apply, rather than the dictionary or ordinary meaning?
4. As we shall see, the HRA 1998 requires courts to construe legislation consistently with the ECHR, at least 'so far as it is possible to do so'. Thus, any ambiguity in a statute will have to be interpreted in a way that renders the statute compatible with the Convention. This may not yield the same result as would have been achieved if one of the more traditional approaches to statutory interpretation had been invoked. Note also, however, that a court needs only to construe legislation to be compatible with the Convention 'so far as it is possible to do so'. The latter 'get-out' clause would seem to give courts considerable leeway in interpreting legislation under the HRA 1998.
5. When a statute is susceptible to more than one interpretation, should a court choose the interpretation that favours the defendant or the Crown? In *Sweet* v *Parsley* [1970] AC 132 Lord Reid wrote that 'it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted'. As you read the various cases in this book, you might note the extent to which this principle seems to be followed in practice.

As an exercise in statutory interpretation, consider the following statute:

PROTECTION FROM HARASSMENT ACT 1997

1. Prohibition of harassment

(1) A person must not pursue a course of conduct—

(a) which amounts to harassment of another, and

(b) which he knows or ought to know amounts to harassment of the other.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

(3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows—
(a) that it was pursued for the purpose of preventing or detecting crime,
(b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

2. Offence of harassment

(1) A person who pursues a course of conduct in breach of section 1 is guilty of an offence.
(2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.

. . .

4. Putting people in fear of violence

(1) A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.
(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.
(3) It is a defence for a person charged with an offence under this section to show that—
(a) his course of conduct was pursued for the purpose of preventing or detecting crime,
(b) his course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
(c) the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.
(4) A person guilty of an offence under this section is liable—
(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or
(b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.

■ NOTES AND QUESTIONS

1. Both the social and legislative history of the Protection from Harassment Act 1997 make it clear that its goal was to address the then much-publicised problem of 'stalking'. Yet the Act itself uses neither the word 'stalking' nor any of its variants. Should a court take into account this history in interpreting the statute?
2. In the employment context, harassment has more far-reaching connotations, often referring to sexual harassment. Is sexual harassment now a crime under the Protection from Harassment Act?
3. Are animal rights protestors who stand outside the home of persons who work in laboratories which experiment on animals, shouting abuse at the workers, guilty of harassment? Are newspaper reporters who, day after day, persevere in badgering politicians with the same questions?

SECTION 3: THE RELEVANCE OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Following World War II, the Council of Europe promulgated the 'European Convention for the Protection of Human Rights and Fundamental Freedoms' (often referred to, more simply, as the European Convention on Human Rights or by the acronym ECHR). The UK played a key role in the drafting of the Convention and was the first country to ratify it (March 1951). The Convention sets out the basic human rights to which all persons are entitled. It also created a European Commission (since abolished) and a European Court of Human Rights to enforce these rights.

While the UK ratified the European Convention early, it did not incorporate it into its domestic law, as did most other European States. The most significant ramification of the UK approach was that the rights set out in the Convention could not be enforced in a court in England or Wales. Thus, in order to vindicate their rights, aggrieved individuals had to take their case against the government to Strasbourg (the home of the Commission and Court). Unfortunately, this was often an expensive and time-consuming process.

A: The Human Rights Act 1998

In 1998 Parliament enacted the HRA 1998. The Act came into force on 2 October 2000. It has implications for Parliament's authority to create crimes, and may alter the historic balance between the judiciary and Parliament (although it is still too soon to offer a judgement on how great the effects will be). Most significantly, the Act allows individuals who believe that their human rights have been violated by the government to have their claims heard in a domestic court.

Section 1 of the Act specifies the Articles and Protocols of the Convention which are to be incorporated into domestic law (see below for specific provisions). Section 2 instructs courts and tribunals that they *must*, in determining issues which raise questions of rights under the Convention, take into account the relevant judgments, decisions, declarations and advisory opinions of the European Commission, the European Court of Human Rights and the Committee of Ministers of the Council of Europe. In this regard it should be noted that the UK does not have to have been a party to the original decision for its courts to have to take account of it. Section 3 provides that all primary and subordinate legislation must, as far as possible, be interpreted in a way that is compatible with the Convention. Section 4 permits the courts to make a 'declaration of incompatibility' when the law in question fails to comply with the requirements of the Convention. The effect of a 'declaration of incompatibility' is not to invalidate primary legislation (the courts will, however, be able to strike down secondary legislation) but to alert Parliament of the need to amend the law so that it will be compatible. The White Paper accompanying the Bill confidently predicted that

prompt Parliamentary action to redress any incompatibility would be forthcoming but to heighten the likelihood of this prediction coming true, the Act provides for a 'fast-track' procedure which allows a government Minister to take immediate steps to change the law with prompt subsequent submission of the Minister's order to Parliament for approval (s. 10). Judicial proceedings to enforce the Convention may be brought by any individual whose rights under the Convention have been, or threaten to be, violated by a public authority (s. 7) and reliance on Convention rights may be had in any legal proceeding. (For full coverage and discussion of the European dimension see Chapter 11.)

SECTION 4: GRADING AND PUNISHMENT

Once the decision to criminalise has been made, there is a still a grading issue to be considered. Not all crimes engender the same degree of concern, or cause the same amount of harm. Few would disagree that murder and rape are more serious offences than criminal damage and tax evasion. All may need to be made criminal, but the same punishment should not be attached to each. The sanction that is attached to an offence reflects the grading of the offence by Parliament.

A: The grading of offences

There are issues of both absolute ranking (which is the most serious crime, the second most serious, etc.) and relative ranking (*how much* more serious is one crime than another).

A. Ashworth, *Principles of Criminal Law*
2nd ed. (1995)

...In essence, then, we may distinguish five stages in the calculation of offence-seriousness that von Hirsch and Jareborg [A. von Hirsch and N. Jareborg, 'Gauging Criminal Harms: A Living Standard Analysis' [1991] OJLS 1] propose:

1. the interests violated by the offence are identified;
2. the effect on a typical victim's living standard is quantified on the scale ranging from offences that merely affect significant enhancement to those that affect subsistence;
3. the culpability of the offender is taken into account;
4. the level of seriousness may be reduced to reflect the remoteness of the offence from the actual harm; and
5. transfer this assessment on to a scale that in some way quantifies the degree of seriousness.

It would be possible to devise an elaborate 100-point scale for this, but von Hirsch and Jareborg say that this would give the impression of a 'misleading sense of precision', and their preference is for a scale with five broad bands. This both allows further adjustment within each band and signifies that it remains a rather approximate enterprise.

Inexact it may be, but the enterprise is essential. Judgments of relative seriousness are made frequently in all walks of life—not just by legislators when deciding whether to criminalize and what maximum penalty to assign to an offence, but also by judges and magistrates when sentencing,

and also by lay people in commenting on whether the official response is proportionate. The value of the von Hirsch-Jareborg approach is that it identifies the stages of thought through which it is desirable to pass when making these judgments. In practice many of the judgments are made impressionistically, often on the basis of traditional assumptions about the ranking of offences. The von Hirsch-Jareborg approach urges one to dig deeper, and to look more closely at the interests affected. However, their approach is confined to harms with individual victims. It awaits development to deal with the myriad other forms of conduct that modern systems of criminal law tend to criminalize.... We must enquire...not only whether the behaviour is serious enough to be made into a criminal offence, but also, if it is an offence, how serious it is when compared with other crimes.

It is not difficult to see some toeholds for the assessment of relative seriousness. There is a widely held view that, in general, offences of violence are more serious than property offences. Thus Lord Lane CJ, assessing the relative seriousness of frauds on the social security system, remarked that 'it must be remembered that they are non-violent nonsexual and non-frightening crimes'. However, the very breadth of modern systems of criminal law means that this point is no more than a toehold. It is not difficult to think of circumstances in which an offence against property (say, stealing £1 million) might be thought more serious than a particular offence of violence (such as one person pushing another while queuing). Thus it is necessary to press the enquiry further by examining those values or interests which are protected by the offence, and those elements which distinguished it from other similar offences. This task soon reveals a bewildering number of separate factors. When passing sentence, the courts have to range the different crimes along a single scale of relative gravity (represented by imprisonment, fines, and other non-custodial sentences). Is it possible to range the various offences along a single scale of social seriousness?

There are some who would argue that, academically interesting though this enquiry might be, it is quite unnecessary in practice, because most people in most countries agree on the relative gravity of harms. Research by the criminologists Sellin and Wolfgang purported to find considerable agreement in ranking criminal offences, whether amongst people from different countries or from different social groups in one country. However, the questions asked in this research were relatively unsophisticated for the purpose of the criminal law, and its findings cannot sustain the argument that it is unnecessary to think further about the grading of crimes as more or less serious....

NOTES AND QUESTIONS

1. Issues of both inter-crime and intra-crime grading can arise. Intra-crime grading relates to offences which address a related subject matter, while inter-crime grading involves unrelated and dissimilar offences.
2. Consider the following inter-crime grading problem. Rank the following offences on a 'most serious' to 'least serious' scale, identifying the reasons for each ranking.
   - aggressive begging
   - assault
   - assault with a deadly weapon
   - burglary
   - reckless driving
   - murder
   - rape
   - theft
   - vagrancy

Let us now examine a problem of intra-crime grading. In the following statutes Parliament has purported to draw a distinction between a number of similar but distinguishable vehicular-related offences:

ROAD TRAFFIC ACT 1991

1. Causing death by dangerous driving

A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.

2. Dangerous driving

A person who drives a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.

3. Careless, and inconsiderate, driving

If a person drives a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, he is guilty of an offence.

