

§ Law in Context

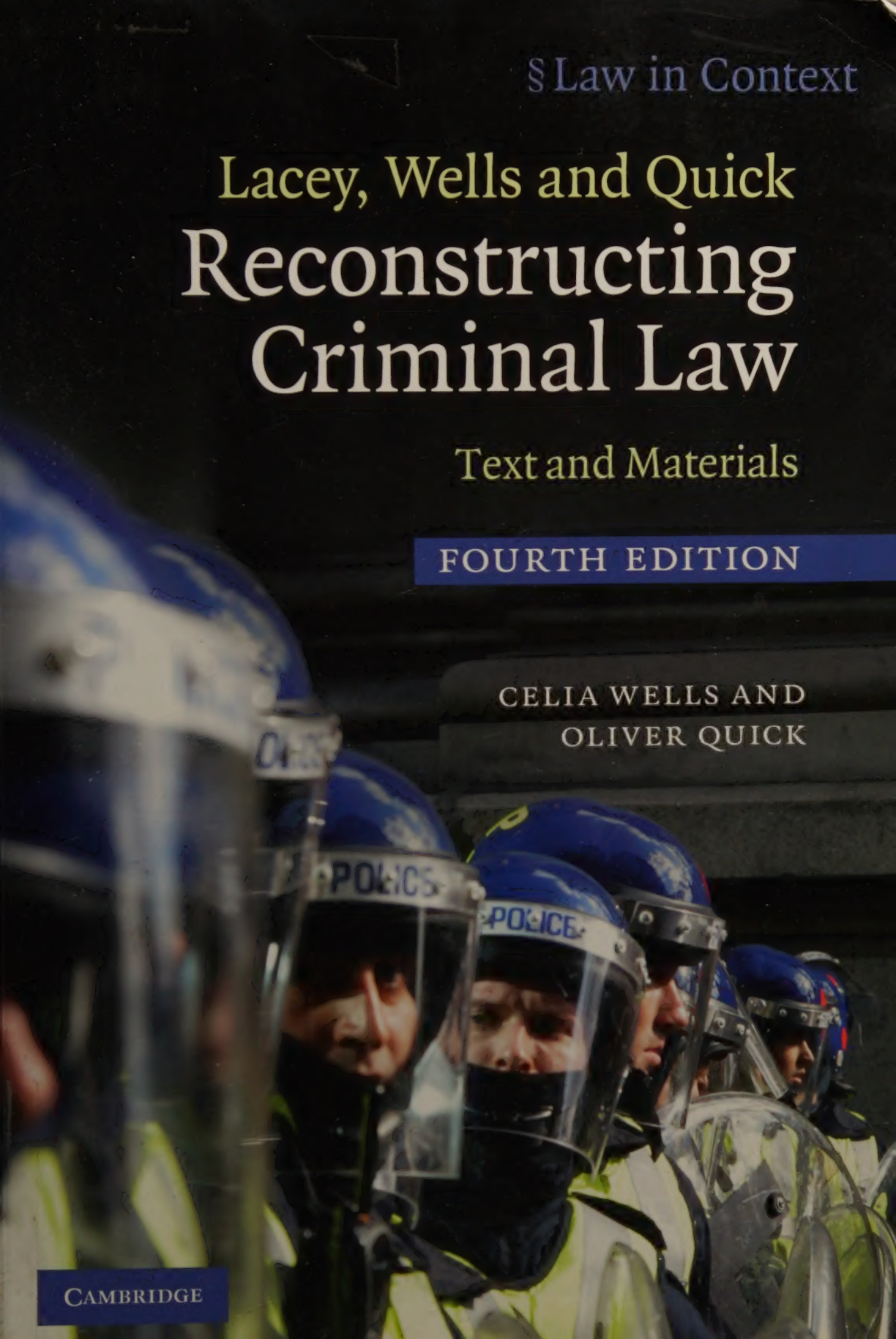
# Lacey, Wells and Quick Reconstructing Criminal Law

Text and Materials

FOURTH EDITION

CELIA WELLS AND  
OLIVER QUICK

CAMBRIDGE







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Since the publication of the first edition, this textbook has offered one of the most distinctive and innovative approaches to the study of criminal law. Looking at both traditional and emerging areas, such as public order offences and corporate manslaughter, it offers a broad and thorough perspective on the subject. Material is organised thematically and is clearly signposted at the beginning of each section to allow the student to navigate successfully through the different fields. This new edition looks at topical issues such as policing, the Serious Crime Act 2007, and reform of the Fraud Act 2006. Relevant case law and extracts from the most topical and engaging debates give the subject immediacy. The book is essential for both undergraduate and postgraduate study of criminal law and justice.

**Celia Wells** is Professor of Criminal Law at the University of Bristol, where her research focuses on criminal law and, in particular, corporate criminal liability. In 2006 she was awarded the OBE for services to legal education.

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Fourth edition

CELIA WELLS  
OLIVER QUICK



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## Preface

*Reconstructing Criminal Law* first appeared 20 years ago at a time when the law in context movement in legal education was further from the mainstream than now. Yet we sense that criminal law teaching often still relies on a view of the subject against the grain of which this book has always tried to venture. We continue to believe that historical, sociological and philosophical insights help to explain and bring to life the complexity that is criminal law and justice. This has eased our task in producing this fourth edition. We have considered all of the material in the book, asking ourselves whether it is still relevant or has been overtaken by new developments, but we have not replaced extracts merely for the sake of it. In many cases, the writings on which we drew in 1990 continue to shine a powerful light on the shifting terrain of criminal law and justice.

The intellectual drive behind the book came largely from Nicola Lacey who has played an advisory role in this edition. The re-ordering, re-writing, and selection of extracts have been carried out by the two of us. In terms of lead author, we have always done some swapping around between editions; for this edition Celia was mainly responsible for Sections I to IV and Oliver for V and VI. We have re-ordered some parts and updated all of it. The pace of legislative change has been relentless. But other major transformations have taken place. The impact of the Human Rights Act 1998 can now be seen more clearly than at the time of the last edition in 2003. The book has always emphasised the importance of public order law, of policing and of enforcement strategies in the study of criminal law and justice. This meant we were very well placed to incorporate discussion of the G20 protests in 2009 and of the increased use of hybrid civil criminal mechanisms such as Anti-Social Behaviour Orders. We have also been able to consider judicial interpretation of the all important consent provisions in the Sexual Offences Act 2003.

There has been a revolution of another sort since 1990. No longer do we need to go to the library to seek out law reports, or consult in hard copy *Halsbury's Laws*, or even the Index to Legal Periodicals. This not only affects the work of editing, it also affects the editorial decisions we have made. We do not need to provide such lengthy extracts from cases, we can point readers to a plethora of web sources of statutory, government and other publications. Our aim has never been to provide a comprehensive account of criminal law and criminal



justice but we can now more confidently assert that the aim of the book is to stimulate rather than to answer questions.

Many people have helped to get this edition out. We wish to thank in particular Will Turner and Lyndy Davies who provided some initial research assistance, and to Sharon Cowan, Richard Huxtable and Emily Jackson for providing us with some useful sources. Our fantastic colleague Richard Young read and provided extremely useful comments on a draft of Section II. Most of all, we would like to thank our families. Celia's children – Joe Wells, Alice and Lydia Morgan – were 14, 9 and 4 when the black and shocking pink first edition arrived in 1990. They contributed lively arguments then, and still do as adults, but we haven't let Lydia choose the cover colours again. Oliver would like to thank Celia and Niki for inviting him to contribute to a text which much inspired him as a student of Celia's back in 1996. As ever, he is indebted to his wonderful family (the Welsh and Spanish) for all their support.

Celia Wells and Oliver Quick February 2010

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References printed in **bold** type indicate an extract from the case.

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## Section I

# Approaching Criminal Law

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# Images of Criminal Law

Images of criminal law infuse our everyday lives. From newspapers and television news programmes reporting incidents or trials, to detective novels, films and television series such as *The Bill*, *Law and Order*, *Silent Witness* and *The Wire*, crime and the control of crime pour into our individual and collective consciousness. The images produced are complex and contradictory: heroic detectives compete for our attention with 'bent' police; wily criminals and informers jostle with the inadequate, the psychopath, the wife-batterer and even, on occasion, the offender with whom we are invited to sympathise; the dramatic appeal of racial injustice vies with the cultural resonance of racist stereotypes.

For many people who are neither practising lawyers nor legal scholars, criminal law represents the dominant image of what it is to have a legal system. In thinking carefully about the nature of criminal law, however, this familiarity can be an intellectual barrier. Most people's image of crime is dominated by crimes of violence or serious crimes against property, proceeded against through trial by jury. But in fact violent and sexual offences make up only a fifth of offences (and only half of violent offences involve injury). The reality of the criminal justice system is dominated by the processing of road traffic offences, minor public order and low-level property offences. Many never reach a court, having been diverted via fixed penalty notices or cautions (Young 2008). Of those that do, most are dealt with in magistrates' courts, and since the vast majority of defendants plead guilty, the trial process is a summary affair. These will become even more summary with the introduction of video link proceedings for guilty pleas (Coroners and Justice Act 2009). Yet the distortion in popular representations of criminal justice is equally marked in criminal law textbooks, whose image of criminal law is dominated by a focus on violent and sexual offences, along with the more serious offences against property, and by a preoccupation with questions of individual responsibility for serious crime. Students of criminal law are therefore rarely introduced to the more 'everyday' offences which make up the vast majority of the business of the criminal process, and even less frequently to the social context in which images of crime are produced or to the procedural context in which practices of criminal law take shape.

While we have set out to produce a rather different sort of text, taking as our counterpoint the following deft caricature, we aim to illuminate rather than replace the traditional approach:

**Lindsay Farmer, 'The Obsession with Definition' (1996) *Social and Legal Studies* 57**

The Criminal Law Textbook embodies the supreme positivism of the law. The moral, political and social dimensions of the law are tantalizingly raised and dismissed in a single movement in favour of grinding technical discussions of legal minutiae. Entire chapters and many hundreds of footnotes are devoted to such arcane issues as impossible attempts or the precise meaning of 'subjective liability'. As if this weren't enough, we are continuously reminded by the authors of how uniquely enjoyable the criminal law is supposed to be to students. It alone is said to capture the rich tapestry of human life – though our experience in the classroom suggests otherwise. The standard opening chapter illustrates perfectly this uneasy relationship between the criminal law and what, for want of a better term, might be called its moral and social context. It is, invariably, on the definition of crime – seeking to define the scope of the work and so, more or less implicitly, the object of the criminal law. While . . . it may be unfashionable to begin law books with definitions, few seem capable of resisting. No amount of tinkering with the order and style of presentation can alter the fact that the authors of the average criminal-law textbook are, and perhaps destined to remain, deeply unfashionable.

In this book, our approach to criminal law, far from devoting only a 'single movement' to the social and political context which informs criminal law, locates criminal laws, their development and their implementation, firmly within a social framework.

This Chapter therefore introduces the issues and ideas which form the basis for a critical and contextual reading of criminal law. We remain, however, in Farmer's terms, 'deeply unfashionable'. For though our starting point is a very broad conception of criminal law as one among several sets of practices through which a society – in this case that of England and Wales – both defines or constructs, and responds to, 'deviance' or 'wrongdoing', we do think that it is worth pausing to give some attention to prevailing ideas about what, if anything, unifies or identifies criminal law as a social practice: the problem of definition.

Farmer draws attention to the link between 'the obsession with definition' and the positivist tradition. Legal positivism asserts that law is a discrete set of rules or norms whose validity derives from the fact that they originate from a distinctive source: they have been set down by 'the sovereign' or may be identified through a constitutional 'rule of recognition' (Hart 1961). This positivist claim about the nature of law is inextricably bound up with a modern, scientific conception of law and legal scholarship, in which the task of the legal scientist – and hence of the law student – is to garner knowledge of the distinctive

legal terrain and, ideally, to produce a complete and accurate description of it. However, as soon as one begins to think about the range of conduct covered by modern systems of criminal law – from homicide to harassment, from rape to road traffic infringements, from paedophilia to pollution; from deception to drug dealing (via dangerous dogs . . . ) – the idea that there is anything *general* to be said about ‘the nature of crime’ begins to look very problematic indeed. Nonetheless, the quest for a definition or a theory of criminal law persists: and that persistence is itself of considerable interest. We therefore want to begin by taking a closer look at what is meant by ‘the quest for a definition’ and to delineate two influential approaches to theorising – producing a general account of – criminal law.

### 1.1.a. Theories of criminal law: history, sociology and philosophy

#### 1.1.a.i. Explaining criminal law

The first approach to theorising criminal law is located firmly within the social sciences. This is the approach taken by sociologists of law and legal historians. This approach seeks to answer the question of definition in relation to an analysis and interpretation of the history of criminal regulation in specific social and political contexts. This kind of criminal law theory is closely tied to the interpretation of specific areas of substantive and procedural law, and the development of such an approach will be one of the main tasks of each of the following chapters. How might an interpretive approach tackle the quest for a defining conception of criminal law?

To think about this, let us take as a broad starting point that criminal law is a particular social construction of, and response to, ‘deviance’ or ‘wrongdoing’. If we understand deviance to mean behaviour which departs from social norms enforced by criminal law, our definition is clearly circular: criminal law claims to respond to deviance, yet deviance (for the purposes of criminal law) can only be defined by looking to criminal law itself. Evidently, ‘external’ questions arise about the conditions under which the definitions of crime ‘internal’ to criminal law – what has been the positivist terrain – become socially effective. These questions include how and by whom norms of criminal law are set; the extent to which criminal laws are underpinned by social consensus at particular times and in particular places; and the relationship between criminal law and other forms of ‘social control’ – non-legal normative systems whose power entails that the definition and management of deviance cannot be assumed to be exclusively or even primarily the role of the state (see Chapter 2).

Let us, therefore, revise our starting point so as to think of criminal law as a social normative system: in other words, as a system which operates within a particular social space by setting down standards of conduct, and by enforcing, in distinctive ways, those substantive standards or norms. Within this very general idea of criminal law as one normative system among many others – the



religious, moral and traditional norms and institutional systems which we shall discuss in the second Chapter – it is important to see that there are at least two rather different ways of looking at criminal law.

In the first place, we can look at *criminal law as a moral and as a retributive system*. From this point of view, criminal law is a system of quasi-moral judgment which reflects a society's basic values; in which criminal punishment serves the retributive function of meting out to offenders their just deserts; and in which criminal law has a strongly symbolic function. This image is central to most people's stereotype of criminal law, resonating as it does with offences such as murder, crimes of violence or theft. But not everything which is regarded as wrong is criminal – and some of the things which are criminal are not regarded by everyone as wrong. So, secondly, we have to acknowledge that *criminal law has a regulatory, instrumental or utilitarian aspect*: in other words, it prohibits certain things on grounds of public health or safety, or for economic or political reasons, and sees the purpose of punishment as deterring that behaviour. This aspect of criminal law underpins offences such as health and safety offences, unwittingly serving alcohol to an underage person and a wide range of less serious road traffic offences. But it can't explain, for example, the offence of murder, which most of us would support independently of its instrumental contribution to lower rates of homicide.

This is not to say that the lines between the quasi-moral and the instrumental or regulatory aspects of criminal law are absolutely clear. Not all 'regulatory' offences are trivial: some carry severe penalties such as the loss of licences necessary to the defendant's livelihood. And many offences can be seen from both regulatory and moral points of view, with our attitudes to the boundary between 'regulatory' and 'real' crime shifting over time. For example, twenty years ago, driving under the influence of alcohol would have been seen as an essentially regulatory offence, while today it has become heavily moralised. It is, however, crucial to a proper understanding of criminal law to see that it has these two aspects, and that the balance and interaction between them is a key to its historical development and contemporary social significance.

Not least because of these two very different aspects to contemporary criminal law, the idea that we can define 'crime' in relation to its subject matter looks implausible from an interpretive point of view. The reason is very simple: modern criminal law encompasses a quite extraordinary range of activities. In constructing its particular notions of 'deviance', 'wrongdoing' or 'harmful conduct', however, contemporary criminal law arguably does have two distinctive general features. On the one hand, it is a peculiarly institutionalised practice, structured by relatively fixed norms and procedures, and administered by official personnel. This high degree of institutionalisation is a feature of its position as a *legal* response, and to explain this aspect fully, we must reflect on the idea of law and legal regulation itself and on what, if anything, distinguishes legal from other institutional responses. The entire literature of analytical and sociological jurisprudence peers over the shoulder of the criminal lawyer as she begins her

apparently straightforward task of exposition. She might well, then, turn aside to a second distinctive feature of criminal law. This is that it is distinguished among legal categories from the responses of civil law. This distinction cannot be explained merely in terms of subject matter, since many forms of behaviour are covered by both criminal and civil regulation. Here the lawyer can breathe a sigh of relief as she recognises a firm and familiar terrain; criminal law can be identified in terms of its distinctive *procedural* rules such as rules of evidence, burdens and standards of proof, special enforcement mechanisms such as public policing and prosecution, and particular tribunals and forms of trial, and types of punishment. Criminal law can therefore be defined simply as that legal response to deviance over which the state has the dominant if not exclusive right of action; in which defendants must be proved by the prosecution to be guilty beyond reasonable doubt; and under which, if charged with an offence of a certain degree of seriousness, they are entitled to trial by jury. It is equally that area of legal regulation in which certain sorts of evidence are inadmissible, and in which the result of conviction is typically the imposition of a punitive (as opposed to compensatory) sentence executed by or on behalf of the state. Criminal law, in other words, can be identified in terms of the distinctive features of criminal procedure (Williams 1955, p. 123). And if anyone is sufficiently presumptuous to ask how we can tell whether criminal procedure should (legally) apply, she can be met by the simple answer, 'Whenever the law identifies itself as criminal.'