3A. Causing death by careless driving when under influence of drink or drugs

(1) If a person causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, and—

(a) he is, at the time when he is driving, unfit to drive through drink or drugs, or

(b) he has consumed so much alcohol that the proportion of it in his breath, blood or urine at that time exceeds the prescribed limit, or

(c) he is, within 18 hours after that time, required to provide a specimen in pursuance of section 7 of this Act, but without reasonable excuse fails to provide it, he is guilty of an offence.

. . .

22A. Causing danger to road-users

(1) A person is guilty of an offence if he intentionally and without lawful authority or reasonable cause—

(a) causes anything to be on or over a road, or

(b) interferes with a motor vehicle, trailer or cycle, or

(c) interferes (directly or indirectly) with traffic equipment, in such circumstances that itwould be obvious to a reasonable person that to do so would be dangerous.

. . .

28. Dangerous cycling

(1) A person who rides a cycle on a road dangerously is guilty of an offence.

AGGRAVATED VEHICLE TAKING ACT 1992

12A. Aggravated vehicle-taking

(1) Subject to subsection (3) below, a person is guilty of aggravated taking of a vehicle if—

(a) he commits an offence under section 12(1) above (in this section referred to as a 'basic offence') in relation to a mechanically propelled vehicle; and

(b) it is proved that, at any time after the vehicle was unlawfully taken (whether by him or another) and before it was recovered, the vehicle was driven, or injury or damage was caused, in one or more of the circumstances set out in paragraphs (a) to (d) of subsection(2) below.

(2) The circumstances referred to in subsection (1)(b) above are—

(a) that the vehicle was driven dangerously on a road or other public place;

(b) that, owing to the driving of the vehicle, an accident occurred by which injury was caused to any person;

(c) that, owing to the driving of the vehicle, an accident occurred by which damage was caused to any property, other than the vehicle;
(d) that damage was caused to the vehicle.

■ NOTES AND QUESTIONS

1. What penalties should be attached to each of these offences? The penalties under the Road Traffic Act 1991 can be found in the schedules attached to the statute. The penalty for violation of the Aggravated Vehicle Taking Act 1992 is contained in s. 4 of the relevant statute.
2. One factor which often serves as the basis for attaching greater penalties to one crime rather than another is that the offence results in death. Thus, causing death by dangerous driving attracts a greater penalty than dangerous driving. But is the difference between the two offences simply a matter of chance, one of the drivers being unlucky enough to have a victim cross the road while he is engaged in his act of dangerous driving? In cases such as this, should the penalties for the offence be based on the risk of death that has been created rather than on the fact that a death actually occurs? See generally Gobert, 'The Fortuity of Consequences' (1993) 4 Criminal Law Forum 1; J.C. Smith, 'The Element of Chance in Criminal Liability' [1971] Crim LR 63.

B: Punishment

One critical effect of having been convicted of a criminal offence is that sanctions may be imposed on the offender in the name of the State. But what purpose is sought to be achieved through this punishment? Over the years many answers have been offered to this question. Probably the four most commonly given follow.

(i) Retribution

Retribution is the oldest of the rationales for punishment, tracing its roots to the Bible:

LEVITICUS 24:17–22, THE NEW ENGLISH BIBLE

When one man strikes another and kills him, he shall be put to death. Whoever strikes a beast and kills it shall make restitution, life for life. When one man injures and disfigures his fellow-countryman, it shall be done to him as he has done; fracture for fracture, eye for eye, tooth for tooth; the injury and disfigurement that he has inflicted upon another shall in turn be inflicted upon him.

Retribution is often assimilated to revenge, but a public rather than a private revenge. Sir James Stephen put it this way: 'The sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to wax' (Stephen, *A History of the Criminal Law in England*, II (1883), p. 81). Indeed, one of the arguments for a retributive theory of punishment is that it forestalls the need for private revenge. Implicit in retribution is the condemnation or denunciation of both the offender and the offending behaviour. Retribution, however, is not in kind – society does not rape rapists or steal from thieves (although in some countries the death

penalty is exacted for murder). Instead, the law imposes a sentence (typically a fine, imprisonment or term of community service) which is proportional to the harm caused. In this regard it might be observed that retribution, with its emphasis on proportional punishment, provides a basis for grading offences.

Retribution as a justification for punishment has been criticised as backwards-looking and vindictive. As retribution has fallen into disfavour, however, there has been a rise in interest in the concept of 'just deserts'. Both retribution and 'just deserts' theory boil down to the idea that criminals are punished because they deserve to be. The State is right to denounce criminals and to punish them for their crimes. In the following extract Grant Lamont gives his account of how the specific elements of a crime are an expression of the State's duty to express, through punishment, condemnation for the disrespect shown by the accused for a social value, be that value the sanctity of life, the autonomy of the individual, or the sovereignty of property. He makes clear that whatever purposes, deterrence, restraint, rehabilitation and so on, punishment can have only one justification, namely that it is deserved.

Grant Lamond, What is a Crime?

(2007) *Oxford Journal of Legal Studies* 609

There is a better way to understand crimes as public wrongs, viz., not as wrongs *to* the public but as wrongs that the community is *responsible* for punishing, i.e. whose prosecution is appropriately a case for the community rather than the individual victim. It is not that the community is the victim, but that the community is the appropriate body to bring proceedings and impose punishment. This raises a new question—which wrongs are the state responsible for punishing? There are, in fact, two questions here: which wrongs merit punishment, and which merit state punishment. To get to the bottom of this, it is best to deal with them in that order.

The first question is which wrongs merit punishment. A number of preliminary points are relatively straightforward. Punishment, I take it, is the deliberate imposition of a burdensome liability on an individual for some blameworthy conduct in order to censure that conduct. Punishment, then, presupposes blameworthy conduct. What makes conduct blameworthy? There are a number of features. The first is that the conduct in question is wrongful. . . . The second feature is that the wrongdoer is a responsible agent who acted without either justification or excuse. . . . The fact that someone is blameworthy, however, still falls short of showing that they deserve to be punished. It establishes only that they are liable to be blamed or criticized for what they have done, and that there are grounds for such censure . . .

Punishment goes beyond criticism and blame. Not every act of wrongdoing merits punishment—many wrongs are just not serious enough. But what makes some wrongdoing 'serious enough' to call for punishment? The fundamental answer to this is that it is the type of blameworthy conduct that manifests a *disrespect* for the interest or value that has been violated. What does this mean? To respect a value is to treat it in the way appropriate to its nature. Some values can be promoted, whereas others can only be upheld (or honoured), and others still can be both promoted and upheld. Whatever is the case, a failure to respect a value goes beyond the mere failure to be guided by it, i.e. it goes beyond simply violating the value. What marks out the failure to be guided as particularly reprehensible, and thus eligible for punishment, is an *unwillingness* to be guided by the value in the appropriate way. This is most obvious in the case of intentional wrongs, where the wrongdoer deliberately violates some value. But it is also true of cases where the wrongdoer knows that they are violating some value, and those where the wrongdoer is aware that they are taking an unjustified risk of doing so . . .

That a wrong manifests an attitude of disrespect for some value, then, marks out the wrong as punishable. But, as in the case of blame, it only marks out the wrongdoer as *liable* for punishment and provides *a* reason in favour of doing so. The strength of the reason in favour of punishment will depend upon the overall gravity of the wrong, which depends in turn on the importance of the

interest or value at stake, the degree of violation (or risk of violation) that the wrong created, and the kind of disrespect shown by the wrongdoer. Punishment is a form of censure that goes beyond simply bringing the wrongdoing to the attention of the offender and confronting them with it. But there is an enormous range of punishments, from public condemnation to forfeiture of life. Hence the 'seriousness' of the wrongdoing (the aspect that renders it liable to punishment) is merely one dimension of the ultimate 'gravity' of the wrong (how deserving of punishment it is). And even in the case of grave wrongs, there is always the question of whether the wrongdoer should be punished all things considered, since there may be extenuating circumstances militating against punishment.

What of the second issue raised earlier? Which wrongs not only merit punishment, but merit punishment by the *state*? . . . In principle, any serious violation of a value that the state is responsible for supporting is a candidate for criminal punishment. The broader the range of values and activities that are properly the responsibility of the state, the broader the scope for the criminal law. Thus, if all values are supportable by public action then all forms of serious immorality are potentially within the criminal law, whereas if a more limited range of values are the responsibility of the state the criminal law will be similarly circumscribed. Of course, it might be wondered whether state punishment really does extend (even potentially) to *every* value it may support. Surely, for instance, there is a distinction between those values that a state is *required* to support, and those that it is merely at liberty to support. If the state is required to support some value, then it would be wrong to fail to do so, whereas it is not wrong to fail to support a value that it is simply at liberty to promote. Hence, it might be thought, only serious violations of mandatory values (those the state is required to support) could ground punishment. The state is not *responsible* for supporting merely permissible values, so how can it be responsible for punishing their violation? Appealing as this line of argument might seem, the conclusion does not follow from its premisses. If the state is permitted to support a value, then there is nothing in the argument to establish that it may not do so by punishing serious violations of that value. What is needed is not an argument that some values are mandatory and others merely permissive, but that some values (possibly including mandatory ones) may not be supported by *coercive* means, whereas others may . . .

It is not enough to say that a wrong is a *candidate* for such punishment, i.e. that it lies within the scope of the state's responsibility—it must also be the case that it is the type of wrong that *ought* to be punished by the state. The only wrongs that should be criminalized are those that are reasonably grave, i.e. that involve the violation of an important value. Why is this? State punishment, by its very nature, is imposed in the name of the whole community, not merely in the name of some other institution of civil society. The condemnatory force of that judgment is correspondingly greater, and given that expressive power the wrong must be sufficiently grave to warrant such condemnation. Regardless of what other consequences follow, to be found to have committed a crime involves being convicted by a court, i.e. being adjudged to have been *guilty* of committing a crime. Conviction is an authoritative judgment on behalf of the community that the defendant has committed such a serious violation of some value that it calls for punishment *by* the community. The defendant is being held to account in the face of the whole community, and consequently this must not be a disproportionate response to the gravity of the wrongdoing. The force of such public conviction means that in the case of many wrongs it would be manifestly excessive to impose it, because it would be too severe or too blunt an instrument of censure. So punishment by the state must be necessary to bring home to the perpetrator and the wider community the gravity of the wrongdoing. By its very nature it is inappropriate for dealing with wrongs that are not grave enough to merit such public condemnation.[45] . . .