There is, of course, a sense in which this circular argument about the definition of criminal law as resting in criminal procedure represents a truth. As we have stated it, however – and as it is stated by most textbook writers – it is not illuminating, for it gives little sense of what *kind* of social practice is thus identified. But, as Farmer suggests, a careful historical interpretation can both reveal the social insight lurking within what appears a conceptual truism, and illuminate that social 'truth' as relative to a particular period in the development of criminal law. Farmer argues that both the modern bemusement about how to define criminal law and the modern tendency to resolve the problem of definition in terms of criminal procedure can best be understood in the context of the marked expansion of criminal law in the nineteenth and early twentieth centuries. This expansion was effected primarily through the creation of summary offences tried in magistrates' courts. These offences were a product of the expanding functions of the modern administrative state, for which the criminal law became an increasingly important tool for regulating the areas of social life born of industrialisation and urbanisation from the early nineteenth century onwards. They often, therefore, regulated lawful business activities, and they were punishable not by imprisonment but by fines. As a result, they infused the law with a new set of 'regulatory' standards which did not – and do not to this day – fit comfortably with the 'quasi-moral', received view of crime as genuine wrongdoing. The courts consequently grappled with the question of whether the latter were genuinely 'criminal' penalties:



## Lindsay Farmer, 'The Obsession with Definition', pp. 64-6

Although the answer to these problems was sought in a reference to the nature of the offence, they could not be resolved by means of the traditional categorization of crimes as 'public wrongs'. Accurate as it might once have been as a means of distinguishing between civil and criminal jurisdiction, it could no longer bear the load that was being placed on it since the issues raised by these cases largely involved minor offences arising from particular regulatory provisions with no apparent reference to larger questions of moral right and wrong. The line taken by both English and Scottish courts was thus that 'proper' criminal offences could only be distinguished by reference to the practice of the criminal courts, and in particular the matter of whether the object of the proceedings was punitive... [C]rime was defined by the development of stricter procedural rules, the specification of criminal proceedings. This finds its clearest expression in the emergence of summary jurisdiction.

The nineteenth-century expansion in the business of the summary courts created bureaucratic demands for the administrative processing of large numbers of people, or the regulation of the administrative distribution of bodies within the criminal justice system. This demand was met by the development, among other things, of a more rigorous and systematic body of procedural law. Under this new body of law, jurisdiction was not defined primarily in terms of competence relating to a geographical space, the nature of the crime or the power of the particular court to punish – as had traditionally been the case. Instead the decisive factor was the type of procedure used... [T]he mark of the modernity of the law is less a matter of the division between civil and criminal jurisdiction than it is the emergence of this new reliance on procedural law.

This underlines a more general transformation in the legal order that occurred in the course of the nineteenth century. As the political order was secured against the threat of external domination and internal revolution, there was a movement towards the more intensive regulation or government of territory and the population of that territory. Criminal justice became a matter of administration and security, increasingly less concerned with the establishment and protection of sovereign power. So, as the substantive jurisdiction of the criminal law changed, with the increasing predominance of administrative or police offences, there was a subtle change in the way that the object of the criminal law was conceived (in relation to social order). There is... a movement away from crimes regarded as actions that offend against the community or justice, as this has been constructed through the mirror of political order (public wrong). Crimes instead come to be seen as actions that offend the community in its social interest or welfare, which is the aggregate of individual interests as this is known through the new social knowledges. That criminal law can then be defined only according to the positive criterion of whether an act is tried under criminal proceedings simply reflects the diversity of functions of law in the interventionist state. There is no single, simple moral or other purpose that is capable of holding the whole together. It cannot be that we fall back onto the definition of crime as an act that harms the community... for this is merely to reflect the same tautology (i.e. what harms the community – a crime) dressed up as moral or political theory. The specifically legal character of modern criminal justice cannot be so easily hidden.

The 'obsession with definition', in other words, stands in for a prevailing tension in contemporary criminal law: that between the older ideas of crime as public wrongdoing and the modern reality of criminal law as a predominantly administrative system managing enormous numbers of relatively non-serious and 'regulatory offences': between the older, quasi-moral and retributive view of criminal law and the instrumental, regulatory aspect of criminal law which has become increasingly dominant under modern and late modern conditions. This modern reality also underpins the explanatory appeal of legal positivism; since the validity of positive law derives from its source rather than its content, positivism can encompass without difficulty the expanding terrain of criminal regulation. Nonetheless, the assumption that for example common assault is wrongdoing while health and safety regulation is administrative is open to question.

### 1.1.a.ii. Justifying criminal law

Interestingly, the tension between the 'quasi-moral' and 'regulatory' conceptions of criminal law also surfaces in the second, very different, approach to criminal law theory which we shall consider. This approach is essentially philosophical – Farmer's 'moral and political theory' – and consists in normative theorising: the task of producing an account of what the nature, functions and scope of criminal law *ought* to be. The most famous account of the nature and limits of criminal law is a liberal one deriving from J. S. Mill's 'principle of liberty' (Mill 1859) and from the associated literature which applies that principle to the limits of criminal law (Hart 1963). Mill argued from a utilitarian ethic, according to which the justifying purpose of any social rule or institution must be the maximisation of happiness. This approach leads naturally to a view of criminal law as devoted to minimising human suffering through the prevention of harmful conduct – crime – by the most efficient means possible (Gross 1979). However, the content of criminal law should be circumscribed, Mill argued, according to the principle that the coercive powers of the state should only be invoked as a means of preventing 'harm to others', and never to control harmless behaviour or to prevent the person harming herself. The 'harm principle' thus purports to accommodate the concerns of the state whilst respecting individual freedom. In the context of criminal justice, the harm principle has been refined by the liberal precept that an individual's harmful conduct should only be subject to punishment where she is genuinely responsible for it, in the sense that she had the capacity to act otherwise than she did (Hart 1968, Ch. 1). Since Mill's time, this principle has informed debate about issues such as the enforcement of morality through criminal law in offences such as blasphemy, and the proper limits of 'paternalistic' legislation which aims to protect people not from the harms which are inflicted on them by others but rather from those harms which they may inflict on themselves: laws, for example, which prescribe the wearing of seatbelts or which prohibit the use of certain drugs (Hart 1963; Devlin 1965).

Yet although the harm principle captures (and indeed has been influential in shaping) some strong and widely held intuitions about the proper limits of state power and the value of human autonomy, the test of 'harm to others' is notoriously difficult to apply. This is mainly due to the flexibility of the core notion of harm. The idea of harm is, after all, not self-defining. For example, if a large number of people find the idea of homosexuality, or prostitution, offensive, is this sufficient to justify criminalising that conduct? Does offence, in short, count as harm? And should the creation of risk – for example, by driving while intoxicated – count as 'harm'? Furthermore, the assumed opposition between individual and state interests which is central to Mill's liberal principle is not accepted by political theorists either to right or left, whose arguments, albeit in very different ways, emphasise the links between individual and social interests. These issues among others have been at the centre of a fierce philosophical debate about the acceptability of liberal utilitarian conceptions of the proper functions of criminal law (Lacey 1988).

The philosophical debate about such theories of criminal law has tried to assess their merits as normative theories: as visions of what criminal law ought to be. However, the distinction between normative, prescriptive approaches and explanatory, descriptive approaches has not always been maintained, and the theories have also been used to rationalise and explain the nature of actual criminal law (Hart 1968). In textbooks, for example, the normative theories not only act as frameworks for critical assessment of criminal law but also influence the selection of offences and aspects of legal doctrine to be discussed: hence, for example, the relative marginalisation of 'victimless' crimes which violate the harm principle or of offences of strict liability which sit unhappily with the principle of individual responsibility (Lacey 1985 and 2001). For our purposes, the most important question is that of just how influential these theories have been in shaping both contemporary understandings and actual institutions of criminal law. In trying to assess their influence and, hence, explanatory power, it is important to distinguish between their influence on the popular image of criminal law (something which is crucial to its perceived political legitimacy) and on the content and enforcement of criminal law. For example, the harm principle has a significant place in public debate about criminal law and its limits: the idea that criminal law should be used only in response to harmful conduct has a strong common-sense appeal. Yet, at the levels of criminal law's content and enforcement, we encounter again the problem confronting any definition in terms of the law's subject matter: the vast variety of contemporary criminal laws entails that many examples can be found which appear either to exceed the harm principle (conspiracy to corrupt public morals and outraging public decency are good examples here) or which fail to meet it (the exemption of rape of women by their husbands until 1991 comes to mind). Such examples suggest that the harm principle is not only indeterminate at a normative level but also incomplete at an explanatory level. They therefore imply that we should see it neither as ideal nor as explanation but rather as an ideological framework in terms of which policy debate about criminal law is expressed.



What is meant by the claim that the utilitarian conception of criminal law and its concomitant harm principle form an ideological framework? The idea that criminal law sets out in advance standards of prohibited behaviour, punishing and threatening to punish breaches of those standards, thus deterring actual and potential offenders, characterises it as a social process which is oriented to the reduction of harm. Yet empirical evidence suggests that the reductive effects of criminal processes (although extraordinarily hard to assess) are meagre, and casts doubt on the validity of characterising criminal law primarily in instrumental terms (Ashworth 2006, pp. 15–16, Von Hirsch et al. 1999). Nonetheless, it may be that a widespread *belief* in the instrumental efficacy of and necessity for criminal law is something which typically underpins its existence. But if that belief lacks foundation, we need to look for the reasons sustaining a belief which is widely yet falsely held. Understood as a descriptive theory, the instrumental conception fails to consider the possibility that criminal law may have important symbolic functions in constructing social values or in upholding the prevailing structure of power relations. Understood as an ideology, the instrumental conception may itself be seen as playing a role in repressing questions about the relationship between criminal law and broader structures of social, political and economic power, and in obscuring the productive capacity of criminal law to generate norms – indeed visions of ‘normality’ – which have diffuse social implications. As Garland notes in relation to punishment:

David Garland, *Punishment and Modern Society* (Oxford edition: Oxford University Press), pp. 112–3.

[Penalty] communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other tangential matters. Penal signs and symbols are one part of an authoritative, institutional discourse which seeks to organise our moral and political understanding and to educate our sentiments and sensibilities. They provide a continuous, repetitive set of instructions as to how we should think about good and evil, normal and pathological, legitimate and illegitimate, order and disorder. Through their judgments, condemnations and classifications, they teach us (and persuade us) how to judge, what to condemn, and how to classify, and they supply a set of languages, idioms, and vocabularies with which to do so. These signifying practices also tell us where to locate social authority, how to preserve order and community, where to look for social dangers, and how to feel about these matters . . . In short, the practices, institutions and discourses all signify . . . Penalty is . . . a cultural text – or perhaps, better, a cultural performance – which communicates with a variety of social audiences and conveys an extended range of meanings . . . [I]f we are to understand the social effects of punishment then we are obliged to trace this positive capacity to produce meaning and create ‘normality’ as well as its more negative capacity to suppress and silence deviance.

Utilitarian and other instrumental approaches are, however, not the only influential normative conceptions of criminal law. Beside them sits a different view which rests heavily on what might be called a 'moral analogy' (Devlin 1965) and which evokes the moral/retributive aspect of criminal law already mentioned. On this view, criminal law does and should engage in a legal entrenchment of certain fundamental moral precepts. When laws are broken the offender is culpable and deserves to be punished; criminal conviction expresses an adverse social judgment of blameworthiness. Conviction is an institutionalised equivalent of the expression of moral condemnation, and criminal punishment is denunciatory and retributive: it is based on the offender's desert (Fletcher 1978) and should be commensurate with the seriousness of the offence: 'The principle of proportionality – that sanctions be proportionate in their severity to the gravity of offences – appears to be a requirement of justice' (Von Hirsch 1993, p. 6; see also Norrie 2000). In seeking to understand what it means to have criminal law in a society like our own, retributivist ideas drawing on the analogy between criminal conviction and moral judgment are important popular attitudes. However, actual criminal laws provide many examples which sit unhappily with this conception. Obvious examples are laws which deal with relatively trivial conduct or which penalise conduct irrespective of fault. This is certainly the case with many of the 'regulatory' offences which have proliferated over the last 150 years, such as selling liquor to an intoxicated person or to someone under eighteen, where liability is, technically, strict (i.e. not based on fault). Once again, we have to consider whether the moralist theory's focus on a highly selected portion of criminal law is ideological: serving to obscure conflict and complexity by emphasising those aspects of contemporary criminal justice which command widest support. Paradoxically, the two competing normative conceptions of criminal law – utilitarian and moral-retributive – often emphasise and marginalise the same areas of law, albeit for rather different reasons (see Norrie 2001, Ch. 2). Not surprisingly, an important concern of modern contributors to the philosophical debate has been to explore the extent to which the insights underlying both instrumentalist and retributive theories can be accommodated within a pluralist conception of criminal justice: a point to which we shall return when we consider the principle of criminal responsibility in the second section of this Chapter (Hart 1968; Lacey 1988). Within such pluralist conceptions, however, the very different moral-retributive and utilitarian approaches remain uneasy companions.

Notwithstanding the intuitive plausibility of aspects of both instrumental and quasi-moral conceptions of criminal law, reflection on the complexity of actual criminal laws therefore prompts reservations about the possibility of a unitary conception of criminal law, and leads us back in the direction of a more historically grounded and interpretive approach. Certainly, the philosophical conceptions produce truisms; criminal law sometimes engages in condemnatory judgment analogous to moral judgment: but could we say this of conviction under all of the many 'regulatory offences' such as inadvertently failing to



display a vehicle tax disc or serving an underage customer in a pub? Criminal law often responds to serious threats to interests seen as fundamental to human well-being or social cohesion: but could this really be said of trivial breaches of the peace or offences relating to prostitution? Criminal law has some obvious instrumental functions: but could the law on conspiracy to corrupt public morals be accommodated within such a conception? It is part of the ideology of criminal law that it is used sparingly: but how is this to be reconciled with the existence of thousands of minor 'regulatory' offences and the political impulse to 'pass a law against it' whenever a social problem appears – whether it be stalking, dangerous dogs, new forms of terrorism or mobile phone theft. The insights generated by the philosophical conceptions are at a very high level of abstraction and, for our purposes, need to be understood not so much as 'general theories' but rather as aspects of the social meaning of criminal law. Reflection on actual criminal law suggests that the genesis of the social definition of crime is both more complicated and to a greater extent a matter of historical development, explicable in terms of the salience of particular issues at particular moments, than general theories can allow.

In particular, although the philosophical theories capture a reasonably plausible conception of a portion of actual criminal laws – what might be called 'serious' or 'conventional' crime – we can find many counter-examples among other offences which in fact make up the major part of enforced criminal laws, as measured by arrests, prosecutions and convictions. The general theories may summon up reasonably balanced images of law as applied in the Crown Court and the Appeal Courts, but at the level of the magistrates' court or police station they would be practically unrecognisable. This is true notwithstanding the fact that criminal justice officials' own understandings of their roles may be influenced by those images of the 'core' criminal process. We therefore need to reconceive the theories as ideologies which have been influential in shaping and legitimising legal regulation by reference to what is seen as 'real crime'. As ideologies, they have equally been influential in marginalising and obscuring empirically significant areas of criminal law which do not fit the philosophical paradigm.

### 1.1.a.iii. The power of criminal law

The key assumption of this book is that the substance of criminalisation – how societies define deviance and determine which deviance calls for definition as criminal, and which behaviour actually meets with criminal enforcement – is of central importance to understanding criminal law. There has been a marked increase in the number of offences with an estimated 3,000 offences enacted since 1997 (Ashworth and Zedner 2008). In addition, at every twist and turn we encounter the complex relationship between substance and procedure. We cannot for example assume that a criminal conviction always entails, if only in attenuated form, a criminal trial. Ashworth and Zedner have noted that there

are now many more ways that a person can be given a criminal sanction than via a formal court-based procedure. This runs counter to the European Convention on Human Rights' emphasis on procedural safeguards to ensure that there is sufficient evidence to link the defendant with the offence.

Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21–51

... [W]e will outline five avenues of challenge to the paradigmatic sequence of prosecution-trial-conviction-sentence:

- (a) Not cost-effective: it is argued that, as the cost of trials rises, they are not a cost-effective means of fulfilling their purpose. Jury trials should therefore be reserved for the most serious charges where the defendant pleads not guilty, and even summary trials should be reserved for cases in which a court hearing really is necessary.
- (b) Not preventive: it is argued that bringing a defendant to court, with a view to conviction and sentence, may not have preventive effects and may even be counterproductive. This has been a prominent argument in youth justice, where the experience of being accused in court may reinforce a youth's self-identification with lawbreakers and impose the stigma of conviction. It also appears that for some adult offenders conviction and sentence have no greater preventive effect than a form of diversion. This challenge assumes that the purpose of the criminal law and its processes is preventive, at least to some degree.
- (c) Not necessary: it is argued that court proceedings are unnecessary where the defendant is willing to plead guilty, and that for some lesser forms of offending a court hearing may not need to examine the defendant's fault or may not be necessary at all for minor offences, since almost all defendants are willing to accept some lesser, swifter resolution of the case.
- (d) Not appropriate: it is argued that the criminal trial is not well suited to dealing with ongoing conduct and continual offending, because it focuses on specific charges without examining broader issues and continuing patterns of misconduct.
- (e) Not effective: it is argued that in some cases it may not be possible to have a trial, if the canons of procedural fairness are observed, because witnesses are likely to be in fear or otherwise reluctant, and the charge will therefore have to be dropped. For some kinds of crime, high attrition rates (i.e. a low proportion of detected cases going to trial) suggest that aspects of criminal procedure may have the effect of preventing some defendants from being brought to trial.

Many of the seven major trends identified by Ashworth and Zedner are explored further in later parts of the book: fixed penalties in Chapters 2 and 6, hybrid civil/criminal processes in Chapter 5, preventive orders in Chapter 5. Here we pick up the authors' discussion of diversion from prosecution:

**Ashworth and Zedner 2008, p. 24**

The principal means of diverting defendants from prosecution throughout this period was the formal police caution, and the official statistics record that some 109,000 persons were cautioned rather than prosecuted in 1971, rising to some 230,000 persons in 2001. That is more than a twofold increase, and may be compared with the decline in convictions over the same period from 1.7 million to 1.5 million . . . In 1998 the Crime and Disorder Act replaced the police caution for young defendants with reprimands and final warnings, a more structured framework that appears to have been used only a little less widely than the police caution in earlier years. Where the youth is given a warning, the police refer the case to the local Youth Offending Team, which should then arrange for the youth to participate in a rehabilitation programme unless they think this inappropriate. The result is that this form of 'diversion' imposes the quasi-penal burden of a rehabilitative programme notwithstanding the fact that the young person has not been brought to trial.

Turning to adults, the Criminal Justice Act 2003 introduced the conditional caution, which may be given by the Crown Prosecution Service to a person who admits the offence and agrees to the stipulated conditions. These may include participation in some rehabilitative, reparative or restorative programme. No clear pattern in the use of conditional cautions has yet appeared, but it is important to note that, whereas the system of reprimands and warnings for youths replaces police cautions, the conditional caution for adults has not replaced police cautions. It remains open to the police to administer a 'simple caution' when they think it fit. Add to this the wide scope that continues to exist, in respect of both youths and adults, for the police to caution people informally for offending behaviour, then English law and practice provides considerable opportunity for diversion from court.

The issues raised by the increase in criminalisation – the conversion of behaviour or conduct into criminal offences and the diminution of the role of the trial as the public forum for processing offenders – lead to a consideration of social power relations and the political role of criminal law. A small insight into the contingency of much modern criminalisation comes from Chris Mullin's diary entry for 17 July 2000 in which he reports a leaked memo from Prime Minister Blair calling for "eye-catching initiatives, [for example] locking up street muggers . . . something tough with immediate bite". Mullin (then a junior Minister) comments (2009): 'No doubt this is the origin of Jack Straw's nasty little Bill to mete out rough justice to football hooligans that is currently keeping us up half the night.' Our focus will be both on economic and political power and on the power which is exercised through particular disciplinary techniques and discourses which generate their own 'truths' and 'knowledges' and which marginalise other ways of looking at the world (Foucault 1979a; Smart 1989, pp. 4–25). Crime is a construct of particular legal and social systems, reflecting temporally and geographically specific interests, imperatives and arrangements. We must ask, then, how responsibility for crime comes to be attributed exclusively to individual offenders rather than (also) to the social, legal and political



systems which define and enforce criminal law. For what reasons and under what circumstances are people drawn into the criminal process, and why is it that in our society the vast majority of crimes which are 'cleared up' are committed by young men from socio-economically and otherwise disadvantaged groups? What do patterns of criminal enforcement and the disproportionate focus, for example, on young black men tell us about our society as a whole? Without some appreciation of the answers to these questions, and of the broad vectors of power which shape patterns of criminalisation, we cannot begin to grasp the social meaning of criminal law. Yet criminal law scholarship has been even slower than has criminology to address the structural relevance of factors such as gender, race and class:

Donald Nicolson 2000 'Criminal Law and Feminism' in Nicolson and Lois Bibbings (eds.) *Feminist Perspectives on Criminal Law* (Cavendish), pp. 1-2

Crime and society's responses to it, like virtually all social phenomena, are heavily influenced by issues of gender. Gender distinctions are made in deciding what activities are criminal. Gender significantly affects who commits crimes and what crimes they commit. Those involved in enforcing the criminal law... are influenced by gender in deciding who might have committed crimes, who ought to be prosecuted, whether they are, in fact, guilty and how they should be punished. Gender stereotypes underlie the application and even the formulation of core criminal law concepts, such as *actus reus*, *mens rea* and the various defences to liability.

Yet, until relatively recently, the gender dimension to crime has been ignored. Traditionally, criminal law has been analysed and taught as if its rules are gender blind and as if the gender of both the victims and perpetrators of crimes is irrelevant to the way the law is applied...

Only in the last 30 or so years have feminists begun to uncover the 'maleness' of criminal law and the way in which it frequently discriminates against women as defendants or fails to provide adequate protection against male violence and sexual abuse. In many cases, the feminist critique of specific areas of criminal law tied in with early analyses of law and patriarchy, focusing primarily on areas of obvious concern, such as rape and prostitution... Later, a more sophisticated critique of criminal law developed when feminists discovered that even those areas of criminal law which are not directly based on sex differentiation (like prostitution law) or deal with issues of crucial importance to women (like rape law) are premised upon assumptions about gender. As a result, even when ostensibly gender-neutral, the formulation or actual application of criminal law may, in fact, discriminate against women defendants or, even when they do not, reinforce sexist stereotypes about appropriate female and male behaviour... Even more subtly, it was discovered that, behind the apparent gender neutrality of core criminal law concepts... a complex process occurs whereby actors in the criminal justice system make different assumptions about female criminal behaviour. Thus, in her path-breaking book, *Justice Unbalanced*, Hilary Allen

demonstrated how such actors concentrate on the external appearance of male criminal behaviour – on the assumption that it is rationally chosen – whereas with women, the focus is on their internal motivations – on the assumption that their criminality emanates from pathological states of mind . . . This work showed that female criminals are generally treated by the criminal justice system (and wider social discourse) as either mad or bad. What Allen thus illustrated was that, while the denial of rational agency to female defendants frequently worked to their advantage, it dangerously reinforced stereotypes of women as inherently irrational and passive and, hence, as disqualified from fully legal and civic subjecthood.

[p. 25] The criminal legal subject is male. Men commit the majority of crimes and are far more likely to be charged, convicted and punished. As a result, it is their behaviour which informs the norms of criminal law and the response of actors in the criminal justice system. Equally, the law treats them as legal subjects by recognising the rationality and autonomy of their actions . . . [C]riminal law tends to portray women as passive victims whose agency and autonomy is effaced by the focus on the perspective of male defendants. And, when women themselves appear as defendants, they are treated as irrational actors, borne along by psychological and external factors or, alternatively, as unfeminine monsters.

To understand these and similar issues, we have to look both at and beyond the criminal process. We must look at a range of powerful institutions and at the distinctive techniques through which they operate. We also need to set criminal law in the context of the rules and practices, the institutional goals, the aims, attitudes and professional preoccupations of the personnel at all stages of the criminal process. We need to ask how these relate to each other and to the criminal law. Does the criminal process make up one coherent whole? (Packer 1968). Or must it rather be viewed as a complex web of institutions and practices which are often pulling in different directions; as a fragmented process, fractured by divergent institutional aims and values? We attempt to answer these questions in the next Chapter.

Yet whilst we do not adopt the formal, ‘internal-legal’ starting point of most texts, we do emphasise the importance of tracing the distinctive procedural and formal logics produced within the doctrine of criminal law itself. A central aspect of the power to define ‘deviance’ is, after all, the distinctive power of criminal law: the way in which legal definition of certain behaviour as criminal operates as an ‘objective’, depoliticised construction of that behaviour as deviant or wrongful. This distinctive power is considered in the next two chapters. By juxtaposing ‘external’ and ‘internal’ analysis of criminal legal practices, we aim to develop a critical perspective whilst maintaining a sharp focus on the intricacies of criminal law conceived as a distinctive member of an interlocking set of social practices.

#### FURTHER READING

Steven Box *Power, Crime and Mystification* (Tavistock 1983).

Robert C. Ellickson *Order without Law* (Harvard University Press 1991), Part II.



- Lorraine Gelsthorpe and Frances Heidensohn, 'Gender and Crime', in Maguire *et al.* (eds.) *Oxford Handbook of Criminology* (Oxford University Press 2007), p. 381.
- H. L. A. Hart *Law, Liberty and Morality* (Oxford University Press 1963).
- D. Husak *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2008).
- Donald Nicolson and Lois Bibbings (eds.) *Feminist Perspectives on Criminal Law* (Cavendish Publishing 2000).
- Carol Smart *Feminism and the Power of Law* (Routledge 1989), Ch. 1.

## Criminal Laws in Context

In this Chapter, we explore in more detail the relationship between criminal law and the social and procedural contexts in which it is invoked, interpreted and enforced. Taking criminal law simply as a set of doctrinal rules is to fail to understand it. Taking the criminal process simply as a given in which criminal law doctrine is developed is to fail to understand both criminal law and criminal process. We note in the first part the existence of a wide array of social methods of defining and dealing with 'deviance', 'anti-social behaviour' or 'wrongdoing'. These include the total set of practices, norms and institutions which seek to shape our attitudes, producing a variety of social norms and directing our internalisation of those norms. We can therefore identify a large number of educative, preventive, coercive and reactive practices which have a relevance to and are in some respects analogous with the formal techniques of criminal law. We then move in the second part to examine how these broad normative systems shape criminal law, before focussing in the third on the institutions, players and practices that collectively enforce criminal law.

Thus before we consider the formal aspects of due process and criminal law doctrine in Chapter 3, we want to consider the criminal justice context, (very) broadly conceived. This will enable us to develop a more sophisticated understanding of how many purportedly central criminal law principles come to be relatively marginal in the practice of criminal justice. We should also consider the ways in which the separation of criminal law from criminal justice and criminal procedure foster the image of criminal law's principled and autonomous nature and, hence, of its legitimacy (Farmer 1997, pp. 8–9; Norrie 2001, Ch. 1). For in understanding how the political legitimacy and perceived effectiveness of criminal justice is managed in contemporary Britain, the criminal process is a more salient focus than the substantive criminal law. Virtually every year for the last twenty years there has been a major piece of legislation, which taken together touch the length and breadth of the criminal justice system, changing the contours, restructuring everything from policing to punishment. Much of this 'binge law-making', as *Private Eye* dubbed it, is so complex that judges have despaired at discovering its meaning (Spencer 2008, p. 585). While large numbers of new offences have been created (estimated at over 3,000 since 1997) these additions to the substance of criminal law have been interstitial and, apart

from sexual offences, have included no major systematic reform of any area of the law.

### 1.2.a. Social norms

Among the most important social institutions in the construction and enforcement of social norms is the *education system*. In Britain, despite the existence of a substantial number of private schools and colleges, the education of children, particularly those under sixteen, is seen as a matter of public responsibility. This is reflected in the fact that such education is compulsory, and in the increasing extent to which the content of school education is specified and monitored by the state. The process of compulsory education involves both explicit and implicit inculcation of cultural values such as honesty, endeavour, respect for others, citizenship, cooperation and (of course) competition – although the extent to which this is so will vary from school to school. The education system constitutes a central strategy in society's practice of socialising its members and producing citizens who have internalised many of the norms embedded in criminal law. At school, children encounter an institutionalised regulatory system, in the form of school rules backed by penalties on breach, and are encouraged to have a docile attitude to this kind of disciplinary technique. From our earliest education, we begin to become accustomed to routine and surveillance which prepare us for submission to legal coercion for the rest of our lives.

Preceding, coexisting with and succeeding our experience of formal education is another fundamental social institution, the *family*. Widely regarded as a sacred 'private' sphere free from coercive state intervention, the family is in fact hedged around with legal regulation, and breaches of the standard norms and conventions of family life render family members subject to state intervention of various kinds, by children being taken into care, welfare benefits being cut, social workers' visits being imposed (Smart 1984). Notwithstanding the diversity of family forms, and the statistical 'abnormality' of the 'normal' two-biological-parent family unit, the hold of the normative stereotype remains firm, and this stereotype informs welfare and other decisions about intervention in a range of aspects of 'private life' (O'Donovan 1993; Collier 1994; Collier 1998; Collier and Sheldon 2008). Where the family is not operating as an appropriate socialiser of citizens (both through the upbringing of children and in terms of keeping adults in conventional social and gender roles), the state is not so reluctant to step in as liberal ideology would suggest. What is more, both through the development of affective ties, and through more explicitly disciplinary techniques such as parental discipline, the family itself acts as a regulatory mechanism. It also constitutes a site for the operation of other disciplinary mechanisms such as psychiatry and social work (Donzelot 1980). The direct relevance of family situation to criminal enforcement is demonstrated by reliance on information about background (and indeed school reports) in sentencing young offenders, and by feminist research which suggests that failure to occupy a conventional

family role (being a single woman, a 'working' single mother, lesbian) invites a peculiarly punitive response in the criminal process (Eaton 1986; Edwards 1984; Jackson 1997). So the legal order presupposes an important control function in the family, formal and informal institutions combining to create a web of socialisation, surveillance and punishment.

Another important social factor in constructing, discouraging and responding to 'deviance' is the *welfare system*; the state system of support for those in need and those filling important social roles such as caring for children. In setting out conditions for assignment of benefits, the social welfare system in effect lays down a model of 'the right way to live'. Those who deviate from this – for example, those who have no fixed address, or who refuse to or are unable to come to a benefit office regularly and punctually, or who refuse to take up work or training – cannot claim or have difficulty in claiming benefit. The welfare system is, of course, just one among many aspects of the *bureaucratic power* of governmental, quasi-governmental and private organisations which, through the work of officials in a wide variety of public or quasi-public bodies (factory inspectorates, HM Revenue and Customs, companies, local government), exerts significant influence over definitions and responses to deviance, in ways which often blur the line between criminal and non-criminal social control (Cohen 1985).

Relevant institutions also include civil law, which provides damages and other remedies in tort and contract and statutory claims and actions in public law for certain categories of losses and harms. The honesty, reasonableness and fair procedures of public bodies, the non-negligent, responsible behaviour of citizens, the honest and reliable dealings of contracting parties and a long list of other matters are defined and may be enforced by non-criminal norms of the legal system, and in many cases the same 'deviant' behaviour may elicit both a criminal and a civil legal response. The line between civil and criminal legal responses has varied over the course of history, and the persisting continuities in form and function between the two should not escape us. This has become more obvious with the introduction of hybrid forms such as the anti-social behaviour order but in itself is not a new development. For example, civil legal regulation is ultimately underpinned by the possibility of coercive enforcement *via* penalties for contempt of court. Furthermore, civil law, like criminal law, plays some part in setting down acceptable standards of behaviour and mutual responsibilities among citizens, even if only indirectly.

Another influential source of social norms is the practice of *religion*. Many different religions are practised in England and Wales, though Christian doctrine is legally privileged in various ways. The Church of England is the established church of the state; under section 7 of the Education Reform Act 1988, collective worship in county schools must be 'wholly or mainly of a broadly Christian character'. By a last-minute political compromise, the Act was amended to allow for separate religious assemblies for non-Christian children. However, criminal laws of blasphemy apply only to Christian religions – an increasingly anomalous position in this multicultural society. The debate of 1989 about

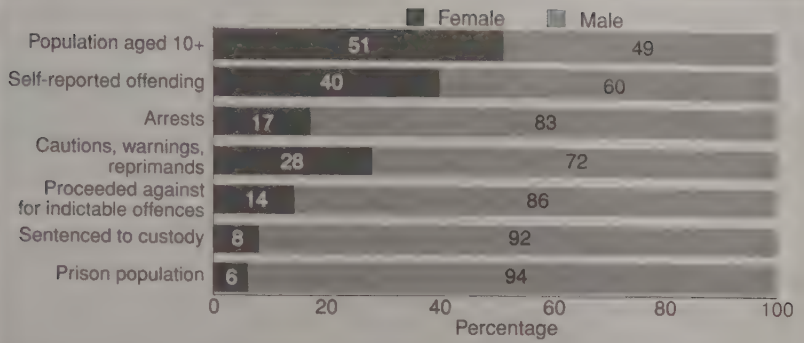


Salman Rushdie's *The Satanic Verses* – a novel regarded as blasphemous by Muslims, which prompted the Fatwa by the Iranian government ordering him to be killed – illustrates the way in which religion can serve as the framework in which broader social questions and divisions (such as those of racism, poverty and cultural intolerance) are fought out. Certain key religious values are propagated, indoctrinated and more or less formally enforced through state education, in the family, through personal faith and membership of faith communities, through media coverage of the pronouncements of leading religious figures, and in terms of political symbolism (religious services on state occasions, the monarch's position as head of the Church of England). Religious practice therefore functions as a social mechanism for defining normal and acceptable behaviour and responding to deviation from it.

More intangibly, but no less importantly, we have the existence of a cluster of and prevailing *cultural assumptions*. These encompass norms concerning the proper conduct of family life, honesty, self-restraint, forbearance from violence, enterprise, effort and so on. As with religion, consensus in a society such as ours is limited by the existence of a plurality of cultures, as well as by the competing interests of groups at different positions in the structure of power relations. In many areas, however, the consensus of one powerful group serves to 'legitimate' particular norms and impose them more generally; some conventional moralities, in other words, become more powerful than others. The status of this plurality of conventional moralities as means of social control and their relationship with the substance of criminal laws can hardly be doubted. One particularly important set of cultural assumptions are those surrounding *sex and gender*, through which male and female, masculine and feminine identities are constructed in strikingly different terms. It is hard to escape the conclusion that a system in which sexual difference is so marked is directly implicated in producing one of the most striking facts about recorded crime: that 80 per cent of it is committed by men against men (Ministry of Justice 2009).

*The Institute for Criminal Policy Research 2009 Statistics on Women and the Criminal Justice System (Ministry of Justice Publication under Section 95 of the Criminal Justice Act 1991)*

The British Crime Survey (BCS) shows that women are much less likely than men to be victims of violent crime. They are, however, the main victims of domestic violence and sexual assault. Female victims of violence are more likely than men to know the perpetrator, who is usually a current or former partner. Female homicide victims are also more likely than male victims to be killed by their present or former partner. The BCS shows that the large majority of incidents of domestic violence and sexual assault go unreported to the police. Of those rape cases that are recorded by the police only one in four results in a successful detection.



Representation of males and females at different stages of the criminal justice process, England and Wales 2006/7.

Notes: Populations figures derived from 2006 ONS Population estimates

Self-reported offending (among sample of 10–59 yrs)

Arrests; Cautions warnings and reprimands; Proceedings; Sentenced to custody (10 years+)

Historically, the consistent pattern has been that women are less likely to offend than men. The overall picture to emerge from the various recent statistics and surveys on offending is that there is a degree of convergence between the sexes in less serious offending but that males remain disproportionately involved in more serious crime.

*Representing the Criminal: Gender and Criminology* (Penny Priddy), pp. 6–7

The most consistent and prominent fact about crime is the sex of the offender. As a rule, crime is something men do, not women, so the denial of the gender question... seems particularly perverse. Sexual difference runs right through the crime statistics – from large-scale corporate fraud to petty property crime; from major to minor crimes against the person. Crime is also something that men are expected to do, because they are men, and women are expected not to do, because we are women. Crime, men and masculinity have an intimate relationship, so intimate that we often fail to see it, and so intimate that it can seem natural. Though the vast majority of men do not enter the official criminal statistics, those individuals who do become known as criminals are usually men... The maleness of crime is true of the United States of America, of Britain, of Australia and indeed of all Western countries. Men are the vast majority of violent and non-violent offenders. They are virtually all of the rapists, they are responsible for the majority of other forms of assault, and they are most of the burglars. They even predominate in that area of crime which is sometimes thought to be the preserve of women: larceny. In view of this remarkable sex bias in crime, it is surprising that gender has not become the central preoccupation of the criminologist, rather than an after-thought... Criminology has been developed and presented as a study of men (by men) and their relation to crime, but it is a study that is uninterested in men (as men) and that fails to recognise the consequent specificity, limitations and underlying assumptions of the discipline.