The key to the nature of crime, then, lies in understanding that they are public wrongs not because they are wrongs *to* the public, but because they are wrongs that the public is responsible for punishing. There is a public interest in crimes not because the public's interests are necessarily affected, but because the public is the appropriate body to bring proceedings and punish them. Crimes are a sub-set of the wrongs that generally merit punishment. That larger class is composed of those blameworthy wrongs that manifest a disrespect for the value violated, because they evince an unwillingness to be guided appropriately by the value at the time the wrongdoer acted. The state, however, is only concerned with the graver cases of such wrongdoing, because of the condemnatory force of conviction in the name of the community as a whole.

(ii) Restraint

Restraint theory has a more pragmatic focus. The theory here is that criminals need to be separated from the rest of society in order to protect ordinary persons from their predatory behaviour. The implicit premise is that, if not incarcerated, the offender will continue in his criminal ways. Whether this is true as an empirical proposition is not entirely clear. Even if true, the corollary question arises for how long the offender should be confined. A plausible answer is until he or she is no longer a threat to society. This answer is troublesome, however, for it can lead to lengthy imprisonment for some who commit minor offences but who are likely to do so again (e.g., shoplifters and anti-war protesters who violate public order laws) and minimal imprisonment for some who commit serious offences but who are unlikely to do so ever again (e.g., a bank robber who is rendered paraplegic as a consequence of a shoot-out with police).

(iii) Rehabilitation

The other side of the restraint coin is rehabilitation. If dangerous offenders need to be isolated until no longer dangerous, it behoves the State to rehabilitate such offenders so that they can be released. This makes sense both from the altruistic perspective of helping the offender and from the pragmatic perspective of not burdening the State with the costs of maintaining an offender in prison any longer than is necessary. But being in favour of rehabilitation is one thing and knowing how to rehabilitate criminals is quite another. Innumerable rehabilitation programmes have been essayed over the years but often with limited success, at least as measured by recidivism figures, and sometimes unpredictable results. It may well be that our hopes for rehabilitation exceed our knowledge of why people commit crimes. Despite what seemed at one time to be promising advances in the fields of psychology and sociology, professionals in these disciplines still find the scientific control of criminal behaviour to be largely beyond their capability.

(iv) Deterrence

Whereas restraint and rehabilitation theory focus on the individual offender, general deterrence is concerned with other would-be offenders. The idea is to make an example of actual offenders so that others will not be tempted into similar criminal activity. In like vein, the offenders themselves should also be deterred from future criminal activities as a result of the punishment. Society will be protected if deterrence works as envisaged. Whether or not it in fact does is difficult to prove, for success can only be measured by the incidence of those who do not commit crimes. And how is one to measure this negative? Moreover, the process by which deterrence works, assuming it does, is not at all clear. Consider the views of the respected criminologist Johannes Andenaes:

Johannes Andenaes, 'The General Preventive Effects of Punishment'
(1966) 114 *University of Pennsylvania Law Review* 949

In continental theories of criminal law, a basic distinction is made between the effects of punishment on the man being punished—individual prevention or special prevention—and the effects of punishment upon the members of society in general—general prevention. The characteristics of special prevention are termed 'deterrence,' 'reformation' and 'incapacitation,' and these terms

have meanings similar to their meanings in the English speaking world. General prevention, on the other hand, may be described as the *restraining influences emanating from the criminal law and the legal machinery*.

By means of the criminal law, and by means of specific applications of this law, 'messages' are sent to members of a society. The criminal law lists those actions which are liable to prosecution, and it specifies the penalties involved. The decisions of the courts and actions by the police and prison officials transmit knowledge about the law, underlining the fact that criminal laws are not mere empty threats, and providing detailed information as to what kind of penalty might be expected for violations of specific laws. To the extent that these stimuli restrain citizens from socially undesired actions which they might otherwise have committed, a general preventive effect is secured.

. . . While the effects of special prevention depend upon how the law is implemented in each individual case, general prevention occurs as a result of an interplay between the provisions of the law and its enforcement in specific cases. In former times, emphasis was often placed on the physical exhibition of punishment as a deterrent influence, for example, by performing executions in public. Today it is customary to emphasize the *threat* of punishment as such. From this point of view the significance of the individual sentence and the execution of it lies in the support that these actions give to the law . . . .

The effect of the criminal law and its enforcement may be *mere deterrence*. Because of the hazards involved, a person who contemplates a punishable offense might not act. But it is not correct to regard general prevention and deterrence as one and the same thing. The concept of general prevention also includes the *moral* or *sociopedagogical* influence of punishment. The 'messages' sent by law and the legal processes contain factual information about what would be risked by disobedience, but they also contain proclamations specifying that it is *wrong* to disobey . . . .

The moral influence of the criminal law may take various forms. It seems to be quite generally accepted among the members of society that the law should be obeyed even though one is dissatisfied with it and wants it changed. If this is true, we may conclude that the law as an institution itself to some extent creates conformity. But more important than this formal respect for the law is respect for the values which the law seeks to protect. It may be said that from law and the legal machinery there emanates a flow of propaganda which favors such respect. Punishment is a means of expressing social disapproval. In this way the criminal law and its enforcement supplement and enhance the moral influence acquired through education and other non-legal processes. Stated negatively, the penalty neutralizes the demoralizing consequences that arise when people witness crimes being perpetrated.

Deterrence and moral influence may both operate on the conscious level. The potential criminal may deliberate about the hazards involved, or he may be influenced by a conscious desire to behave lawfully. However, with fear or moral influence as an intermediate link, it is possible to create unconscious inhibitions against crime, and perhaps to establish a condition of habitual lawfulness. In this case, illegal actions will not present themselves consciously as real alternatives to conformity, even in situations where the potential criminal would run no risk whatsoever of being caught.

General preventive effects do not occur only among those who have been informed about penal provisions and their applications. Through a process of learning and social imitation, norms and taboos may be transmitted to persons who have no idea about their origins—in much the way that innovations in Parisian fashions appear in the clothing of country girls who have never heard of Dior or Lanvin.

There is an interesting interplay between moral reprobation and legal implementation. At least three conditions combine to prevent an individual from perpetrating a punishable act he is tempted to perform: his moral inhibitions, his fear of the censure of his associates and his fear of punishment. The latter two elements are interwoven in many ways. A law violation may become known to the criminal's family, friends and neighbors even if there is no arrest or prosecution. However, it is frequently the process of arrest, prosecution and trial which brings the affair into the open and exposes the criminal to the censure of his associates. If the criminal can be sure that there will be no police action, he can generally rest assured that there will be no social reprobation. The legal machinery, therefore, is in itself the most effective means of mobilizing that kind of social control which emanates from community condemnation.

■ NOTES AND QUESTIONS

1. The theories of punishment which have been discussed are not mutually exclusive. Imprisoning an offender may serve both retributive and deterrent functions, while at the same time restraining the offender for the duration of the sentence and offering the opportunity for rehabilitation.
2. To what extent under each theory will punishment fit (a) the crime, (b) the criminal?
3. Consider the task of a Parliament which has decided to make careless driving a criminal offence. What penalties should be imposed if the goal is (a) restraint, (b) rehabilitation, (c) deterrence, (d) retribution?
4. To what extent are the various theories based on different theories of human nature? Which of the theories is premised on an assumption of 'free will'? What would be the implications if one were to accept a determinist philosophy that events are predetermined by forces beyond the control of individuals?
5. While we have set out the most frequently discussed theories of punishment, there are others that also deserve mention. Some penologists see a major function of punishment as denunciation (or, as it tends to be known colloquially, 'naming and shaming'). John Braithwaite, who has written extensively on the topic, would combine 'shaming' with reintegration into the community. See Braithwaite, *Crime, Shame and Reintegration* (1989). A strategy of 'naming and shaming' may be particularly effective in the case of companies which violate the law. A company obviously cannot be imprisoned and can usually afford to pay any fine that might realistically be levied against it (often passing the fine on to its customers). However, the potential loss of custom resulting from a well-publicised criminal conviction may have significant effects.

Other penologists have noted the educative potential of punishment. This function may take prominence in areas of law where the criminality of the conduct in question is not clear or disputed (e.g., insider dealing and gambling). It is also useful in respect of crimes that have long gone unprosecuted.

In recent years there has been a growing interest in restorative justice. (See von Hirsch, Roberts, Bottoms, Roach and Schiff, *Restorative Justice and Criminal Justice* (2003).) In restorative justice the goal is to have the offender make amends to the victim for the harm that the latter has suffered as a result of the offence. This might include compensating the victim, or rectifying the damage caused to the victim (in the case of a violation of the Criminal Damage Act, for instance). Some restorative justice proponents see a role for allowing a victim to confront the offender, enabling a reconciliation to be made between restoration and retribution.

Sometimes a philosophy of punishment is implicit in legislation.

CRIMINAL JUSTICE ACT 1991

1. Restrictions on imposing custodial sentences

(1) This section applies where a person is convicted of an offence punishable with a custodial sentence other than one fixed by law.

(2) Subject to subsection (3) below, the court shall not pass a custodial sentence on the offender unless it is of the opinion—

(a) that the offence, or the combination of the offence and one other offence associated with it, was so serious that only such a sentence can be justified for the offence; or

(b) where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from him.

(3) Nothing in subsection (2) above shall prevent the court from passing a custodial sentence on the offender if he refuses to give his consent to a community sentence which is proposed by the court and requires that consent.