There is however a contingency about the prevalent view that women have always been under-represented in the criminal process, as Lacey shows here:

Nicola Lacey 2008 *Women, Time and Character: From Moll Flanders to Tess of the D'Urbervilles* (Oxford University Press), pp. 2-3, 9-10

Women's relatively low representation among offenders, and the strong association of notions of criminality and deviance with characteristics culturally marked as masculine, consigned female offenders to the outer margins of the discipline until the pioneering work of feminist writers like Carol Smart in the 1970s. As feminist criminologists noted, women offenders tend to be thought of as weak-minded or mad rather than bad: or, when engaged in behaviour sufficiently subversive of conventional norms of femininity, as 'doubly deviant'. Female offenders also tend to be seen as victims: victims of their hormones, of their circumstances and, sometimes, of men. The idea that choices, agency or reason are important factors in their offending behaviour surfaces implicitly in theories rooted in distinctively gendered opportunity structures, but is rarely emphasised (and here feminist criminologists have sometimes unwittingly echoed the assumptions of the criminological traditions which they criticise). The female gendering of particular defences such as mental incapacity defences like diminished responsibility (as opposed to 'masculine' defences like provocation and self-defence) has also been widely noted. The criminological image of the female offender has often approached the ultimate stereotype of conventional femininity: passive rather than active; driven by emotion rather than reason; moved by impulses located in the body rather than the mind...

In the turbulent history of criminal justice, most criminologists would agree that one of the few constants, across widely divergent societies, is the relatively low representation of women among those accused and convicted of crime. In contemporary England and Wales, for example, women make up about a fifth of known offenders. Though the assessment of crime figures before the inception of public statistics in the early 19th Century is a notoriously tricky matter, the gradual accretion of historical research on local records now allows for some estimates. These suggest that, in England, women made up a relatively small minority of offenders officially proceeded against from at least the 14th Century on. The degree to which the recorded difference reflects specificities of women's behaviour as opposed to different responses to female and male conduct has, of course been debated. And, reflecting the different poles of this debate, the official 'under-representation' of women has in turn been 'explained' in terms of, on the one hand, assertions of female passivity, weakness, incapacity, lack of opportunity, strong socialization to conformity or powerlessness, and, on the other, claims about leniency or 'chivalry' towards women.

In 1981, however, Malcolm Feeley and Deborah Little published what has become an influential paper on 'The Vanishing Female: the decline of women in the criminal process 1687-1912'. The paper presented figures from the Old Bailey (London's principal criminal court) which suggested that the proportion of women charged with felonies dropped from, on average, a hefty 40 per cent in 1680 to a mere 10 per cent by the end of the 19th Century. In the first decade of the 18th Century, women even outnumbered men as defendants at the Old Bailey. Feeley and Little charted a relatively steady decline from the early 18th



Century, albeit punctuated by spikes related to specific social conditions such as war or economic disruption. Similarly high levels of female crime in the late 17th and early 18th Centuries have been reported by other historians working on Cheshire and on the North East of England, while John Beattie's Surrey data also confirms a higher (though less striking) proportion of female property offenders in the areas nearest to London.

One possible explanation for the contemporary startling sex ratio of criminality is that systems of informal social control (by husbands, fathers, teachers, priests and so on) are such that women are generally too well disciplined to breach criminal-legal norms, whereas men, who enjoy greater autonomy and power, are not so effectively informally controlled (Heidensohn 1986). The fact that it is relatively 'normal' for men to offend (and correspondingly 'abnormal' for women to do so) resonates, after all, with differences which are established very early in life, the association of boyhood with naughtiness and girlhood with compliance being reflected in the description of disobedient or independent-minded girls as 'tomboys' (Cain (ed.) 1990). Another explanation has to do with women's significant involvement as positive agents of social control – notably in their continuing position as the primary socialisers of children. These arguments sidestep the spectre of women's liberation as promoting female crime, and suggest that we should shift our perspective and ask whether men's socialisation and informal control should be made more akin to that of women, and whether this would result in a reduction of male crime. But these accounts beg questions about how sex roles and controls come to be constructed and imposed in the first place. Furthermore, it seems doubtful that we would want to extend a process of informal control which is, in many ways, oppressive. The debate underlines the depth and complexity of the social processes and conditions which underpin the practice and impact of criminal justice.

The impact of cultural assumptions about *race and ethnicity* on the criminal justice landscape is just as stark. On the one hand, the spectacular failure of the prosecutions in the Stephen Lawrence and subsequent cases (MacPherson Report 1999), as well as growing evidence of racially motivated violence, has raised grave concerns about the capacity of the criminal process to deliver justice to members of ethnic minorities. *Statistics on Race and the Criminal Justice System* published by the Ministry of Justice under section 95 of the Criminal Justice Act 1991 reveal a total of 42,551 recorded instances of racially aggravated offences in 2006/7 of which half were offences of harassment (Ministry of Justice 2008, Table 3.2, on these offences, see further Chapter 6.d.). On the other hand, both the threat of international terrorism and political concern about illegal immigration have reinforced stereotypes about the association of criminality with certain ethnic identities. Ministry of Justice figures show a statistical over-representation of black people at every level of the criminal justice system: while black (as distinct from Asian) people make up 1.8 per cent of the population, they account for 15.9 per cent of stops and searches; 9.6 per cent of arrests;



6.4 per cent of cautions; and 11 per cent of the prison population. Or put another way, black people are seven times more likely than white people to be stopped and searched, and 3.6 times more likely to be arrested (Ministry of Justice 2008, Table A). We further discuss questions of ethnicity and criminal justice in relation to policing in Part c. of this Chapter.

The *media and popular culture* are influential in portraying images of criminal justice, through television, newspapers, the radio, the internet and magazines (Ericson, Baranek and Chan, 1987; Sparks 1994; Reiner 2007a). Norms produced and practised in other institutions such as family, church and school are publicised, underlined, exemplified in a never-ending series of morality plays (soap operas), (selective) representations of reality (the news) and many other forms of media production which themselves present competing versions of social reality. Not only are the various parts of the media important as means of conveying ideas and arguments about law reform, they also influence perceptions of how threatening crime is, what kind of crime is prevalent, and what should be done about it. Media involvement in producing social images of both perpetrators and victims of crime and of institutional responses to crime (images which are often far removed from empirical reality) has a long history. In the nineteenth century, broadsheets telling stories of notorious crimes would be circulated, rather like the modern 'True Crime' magazines; today, *Crimewatch* and other broadcasts not only propagate images of crime but also encourage viewers to take an active role in providing information to the police. Novels, short stories, folklore, myths and other features of popular culture are also implicated in producing popular images of crime. The media is both a means of disseminating the other influences we have mentioned, and a source of power itself. Those who control the media have substantial influence over social beliefs about how much crime exists, what kind of crime it is and how seriously it should be viewed; who does it, to whom it is done, and the extent and adequacy of institutional responses to it. Who controls media channels, the extent of their accountability, and the means whereby particular parts of the media come to wield power and influence are therefore important questions for students of criminal law.

Finally, physical responses to the possibility of deviance in the form of *environmental design and technology* are an increasingly significant part of the social context in which criminal justice operates. One of the most spectacular examples of such physical embodiments of discipline is Bentham's design for the Panopticon prison, in which prisoners would be constantly open to surveillance, yet unable to tell when they were under observation (Bentham 1843; for an influential analysis, see Foucault 1979, pp. 195–228). Such techniques reach out from the penal process and influence the design and planning of the environment: street lighting to make crime visible; housing estates with units overlooking each other and communal areas to increase visibility; similar designs applied to shopping precincts; open plan offices; the technology of (and media campaigns for the use of) locks and strong doors and windows;

surveillance cameras as an almost standard feature of supermarkets, department stores, shopping malls, stations and roads; 'spy-holes' in outer doors of domestic houses. Sociologists have reflected critically on the 'punitive city' which we have created, linking the growth of general surveillance and our tolerant attitude towards it with the criminal justice development towards both 'community corrections', the policing of 'problem populations' as opposed to particular offenders (Matthiesen 1983; Scull 1983; von Hirsch et al. 2000), and the development of a 'culture of control' oriented to the management of an increasingly 'exclusive society' (Garland 2001; Young 1999). Conversely, they have linked the increased emphasis on 'situational' crime prevention with an increasing governmental tendency to individualise or disperse responsibility not only for crime itself but for avoiding victimisation, drawing our attention to the implications of this political framework for those individuals or communities who cannot afford elaborate preventive technology and who risk being held responsible for their own victimisation. In the context of the criminal process, it might therefore be argued that the focus of criminal law doctrine on responsibility as founded in 'capacity' considered in the last section is being replaced by an increasing focus on criminality as founded in 'character' or social position (Lacey 2001a). These developments are assisted by other technologies, such as computing, which facilitate the collection of the huge amounts of information generated by electronic surveillance and the creation of offender profiling as a tool of policing and policy construction. Some commentators have argued that the very boundaries between 'crime' and 'anti-social behaviour', between the processes of criminal justice and social control are becoming blurred in a disturbing and possibly irreversible way (Cohen 1985) – a trajectory confirmed by the invention of 'anti-social behaviour orders' under the Crime and Disorder Act 1998 (see Chapter 5.d.). These developments call into question the assumption that criminal justice is exclusively the domain of the nation state.

These practices, systems and techniques, along with many others, combine to create a complex web of social governance. It is in these contexts, as well as those of the criminal process and of criminal law doctrine, that we must approach criminal law and its system of punishment. As Garland argues below, the relationship between these broader social and cultural factors and the concrete arrangement of the criminal process is complex, but intimate:

David Garland 2001 *The Culture of Control* (Oxford University Press), pp. x–xi

My argument is that our contemporary crime control arrangements have been shaped by two underlying social forces – the distinctive social organisation of late modernity, and the free market, socially conservative politics that came to dominate the USA and the UK in the 1980s... [P]olitical actors and government agencies – police forces, prosecution agencies, courts, prisons, government departments, elected officials – were confronted

with a new set of practical problems in their daily operations. Their problems chiefly flowed from the prevalence of high rates of crime and disorder in late modern society and the growing realization that modern criminal justice is limited in its capacity to control crime and deliver security... The odd fact that punitive 'law and order' politics have co-existed, in both countries, with an entirely different strategy – of preventative partnerships, community policing and generalized crime prevention – is explained by reference to the public's ambivalence about crime and crime control: an ambivalence that gives rise to quite divergent forms of action. The sensibilities that characterize this popular culture do not stem from media representations or political rhetoric though these have a shaping effect. They originate in the collective experience of crime in everyday life and the practical adaptations to which it eventually gave rise...

My analysis suggests that although the structures of criminal justice have changed in important ways in recent decades, the most important changes have been in the cultural assumptions that animate them... [A] new crime control culture has emerged that embodies a reworked conception of penal-welfarism, a new criminology of control, and an economic style of decision-making. The roots of today's crime control arrangement lie in the character of contemporary social organisation and the political and cultural choices that have been made in relation to it.

### 1.2.b. Shaping criminal law

In contextualising criminal law doctrine we began this Chapter at a broad level of generality, describing important but taken-for-granted ways in which norms develop. We move now to consider the means by which, in some cases, these norms convert to criminal offences. This approach, unlike the one we will develop in Chapter 3, is not an internal analysis of criminal law's structure or content, but rather an external, social science analysis of the process of its creation and the groups who have the power to define and develop it. In other words, we will attempt to unravel the ways in which definitions of crime are socially produced.

We begin in what may appear a counter-intuitive place: with ordinary members of the public. At first sight, it might appear that private citizens have little impact on the shape of criminal law. This, however, is far from true. Both in terms of the developing definition of crime and in terms of its enforcement, the intangible phenomenon of 'public opinion' and, perhaps more importantly, perceptions of that phenomenon, are enormously influential. The politicians who are involved in the legislative process are ultimately accountable to the populace and are therefore liable to be influenced by what they think are prevailing opinions. This fact is well illustrated by the populist approach of both the Conservative Michael Howard, Home Secretary between 1993 and 1997, and his Labour successors, David Blunkett and Jack Straw (later to become the first Secretary of State for Justice and also Lord Chancellor following the departmental reorganisation in 2007) who in their different ways exploited the



popularity of tough 'law and order' policies in the face of both judicial and other expert criticism. Judges, too, often find it useful to appeal to 'public opinion' (in the form of fear, anxiety or disgust at, or sympathy for, a particular crime) to justify a particular legal outcome. This is especially so in the area of sentencing, where judges have more overtly acknowledged discretion than in many other aspects of their formal function (see Part c.v. below). Furthermore, those who apply criminal law in the vast bulk of cases are magistrates, whose (mainly) amateur status is sometimes seen to invest them with the authority to embody 'public opinion' and hence with a kind of popular legitimacy, despite their unrepresentative class, ethnic and gender composition (Carlen 1976). In one of the many contradictions or paradoxes in the criminal justice system, the rhetoric of trial by one's peers breaks down when one considers that there are 200 professional magistrates (District Judges), indeed in London the majority of hearings may be before one of these (Morgan and Russell 2000). 'Public opinion' is also at work in the fact that a jury may occasionally 'perversely' refuse to convict if the law is too far outside their common-sense conception of what is reasonable. The converse risk – that a jury may be more inclined to convict if the alleged offence is one which elicits particular revulsion – also exists, as several of the recent miscarriage of justice cases testify.

There is, however, a yet more fundamental sense in which the definition of crime is driven by popular opinion. The vast majority of law enforcement is initiated by public complaint and information. The views of members of the public about what is 'real' crime – crime which is worth reporting – and our very willingness to label certain behaviour a crime at all therefore directly affect patterns of enforcement and, in turn, public perceptions about the nature of the 'crime problem' (Lacey 1994a and 1995; on levels of fear of crime, see Hough 1995; Downes and Morgan 2007). The disillusionment and consequent unwillingness of sections of the public to participate in the criminal process by making complaints should also be borne in mind, for this too has its effect on the social production of crime. Key examples would be some classes of victims of crime such as those subject to rape and domestic violence and members of ethnic groups, who have a variety of reasons for placing low levels of trust in the system. A complex process of construction and reinforcement, in which news media have an important role, produces public opinion about criminal law: both public opinion and beliefs about it are in turn crucially important to criminal law's development and enforcement.

Criminological literature and government surveys speak of the 'dark figure' of true crime, far larger than the figure of reported and recorded crime, let alone than that of crime which is 'cleared up'. It is, of course, difficult to get any idea of what this 'dark figure' might be, not least because of the fact that behaviour has to be *interpreted* as coming within a criminal definition rather than merely *pre-existing* as 'criminal'. Surveys of victims of crime and self-reports of offenders such as the British Crime Survey, however, can give us supplementary pictures taken from particular vantage points (Kershaw et al. 2001). The Home Office



now undertakes such a survey on a regular basis; the Home Office suggests that less than half (41 per cent) of BCS crime is reported to the police (Home Office 2009).

The issue is further complicated by various practices used by the police in order to boost clear-up rates, such as getting offences 'taken into consideration' at trial, and securing 'confessions' to unsolved crimes from convicted offenders in prison. The police, as we show in Part c. below, must be regarded as one of the key filters in selecting crime which becomes the subject of the criminal process and hence the focus of media and popular attention. The attrition rate is stark. Taking the British Crime Survey as the baseline of 100 per cent, 45.2 per cent of crimes are reported to the police, 24.3 per cent are recorded by the police, 5.5 per cent are cleared up, 3 per cent result in a caution or conviction, 2.2 per cent in a conviction and 0.3 per cent in a custodial sentence (Home Office Digest 4 1999). But the baseline itself excludes crimes which do not have a victim (drugs offences) or where the victim does not realise there has been a crime (some frauds); nor does it include health and safety offences (see generally Home Office 2009).

Paddy Hillyard and Steve Tombs 2008 'Beyond criminology?' in Danny Dorling et al. (eds.) *Criminal Obsessions. Why Harm Matters More than Crime* (Centre for Crime and Justice Studies)

The term 'crime' always invokes a certain level of seriousness, both popularly and academically. However, the vast majority of events which are defined as crimes are very minor and would not... score particularly high on a scale of personal hardship. The Criminal Statistics for England and Wales illustrates this point. The police record the detail of over 1,000 different criminal events, most of which create little physical or even financial harm and often involve no victim. In addition, many of the petty events defined as crimes are often covered by insurance and individuals are able to obtain compensation for the harm done or, indeed, for harms which either have not occurred or which have been greatly exaggerated. There appears to be some expectation that since the potential harm has been insured against, it is legitimate (and not criminal) to make false claims in order to recover some of the outlay for the costs of insurance.

The inclusion of vast numbers of petty events which would score relatively low on scales of seriousness is not simply a function of the definition of crime in the criminal law. Amongst those events that get defined as crime through the law, a selection process takes place in terms of which crimes are chosen for control by criminal justice agencies, and how these selected crimes are then defined and treated by the courts... Many events and incidents which cause serious harm are either not part of the criminal law or, if they could be dealt with by it, are either ignored or handled outside of it... [c]orporate crime, domestic violence and sexual assault, and police crimes are all largely marginal to dominant legal, policy, enforcement, and indeed academic, agendas. Yet all are at the same time creating widespread harm, not least amongst already disadvantaged and powerless people.

[T]he undue attention given to events which are defined as crimes distracts attention from more serious harm. But it is not simply that a focus on crime deflects attention from other more socially pressing harms; in many respects it positively excludes them. This is certainly the case for harms caused by corporations or by the state. For example, in the context of 'safety crimes', recorded occupational injury amounts to over one million workplace injuries per year in Britain; but restriction to the term 'crimes' means making reference to just 1,000 or so successfully prosecuted health and safety offences.

There are also many interest and *pressure groups* which lobby and campaign for changes in specific areas of criminal law. For example, women's groups such as the Fawcett Society and Women against Rape have argued on issues such as abortion, pornography, prostitution and sexual offences; organisations such as Liberty and Justice are regular advocates of criminal law reform as, more officially, are the Law Commission, Royal Commissions, the Equality and Human Rights Commission, and public inquiries; banks and other commercial bodies have an interest in the reform of laws such as those on fraud; the police have views about matters such as extending public order laws, the scope of their own powers and rules of evidence and procedure; doctors and psychiatrists make proposals about defences such as insanity and diminished responsibility. Clearly, some of these views and groups are more influential than others, and the extent of each group's influence is itself an index of power relations in society. But they all form part of the social and political climate within which criminal law is created, applied and developed, and have a bearing on the views of those who have the final say in that application and development. For example, it is interesting to speculate whether the campaigns of various women's groups on rape law reform and on the partial provocation defence to murder would have been brought forward when they were (2003 and 2009 respectively) were it not for the strongly feminist women in government positions (Baroness Scotland – Attorney General, Vera Baird – the Solicitor General, Harriet Harman – Leader of the House of Commons and Bridget Prentice – the Justice Minister).