(4) Where a court passes a custodial sentence, it shall be its duty—

(a) in a case not falling within subsection (3) above, to state in open court that it is of the opinion that either or both of paragraphs (a) and (b) of subsection (2) above apply and why it is of that opinion; and

(b) in any case, to explain to the offender in open court and in ordinary language why it is passing a custodial sentence on him.

(5) A magistrates' court shall cause a reason stated by it under subsection (4) above to be specified in the warrant of commitment and to be entered in the register.

2. Length of custodial sentences

(1) This section applies where a court passes a custodial sentence other than one fixed by law.

(2) The custodial sentence shall be—

(a) for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with it; or

(b) where the offence is a violent or sexual offence, for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender.

(3) Where the court passes a custodial sentence for a term longer than is commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with it, the court shall—

(a) state in open court that it is of the opinion that subsection (2)(b) above applies and why it is of that opinion; and

(b) explain to the offender in open court and in ordinary language why the sentence is for such a term.

(4) A custodial sentence for an indeterminate period shall be regarded for the purposes of subsections (2) and (3) above as a custodial sentence for a term longer than any actual term.

. . .

29. Effect of previous convictions etc.

(1) An offence shall not be regarded as more serious for the purposes of any provision of this Part by reason of any previous convictions of the offender or any failure of his to respond to previous sentences.

(2) Where any aggravating factors of an offence are disclosed by the circumstances of other offences committed by the offender, nothing in this Part shall prevent the court from taking those factors into account for the purpose of forming an opinion as to the seriousness of the offence.

■ NOTES AND QUESTIONS

1. What theory of punishment underlies ss. 1(2)(a) and 2(2)(a) of the 1991 Act? Sections 1(2)(b) and 2(2)(b)? Section 29?
2. It has been claimed that the Criminal Justice Act 1991 should lead to proportionate sentences. Proportionate to what?

3. The White Paper preceding the Act (*Crime, Justice, and Protecting the Public* (Cmd. 965, 1990) made some telling observations about the value of deterrent sentences:

> [M]uch crime is committed on impulse, given the opportunity presented by an open window or unlocked door, and it is committed by offenders who live from moment to moment; their crimes are as impulsive as the rest of their feckless, sad or pathetic lives. It is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation. Often they do not.

In contrast to the Criminal Justice Act 1991, the Criminal Justice Act 2003 is more 'up front' and specific about what it views as the proper purposes of sentencing:

CRIMINAL JUSTICE ACT 2003

142. Purposes of sentencing

(1) Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing—

(a) the punishment of offenders,
(b) the reduction of crime (including its reduction by deterrence),
(c) the reform and rehabilitation of offenders,
(d) the protection of the public, and
(e) the making of reparation by offenders to persons affected by their offences.

(2) Subsection (1) does not apply—

(a) in relation to an offender who is aged under 18 at the time of conviction,
(b) to an offence the sentence for which is fixed by law,
(c) to an offence the sentence for which falls to be imposed under section 51A(2) of the Firearms Act 1968 (c. 27) (minimum sentence for certain firearms offences), under subsection (2) of section 110 or 111 of the Sentencing Act (required custodial sentences) or under any of sections 225 to 228 of this Act (dangerous offenders), or
(d) in relation to the making under Part 3 of the Mental Health Act 1983 (c. 20) of a hospital order (with or without a restriction order), an interim hospital order, a hospital direction or a limitation direction.

■ NOTES AND QUESTIONS

1. Does the Criminal Justice Act 2003, when compared with the Criminal Justice Act 2001 (see also the Crime (Sentences) Act 1997) suggest that theories of punishment, like fashions in clothes, are subject to constant change? What explanations may underlie shifts in penal philosophy?
2. How helpful in practice are the list of sentencing purposes in s. 142(1) of the Criminal Justice Act 2003 likely to be? They do not provide guidance to the judge on what the priorities should be if the purposes of sentencing conflict. Even when they do not conflict, the list does not indicate what weight should be attached to each of the respective purposes.
3. The Criminal Justice Act 2003 also provides for the establishment of a Sentencing Guidelines Council, whose pronouncements and elucidations should help to promote consistency in sentencing. One function of the Council might be to give guidance on the issues raised in the preceding question.

C: Sentencing: the implementation of the theories in practice

Every time a defendant is convicted, the trial court must pass sentence. This may require the judge to consider the purposes of punishment. Sentences may also be appealed by both dissatisfied defendants and the prosecution. Again, theories of punishment may need to be considered by the appellate court:

R v *Sargeant*

(1974) 60 Cr App R 74, Court of Appeal

LAWTON LJ: On May 20, 1974, at the Central Criminal Court, the appellant pleaded guilty to a charge of affray at the end of the prosecution's case. On May 24, 1974, he was sentenced by His Honour Judge Argyle to two years' imprisonment. He now appeals against that sentence.

During the evening of October 26, 1973, the appellant was on duty at a discotheque at Crown Hill at Croydon, together with three other doormen. Their job in colloquial language was to act as 'bouncers.' The appellant had no criminal record. The other bouncers had. One of them had a bad criminal record. There was another man on the staff of this discotheque who was taking part in what the prosecution alleged was the affray. He too had a bad criminal record.

. . . [The] appellant has had no previous convictions. He is 26 years of age, and a skilled green-keeper in the golfing world. He started acting as an assistant green-keeper in his adolescence. He has acquired a good deal of expertise. He has had jobs as green-keeper with a number of distinguished and well-known golf clubs. The tragedy of his case is that the very day on which he appeared at the Central Criminal Court he should have been starting work as head green-keeper with one of the best known golf clubs in the south of England. His conviction has inevitably meant that that job is no longer available to him, and it also means that there is a strong possibility that no golf club will ever employ him again. By his stupidity on this occasion he has deprived himself of a career in the golfing world, and all because he lost his temper when trouble started. The very fact that he has lost his career is of course a severe penalty for him.

The problem for this Court is whether the sentence was wrong in principle. It is necessary for this Court to analyse the facts of this case. We have come to the conclusion that, if the trial judge did analyse them, he analysed them incorrectly. What really was the case against this appellant? His job was to help to keep order. He was inexperienced in that job. It is clear from his record that he is inclined to be headstrong. I say that, because despite his skill as a green-keeper, he has had some difficulty in keeping jobs, because he cannot always see eye to eye with golf clubs' secretaries. He had had something to drink whilst he was on duty that night, though there was nothing to suggest that he had had too much to drink. If he had followed the instructions of his employers, he would not have had anything to drink. He was faced with a situation in which a young man had been misbehaving. He took the view, wrongly with hindsight, that the best way of dealing with the potential difficulties which that young man might cause, if he resumed misbehaving, was to use some force on him. He used no weapon. What he did do was to butt the young man, which can be very painful for the victim. If he had thought for a moment, he would have appreciated the nature and extent of the chain of events which he was starting. It is almost certain that he did not think. Young men who act in this kind of physical way seldom do think of which the consequences are going to be. The evidence establishes that very soon after he did what he did he was put out of action and took no further part in the appalling violence which followed.

What ought the proper penalty to be? We have thought it necessary not only to analyse the facts, but to apply to those facts the classical principles of sentencing. Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.

I will start with retribution. The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked; it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the court is to lead public opinion. Anyone who surveys the criminal scene at the present time must be alive to the appalling problem of violence. Society, we are satisfied, expects the courts to deal with violence. The weapons which the courts have at their disposal for doing so are few. We are satisfied that in most cases fines are not sufficient punishment for senseless violence. The time has come, in the opinion of this Court, when those who indulge in the kind of violence with which we are concerned in this case must expect custodial sentences.

But we are also satisfied that, although society expects the courts to impose punishment for violence which really hurts, it does not expect the courts to go on hurting for a long time, which is what this sentence is likely to do. We agree with the trial judge that the kind of violence which occurred in this case called for a custodial sentence. This young man has had a custodial sentence. Despite his good character, despite the excellent background from which he comes, very deservedly he has had the humiliation of hearing prison gates closing behind him. We take the view that for men of good character the very fact that prison gates have closed is the main punishment. It does not necessarily follow that they should remain closed for a long time.

I turn now to the element of deterrence, because it seems to us the trial judge probably passed this sentence as a deterrent one. There are two aspects of deterrence: deterrence of the offender and deterrence of likely offenders. Experience has shown over the years that deterrence of the offender is not a very useful approach, because those who have their wits about them usually find the closing of prison gates an experience which they do not want again. If they do not learn that lesson, there is likely to be a high degree of recidivism anyway. So far as deterrence of others is concerned, it is the experience of the courts that deterrent sentences are of little value in respect of offences which are committed on the spur of the moment, either in hot blood or in drink or both. Deterrent sentences may very well be of considerable value where crime is premeditated. Burglars, robbers and users of firearms and weapons may very well be put off by deterrent sentences. We think it unlikely that deterrence would be of any value in this case.

We come now to the element of prevention. Unfortunately it is one of the facts of life that there are some offenders for whom neither deterrence nor rehabilitation works. They will go on committing crimes as long as they are able to do so. In those cases the only protection which the public has is that such persons should be locked up for a long period. This case does not call for a preventive sentence.

Finally, there is the principle of rehabilitation. Some 20 to 25 years ago there was a view abroad, held by many people in executive authority, that short sentences were of little value, because there was not enough time to give in prison the benefit of training. That view is no longer held as firmly as it was. This young man does not want prison training. It is not going to do him any good. It is his memory of the clanging of prison gates which is likely to keep him from crime in the future.

In the light of that analysis of the classical principles to be applied in sentencing, what is the result on the facts of this case? The answer is that this sentence is much too long. It was submitted that a suspended sentence should have been passed. For the reasons I have already given, we do not agree. But we are satisfied, having regard to the facts of this case and the social inquiry and prison reports which the Court has been given that we can deal with this case by substituting for the sentence which was passed such a sentence as will enable him to be discharged today. To that extent the appeal is allowed.

■ NOTES AND QUESTIONS

1. Is the matter of the appropriate theory (theories) of punishment for the legislature or the judiciary to decide?
2. The court in *Sargeant* states its view that 'for men of good character the very fact that the prison gates have closed is the main punishment'. Should punishments

be based on a defendant's acts or the defendant's 'character'? Would sentencing based on 'character' (whatever might be embraced within this term) be potentially discriminatory and in violation of Article 14 of the ECHR?

3. Who should be responsible for sentencing in a particular case? The judge who presided over the trial? A different judge? A panel of experts (what expertise is needed?)? The jury which has found the defendant guilty? A different jury? A sentencing council (composed of whom?)? What are the advantages and disadvantages of these respective potential sentencers? In the UK, sentencing is the responsibility of the trial court, although, as can be seen in *Sargeant*, sentences may be appealed and reviewed by the Court of Appeal.
4. Should Parliament avoid issues like those contained in the previous question by imposing fixed sentences for crimes (as opposed to allowing sentencing within a range of sentences)? What are the advantages and disadvantages?

Increasingly, one can expect punishments authorised by statute to be challenged as violative of the HRA 1998.

R v *Lichniak*

[2001] 4 All ER 934, Queen's Bench Division, Divisional Court and Court of Appeal (Criminal Division)

KENNEDY LJ: [1] Each of these claimants seeks judicial review of a decision to impose a mandatory sentence of life imprisonment following their separate convictions for murder. They contend that s 1 of the Murder (Abolition of Death Penalty) Act 1965 is incompatible with arts 3 and 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (as set out in Sch 1 to the Human Rights Act 1998). Section 1(1) of the 1965 Act so far as material provides that 'a person convicted of murder shall . . . be sentenced to imprisonment for life'. Article 3 of the convention reads: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Article 5 so far as material reads:

> '1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court . . .'

Permission to apply for judicial review was granted by Scott Baker J on 23 January 2001 when he also ordered that this court sit both as a Divisional Court and as the Court of Appeal (Criminal Division), which we have done.

. . .

The basic submission

Mr Fitzgerald's basic submission is that now that all mandatory life sentences are recognised to fall into two parts, namely first a penal element to meet the requirements of retribution and general deterrence (fixed by the Home Secretary after considering the views of the trial judge and the Lord Chief Justice) and, secondly, a subsequent period of detention justified on preventive grounds, life sentences should not be imposed where at the time of sentencing there is no foreseeable risk of the defendant being a danger to the public after he or she has served the penal element of the sentence. Referring to the convention, Mr Fitzgerald argues that the mandatory life sentence has no clear penological objective. It violates art 5 because it is arbitrary, and art 3 because it is disproportionate. Before we turn to look at these submissions in more detail we must say something about the jurisdiction of this court.

. . .

General approach

Mr Fitzgerald submits that under art 5 of the convention the basic principle is that no one should be deprived of their liberty in an arbitrary fashion, and that if a life sentence is imposed where there is no objective justification for that sentence then the sentence is both arbitrary and disproportionate. Under art 3 a sentence which is manifestly disproportionate can be an 'inhuman and degrading' punishment.

For the defendant Mr Pannick's response is that these issues have been addressed by the European Court of Human Rights in *V* v *UK*, *T* v *UK* (1999) 30 EHRR 121, where the appellants had been sentenced to be detained during Her Majesty's pleasure. That too is a sentence which is automatically imposed where a defendant of the prescribed age is convicted of murder. It is imposed irrespective of the circumstances of the offence and of the offender. Some offenders may present no risk of future offending, and may have committed an offence less grave than other offences which do not require a mandatory indeterminate sentence from which the offender will only be released after serving a tariff period, when it is considered that he may safely be released, and on the basis that thereafter he will be at risk of recall for the rest of his life. In other words, Mr Pannick submits, for present purposes the cases of *T* and *V* are indistinguishable on their facts, and this court is required by s 2(1) of the 1998 Act to take into account the decisions of the European Court. Mr Fitzgerald submits that in *V* v *UK*, *T* v *UK* there was an important distinction, in that the two boys could not be regarded as presenting no danger if released at the end of their tariff period, and that is something which we must examine more closely in due course.

Mr Pannick goes on to submit that there was a very good reason why the European Court decided *V* v *UK*, *T* v *UK* as it did—namely because an indeterminate sentence (whether it be mandatory life imprisonment or detention during Her Majesty's pleasure) allows for and involves in practice an individualised assessment of tariff, risk and recall, so that it is neither degrading nor arbitrary. It may be that an assessment should not be made by the executive, but that is not something for consideration in this case.

...

Mr Pannick further submits that there are three principles established under the convention to which we must have regard. First, the relevant provisions of the convention require a balance between the interests of the applicant and those of the community. In *Soering* v *UK* (1989) 11 EHRR 439 a West German national was seeking to avoid extradition to Virginia to face a charge of capital murder, and in its judgment the court said (at 468 (para 89)):

> '... inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.'

Secondly, the European Court in its approach to the convention does not concentrate on formal procedures, but looks at the realities. In *Van Droogenbroeck* v *Belgium* (1982) 4 EHRR 443, a case concerned with detention of a recidivist, the court said (at 456 (para 38)) 'one must look beyond the appearances and the language used and concentrate on the realities of the situation'. Here, Mr Pannick submits, the claimants are putting too much weight on the language used when a judge sentences a defendant to life imprisonment, and not concentrating on the realities of the situation.

Thirdly, Mr Pannick reminds us that in *Brown* v *Stott* (*Procurator Fiscal, Dunfermline*) [2001] 2 All ER 97 at 114, [2001] 2 WLR 817 at 834 Lord Bingham of Cornhill said:

> 'Judicial recognition and assertion of the human rights defined in the convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European Court as a supranational court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies.'

Other members of the Privy Council made observations to the same effect. That, he submits, is of particular relevance to a controversial issue of policy which has been the subject of repeated consideration by Parliament. In his reply Mr Fitzgerald reminded us of an additional principle, that decisions of the European Court and Commission are made on their particular facts rather than

reviewing national law in abstracto (see *Håkansson and Sturesson* v *Sweden* (1990) 13 EHRR 1 at 11 (para 46)). Decisions need to be read with that in mind.

Previous litigation

Mr Pannick submits that this case is the latest in a series of cases in England and in Strasbourg which have challenged various aspects of the requirement that a life sentence be imposed after a conviction for murder. Each challenge has failed because on each occasion the courts have said that Parliament is entitled to maintain its statutory requirement.

Article 3

In *Costello-Roberts* v *UK* (1993) 19 EHRR 112, a case about corporal punishment in a school, the European Court stated (at 133 (para 30)):

> '. . . in order for punishment to be "degrading" and in breach of Article 3, the humiliation or debasement involved must attain a particular level of severity and must in any event be other than that usual element of humiliation inherent in any punishment. Indeed Article 3, by expressly prohibiting "inhuman" and "degrading" punishment, implies that there is a distinction between such punishment and punishment more generally. The assessment of this minimal level of severity depends on all the circumstances of the case. Factors such as the nature and context of the punishment, the manner and method of its execution, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim must all be taken into account.'

In *V* v *UK*, *T* v *UK* (1999) 30 EHRR 121 the European Court considered whether that article could be invoked in relation to the sentence of detention during Her Majesty's pleasure passed on the two boys. It recorded the Commission's acceptance of the case for the government, saying (at 182 (para 95)):

> '[The Commission] referred to [*Hussain* v *UK* (1996) 22 EHRR 1] where the Court held that the sentence of detention during Her Majesty's pleasure was primarily preventative, attracting the guarantees of Article 5(4). It could not, therefore, be said that the applicant had forfeited his liberty for life or that his detention gave rise to a violation of Article 3.'

Mr Fitzgerald submits that the reference to *Hussain's* case is significant because in that case, which also concerned a sentence of detention during Her Majesty's pleasure, the court had said (at 24 (para 53)):

> '. . . an indeterminate term of detention for a convicted young person, which may be as long as that person's life, can only be justified by considerations based on the need to protect the public.'

The same point was repeated by the court in *V* v *UK*, *T* v *UK* (1999) 30 EHRR 121 at 183 (para 96). Thus the context, submits Mr Fitzgerald, is an indeterminate sentence for which the only justification is preventive.

In *V* v *UK*, *T* v *UK* the court expressed its conclusion in relation to art 3, saying (at 183 (para 98)):

> 'The Court recalls that States have a duty under the Convention to take measures for the protection of the public from violent crime. It does not consider that the punitive element inherent in the tariff approach itself gives rise to a breach of Article 3, or that the Convention prohibits States from subjecting a child or young person convicted of a serious crime to an indeterminate sentence allowing for the offenders continued detention or recall to detention following release where necessary for the protection of the public.'

As Mr Pannick points out, there is nothing there to suggest that the sentence will only be legitimate if at the time of sentencing it is envisaged that the offender will present an ongoing risk. Indeed para 99 (at 183) begins:

> 'The applicant has not yet reached the stage in his sentence where he is able to have the continued lawfulness of his detention reviewed with regard to the question of dangerousness . . . '

That would tend to suggest that so far as the European Court was concerned any assessment of dangerousness that may or may not have been made at the time of sentence was of no significance. Overall, the court's conclusions are expressed in terms that indicate no objection under art 3 to a mandatory indeterminate sentence for murder.