It is important to consider the various official groups involved in the creation and interpretation of criminal law. Here the most obvious groups are the legislature, judiciary and magistracy and their clerks who define, create and apply law directly. The lawyers who select, edit and write headnotes for the small proportion of cases which come to be reported also have considerable influence over the development of the system of precedent. Even though most criminal law is now in statutory form, the judges retain significant interpretive power. This interpretive power is difficult to distinguish from the creative power the existence of which judges are generally concerned to deny; it is particularly evident in the significant fields of criminal law still governed by common law – homicide, participatory liability and the 'general part' – and in cases in which criminal law is challenged on the basis of relatively open-ended human rights standards. Beyond the judiciary, magistracy and legislature, the professional

and socio-economic status of many other interest groups gives them an influence over the development of law. Among such groups are lawyers who argue in court, selecting among possible postures and interpretations; parliamentary drafters; members of and those making representations to reform bodies such as the Law Commission; and academic commentators, both by participating in reform projects and through their published views on disputed questions of law, which are occasionally cited and adopted by judges.

To draw this together we can conceive of crime and criminal law as planets in constant motion from shifting, mutating, social, political and cultural forces. We can interpret and explain through many different lenses as we have shown. But one thing is clear. Criminalisation has accelerated over the last half century. Husak shows how the creation of more and more criminal offences leads to an increase in police discretion which ultimately poses a threat to the rule of law. Although his examples are drawn from the US the argument applies equally to the UK.

*Douglas Husak 2003 Overcriminalization: The Limits of the Criminal Law (Oxford University Press), p. 26*

I cite here just three examples of how the expanding net of criminal liability threatens to ensnare us all... First and perhaps most notably, about 90 million living Americans have used an illicit drug, an activity for which many could have been sent to prison if detected and prosecuted. Even occupants of our highest offices have engaged in felonious drug use;... Second, astronomical numbers of young adults have engaged in music piracy. According to some estimates, 52 per cent of Internet users between the ages of 18 and 29 commit this crime by illegally downloading approximately 3.6 billion songs each month... Internet gambling provides my final example of the ubiquity of criminal behavior. Millions of citizens in the United States place bets from their home computers on Internet casinos. The law on this phenomenon is in a state of flux. Under existing statutes, individuals who gamble online are not guilty of any crime... The ownership of offshore Internet casinos that do business in the United States includes many of the most prestigious investment firms in the world: Fidelity, Merrill Lynch, Goldman Sachs, Morgan Stanley, and others. It is hard to see why these investment companies are not punishable for aiding and abetting these illegal activities. Only prosecutorial discretion prevents criminal liability from extending to the highest reaches of mainstream society. As these examples show, what tends to characterize many of us who have evaded punishment is not our compliance with law but the good fortune not to have been caught, the discretion of authorities in failing to make arrests or bring charges, or the resources to escape criminal penalties in the event we are prosecuted.

Only prosecutorial discretion prevents criminal liability from extending to the highest reaches of mainstream society... [W]hat tends to characterize many of us who have evaded punishment is not our compliance with law but the good fortune not to have been caught, the discretion of authorities in failing to make arrests or bring charges, or the resources to



escape criminal penalties in the event we are prosecuted. [T]he substantive criminal law itself rarely functions to define prohibited conduct or the consequences of disobedience. Instead, statutes are mainly 'a means of empowering prosecutors' they serve 'as items on a menu from which the prosecutor may order as she wishes.' [William Stuntz: 'Plea Bargaining and Criminal Law's Disappearing Shadow' (2004) 117 *Harvard Law Review* 2548, 2549]. . . Criminal statutes are so pervasive that prosecutors have little choice but to decide which crimes are worth enforcing and which are not. The factors that contribute to the laws prosecutors will enforce and the sentences they will seek through plea bargains include 'voters' preferences, courthouse customs, the prosecutor's reputation as a tough or lenient bargainer, [and] her own views about what is a proper sentence for the crime in question.' Obviously, these variables will differ from case to case. Whatever their motivations may be, Stuntz concludes that prosecutors rather than legislators are 'the criminal justice system's real lawmakers' . . .

What is worrisome about delegating so much authority to prosecutors? Surely the objection cannot be that prosecutors fail to use their power to punish even more individuals than are sentenced at the present time. From the perspective of a legal philosopher, the answer is simple. Even when exercised wisely, this discretionary power, unchecked and unbalanced by other branches of government, is incompatible with the rule of law. This deterioration in the rule of law produces injustice. Because real power in our criminal justice system is not exercised in conformity with any principle that commentators have been able to formulate, no one is able to answer the question that legal realists like Oliver Wendell Holmes identified as fundamental to understanding what the law is. According to Holmes, the law consists in 'prophecies of what the courts will do in fact, and nothing more pretentious.' Without endorsing the whole school of jurisprudence Holmes sought to defend, he clearly articulated the central concern of laypersons who make inquiries about the law. Holmes recognized that experts who profess to know the law should be able to make a fairly accurate 'prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court.' But these predictions become notoriously unreliable in a system in which real power, and the decisions that govern the fate of individuals, is wielded with so much discretion.

### 1.2.c. Constructing crime: processing suspects and offenders

Frequent reference has already been made to 'the criminal process'. But what is it? One thing we can say for sure is that it consists of complex, overlapping and interlocking institutions, professional groups, policies and practices. These practices operate on the basis of more and less formal systems of norms which govern the identification, pursuit, prosecution, trial and sentence of a selection of persons who are alleged to have committed crimes as defined by criminal law. Many of the features thought to be crucial to and distinctive of criminal law, given its importance and coercive methods, are notoriously absent from the practice of criminal justice. These features include the (formal) burden on the state to prove guilt beyond reasonable doubt, the adoption and



announcement of standards in advance, and the quest to promote certainty and curtail discretion. Conversely, issues which are systematically obscured by the abstract individualism of criminal law doctrine – issues such as ethnic, gender and socio-economic patterns of criminalisation – become glaringly obvious when we examine the operation of the criminal process. We can do no more than give an introduction or an overview of these different elements; the subject, like criminal law in its substantive forms, is vast and constantly changing.

### 1.2.c.i. Institutions, people and practices

The official account (from the government's CJSonline website) goes thus:

The Criminal Justice Service employs 400,000 staff across six agencies: the Police Service, the Crown Prosecution Service, Her Majesty's Court Service, The National Offender Management Service (comprising prisons and probation) and the Youth Justice Board. Three Government Departments oversee the Criminal Justice System:

The Ministry of Justice (MoJ): responsible for criminal law and sentencing, for prisons and probation, and oversees Magistrates' Courts, the Crown Court, the Appeals Courts and the Legal Services Commission.

The Home Office: responsible for crime and crime reduction, policing, security and counter-terrorism, borders and immigration, passports and identity.

The Office of the Attorney General: oversees the Crown Prosecution Service, the Serious Fraud Office and the Revenue and Customs Prosecutions Office.

The Office for Criminal Justice Reform (OCJR), a cross-departmental organisation, is responsible for coordinating all three departments. Other government departments also have an interest in criminal law and justice. The Department for Business Innovation and Skills for example is closely engaged in policy in respect of crimes against, and by, business.

The Home Secretary and the Secretary of State for Justice between them cover the core policy areas in relation to crime, policing and criminal law. The office of Lord Chancellor, once a powerful combination of judicial and executive roles, has been significantly altered by the Constitutional Reform Act 2005, and has, since 2007, been amalgamated with that of Secretary of State for Justice. The line between judicial and executive functions remains blurred. It was challenged successfully in relation to life sentences in the European Court of Human Rights (*Benjamin and Wilson v. UK* 2002; *Stafford v. UK* 2002; *R v. Secretary of State for Home Dept ex parte Anderson* 2002). But the powers of the Attorney-General (a member of the government) and the *Director of Public Prosecutions* include the exclusive power to allow prosecutions to be brought in certain circumstances (for example, offences involving racial hatred under Part III of the Public Order Act 1986 may only be prosecuted with the Attorney-General's consent), the power to stop prosecutions and to order them, and

the responsibility for bringing certain prosecutions in the public interest. These powers render them an important focus in analysing the criminal process. The Attorney-General's status as a political appointee gives a special significance to his or her actions and decisions, evidenced when he intervened to stop the prosecution of BAE Systems for bribery in 2006 (see *R (on the application of Corner House Research) v. Director of the Serious Fraud Office* 2008).

As head of the Criminal Courts, the *Lord Chief Justice* has responsibility for the administration of criminal trials and for judicial sentencing policy (the role of the Sentencing Guideline Council is explained below in Chapter 2.c.v.). Furthermore, the Lord Chief Justice (in consultation with the *Lord Chancellor*) controls any empirical research into sentencing practice which requires presence in court or the cooperation of court personnel. Lord Lane's influence in reorganising the Criminal Courts and his personal involvement in sitting regularly in Crown Courts during his term as Lord Chief Justice in the 1980s illustrates the significance of the Lord Chief Justice's position for the development and administration of criminal law. Lord Lane's activist precedent has been followed by his (very different) successors, Lords Taylor, Bingham, Woolf, Phillips and Judge – all of whom have been vociferous critics of government criminal justice policy, particularly in the field of sentencing, in the House of Lords and other public fora covered by the news media.

A number of professional groups and lay participants are involved in the day-to day processing of crime. We discuss them below as follows:

2.c.ii. *Investigating crime: the police*

2.c.iii. *Prosecuting crime: prosecutors*

2.c.iv. *Constructing crime in the trial: lawyers, magistrates and juries*

Apart from the various legal personnel and lay participants such as magistrates and jurors, several different groups of *experts* are often involved in (and have views about and interests in the outcome and conduct of) the trial. Probation officers and social workers may be involved in giving evidence and/or in preparing 'pre-sentence reports' which build up a picture of the defendant's history and personality for sentencing purposes. Doctors and psychiatrists may give evidence of the defendant's current or past mental state, make prognoses of her likely future physical and mental health or make expert comment on the facts which constitute the basis of the allegation; this evidence may be relevant at conviction or sentencing stages. Forensic experts may give crucial evidence relating to the defendant's guilt or innocence: as we will see, the work of the Forensic Science Service came under particularly adverse scrutiny in recent miscarriage of justice cases. The need for proper management of this area is pressing given that it is likely to increase in significance as developing technologies allow the production of new forms of evidence such as DNA fingerprinting. School teachers, family friends, former employers may give character references going to the defendant's credibility or relevant to sentencing and may become involved in mediation or other restorative justice practices. Psychologists may

give assessments of personality and level of intelligence. We could multiply this list of 'experts' with a role to play at various points in the trial process (and of course in the preparation of the case by lawyers and prosecutors). The occupational aims and values of these experts vary: they all have different professional and institutional 'axes to grind'. Thus they bring communication problems and further conflicting objectives (not to mention conflicting egos and reputations, especially where two expert witnesses in the same field are called by prosecution and defence) into the courtroom and the criminal process (Bennett and Feldman 1981). Uncritical reliance on the opinion of medical experts in cases of sudden infant deaths led to miscarriages of justice in some cases.

Celia Wells, 'The Impact of Feminist Thinking on Criminal Law and Justice: Contradiction, Complexity, Conviction and Connection' [2004] *Criminal Law Review* 503, 511

Sally Clark was convicted in November 1999 of murdering her two infant sons. One had died in 1996 aged 11 weeks. The second had died in 1998 aged 8 weeks. Her first appeal was turned down in 2000. Following a referral two years later by the Criminal Cases Review Commission the Court of Appeal overturned her conviction in 2003. [Clark 2003] Angela Cannings was convicted in 2002 of murdering two of her children. They too had died in infancy (as had a third). Her appeal was allowed earlier this year. [Cannings 2004] Clark's appeal turned on evidence of serious non-disclosure by the Crown's pathologist and the potentially misleading statistical evidence of consultant paediatrician Professor Roy Meadow. Had the undisclosed evidence not come to light (or rather had it not been unearthed by the dedication and persistence of Clark's husband) both she and Cannings might still be in jail. In some ways it is hard to think of a worse miscarriage of justice. Not only were they not guilty, there was not even a crime in the first place... The cases disclose a degree of gullibility in the system as a whole that can not be explained simply by referring to isolated pieces of ill fitting evidence, wrong inferences, statistical errors or dubious theories. Misplaced faith in medical certainties combined with a willingness to assign blame for unexplained events, in particular to attribute blame to women despite the absence of evidence to support the inference.

*Victims* of crime are one group whose role is vital yet often overlooked. Victims have been accorded much greater formal involvement in the criminal justice process in the last twenty years. Somewhat paradoxically, victims were for a long time allowed only a shadowy role in the criminal process. Homicide victims of course had no choice but strangely victims who were still alive and well were treated as just another type of witness (Shapland et al. 1985; Maguire and Pointing 1988; Mawby and Walklate 1994; Zedner 1997). Their position both as reporters of crime to the police and as crucial witnesses at many trials, as well as their symbolic importance even at trials from which they are absent (notably homicide trials) cannot be ignored. Moreover, they have an actual and potential role as receivers of compensation and restitution, both from the



offender and from the state under the Criminal Injuries Compensation scheme (amended in 1995), as recipients of the attention of victim support schemes, and as participants in schemes of conciliation and mediation involving offenders. All relevant government agencies concerned with the criminal process are now under a statutory duty to provide services to victims in accordance with the Code of Practice published under section 32 of the Domestic Violence, Crime and Victims Act 2004 (Office of Criminal Justice Reform 2005).

Victim impact statements (called Victim Personal Statements) have, controversially, become an integral part of the sentencing process. Introduced via a Home Office Circular in 2001 these voluntary statements become part of the case papers available to the police, the Crown Prosecution Service, the defence, and the magistrates and judges at trial (Edwards 2002). Witness support programmes are an important part of the increasing recognition that victims are entitled to more than a side role in the criminal process. There are now 165 Witness Care Units across England and Wales (Hoyle and Zedner 2007, p. 475).

The restorative justice movement does not fit so well with the government's rhetoric of a 'war' against crime. The war metaphor suggests that the antagonists need to face each other in a ritualised encounter, not sit down with a cup of tea and discuss what they have in common. Restorative justice provides an alternative route which involves a conference with the victim and the offender and representatives of the community, leading ideally to a negotiated settlement and formal apology. In the area of youth justice, steps were taken towards this kind of restorative and victim-integrating diversion from the formal criminal process with the creation of Youth Offender Panels under the Crime and Disorder Act 1998, which drew on several other programmes, including Scotland's Children's Hearing system and New Zealand's family group conferences for young offenders (Crawford and Newburn 2002). The government has sponsored three trial schemes which have been evaluated but as yet there has been no commitment to extend them more widely (see Home Office 2003 and Shapland et al. 2008). As these examples show, the position of the victim lies at the crux of questions not only about the relationship between civil and criminal law but also about the relentless politicisation of criminal justice policy.

### 1.2.c.ii. Investigating crime

The *police*, on any account, are central to any consideration of criminal law and justice. They play a significant number of roles in the enforcement of crime. Increasingly extensive powers have been bestowed upon them in maintaining public order and the investigation of crime. What those powers consist in, and the way in which they are exercised, are of central concern to a study of criminal law. It is important to recognise however that there are many other bodies that investigate crime such as the Serious Fraud Office and the Serious Organised Crime Agency (SOCA), an intelligence-led agency dealing with Class



A drugs, organised immigration crime, fraud against individuals, high-tech crime, counterfeiting, firearms, serious robbery and recovery of the proceeds of crime created in 2006 (which we discuss in Chapter 13).

Before examining their formal powers in more detail, we look first at the role of the police in determining levels of recorded crime – which determines those who will end up convicted of offences – and at different styles of policing. At a general level, the police have considerable influence over the shape of detected criminality because of their ability to make managerial decisions about the style of policing, the distribution of limited resources for detection, surveillance and investigation, and the balance to be struck between investigation, conciliation, surveillance and community involvement. These decisions are circumscribed to a limited extent by principles of administrative law. But the way in which the police perceive their role in relation to prevailing ‘crime problems’ directly influences how they respond to information and complaints from the public, and hence what kinds of and how much crime is recorded and investigated and thus potentially prosecuted (Reiner 2000; Newburn and Reiner 2007). Of course, there may be considerable local variation in police practice. Although these variations were meant to be reduced once the decision to prosecute was handed to the Crown Prosecution Service in 1986, it is hard to see how this can affect the types of cases submitted to the Crown Prosecutor in the first place.

Attempts to change police attitudes to pursuing cases involving domestic violence and towards the allegations made by victims of rape and racial harassment are recent examples of how the police’s perception of their role, of the characteristics of ‘real’ victims and ‘normal’ offenders, and of the nature of crime may ultimately affect the pattern of enforcement (Morris 1987, pp. 181–7; Grace 1995; Cretney and Davis 1997). However, as the eventual conviction of taxi driver John Worboys in 2009 on nineteen charges of drug-ging and raping women underlines, it is difficult to shift ingrained attitudes to women who report rape. Police received numerous complaints from women, many of which were not recorded; the Metropolitan police arrested Worboys and released him without charge in July 2007 after which he went on to attack another twenty-nine women before he was finally arrested and charged six months later. Thus beyond any broad managerial concerns we can observe that the police daily make specific decisions which also affect enforcement patterns. A brute yardstick of the breadth and significant of police discretion is given by Home Office figures on decisions taken subsequent to the recording of a crime (and only about two-thirds of reports do lead to recording). Of the crime recorded by the police in 2008/9, a mere 28 per cent led to a sanction detection (that is, culminated in a formal process); 14.9 per cent led to a charge or summons; 6.8 per cent to a caution; and 2.2 per cent to the offence being taken into consideration in the context of another prosecution. Within these figures there are large variations depending on the type of crime, nearly half of recorded instances of violence against the person leading to detection compared with less than a sixth of burglary or criminal damage. Drug offences on the other hand

tend only to be recorded when they are discovered by the police and this leads to a 95 per cent clear up (Home Office 2009, Ch. 6).

On-the-street decisions about whether to arrest or question a suspect or pursue a particular investigation; decisions about whether merely to 'caution' or issue a formal warning to a suspected offender, rather than submit a case for possible prosecution; police selection and construction of 'strong cases' through vigorous efforts at collecting evidence (Sanders and Young 2000; Cape and Young 2008); the conduct of interrogation of suspects and witnesses and the eliciting of confessions; decisions about whom to interview; decisions about and conduct of searches for and seizure of evidence and illegally held property; decisions to grant or refuse bail from the police station: all these factors affect the shape and content of the material which will ultimately inform prosecution decisions (Sanders 1997; Sanders and Young 2007; Cape and Young 2008).