The only other decision to which we need refer in relation to art 3 is the decision on admissibility of the European Commission in *Bromfield* v *UK* (1 July 1998, unreported). There the applicant, aged 20, had been sentenced to custody for life after being convicted of murder. Dealing with his complaint in relation to art 3, para 2 of the decision states:

> 'The Commission recalls that there is no incompatibility with the convention in the imposition of a life sentence as a security or retributive measure in a particular case or in a decision to keep a recidivist or habitual offender at the disposal of the government (*Weeks* v *UK* (1987) 10 EHRR 293). While in the cases concerning detention during Her Majesty's pleasure, the court commented that a sentence pursuant to which young persons forfeited their liberty for the rest of their lives might raise issues under art 3 of the convention (see eg *Hussain* v *UK* (1996) 22 EHRR 1), the Commission considers that these remarks apply to sentences of life imprisonment imposed on children under the age of 18 to whom special considerations apply. It does not find that the imposition of a mandatory sentence of life imprisonment in respect of the offence of murder committed by young adults between the ages of 18 and 21 discloses treatment or punishment prohibited by art 3 of the convention.'

In our judgment the weight of the jurisprudence is overwhelming. Whatever one may think about the desirability of a change of policy, it cannot be accepted that a mandatory sentence of life imprisonment for murder is incompatible with art 3. In reality, as Mr Pannick points out, the sentence is an indeterminate one—rarely will there be imprisonment for life. In other cases the penal element having been decided upon at a earlier stage, when that element has been served the Secretary of State may, if recommended to do so by the Parole Board, after consultation with the Lord Chief Justice and the trial judge if available, release the prisoner on licence (see s 29 of the Crime (Sentences) Act 1997). In practice the Secretary of State does refer cases to the Parole Board for consideration, and if a prisoner has been released on licence and is recalled he will have the opportunity to have his recall considered by the Parole Board (see s 31 of the 1997 Act). That is all part of what is involved in the mandatory life sentence, and in reality such a sentence, which includes the policy applied in relation to it, cannot be labelled inhuman or degrading. There is sufficient individualised consideration of the offender's case within the context of the sentence. Thus it is open to Parliament, acting within its discretionary area of judgment, to retain the sentence without violating art 3.

Article 5

We turn now to the complaint in relation to art 5. Mr Fitzgerald submits that to have an indeterminate sentence for all murders is arbitrary. In some cases a lesser determinate sentence would suffice because culpability and the needs of retribution and deterrence can be evaluated at the end of the trial, and there is no discernible risk to warrant an indeterminate sentence. Furthermore, as such a sentence is at least in theory the most severe sentence available to an English judge it should not be imposed as a matter of course for murders where the gravity of the offence is less than the gravity of other crimes. It is arbitrary to impose a sentence that can neither be justified on preventive grounds nor justified on the basis of retributive proportionality.

...

In so far as Mr Fitzgerald submits that where there is not a discernible risk of re-offending it is wrong to impose an indeterminate sentence, Mr Pannick responds by saying that such a submission falls outside the scope of art 5. In *Weeks* v *UK* (1987) 10 EHRR 293, a case concerned with the lawfulness of detention after recall, the European Court said (at 312 (para 50)) that 'it is not for the Court, within the context of Article 5, to review the appropriateness of the original sentence'. Even if that be wrong, Mr Pannick submits, and we accept, that a sentence cannot be arbitrary for an adult when an equivalent sentence has been found not to be so in the case of a young offender, and when in each case the application of the sentence is individualised, and everyone knows that it will

be individualised from the moment it is imposed. Although, as Mr Fitzgerald pointed out, decisions of the European Court are related to their own particular facts, the process of reasoning displayed by the European Court is of assistance, as illustrated by both counsel during the course of this case. The reasoning in the decided cases tells strongly against the claimant's case on art 5.

. . .

Conclusion

The arguments put forward by Mr Fitzgerald are persuasive in favour of a change of policy, and may carry weight in a political debate, but in our judgment, as the law now stands, they do not enable this court to allow these appeals against sentence on the basis that the mandatory sentences imposed were incompatible with the convention. We therefore dismiss these appeals.

Appeals dismissed.

Matthew Barry, James Offen

[2001] 1 Cr App R 24, Court of Appeal . . .

LORD WOOLF CJ: This judgment relates to five appeals. In each case where leave is required to appeal against sentence, we give leave. The five appeals all involve section 2 of the Crime (Sentences) Act 1997 'the 1997 Act'. (This is now section 109 Powers of the Criminal Courts (Sentencing) Act 2000. In this judgment we will refer to section 2 in the 1997 Act.) The application of section 2 has already given rise to a number of decisions by this Court. They illustrate the problems which can arise in practice in applying statutory provisions which require the courts to impose an automatic life sentence on certain offenders.

The policy of Parliament for establishing the automatic life sentences emerges clearly from the then Government's White Paper, *Protecting the Public, the Government's Strategy on Crime in England and Wales* (1996). In Cm 3190, paragraph 10.11 the White Paper states:

> 'Too often in the past, those who had shown a propensity to commit serious, violent or sex offences have served their sentences and been released only to offend again. In many such cases the danger of releasing the offender has been plain for all to see—but nothing could be done, because once the offender has completed the sentence imposed, he or she has to be released. Too often, victims have paid the price when the offender has repeated the same offences. The Government is determined that the public should receive proper protection from persistent violent or sex offenders. That means requiring the courts to impose an automatic indeterminate sentence, and releasing the offender if and only if it is safe to do so.'

In *Buckland* [2000] 1 Cr App.R.471; [2000] 1 W.L.R. 1262 Lord Bingham of Cornhill C.J. described the rationale of section 2 in these terms, at pages 478 and 1268:

> 'The section is founded on an assumption that those who have been convicted of two qualifying serious offences present such a serious and continuing danger to the safety of the public that they should be liable to indefinite incarceration and, if released should be liable indefinitely to recall to prison. In any case where, on all the evidence, it appears that such a danger does or may exist, it is hard to see how the court can consider itself justified in not imposing the statutory penalty, even if exceptional circumstances are found to exist. But if exceptional circumstances are found, and the evidence suggests that an offender does not present a serious and continuing danger to the safety of the public, the court may be justified in imposing a lesser penalty.'

The reason why we have heard these appeals together is because in each case it is contended that either the interpretation of section 2 of the 1997 Act is affected by section 3 of the Human Rights Act 1998 ('the 1998 Act'), or that section 2 is incompatible with a Convention right so that the appellants are entitled to a declaration of incompatibility. The impact of the 1998 Act on the interpretation of legislation arises under section 3 of the Act, which provides:

> '3.—(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

The legislation

Section 2 of the 1997 Act, so far as relevant, is in the following terms:

...

'(1) This section applies where—

(a) a person is convicted of a serious offence committed after the commencement of this section; and

(b) at the time when that offence was committed, he was 18 or over and had been convicted in any part of the United Kingdom of another serious offence.

(2) The court shall impose a life sentence, that is to say—

(a) where the person is 21 or over, a sentence of imprisonment for life;

(b) where he is under 21, a sentence of custody for life under section (2) of the Criminal Justice Act 1982 ("the 1982 Act"),

unless the court is of the opinion that there are *exceptional circumstances relating to either of the offences or to the offender which justify its not doing so*. [Emphasis added.]

(6) Where the court does not impose a life sentence, it shall state in open court that it is of that opinion and what the exceptional circumstances are.

(7) An offence the sentence for which is imposed under sub-section (2) above shall not be regarded as an offence the sentence for which is fixed by law.

(8) An offence committed in England and Wales is a serious offence for the purposes of this section if it is any of the following, namely—

(a) an attempt to commit murder, a conspiracy to commit murder or an incitement to murder;

(b) an offence under section 4 of the Offences against the Person Act 1861 (soliciting murder);

(c) manslaughter;

(d) an offence under section 18 of the Offences against the Person Act 1861 (wounding, or causing grievous bodily harm, with intent);

(e) rape or an attempt to commit rape;

(f) an offence under section 5 of the Sexual Offences Act 1956 (intercourse with a girl under 13);

(g) an offence under section 16 (possession of a firearm with intent to injure), section 17 (use of a firearm to resist arrest) or section 18 (carrying a firearm with criminal intent) of the Firearms Act 1968; and

(h) robbery where, at some time during the commission of the offence, the offender had in his possession a firearm or imitation firearm within the meaning of that Act.'

The following features of the section will be noted:

(i) It refers to two offences having been committed by the offender.

(ii) It is only the second offence (the 'trigger offence') which has to have been committed after the commencement of the section. The earlier offence may have been committed at any time.

(iii) When the second offence is committed the offender is required to be over 18, but there is no age requirement in relation to the first offence.

(iv) The proviso of 'exceptional circumstances' applies to both offences. The 'exceptional circumstances' can relate either to the offences or to the offender but what constitutes exceptional circumstances is not otherwise defined by the section.

(v) All offences identified as serious offences are offences for which life imprisonment could be imposed quite apart from section 2.

...

The Human Rights Act 1998

The appellants contend that as previously applied, section 2 of the 1997 Act is incompatible with Articles 3, 5, 7 and 8 of the Convention.

Article 7

As the argument as to Article 7 is discrete, it is convenient to start with that Article. It is Article 7.1 which is relevant. It provides:

> 'No one shall be held guilty of any criminal offence on account of any actual omission which did not constitute a criminal offence under national or international law at the time it was committed. Nor shall a heavier penalty be imposed than one that was applicable at the time the criminal offence was committed.'

...

Mr Fitzgerald advances the argument, which is adopted by all appellants, that there is a contravention. He submits that the argument has two aspects. Both involve changing the consequences of a conviction of the first serious offence after the date of the offence and after the sentence for which it was imposed. It is submitted that after a punishment for the first serious offence had been imposed, the subsequent coming into force of section 2 increased the penalty for the initial offence since the offender then became liable, if he committed a further serious offence, to be automatically sentenced to life imprisonment. It is also submitted that section 2 itself increased the penalty for the first serious offence since on conviction of the second serious offence a life sentence would be imposed, in reality, in respect of both offences.