It is important to appreciate the institutional complexity of the police: the divergent aims of a force whose goals are as various as its powers. Important preoccupations include improving clear up rates (particularly so as to satisfy auditing criteria set by central government); satisfying public opinion and in particular local feeling; keeping peace in the local community; presenting itself as an efficient and modern force to central government; acting as a pressure group both for more resources for policing and for law reform; and asserting directly the authority of the state by a variety of coercive techniques ranging from reactive policing through to proactive management of risks through methods such as electronic surveillance (Regulation of Investigatory Powers Act 2000; see Akdeniz et al. 2001). These potentially conflicting aims are matched by tensions and complexities in the professional ethic and self-image of a body which is still expected to fulfil the role of 'friendly bobby' whilst increasingly engaging in transnational crime control and hi-tech investigations on the basis of computer-assisted offender profiling and holding itself ready to operate virtually as a paramilitary force in moments of civil unrest.

Historically, the practice of policing has been carried out by a diversity of public and private institutions, and it was only in the nineteenth century that a national public police force was instituted. In earlier times, policing was to a significant extent the responsibility of local communities – a situation which bears an interesting resemblance to contemporary developments such as neighbourhood watch (see Crawford 2007). Private security has increased in importance with a wide range of security firms delivering services to both companies and individuals (Johnston 1992; Bayley and Shearing 1996; Jones 2007), as well as to the local and national state through privatisation and the contracting out of formerly publicly provided services. Hence policing, like other aspects of the process of criminalisation and punishment, is far from being exclusively the business of the state. Furthermore, public policing is not the monopoly of the national police: in areas such as customs and excise and public transport, for example, specialist police forces bear primary responsibility. In relation to criminal law, however, the national police force continues to occupy a

distinctively important position, and it will therefore be our focus in the rest of this section.

One persistent theme in recent discussions of public policing concerns the ways in which specific threats of crime – particularly in relation to terrorism – have become influential in driving broader policy on police powers. Just as the industrial disputes of the 1970s and 1980s arguably encouraged a ‘tooled-up’, aggressive style of policing, the experience of policing Northern Ireland during the ‘troubles’ arguably fostered the gradual extension of general police powers: a trajectory which has been given added impetus by recent developments in international terrorism. This close relationship between developments in the style of policing and the experience of particular crime problems is illustrated by the following extract:

P. Hillyard 1987 ‘The Normalisation of Special Powers’ in P. Scraton (ed.) *Law, Order and the Authoritarian State* (Open University Press), pp. 304–6

#### Policing Northern Ireland and Policing Britain.

The first and most important area of similarity has been in the form of policing. There are two dimensions to this. First, the British police, like their North of Ireland contemporaries, have become increasingly militarized both in thinking and in practice . . . British police forces now have at their disposal extensive armouries which not only include lethal weapons ranging from pistols to sub-machine guns but many forces now possess guns to fire plastic bullets and CS gas – two crowd-control weapons which have been used extensively in Northern Ireland. Much of the equipment – flak jackets, steel helmets and plastic visors, leg-guards, plastic shields and batons – which is now available to police in England and Wales is similar to that used for many years in Northern Ireland . . .

Increasingly, British police forces are adopting military styles of policing. As early as 1972 Sir Robert Mark had his 200-strong S[pecial] P[atrol] G[roup] trained in methods used by the RUC, including the snatch-squad method of making arrests, flying wedges to break up crowds and random stop-and-search and road-block techniques. The 1984–5 coal dispute provided the majority of police forces in Britain with the opportunity to develop military methods of policing. Every weekday morning the police organised what amounted to a military campaign against the striking miners. Every day huge convoys of police Transit vans, horse-boxes, smaller vans with dogs and their handlers, and Land Rovers with arc-lights moved into position to confront the pickets. Police tactics ranging from the extensive use of road-blocks to the specific methods of crowd-control clearly owed much to the experiences of policing in Northern Ireland. All the police documents which have become available since the strike reflect military thinking and tactics. They talk of targets, drawing fire, missiles and decoys.

This military style of policing was not some aberration during the coal dispute. As in Northern Ireland, it is now the dominant style of policing and is visible almost daily from policing inner-city incidents to industrial disputes.



The other dimension concerning the form of policing which has parallels to Northern Ireland has been the way in which the focus of police work has increasingly been upon policing people rather than policing crime... Since 1969, this has involved a number of strands: the gathering of intelligence, monitoring and control of people in and out of Nationalist areas and the incorporation of other agencies in what has been called multi-agency policing. In Britain a similar emphasis on policing people has been emerging in recent years; particularly in relation to the black community. But it is not only the black community; many different sections of the population ranging from those who take part in industrial disputes to the travellers have been treated as suspect and subjected to surveillance and techniques of control, many of which are of dubious legality.

Developments towards greater operational autonomy for the police have not, of course, happened in a political vacuum. An accompanying extension of their formal legal powers, whilst not always directly functional or even relevant to many aspects of police actions, which may be extra-legal or illegal, nevertheless gives a clear message to the police that they have the support of the government in the increasingly aggressive (and arguably counterproductive) pursuit of law and order. In suppressing inner city disturbances or quelling picketing, the availability of plastic bullets and riot equipment are far more important than powers of arrest; nevertheless, the society which accords extended legal powers is the same one which sanctions or acquiesces in the cruder accoutrements of police power.

In assessing the significance of policing for the conduct of trials and hence for the ultimate meaning of substantive criminal laws, it is therefore important to take into account the formal, legal powers of the police: 'If the practice of criminal justice does not live up to its rhetoric [of procedural fairness], one should not look only to the interactions and negotiations of those who put the law into practice but to the law itself. One should not just look to how the rhetoric of justice is subverted intentionally or otherwise by policemen bending the rules, by lawyers negotiating adversarialism out of existence, by out-of-touch judges or biased magistrates: one must also look at how it is subverted *in the law*. Police and court officials need not abuse the law to subvert the principles of justice; they need only use it. Deviation from the rhetoric of legality and justice is institutionalised within the law itself' (McBarnet 1981, p. 156).

We have already mentioned the sheer volume and complexity of criminal justice related legislation. Spencer suggests that there have been fifty-seven separate Acts since 1997 (Spencer 2008, p. 586). Policing powers are found in this bewildering array (and no doubt more): the Police and Criminal Evidence Act 1984 (PACE), the Criminal Justice and Public Order Act 1994 (CJPO), the Crime and Disorder Act 1998, the Regulation of Investigatory Powers Act 2000, the Terrorism Act 2000, the Criminal Justice and Police Act 2001, the Anti-terrorism, Crime and Security Act 2001 (ATCSA), the Serious and Organised Crime and Police Act 2005 (SOCPA), the Prevention of Terrorism Act 2005,



the Terrorism Act 2006 and the Counter Terrorism Act 2008. There is no doubt that these Acts have added significantly to the powers of the police, especially in the areas of arrest and search and – in the case of foreign nationals under the anti-terrorist legislation – detention. We analyse the PACE framework, and changes to it, below and conclude that increases in police accountability have been more than off-set by the expansion in their powers.

PACE codified a substantial part of the common law framework of crime investigation. It subjected to legal regulation several aspects of police behaviour previously either unregulated or regulated only by the Judges' Rules; specified for the first time maximum periods of custody before charge and the conditions under which they may be extended; provided for the first time for tape recording of interviews; and added significantly to the bureaucratic load of the police by imposing obligations for notes and records to be kept at most stages of arrest, questioning and charge. The legislation therefore had some significant reformist aspects. Yet it could hardly be claimed as an unambiguous victory for civil rights. In the first place, it left untouched some significant common law and statutory police powers (those relating to breach of the peace). And although some parts of the Act embodied liberal-sounding assertions of right and principle, it went on to specify detailed qualifications to the general standard in almost every case. The following account of street powers (arrest, stop and search, on the spot penalties) and the regulation of detention and questioning, emphasises their differential application to minority groups. Discretion is necessary but inevitably leads sometimes to abuse of power, and further to miscarriages of justice.

### Street powers

A specific illustration of the degree of operational latitude which PACE gives to police officers is seen in section 24 which provides for arrest by a constable of someone suspected of committing any offence where the 'general arrest conditions' exist (a latitude considerably enhanced when its limited application to arrestable offences only was removed by the SOCPA). The general arrest conditions are as follows: where a constable judges that service of a summons is impracticable or inappropriate because she does not know and cannot readily ascertain the person's name; where a constable has reasonable grounds for doubting the name furnished is real; where a constable judges that a satisfactory address has not been furnished or has reasonable grounds for believing the address furnished to be unsatisfactory (for example because the person will not be at it long enough for the summons to be served); where a constable has reasonable grounds for believing that arrest is necessary to prevent the person causing physical injury to herself or another, suffering injury, causing loss or damage to property, committing an offence against public decency or obstructing the highway; or where a constable has reasonable grounds for believing the arrest to be necessary to protect a child or other vulnerable person. It is not difficult to see that these general arrest conditions render vulnerable to

arrest for any offence certain categories of person, notably those whose lifestyle does not, or appears to a constable not to, conform to social norms. This would include those who have no permanent address (asylum-seekers come to mind) and those whose appearance or manner suggest to the constable that they may be untruthful or unable to furnish such information (a bias against the young and against young black men in particular seems almost inevitable given what we know of police attitudes – see below).

Arrest has serious consequences but is lawful even where the arrested person is willing to go voluntarily for questioning (*R (C) v. Chief Constable of A, and A Magistrates' Court* 2006). As Spencer comments in his case note, the power to arrest 'triggers off a series of other even more invasive powers: in particular, the power to detain the arrested person for questioning for what could be as long as 96 hours, and the power, without obtaining a search-warrant, to search the arrested person's property. Arrests also carry the grave risk of injuring the arrested person's reputation. In our system the identity of suspects is not legally protected' (Spencer 2007). We return to detention and questioning below. Perhaps unsurprisingly given the breadth of this power, there has been a significant increase in the number of arrests since PACE was introduced; Home Office statistics on search, arrest and prosecution suggest that the operational latitude given by its provisions has significant implications for civil liberties. In 2006/7 there were 1,482,000 arrests for notifiable offences. Similarly, stops and searches under PACE have risen inexorably from under 100,000 in 1986, to 576,000 in 1994, to 740,700 in 01/02 to 962,900 in 06/07 (MoJ Statistical Bulletin 2008). This broad discretion was supplemented by the Criminal Justice and Public Order Act 1994. Under section 60 the police may stop and search even *without* specific grounds for suspicion, over a 24-hour period, where there is a 'general anticipation of violence'. The proportion of searches that result in arrests has remained constant at about 12 per cent. And of those detained for more than 24 hours only 10 per cent are charged. These figures suggest that PACE mandates a high degree of police intrusion into ordinary citizens' everyday lives. Stopping and searching someone is an invasion of personal liberty and of reputation. Detaining someone for any period at all is a serious interference with liberty. Yet in nine out of ten cases there appears to be insufficient evidence **even to charge with an offence (let alone take it to conviction)**.

PACE was amended in 2003 to allow a police officer to make a discretionary decision to grant bail to an arrested person without taking them to a police station on the condition that the person attends at a later date (no more than six weeks' hence) (CJA 2003, s. 4). While the rationale for street bail is understandable – convenience for both the police and the suspect – the additional power to attach conditions to it introduced by the Police and Justice Act 2006 further empowers the police on the street and moves away from the **protections introduced by PACE**.

Similarly on the spot penalties (formally Penalty Notices for Disorder) designed to deal with various aspects of disorderly behaviour and other offences

can both mitigate police intrusion but carry the potential to bring more people within the criminal process (Criminal Justice and Police Act 2001, ss. 1–11). The Penalty Notice for Disorder (PND), either £50 or £80 depending on the offence, can be issued not only for disorder offences such as threatening behaviour or causing harassment, alarm or distress, but also shoplifting to the value of £200. In 2005 over 100,000 such notices were issued by police of which about 14 per cent were for theft from a shop (Sentencing Advisory Panel 2006, p. 5). Ashworth and Zedner consider the implications of the PND:

Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy* 31–51

Is the expansion of fixed penalties to be welcomed? In principle, some of the arguments in favour of diversion apply equally here... [S]ince most of the relevant offences are not serious enough to require formal court proceedings and most defendants will accept a fixed penalty, there are good reasons of economics and proportionality for not using full court hearings for these cases. But there are potential difficulties. To some extent they relieve the magistrates' courts of having to deal with a number of less serious offences, but we should also recognize the possibility of net-widening here. The police may well issue a PND for theft in circumstances where they would not have been prepared to prosecute. It is open to the recipient of a PND to contest the notice in court, but that takes energy and in some cases there may be a tendency to pay the money in order to bring the matter to an end. However, the difference between fixed penalties and diversion itself is that the former may have penal consequences... [A] government pilot study suggests that between a quarter and a half of PNDs are imposed upon offenders who would otherwise have been cautioned or prosecuted, suggesting that a majority of those receiving PNDs may previously have fallen outside the criminal justice net. On the other hand, it could be argued that some widening of the net may be fully justified. Police and prosecutors have declined to prosecute some shoplifters because the cost of doing so is disproportionate, with the result that some offenders have escaped scot-free, and it is therefore right to devise a more efficient way of responding to such offences. Another potential difficulty is that fixed penalties may be set at a level that is beyond the means of some people. The £80 PND for theft from a shop, for example, may be overly burdensome for someone on state benefits who has a low income or onerous outgoings. In this context the person who has received a PND must opt for a court hearing, and then trust the court to calculate the fine so as to take account of his or her means. The fact that courts have a duty to take into account the means and outgoings of the defendant reveals that which the fixed penalty system is sacrificing to efficiency: a fixed penalty is a regressive tax capable of doing injustice in the individual case.

The complexity and overlapping nature of these powers produces multiple opportunities for discretionary decisions. Most of them are found either in PACE or in subsequent legislation amending or adding to those powers or in



anti-terrorist legislation. The police can thus draw down from a vast array of powers – either PACE and its derivatives or specific anti-terrorist legislation – in ways that render any notion that a citizen can challenge decisions at the time they are made somewhat optimistic. An insight into the problems posed by such broad discretion can be gained from the following extract from Lord Carlile's Quarterly Report to Parliament under section 36 of the Terrorism Act 2006. The power to which he refers is one of a number of additional powers of search and arrest conferred on the police in terrorism legislation. Under section 44 of the Terrorism Act 2000 Chief Constables can authorise the stop and search of vehicles and of people to search for articles of a kind which could be used in connection with terrorism, whether or not there are grounds for suspecting the presence of such articles. This power was held to constitute a violation of the right to privacy under Art. 8 of the European Convention on Human Rights in *Gillan v. United Kingdom* (2010); it is neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse.

*Lord Carlile of Pertwys Q1 2006 Report on the Operation in 2007 of the Terrorism Act 2002 and of Part 1 of the Terrorism Act 2000 (Ministry of Justice)*

32. Once again I would highlight early in this report issues related to TA2000 section 44. As I have reported repeatedly, difficult problems arise in connection with the use of section 44 by police around the country. There is inconsistency of approach among chief officers as to why, and if so when, section 44 should be used. The section, which permits stopping and searching for terrorism material without suspicion, is rightly perceived as a significant intrusion into personal liberties.

33. ... Much work has continued in 2007 to improve the way in which section 44 is used. However, I believe that it is still used too much in England and Wales. It should not be used where there is an acceptable alternative under other powers. Before each section 44 decision is made the chief officer concerned should ask him/herself very carefully if it is really necessary, without reasonable alternative. The geographical area covered should be as limited as possible. It is fully recognised as important that police officers on the ground (in sometimes challenging situations) must have a fuller understanding of the differences between the various stop and search powers open to them. The aim should be that in all circumstances they stop and search in appropriate circumstances only, and that they use the powers most fit for purpose.

34. Although during my years as independent reviewer there has been a general increase in caution before utilising section 44, I have no doubt that its use could be halved from present levels without risk to national security or to the public. This would not mean halving the



number of stops/searches: searches for weapons should be conducted under public order legislation, and for drugs under misuse of drugs laws. The additional competency required of police officers at all levels is to know when to use other powers, including when to switch from a terrorism search to other legislation.

Lord Carlile's optimism seems to have been misplaced: 37,197 people were searched using these powers in 2006/7. This rose to 117,278 in 2007/8 (Ministry of Justice 2009). This increase was greater for black (322 per cent rise) and Asian (277 per cent) people compared with white people (185 per cent). Only six in 10,000 people stopped were arrested for terrorism, and even fewer charged or convicted.

Terrorist offences themselves also provide a neat illustration of the interplay between substantive law and police powers. Broadly defined offences such as those introduced in the 2006 Terrorism Act – 'acts preparatory to terrorism' and 'encouragement to terrorism' – combined with powers to search and to detain terrorist subjects for up to 28 days give the police significant operational flexibility. In addition, post-charge questioning, authorised by a judge, was introduced in 2008 (Counter Terrorism Act, Part 2). In the period 11 September 2001 to 31 March 2008 there were 1,471 terrorist arrests of which over half led to release without charge. Nearly 10 per cent were deported. Over 20 per cent of those not charged were detained for more than two days. Of those charged with offences, nearly 200 were charged under non-terrorism legislation. Only a fifth of those subjected to these extensive powers were eventually charged with terrorism related offences (Home Office <http://security.homeoffice.gov.uk/news-publications/news-speeches/starts-terrorism-arrests>). The government's proposal in 2007 to extend the 28 days to 42 days was eventually dropped after a heavy defeat in the House of Lords and the high-profile 'Release or Charge' campaign by Liberty (<http://liberty-human-rights.org.uk/42writers/>).

Discretion allows negative attitudes towards certain social groups to manifest itself in police work (Manning 1987). These attitudes vary as between different groups and ranks within the police (Reiner 2000), but they inevitably have a significant impact both on patterns of policing and on public attitudes towards the police. Again, this is not a new problem (see Weinberger in Hay and Snyder 1987, pp. 174–5; Morgan 1987, pp. 270–1). Experiences such as the policing of the miners' strike in the 1980s, poll tax disturbances and anti-war demonstrations give little reason to think that the police have become more sympathetic to, for example, left-wing or labour protests over the last half-century. However, the foremost issue concerning police prejudice has to do with racism, particularly in the context of policing inner city areas (Smith and Gray 1983; Phillips and Bowling 2007). Even before the additional powers bestowed on them in the 'fight' against terror, which themselves target specific members of ethnic minorities, policing falls disproportionately on minority populations, whether as unprotected victims of crime or as victims of excessive police surveillance.