Mr Fitzgerald's argument was well illustrated by the practice in Association Football of sending off a player who is shown two yellow cards. If the rule which brings this about was to be imposed after one yellow card had been shown this would give greater significance to the first yellow card than was the case when it was shown. It could adversely affect a player, since if a player knew he would be sent off if he had two yellow cards, he would make greater efforts to avoid being shown even the first yellow card.

This attractive argument depends upon treating the life sentence as being imposed at least in part or both offences. This is not, however, the manner in which, in our judgment, section 2 works. Section 2 imposes the penalty of the automatic life sentence for the second offence alone. The imposition of the automatic life sentence is, however, subject to certain conditions. Those are that the offender was 18 or over and that he had been previously convicted of another serious offence. The language of section 2(1) makes this clear. The sentence is not being imposed in relation to the earlier offence.

Articles 3 and 5

The relevant provisions of Article 3 and Article 5 are as follows:

> 'Article 3: Prohibition of torture
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'
>
> 'Article 5: Right to Liberty and Security
>
> 1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court.
>
> ...
>
> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

In approaching these articles, it is important to recognise that the 1998 Act is a constitutional instrument introducing into domestic law the relevant articles of the Convention. The consequence of section 3 is that legislation which affects human rights is required to be construed in a manner which conforms with the Convention wherever this is possible.

...

The problem arises because of the restrictive approach which has so far been adopted to the interpretation of exceptional circumstances in section 2. If exceptional circumstances are con-

strued in a manner which accords with the policy of Parliament in passing section 2, the problem disappears.

Section 2 establishes a norm. The norm is that those who commit two serious offences are a danger or risk to the public. If in fact, taking into account all the circumstances relating to a particular offender, he does not create an unacceptable risk to the public, he is an exception to this norm. If the offences are of a different kind, or if there is a long period which elapses between the offences during which the offender has not committed other offences, that may be a very relevant indicator as to the degree of risk to the public that he constitutes. Construing section 2 in accordance with the duty imposed upon us by section 3 of the 1998 Act, and taking into account the rationale of the section as identified by Lord Bingham gives content to exceptional circumstances. In our judgment, section 2 will not contravene Convention rights if courts apply the section so that it does not result in offenders being sentenced to life imprisonment when they do not constitute a significant risk to the public. Whether there is significant risk will depend on the evidence which is before the court. If the offender is a significant risk, the court can impose a life sentence under section 2 without contravening the Convention. Either there will be no exceptional circumstances, or despite the exceptional circumstances the facts will justify imposing a life sentence.

Under section 2 it will be part of the responsibility of judges to assess the risk to the public that offenders constitute. In many cases the degree of risk that an offender constitutes will be established by his record, with or without the assistance of assessments made in reports which are available to the court. If a court needs further assistance, they can call for it. The courts have traditionally had to make a similar assessment when deciding whether a discretionary life sentence should be imposed. There should be no undue difficulty in making a similar assessment when considering whether the court is required to impose an automatic life sentence, although the task will not be straightforward, because of the lack of information as to the first serious offence which will sometimes exist because of the passage of time.

This does not mean that we are approaching the passing of an automatic life sentence as though it is no different from the imposition of a discretionary life sentence. Notwithstanding the interpretation resulting from the application of section 3(1) of the 1998 Act suggested, section 2 will still give effect to the intention of Parliament. It will do so, however, in a more just, less arbitrary and more proportionate manner. Section 2 will still mean that a judge is obliged to pass a life sentence in accordance with its terms unless, in all the circumstances, the offender poses no significant risk to the public. There is no such obligation in cases where section 2 does not apply. In addition, if the judge decides not to impose a life sentence under section 2, he will have to give reasons as required by section 2(3). Furthermore, the issue of dangerousness will have to be addressed in every case and a decision made as to whether or not to impose a life sentence.

The objective of the legislature will be achieved, because it will be mandatory to impose a life sentence in situations where the offender constitutes a significant risk to the public. Section 2 therefore provides a good example of how the 1998 Act can have a beneficial effect on the administration of justice, without defeating the policy which Parliament was seeking to implement.

In view of our conclusions as to the impact of Articles 3 and 5, it is not necessary to consider Article 8.

■ NOTES AND QUESTIONS

1. One gets the impression that courts are generally reluctant to find punishments at odds with either the HRA 1998 or the ECHR. What might account for this reluctance?
2. Some punishments may run afoul of Article 3's prohibition of inhuman or degrading punishment. See, e.g., *Tyrer* v *UK* (1978) 2 EHRR 1 (ECtHR) (element of humiliation in corporal punishment inflicted on a schoolboy was 'degrading' in violation of Article 3).
3. In *Soering* v *United Kingdom* (1989) 11 EHRR 439, the ECtHR considered the extradition of a German national to the US State of Virginia, which intended to put

him on trial for murder. Had he been convicted, he was potentially subject to the death penalty. The European Court, while 'declining' to find the death penalty *per se* violative of Article 3, was of the opinion that the extended period on death-row which US prisoners often had to endure before their execution could amount to torture or inhuman or degrading treatment in violation of Article 3. See also the decision of the European Commission in *Altum* v *Germany* (1983) 36 DR 209.

SECTION 5: ANALYSING A CRIME

It is important for students and practitioners alike to appreciate what must be established in order to warrant a conviction of a criminal defendant. This entails being able to identify the elements of the offence charged. The prosecution must do so because it has to prove each and every element of the crime beyond reasonable doubt. Without a knowledge of the elements, the prosecution will not know what it needs to prove. Defence counsel, on the other hand, will want to identify the elements of the crime because if counsel can establish a reasonable doubt as to *any* of the elements, the jury must acquit (for the prosecution will not have carried its burden of proof).

Below we present two approaches for analysing the elements of a crime. The two approaches are not mutually exclusive, and conscientious lawyers – and students – will use the two in tandem.

A: A conceptual model

It is possible to look at a crime as consisting of a number of building blocks. These building blocks draw our attention not only to the common elements of the typical offence, but also to how the elements relate to one another. In addition, they provide a benchmark against which any crime might be critically evaluated, and thereby further our understanding of the nature of the criminal law. That said, there is no legal requirement that each of the elements must be present in every offence, and the fact that an element may be omitted from the definition of a particular crime does not serve to invalidate the relevant statute.

The elements themselves can be schematically subdivided. There are two formal preconditions to a crime – the existence of a law that makes conduct criminal and the attachment of a potential sanction to a violation of that law. In order to be subject to the criminal law, an individual must also be deemed to have the legal capacity to commit a crime. The courts recognise certain categories of individuals, such as children and the insane, as not having this capacity and exempt them from the law.

In terms of the crime itself, there are two core elements – *actus reus* and *mens rea*. The former refers to the conduct element of the crime and the latter to the mental element. The relationship that needs to exist between *actus reus* and *mens rea* is, somewhat inaccurately described as one of 'concurrence' implying a simultaneity

that is not essential. Offences that are defined in terms of a result (murder and manslaughter, for example, require that a person be killed) envisage a certain relationship between *actus reus* and result, which is referred to, again somewhat inaccurately, as 'causation'. Lastly, there are circumstances that justify or excuse what would otherwise be a crime.

(i) Preconditions to criminal liability

(a) Law

The existence of a law forbidding the conduct in question is an absolute prerequisite to the imposition of criminal liability (*nullum crimen sine lege*). One cannot be prosecuted for an offence that was not in existence at the time it was committed. See Article 7 of the ECHR. The law need not necessarily be written in a statute book, as we saw in the case of common law crimes, but it must exist. Those subject to the law have a right to know what it proscribes, in order that they may conform their conduct to the law's requirements.

(b) Punishment

A second prerequisite is that the law in question must prescribe punishment for its violation. Without prescribed punishment the law is not a criminal law. The punishment is inflicted in the name of the State for the violation of its law, and exists separate and independent of whether the defendant is required to pay damages in a civil suit and of any disgrace that the defendant might suffer as a result of the attendant publicity.

(ii) Capacity

The working assumption of the criminal law is that human beings are autonomous individuals with free will and the ability to choose between good and evil. Although biological, psychological, social and economic forces may impinge on the exercise of free will, the law generally chooses to ignore these factors in assessing a defendant's criminality (considerations such as these are more likely to be taken into account at the sentencing stage). Nonetheless, there are instances where the courts are prepared to recognise that certain individuals may not have the requisite capacity to choose between legal and illegal conduct. Young children, for example, often do not understand the wrongfulness of their mischief. Individuals who suffer from mental illness likewise may be incapable of appreciating when they are doing something wrong. Such persons may not be morally responsible for their actions, and the law, recognising this incapacity, does not seek to hold them criminally responsible. The rationale behind this allowance, however, does not apply to individuals who are responsible for their own lack of capacity, such as by becoming voluntarily intoxicated and thereafter committing an offence that they would not have committed had they been sober, and the law takes a less indulgent view in these circumstances.

The incapacity of the mentally ill and children is a mental incapacity – they lack the ability to understand the nature of their actions. Sometimes, however, individuals have the requisite understanding but are unable to prevent themselves from committing the criminal action. When a defendant acts involuntarily against his will, and there is no fault on the defendant's part in being unable to control his

conduct, the law again is prepared to make an exception from a general rule of liability. Such individuals are permitted a defence of automatism. Technically this defence turns on the involuntary nature of the defendant's acts, but in recent times the courts have drawn a distinction between insane and non-insane automatism, thereby confusing issues of mental incapacity and physical incapacity. Both automatism and insanity, as well as incapacity based on age, will be examined in Chapter 9.

(iii) *Actus reus* and *mens rea*

Actus reus and *mens rea* are the two most critical components of a crime. *Actus reus* refers to the conduct component, and *mens rea* to the mental component. At common law it was said that *'actus non facit reum nisi mens sit rea'*, which literally means that an act is not wrongful unless accompanied by a wrongful state of mind. However, the maxim has typically been construed to mean that before criminal liability can attach, at least for serious offences, the Crown must prove both *actus reus* and *mens rea*.