The findings of the MacPherson Inquiry (1999), set up to investigate policing and prosecution failures in the case of Stephen Lawrence, are of particular significance. Lawrence was a young black man stabbed to death by three white men in a racially motivated attack: the police inquiry into his killing was handled with such incompetence and insensitivity that a successful prosecution was rendered impossible (see further below). The subsequent Inquiry engaged in a general analysis of the question of race and policing in London, focussing in particular on the fact that black people (as distinct from Asians) are five times more likely to be stopped and searched than are whites – a cause of huge resentment against the police. When the fact that stops and searches are heavily directed against young men aged between 15 and 24 was taken into account, the Inquiry found that an astonishing 63 per cent of young black men in the Metropolitan area were stopped each year (Lustgarten 2002, p. 605). These among other findings led the Inquiry to speak in terms of ‘institutional racism’ in the police service. A recent analysis has concluded not only ‘that there is a strong case for a finding of indirect discrimination’ but also ‘that a significant proportion of street searches fail to satisfy the reasonable suspicion standard of PACE, quite apart from any issue of racial discrimination (see Lustgarten 2002, p. 603). The legislative and other messages sent to the police by government in this country have progressively engendered an ‘ends justify means’ mentality which almost certainly works counter to attempted legal safeguards.

*House of Commons Home Affairs Select Committee 2007 Young Black People and the Criminal Justice System Second Report of Session 2006-07 Volume 1 HC 163 (HANSARD, 11th July 2007) HC 1675 (11 July 2007) HC 1675 (11 July 2007)*

It is important to place young black people's overrepresentation in perspective: in 84.7% of offences in 2004-05 involving young offenders aged 10-17, the young people involved classified their ethnicity as white. In 2003-04, 92% of black young people aged 10-17 were not subject to disposals in the youth justice system. However, statistics show that young black people are overrepresented at all stages of the criminal justice system. Black people constitute 2.7% of the population aged 10-17, but represent 8.5% of those of that age group arrested in England and Wales. As a group, they are more likely to be stopped and searched by the police, less likely to be given unconditional bail and more likely to be remanded in custody than white young offenders. Young black people and those of ‘mixed’ ethnicity are likely to receive more punitive sentences than young white people. Data gaps prevent us from building a comprehensive picture of young black people's overrepresentation in the criminal justice system. However, the evidence we received suggests young black people are overrepresented as suspects for certain crimes such as robbery, drugs offences and – in some areas – firearms offences. Young black people are also more likely to be victims of violent crimes. There are variations in the overrepresentation of different groups within the ‘black’ category, and between females and males. We can say with greater certainty

that the patterns of offending vary between different ethnic groups than that the level of offending varies significantly. Some of our witnesses were concerned that the media distorts perceptions of young black people's involvement in crime. Research commissioned by this Committee contradicted this view, indicating that most members of the public reject stereotyping as regards young black people's involvement in crime.

Social exclusion is a key underlying cause of overrepresentation. Eighty per cent of Black African and Black Caribbean communities live in Neighbourhood Renewal Fund areas. Deprivation directly fuels involvement in some types of offence – such as acquisitive crime – and also has an important impact on educational achievement and the profile of the neighbourhood young people will live in. The level of school exclusions appears to be directly related to educational underachievement and both are linked to involvement in the criminal justice system. Witnesses also emphasised factors within black communities which help exacerbate disadvantage and fuel involvement in the criminal justice system. They drew attention to a lack of father involvement and to other parenting issues. In the perceived absence of alternative routes to success, some young people also actively choose to emulate negative and violent lifestyles popularised in music and film. Criminal justice system factors play an important role in promoting overrepresentation. There is some evidence to support allegations of direct or indirect discrimination in policing and the youth justice system. However, the perception as well as the reality of discrimination has an impact. Lack of confidence in the criminal justice system may mean some young black people take the law into their own hands or carry weapons in an attempt to distribute justice and ensure their own personal safety.

The government rejected the suggestion of the Home Affairs Select Committee that alternatives to stop and search might be more effective in crime prevention arguing that arrest would be more disruptive (HASC YBP 2008, p. 53).

### Detention and questioning

We have mentioned so far police discretion in recording offences, in arrest, in stop and search, in 'street' bail and in issuing 'on the spot' penalties. In many cases there is no need to question suspects in the police station as the apprehension of the offender and the relevant evidence occur simultaneously (as in police action in public order or their response to violent incidents). But the stereotype of a serious offence reported to the police, followed by police detective work ('sleuth'), does of course represent what happens in some cases. Here the arrest will often lead to detention and questioning. The PACE framework introduced major changes to this aspect of police work.

For how long may a person be detained without charge? Under section 42 of PACE (as amended by SOCPA 2005), detention in police custody before charge on the authority of a police officer is limited to 24 hours except where the alleged offence is an indictable one, where the maximum is 36 hours. On application to a magistrates' court this can extend to 96 hours. The overall number of persons detained for more than 24 hours (up to a maximum of 96 hours) under PACE



and subsequently released without charge was 1,826 during 2006/7. This was 633 lower than in 2005/6. More than eight out of ten of those detained during 2006/7 were released within 36 hours (MoJ 2008).

Different rules apply in respect of arrests made under terrorism legislation where the maximum detention without charge is 28 days (Terrorism Act 2000 as amended by Terrorism Act 2006) or, for suspected non-national terrorists, indefinitely (under the Anti-terrorism Crime and Security Act 2001). Detainees are 'free' to return to their home country.

PACE introduced safeguards in relation to custody and questioning, the most significant of which was the mandatory tape recording of all interrogations. Detailed Codes of Practice issued under PACE cover each of the areas of police powers: Code C deals with detention, treatment and questioning in non terrorist cases; Code E with tape recording; and Code H with detention etc. in terrorist cases. In his essay below John Jackson explains the history behind these reforms but also how subsequent changes to the right of silence have begun to subvert the PACE regime.

John Jackson *Time, Trials and Prosecutors after PACE: The Road from Case Construction to Case Disposal in Law and Young (ed.)*  
(London: Pauline Hart Publishing)

... Throughout the course of the twentieth century the police increasingly began to rely on arrest for the purpose of interrogation as a means of obtaining confessions and convictions. In 1984 the House of Lords officially endorsed the practice... Also during the course of the twentieth century the judges developed the Judges' Rules according to which a caution was administered before any questioning that the suspect was not obliged to say anything unless he wished to do so but whatever he said would be taken down in writing and might be given in evidence. But in practice these rules gave plenty of leeway for police officers to question suspects. Although the caution reminded the suspect of his right of silence, it did nothing to urge him to take advantage of his right. On the contrary, the freedom given to the police to question suspects made it very difficult to exercise it. It was hardly surprising then that the statements made by suspects often played... a great and decisive part of the prosecution case.

... As McBarnet put it... the police operated a 'three-stage model' of investigation involving custody, interrogation and charge and the tasks of investigation and incrimination became reversed to become first incrimination and then investigation. The investigation that followed custody was far from a neutral procedure whereby the police gathered information from the suspect in order to determine whether he had committed the offence. Instead it became a one-sided attempt to assemble and 'construct' a case for prosecution.

The potential for miscarriages of justice in this regime was immense but it was not easy for them to be uncovered... The difficulty was that without a clear record of what exactly took place in the police station, cases often came down to believing one word - the police's - against the accused, and judges were slow to find against the police on a disputed



issue of fact. [PACE 1984 was introduced following a series of high profile miscarriage of justice cases]

... PACE opened up the prospect of a much more transparent custody regime with custody officers having to maintain a custody record for each suspect, access given to appropriate adults, third parties and legal advisers and a clear record being available of what was said by suspects in interviews... The procedure for the reception of suspects, their processing, telling them their rights, the monitoring and length of detention, access to lawyers, family or friends, doctors, interpreters and appropriate adults and the regime in the police station were all brought under a new form of control. Where previously the position on many of these matters was fuzzy... and unclear, now it became the subject of detailed and precise rules. Furthermore, the judges indicated early on that in contrast to their attitude towards the Judges' Rules, they were prepared to exclude evidence obtained where there had been significant breaches of the new rules.

Fundamentally, however, what PACE did was to give greater legitimacy to the investigative custody regime that had been developed throughout the course of the 20th century. As one commentator put it, its main effect was to enable more suspects to be taken into police custody and kept there for the purposes of questioning. Given this, it is not perhaps surprising that... the police came fairly quickly to accept the changes made in the Codes of Practice. They found that they were able to mould the new rules to take account of their own organisational goals which remained the need to obtain statements from suspects and assemble a case against the suspect.

The change that potentially provided the greatest obstacle towards the realisation of these goals was the requirement that suspects be told of their right to legal advice and their right to have a legal adviser present at police interviews. Given the right of silence, the police fear was that legal advisers would stymie their attempts to obtain statements from suspects by advising their clients to be silent during police interviews. In practice a number of factors prevented this fear being realised. Research on the reception of suspects in custody in a number of police stations found that the police used 'ploys' to dissuade suspects from seeking advice in over 40 per cent of cases. Although figures did in time show an increase in the numbers requesting legal advice, further research found that legal advisers, many of who were very junior or unqualified, did very little when they attended interrogations and frequently saw their task as facilitating the police investigation rather than protecting the rights of their clients...

Despite this, calls to curtail the right to silence continued and section 34 of CJPO 1994 now provides that adverse inferences can be drawn where a defendant relies on a fact or defence in his trial which he could reasonably have been expected to mention in interview. The European Court of Human Rights has given this qualified approval emphasising that silence itself is insufficient. It must have been reasonable for the fact or defence to be mentioned (*Condron v. UK* 2001). The Court of Appeal does not necessarily regard it as reasonable to stay silent merely because the legal adviser so counsels (*Knight* 2004). Jackson argues that section 34 has shifted the balance between the investigatory and

the charging stages of the process because the interview now puts the onus on the suspect to answer allegations made: 'The silence legislation has thus enabled the investigative custody regime that was legitimised by PACE to be transformed into an accusatory venue for testing and examining accusations as part of the criminal proceedings against an accused.' The 2008 Counter Terrorism Act which allows post charge questioning in terrorism cases takes investigative custody – and the continued application of section 34 – a stage further. PACE is currently under review (Home Office 2008).

### 1.2.c.iii. Prosecuting crime

At the same time that PACE radically altered the regime for detention and questioning, the Prosecution of Offenders Act 1985 drew a clear line between the investigatory and prosecution stages. The police had three choices after the period of detention expired – to release without charge, to caution or to charge. Where the decision was to charge the file was handed to the Crown Prosecution Service to determine whether there should be a prosecution using the criteria of sufficiency of evidence to provide a realistic prospect of conviction become adverse inferences may be drawn. This line has however become blurred. The Auld Review concluded in 2001 that this division of responsibilities led to inefficiencies, with nearly a quarter of indictments having to be amended before trial. PACE was therefore amended in 2003 so that now the CPS determines the charge as well as making the decision to prosecute, with the result that Crown Prosecutors are more closely linked with the police investigation than before (Jackson 2008).

Before moving to the trial itself, we consider plea-bargaining. In a sense this straddles the pre-trial and trial stages. Ashworth and Redmayne divide plea bargains into three types; charge bargains, fact bargains and plea/sentence bargains (2005, p. 272). Charge bargains are where the defendant agrees to plead guilty to one or more of the lesser charges in exchange for the dropping of a more serious charge – for example pleading guilty to malicious wounding (Offences against the Person Act, s. 20) in exchange for dropping a charge of wounding with intent (OAPA, s. 18). Guilty pleas to reduced charges are negotiated almost as a matter of course between defendants, prosecutors and defence lawyers: the rate of guilty pleas in magistrates' courts is 94 per cent, and in the Crown Court it is approximately 60 per cent (Sanders and Young 2000 p. 396). The practice of offering a sentencing discount for a guilty plea has been institutionalised, as recommended by the 1993 Royal Commission. An incentive to plead guilty as early as possible in proceedings is found in the instruction that courts, in deciding what sentence to pass on an offender who has pleaded guilty, *must* take into account the stage at which the person indicated they would plead guilty (Criminal Justice Act 2003, s. 144). The definitive guideline indicates a one-third reduction where the guilty plea was entered at the first reasonable opportunity, one-quarter if entered once a trial date has been set, and one-tenth

for a guilty plea entered at the 'door of the court' or after the trial has begun (SGC 2007). The main rationale for plea-bargaining is, of course, managerial and pragmatic. The Crown Prosecution Service has always been under pressure due to concerns about delays, backlogs of cases and perceived efficiency, and this may have prompted an increase in the level of plea-bargaining. Plea-bargaining is thus well established as one of the most important administrative practices in the criminal process. Its existence underlines the fact that the resources which we are prepared, as a society, to devote to criminal justice are limited. Current resource levels could not sustain full enforcement procedures even for reported, cleared-up crime in which a strong case can be constructed: without plea-bargaining to hasten cases through, the whole system would collapse. Plea-bargaining is therefore not merely a matter of convenience for those working in the system, but also a matter of government interest in keeping down the costs of the criminal process.

#### 1.2.c.iv. Constructing crime in the trial

90 per cent of cases prosecuted in the magistrates' courts and 75 per cent of those in the Crown Court end in guilty pleas. Of those contested in the Crown Court about a quarter result in acquittals. The trial process itself is the stage at which criminal law doctrine is most directly invoked and yet at which many other influences are also in play. We look first at the professional and lay people who service the trial system, and then to a consideration of jury diversity.

Both *prosecution and defence lawyers* have a considerable influence over the course of the trial. This is not only through their negotiation of plea-bargains, but also through their questioning of witnesses – how hard they push particular points, their use of irony or ridicule and a whole range of rhetorical devices, especially before a jury; the quality and thoroughness of their preparation; the astuteness of the way in which they use their knowledge not only of law, but of the tribunal – of jury reactions, or those of a particular judge or magistrate. In these ways and other more subtle ones, these officials materially affect the outcome of the cases in which they are involved, in ways which do not relate directly to substantive rules or principles of criminal law.

The *judges, recorders (practising lawyers who are part-time judges) and magistrates* who hear criminal cases have diverse professional backgrounds. Judges are drawn largely from the Bar; recorders are practising lawyers; district judges are legally trained magistrates; and magistrates (who hear the vast majority of criminal cases, including all of the less serious, summary, offences) are lay people with some basic training, acting on a voluntary basis, who are advised by a court clerk who has some legal training, and are drawn heavily from white middle-class occupations and households. Despite commendable efforts by the government to improve the diversity of the bench, the problem appears to be intractable. As Marcel Berlins, the *Guardian's* legal columnist comments (19 May 2008):



The year before the new Judicial Appointments Commission started work in 2006, about 14% of judicial posts, at all levels, were being given to black and Asian applicants, and 41% to women. Figures released last month showed that, under the JAC, those percentages had been reduced to 8% and 34% respectively. The JAC was especially created to promote transparency and to eliminate appointments based on the discredited system of the lord chancellor picking judges by way of secret soundings. In addition, the commission was specifically charged with promoting greater diversity.

These professional and lay judges share one important feature: their power of decision on points of law and sentence across the range of criminal cases. Quite apart from judges' interpretive power and power to set precedents, judges and magistrates have considerable powers over the conduct of the trial, which may in subtle ways affect its outcome. Their attitude to accepting guilty (often bargained) pleas; their discretionary admission or exclusion of certain forms of evidence; their conduct in letting the trial run its course or intervening to prompt or challenge witnesses; their discipline of lawyers' questioning; the framing of their direction to the jury and their power to withdraw certain issues from the jury; their manner with witnesses (sympathetic and geared to eliciting considered responses or unsympathetic, impatient and sceptical): all these may affect the outcome of the case (McBarnet 1981; Pattenden 1982 and 1989). We might also mention the influence of their social prejudices and views, which tend to be relatively homogeneous given the social composition of the bench (Malleon 1998).

Judges and magistrates have diverse roles: conduct of the trial; committal for trial; decision on points of law; directions to the jury; sentencing. They also possess the important power to award or refuse bail – a decision in which they are often influenced by the views of the police and CPS. As in the case of prosecution decisions, broad statutory criteria exist under the Bail Act 1976, but leave room for the exercise of considerable discretion. At any one time about 8,000 people are held in custody pending trial of whom 20 per cent are likely to be acquitted (Ashworth and Redmayne 2005, p. 220). The presumption in favour of bail was reversed in a range of cases by the Criminal Justice and Public Order Act 1994 (s. 25–26). The prosecution has given the right to appeal against an award of bail (Bail (Amendment) Act 1993). Several aspects of the bail system were reviewed because of their potential incompatibility with the Human Rights Act. Amendments made in the Criminal Justice Act 2003 introduced a presumption that bail should not be granted if it appears another offence has been committed while on bail for another charge unless the court is satisfied there is no significant risk of reoffending (CJA, s. 14 amending CJPO 1994, s. 26). Or to put it in positive terms, merely because there has been a breach of bail in the past, the court should consider whether there is evidence of significant risk of offending while on bail before remanding in custody. Given current delays in the court system, failure to get bail is a very serious matter.



This is not only because of the loss of liberty and appalling conditions in many remand centres, but also because it results in more restricted access to a lawyer and thus disadvantages a defendant's capacity to prepare for her trial and present her case credibly. The magnitude of the sums of money often demanded as surety for defendants who are offered bail prejudices those who have fewer financial resources available to them. Judges, magistrates and the police also have a discretion to specify conditions for the award of bail such as submission to various forms of treatment or monitoring.

The symbolic, ideological and instrumental significance of *juries* in the criminal process has already been touched upon in discussing popular opinion. In Crown Court trials, the jury has the power to decide, having been directed on the law, on the issues of fact. The prosecution must convince the jury of the facts beyond reasonable doubt. Although the number of jury trials is small (95 per cent of cases are tried in the magistrates' court, and about three-quarters of defendants in the Crown Court plead guilty), the requirement of trial by jury in the Crown Court for the most serious offences, and its availability in 'triable either way' offences, serves to legitimate the criminal process. It awards a role to non-professionals, peers of the defendant who have no vested interest either in the system itself or in any particular outcome in this case. The jury is therefore significant as an isolated instance of popular and compulsory participation in the criminal process.

Recent research suggests that, while social and economic circumstances affect the take up of jury summonses, juries are not unrepresentative in terms of race and ethnicity.