(a) Actus reus

While literally translated as a wrongful act, the term *actus reus* may actually encompass three distinct dimensions. There is first the conduct which one must engage in before one can be held criminally liable, although it is also important to note that in some instances a failure to act or omission may satisfy the requirement of *actus reus*. The second dimension arises in respect of a crime defined in terms of a specified result (murder requires the killing of a human being, and criminal damage the destruction of or damage to property) and embodies the relationship between the defendant's act and the result. If no person has died, the defendant cannot be convicted of murder; and if no property has been damaged, there is no crime of criminal damage. The final dimension to *actus reus* consists of the attendant circumstances that lend colour to what might otherwise appear to be a neutral act. The attendant circumstance that converts sexual relations with an adult woman into rape is the absence of consent on the part of the woman, and that which converts an ordinary marriage into bigamy is the fact that the defendant is already married to another at the time. Thus *actus reus*, like *mens rea*, although on the one hand a seemingly out-moded Latin term of art, conveys a commonly understood (at least among the legal community) constellation of ideas and concepts that facilitate analysis. *Actus reus*, along with causation, will be examined in Chapter 2.

(b) Mens rea

Just as one cannot be punished for bad thoughts alone, one generally cannot be punished for acts which are not accompanied by a guilty mind. The term *mens rea* refers to the wrongful state of mind required to be proven by the prosecutor in order to secure a conviction. Usually the type of *mens rea* which will suffice for a conviction will be specified by statute or case law. In some instances the prosecutor will have to prove that the defendant acted intentionally; in others only that the defendant acted recklessly; and in still others simply that the defendant acted negligently or carelessly. A sliding scale of mental fault exists which varies depending on the crime charged. At the far end of this scale can be found statutes which

do away with *mens rea* altogether and impose strict liability. *Mens rea*, along with concurrence, will be examined in Chapter 3.

(iv) Critical relationships

(a) Concurrence

Concurrence refers to the temporal relationship between *mens rea* and *actus reus*. Usually they will coincide at the point of the *actus reus*, but in crimes of intention it may be a more accurate description of the relationship to say that the *mens rea* was the precipitating factor in the defendant's decision to commit the crime.

(b) Causation

Some crimes are defined in terms of the occurrence of a particular result, of which murder is the clearest example. The defendant's acts must be the cause of that result. As we will see, problems arise when the results are other than those intended or occur in a way other than intended.

(v) Defences

If the Crown has established each and every element of the crime charged by proof beyond a reasonable doubt, it would seem to follow that the defendant will be convicted. However, this is not necessarily so. Sometimes the defendant is prepared to concede that he has violated the law, but argues that he was justified in doing so or should be excused despite having done so. The courts have recognised a number of *general defences* that will in effect negate the defendant's liability.

Conceptually, *defences* can be divided into justifications and excuses, although the practical effect is the same – they both lead to a verdict of not guilty. To say that the defendant's conduct was justified is to say that the defendant was right to have acted as he did. Acting in self-defence or to prevent a crime are examples of justifications. In contrast, criminal conduct which is excusable is still wrong, but the law is prepared to relieve the defendant of the normal consequences of a conviction. A defendant who claims that he committed a crime under duress, for instance, is seeking to be excused.

While both justifications and excuses result in the defendant not being subjected to penal sanction, there are some technical differences that emanate from the fact that the defendant is raising one or the other. For example, some cases suggest that a defendant charged with aiding and abetting cannot be convicted if the principal's conduct is found to have been justified but conviction is possible if the conduct is only excusable. Interestingly, it is not the defendant's burden to prove a justification or excuse, but rather the Crown's obligation to negate the claim by proof beyond reasonable doubt, at least once the defendant has introduced sufficient evidence in support of the defence to raise a reasonable doubt as to guilt.

Specific defences will be examined in Chapter 10.

B: Parsing a statute

The conceptual model of a criminal offence is useful in indicating the criminological basis of legal liability and how the elements of a crime fit together. However,

the model holds the danger of leading astray anybody who takes it too literally. Some crimes, for example, impose strict liability, and any attempt to identify the *mens rea* of the crime would be impossible; there is no *mens rea*. Similarly, issues of causation arise only in respect of crimes which are defined in terms of a particular result. Where the offence consists of simply an act, such as driving a motor vehicle in excess of the speed limit, any effort to identify a causation relationship would be doomed to failure.

The conceptual model can also be frustrating, for it fails to accord with the way that criminal laws are written in practice. No statute declares that the *actus reus* of an offence is X and the *mens rea* is Y. Statutes are drafted in ordinary English and not Latin. Nor do statutes generally speak in terms of concurrence or causation; these are relationships which are implicit within the law. In many statutes, moreover, there may be multiple mental and conduct elements which have more complex interrelationships than the simple statement of the conceptual model might suggest.

Finally, the conceptual model, because of its abstract nature, can be misleading. *Actus reus* and *mens rea* do not exist in a vacuum, as the model might seem to intimate. They come to life only within the context of a specific criminal offence. Each crime has its own *actus reus* and its own *mens rea*, and, although the terminology of *actus reus* and *mens rea* may remain constant, their specific content will differ from statute to statute. One must examine each crime on an individual basis in order to determine its particular *actus reus* and *mens rea*. Thus one needs to dissect a statute in the same way as a student of English might parse the subject, verb, object, etc. of a sentence. In criminal law it is necessary to identify each element of the crime. In a criminal case a prosecutor will go through this exercise in order to ensure that no element is overlooked (as noted previously, the Crown must prove each and every element of the offence beyond reasonable doubt or its case fails); and a defence lawyer will go through the same exercise in order to hold the prosecution to its legal burden of proof. It is helpful at this stage of your career to get into the habit of identifying the elements of a crime and determining how each of the elements is satisfied in a particular case.

It may be useful to illustrate both the conceptual and element-by-element approaches to understanding a crime in respect of a specific statute. Consider s. 1 of the Criminal Damage Act 1971:

CRIMINAL DAMAGE ACT 1971

1. Destroying or damaging property

(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

If one were to dissect this provision, element by element, one could identify six distinct elements that would have to be proved by the prosecutor in a given case: that (i) a person; (ii) without lawful excuse; (iii) destroyed or damaged; (iv) property; (v) belonging to another; (vi) with the intent to destroy or damage that property or being reckless as to whether any such property would be destroyed or damaged. In respect of each of these elements, one might also perceive a number of issues

which would need to be clarified before the element could be fully understood. For purposes of illustration, let us attempt to flag the relevant elements and some (but by no means all) of the possible issues:

(a) *'A person'*. It might not be readily apparent when 'personhood' might become an issue. We have already alluded to the problem of whether a company can be charged with criminal damage for polluting a river. Is the company a person? What about when someone's pet dog fouled another's property – can the dog be guilty of criminal damage? The dog's owner?

(b) *'without lawful excuse'*. This provision raises the question of what constitutes a 'lawful excuse'. Part of the answer is provided in a separate section of the statute (see s. 5).

(c) *'destroys or damages'*. Note that the Crown can succeed by proving either that the defendant has destroyed or has damaged property. But how much must one alter the state of property before it can be said to be sufficiently damaged to come within the criminal law? One might also wonder why the two terms are used and whether it is possible to destroy property without damaging it.

(d) *'property'*. What constitutes 'property'? Are both personal and real property included? Can one destroy or damage intangible property? Are there some things that within normal parlance we may refer to as property but which are not considered such for the purposes of the law (an issue which will be explored in Chapter 7 on Theft)?

(e) *'belonging to another'*. Note that a defendant cannot be convicted for destroying or damaging his or her own property. But what if the defendant has possession of the property pursuant to a rental agreement, or has simply been left in charge of property?

(f) *'intending to destroy or damage . . . property or being reckless as to whether any such property would be destroyed or damaged'*. Note again that the Crown has alternative methods of establishing its case. It can prove that the defendant acted either intentionally *or* recklessly. The question of what constitutes 'recklessness' has been one that has proved extremely problematic and controversial. The issue will be examined in Chapter 3.

If one were to take a conceptual approach to this same provision of the Criminal Damage Act 1971, our analysis would look a bit different:

(a) The preconditions of law and punishment are established. Section 1 establishes the offence and a subsequent section (s. 4) establishes the maximum penalty following a conviction.

(b) The law says nothing about capacity other than its reference to 'person'. But this would be misleading if it were taken to imply, for example, that a child under the age of 10 – who undoubtedly is a person – can be convicted of criminal damage. As we shall see in Chapter 9, a child so young is not capable of being convicted of any crime. Criminal statutes tend not to indicate that children, the mentally ill, and those who act in a state of automatism are not subject to its provisions, for the repetition of such a provision in every statute would become tedious. On the other hand, this omission illustrates how looking at a statute in terms of its expressed elements might cause one to overlook critical issues.

(c) The *actus reus* of the offence consists of destroying or damaging property belonging to another.
(d) The crime is defined in terms of a result – damaging or destroying property. This automatically raises the question of whether the defendant's conduct caused the result. Again this is a 'hidden' issue in the sense that there is no specific reference to causation on the face of the statute.
(e) The *mens rea of* the offence is '*intending* to destroy or damage…property or *being reckless* as to whether any such property would be destroyed or damaged'.
(f) The statute, rather oddly, specifies that the defendant's conduct must be 'without lawful excuse'. This would seem otiose because a 'lawful excuse' would in any event render non-criminal what would otherwise be criminal. Moreover, even more oddly in light of this reference to excuses, the Act is silent on justifications. Yet, criminal damage can clearly be justifiable, as, for example, when the victim of an attack breaks a chair over the head of the attacker.

While one can effectively use either the conceptual approach or an element-by-element approach to analysing a statute, the conscientious student and lawyer will employ both. Using both approaches may allow one to see issues that might be overlooked if either approach were to be used by itself.

FURTHER READING

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