Cheryl Thomas with Nigel Balmer 2007 *Diversity and Fairness in the Jury System* (Ministry of Justice Research Series 2/07)

The Jury Diversity Project found that the juror summoning process does not discriminate, directly or indirectly, against BME groups: a representative section of the local BME community are summoned and serve as jurors in virtually all Crown Courts in England and Wales. It also exposed a number of widespread myths about jury service, which have clouded both public perceptions and policy discussions about the jury system for many years. There is no mass avoidance of jury service among the British public, and juries are also not made up of people who are not important or clever enough to get out of jury service. There is no evidence of any unwillingness to do jury service or any particular lack of trust in the fairness of the jury system among the BME community or the British public in general. This was the reality of jury service in England and Wales even before the introduction of new juror eligibility rules in 2004, which have nonetheless increased participation in the jury system. On the fundamental question of whether juries discriminate against defendants based on race, the case simulation research with real jurors showed that racially mixed juries in highly diverse communities did not discriminate against defendants based on the race of the defendant. This was despite the fact that race did influence the decisions of some individual jurors who sat on these juries in cases where race was not presented as an explicit

element in the case. What remains to be answered is whether all-White juries, which decide cases in most Crown Courts, also do not discriminate against defendants based on race.

The following extract draws together the complex arguments that inform the issue of bias in the jury system.

*Silvia Day and Rosemary Paterson, 'Social Bias and the English Criminal Trial Jury' (2003) Cambridge Law Journal 11, pp. 671-770*

The relationship between decision-making impartiality and acceptance of verdicts in an adversarial legal system is obvious; its importance more generally for public confidence in the administration of justice is a long-standing theme of Strasbourg jurisprudence. Faced with an accusation of racial bias against a judge, Lord Lane C.J. said in *R v. Bath*: Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'. The same applies to juries. In England and Wales the public and defendants currently trust juries: lawyers, judges and opinion polls agree on this. Indeed, there is evidence that ethnic minorities do: given the choice, black defendants opt for trial by jury. This endorsement, however, is a fragile thing. It may evaporate if the law is seen as incapable of dealing effectively with a plausible allegation of juror racial bias.

The Juries Act 1974 preserves the common law right to challenge a qualified juror for actual or apparent bias. The challenge takes place before the juror is sworn in and is tried by the judge. The juror may be questioned, but only after cause to challenge him has been shown. This means *prima facie* evidence of bias must already exist. Since the United States practice of questioning members of the venire to detect prejudice is not followed, this is unlikely unless the juror has been heard to make a racist remark or bears on his person some visible sign of racism. Canadian courts have accepted survey evidence or taken judicial notice of local prejudice against visible racial minorities as *prima facie* evidence, but there is no precedent for this in English law. It is true that in exceptional circumstances, English judges have engaged in pre-emptive questioning of the jury. In the 1972 Angry Brigade Trial the judge asked jurors with certain political affiliations to exclude themselves. This, however, provoked a Practice Note that it was 'contrary to established practice for jurors to be excluded on . . . general grounds such as race, religion or political beliefs or occupation'. The current Practice Direction 93 allows jurors to be excused who are 'personally concerned in the facts of the particular case or . . . closely connected with a party or prospective witness'. Nevertheless in 2003, at the trial of a Muslim cleric accused of soliciting the murder of Jews and Hindus, the trial judge asked members of the panel who were Jewish or Hindu or married to people who were to reveal themselves with a view to de-selection. There was no response. It is implicit in what Lord Hobhouse said in *Mirza* that even this limited inquiry should not have taken place.

English courts place great faith in random selection. A randomly selected jury is not necessarily representative of the local ethnic mix, but more importantly, it is not necessarily racially unbiased. There is a theory that juror prejudices cancel each other out. When the concern is racial bias, this may not happen. People who are racially dissimilar may share racial prejudices. Indeed, people with the same skin colour may be racially prejudiced

against one another. In *R v. White* a black man of West Indian origin was convicted of aggravated racial harassment of a black woman from Sierra Leone. Asians, Whites and Blacks are not homogeneous. Furthermore, we cannot be certain that a jury does not have a majority with a shared prejudice against, for example, asylum seekers, Muslims, Jews or alleged terrorists.

Paradoxically, the relaxation of eligibility criteria for jury selection introduced in 2004 following the recommendations of the Auld Report (2001) has attracted rather than diminished allegations of bias. That is because two occupational groups that had previously been excluded from jury service – lawyers and police officers – are now eligible (CJA 2003, s. 321). Their participation has caused foreseeable difficulties:

*R v. Abdirahim, R v. Green and R v. Williamson* [2007] UKHL 37.

**Lord Bingham:** 1. These three appellants were tried on indictment in different courts on unrelated charges and were convicted. In the first two cases the trial jury included among its members a serving police officer, and in the third case it included a solicitor employed by the Crown Prosecuting Service. The common question raised by these three conjoined appeals is whether a fair-minded and informed observer, on the facts of the three cases, would conclude that there was a real possibility that the trial jury was biased . . .

23. It must in my view be accepted that most adult human beings, as a result of their background, education and experience, harbour certain prejudices and predilections of which they may be conscious or unconscious. I would also, for my part, accept that the safeguards established to protect the impartiality of the jury, when properly operated, do all that can reasonably be done to neutralise the ordinary prejudices and predilections to which we are all prone. But this does not meet the central thrust of the case made by [counsel] for the appellants: that these cases do not involve the ordinary prejudices and predilections to which we are all prone but the possibility of bias (possibly unconscious) which, as he submits, inevitably flows from the presence on a jury of persons professionally committed to one side only of an adversarial trial process, not merely (as the Court of Appeal put it) 'involved in some capacity or other in the administration of justice'. Lord Justice Auld's expectation that each doubtful case would be resolved by the judge on a case by case basis is not, he pointed out, met if neither the judge nor counsel know of the identity of a police officer or the juror, as appears to be the present practice.

24. This is not an argument I feel able, in principle, to dismiss. It is not a criticism of the police service, but a tribute to its greatest strength, that officers belong to a disciplined force, bound to each other by strong bonds of loyalty, mutual support, shared danger and responsibility, culture and tradition . . . Serving police officers remain ineligible for jury service in Scotland, Northern Ireland, Australia, New Zealand, Canada, Hong Kong, Gibraltar and a number of states in the United States, the remainder of the states providing a procedure to question jurors on their occupations and allegiances. But Parliament has declared that in England



and Wales police officers are eligible to sit, perhaps envisaging that their identity would be known and any objection would be the subject of judicial decision.

25. In the case of the first appellant, it was unfortunate that the identity of the officer became known at such a late stage in the trial, and on very short notice to the judge and defence counsel. But had the matter been ventilated at the outset of the trial, it is difficult to see what argument defence counsel could have urged other than the general undesirability of police officers serving on juries, a difficult argument to advance in face of the parliamentary enactment. It was not a case which turned on a contest between the evidence of the police and that of the appellant, and it would have been hard to suggest that the case was one in which unconscious prejudice, even if present, would have been likely to operate to the disadvantage of the appellant, and it makes no difference that the officer was the foreman of the jury. In the event, confronted with this question at very short notice, defence counsel raised no objection. I conclude, not without unease, that having regard to the parliamentary enactment the Court of Appeal reached the right conclusion in this case, and I would dismiss the appeal.

26. The second appellant's case is different. Here, there was a crucial dispute on the evidence between the appellant and the police sergeant, and the sergeant and the juror, although not personally known to each other, shared the same local service background. In this context the instinct (however unconscious) of a police officer on the jury to prefer the evidence of a brother officer to that of a drug-addicted defendant would be judged by the fair-minded and informed observer to be a real and possible source of unfairness, beyond the reach of standard judicial warnings and directions. The second appellant was not tried by a tribunal which was and appeared to be impartial... I would allow this appeal, and quash the second appellant's conviction.

27. In the case of the third appellant, no possible criticism is to be made of [the juror], who acted in strict compliance with the guidance given to him and left the matter to the judge. But the judge gave no serious consideration to the objection of defence counsel, who himself had little opportunity to review the law on this subject. It must, perhaps, be doubted whether Lord Justice Auld or Parliament contemplated that employed Crown prosecutors would sit as jurors in prosecutions brought by their own authority. It is in my opinion clear that justice is not seen to be done if one discharging the very important neutral role of juror is a full-time, salaried, long-serving employee of the prosecutor... The third appellant was entitled to be tried by a tribunal that was and appeared to be impartial, and in my opinion he was not. The consequence is that his convictions must be quashed. This is a most unfortunate outcome, since the third appellant was accused of very grave crimes, of which he may have been guilty. But even a guilty defendant is entitled to be tried by an impartial tribunal and the consequence is inescapable. I would allow the appeal and remit the case to the Court of Appeal with an invitation to quash the convictions and rule on any application which may be made for a retrial.

[Baroness Hale and Lord Mance agreed; Lords Rodger and Carswell agreed on the first appeal but dissented on the second and third.]



Until the late 1980s, public concern about 'perverse' jury verdicts tended to focus on unjustified acquittals as opposed to dubious convictions: the jury was seen as defendant-centred. A particular object of criticism was the right of lawyers to peremptory challenge of jurors. These views influenced the Criminal Justice Act 1988, section 119 of which raised the upper age limit for jury service ('senior' citizens being thought more likely to convict than young people) and section 118 of which abolished the right of peremptory challenge (the main motivation being that it could be used by the defence to 'load' the jury in the defendant's favour) (see Gobert 1989). The currency of such criticism, despite concern about miscarriages of justice, reflects an increasingly retributive public atmosphere in the context of which, notwithstanding the passage of the Human Rights Act, many of the procedural safeguards protecting defendants in the criminal process have to be vigorously defended if they are to survive. The large number of defendants charged with offences triable either way who opt for jury trial reflects a continuing faith in the fairness of juries relative to magistrates, yet the Royal Commission on Criminal Justice recommended that defendants should lose the option of jury trial in such cases. We have noted above the reduction in the number of cases in which the defendant has the right to opt for jury trial. Ashworth and Zedner (2008, p. 29) summarise the arguments:

Whether the confinement of Crown Court trial and the spread of summary justice are to be welcomed depends on a complex analysis of conflicting considerations. If one looks across Europe then jury trial, or the most solemn form of procedure, is everywhere restricted to a small number of serious offences; and in few countries does the defendant have a right to choose the forum. The additional argument in England and Wales concerns the questionable quality of summary justice, an argument that has repeatedly won the day when it has been proposed to make small-value thefts triable summarily only. If it were established that the substance of the procedural safeguards in the Convention is not respected in magistrates' courts, then that would be a strong argument against the trend, whether or not it is economically driven. Others would mount the alternative argument that it is juries that are unreliable, unpredictable and sometimes gullible and/or unable to understand the case. It is strongly arguable that the common law trial's emphasis on orality fits poorly with cases that rely on voluminous documentary evidence. The last argument, about the complexity of some cases, has been much discussed since the Roskill Report in 1985 on fraud trials, and section 43 of the Criminal Justice Act 2003 now makes provision for certain cases of 'serious and complex fraud' to be tried by judge alone, although the provision has not yet been implemented.

However, section 44 of the 2003 Act allowing trial by judge alone where there is a serious risk of the jury being tampered with was implemented in 2006. Finally, we should note the fact that juries are under no duty to give reasons, a conviction can only be appealed on the basis of the judge's direction or on some other point of law. The confidentiality of jury deliberations is protected

by section 8 of the Contempt of Court Act 1981, a provision which helps to preserve the jury's perceived integrity and hence its ideological functions. Cases such as that of the Guildford Four and Cardiff Three demonstrated the difficulty in getting proper reconsideration of a questionable conviction. Despite the inevitable backlog of cases, this situation has undoubtedly been improved by the establishment in 1997 of the Criminal Cases Review Commission, which has the power to investigate alleged miscarriages of justice and to refer case, back to the Court of Appeal (see further Chapter 3.a.iii). Ironically, as a result of the Stephen Lawrence and Damilola Taylor cases, policy debate is preoccupied with the converse problem: the difficulty of re-opening questionable acquittals. The Criminal Justice Act 2003 created a major exception to the double jeopardy principle – the rule against allowing a second prosecution of someone already acquitted of a particular offence – for offences ranging from murder (including attempt and soliciting), manslaughter, rape (including attempt), sexual offences with under 13s, importation of drugs, to arson – where there is 'new and compelling' evidence which makes it highly probable that a person who has been acquitted is guilty (CJA 2003, Pt. 10).

In the same way as traditional thinking about criminal justice has been dogged by an artificial separation of issues of criminal law and those relating to the criminal process, so a dichotomy has tended to be assumed between rules and issues of procedure and those of substance. Hence *rules of evidence and procedure*, crucial to the practical impact of criminal law, have been termed 'adjectival' and largely excluded from studies of criminal law. These rules set out what may or may not count as evidence, whom it may be given by and about, what form it may take, who may hear it, to what standard an issue must be proved and by whom, when an issue may be withdrawn or introduced and a host of other elements crucial to the conduct of the trial (Dennis 2000). We have already considered the judge's or magistrate's role in administering these rules, and their implications for the presumption of innocence. The Criminal Justice Act 2003 introduced a new regime in relation to character evidence and the Youth Justice and Criminal Evidence Act 1999, section 41 and the Sexual Offences Act 2003 deal with the difficult area of evidence in sexual offences: victims' previous sexual behaviour and presumptions in relation to consent. In assessing the scope and impact of criminal law, the rules of evidence and procedure are every bit as important as those of the substantive law.

### 1.2.c.v. Sentencing and punishment

In this section, we move to the conclusion of the criminal process: the stages of sentencing and punishment. We have already noted that judges, recorders and magistrates have at least a dual role – legal decision-making relating to conviction and more discretionary, though legally structured, *sentencing*.

Since 1991, sentencing has been conducted within a statutory framework consolidated in the Powers of Criminal Courts (Sentencing) Act 2000 with

significant additions and amendments in the Criminal Justice Act 2003. By now, the counter-rational idea that criminal justice legislation is often incomprehensible even to those who use it most will be familiar. This applies with a vengeance to sentencing provisions. We ask our readers to bear with us. Courts are required to have regard to five different purposes of sentencing: punishment, deterrence, rehabilitation, public protection and reparation (CJA 2003, s. 142(1)); this has been described as embodying 'the worst of "pick-and-mix" sentencing' (Ashworth 2005, p. 74). The Criminal Justice Act 1991 also introduced the principle that sentences must be commensurate with the seriousness of the offence, with custodial sentences being imposed only where an offence is sufficiently serious that neither a community nor a financial penalty is appropriate. The Criminal Justice Act 2003 reproduces this in amended form (s. 152(2)) but in other ways reduces the emphasis on proportionality, reinstating deterrence and crime prevention to a more central (or a more overt) role.

How is seriousness to be assessed? Section 143(1) provides: 'In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.'

The Sentencing Guidelines Council (replaced by Sentencing Council (Coroners and Justice Act 2009, s. 118), published in 2004 the following guidelines under the title 'Overarching Principles: Seriousness':

... Four levels of criminal culpability can be identified for sentencing purposes:

Where the offender: (i) has the intention to cause harm, with the highest culpability when an offence is planned. The worse the harm intended, the greater the seriousness.

(ii) is reckless as to whether harm is caused, that is, where the offender appreciates at least some harm would be caused but proceeds giving no thought to the consequences even though the extent of the risk would be obvious to most people.

(iii) has knowledge of the specific risks entailed by his actions even though he does not intend to cause the harm that results.

(iv) is guilty of negligence.

The Council had more difficulty in pinning down the harm element:

... The types of harm caused or risked by different types of criminal activity are diverse and victims may suffer physical injury, sexual violation, financial loss, damage to health or psychological distress. There are gradations of harm within all of these categories. The nature of harm will depend on personal characteristics and circumstances of the victim and the court's assessment of harm will be an effective and important way of taking into consideration the impact of a particular crime on the victim.



In some cases no actual harm may have resulted and the court will be concerned with assessing the relative dangerousness of the offender's conduct; it will consider the likelihood of harm occurring and the gravity of the harm that could have resulted.

Some offences cause harm to the community at large (instead of or as well as to an individual victim) and may include economic loss, harm to public health, or interference with the administration of justice.

There are other types of harm that are more difficult to define or categorise. For example, cruelty to animals certainly causes significant harm to the animal but there may also be a human victim who also suffers psychological distress and/or financial loss.

Sentencers are obliged to take account of Victims' Personal Statements – an obligation which may sit unhappily with the courts' recognition that sentencing should be governed by general public interest concerns which may conflict with the victim's particular perspective (Practice Direction 2001; *R v. Perks* 2000; see Edwards 2002).

The journey towards the current degree of legislative control of sentencing discretion has been a slow one. Before 1991, sentencing was constrained only by (usually very high) statutory maximum sentences, except in special cases such as young people and mentally disordered offenders, where elaborate statutory provisions have existed for some time. Even in the higher courts, the systematic reporting of sentencing cases is of relatively recent origin, and their status as precedents is still ambiguous (Ashworth 2005, Ch. 2). In the 1980s, the then Lord Chief Justice, Lord Lane, instituted a practice of delivering 'guideline judgments' on important and disputed sentencing issues. This practice has persisted, but such judgments tend to cover only serious cases. Their influence over the lower courts is therefore limited. The introduction of appeals by the Attorney-General against 'lenient' sentences under section 35 of the Criminal Justice Act 1988 has made some difference to the sample of cases reaching the Court of Appeal and has given greater scope for guideline judgments, but it has not altered the basic dynamics of existing practice. 80 per cent of the 71 offences referred to the Court of Appeal in 2008 were considered unduly lenient and as a result 52 offenders had their sentences increased (Attorney General's Office 2009). Sections 80–81 of the Crime and Disorder Act 1998 gave further impetus to the systematisation of sentencing by putting the Court of Appeal under a duty to consider whether to frame guidelines or to reconsider existing guidelines in every sentencing appeal and, when the Court decides to frame or revise guidelines, to notify the Sentencing Advisory Panel (SAP). The work of the SAP has been reinforced by its absorption into the new Sentencing Guidelines Council, a high-level body whose membership includes the LCJ, the DPP, together with a number of other judges (SAP and SGC are replaced by the Sentencing Council, Coroners and Justice Act 2009). In addition to the Seriousness guideline already mentioned the SGA has published guidelines on the new sentences in the CJA 2003, on reduction in sentence for a guilty plea



and on the following specific offences: manslaughter by reason of provocation; robbery; domestic violence; sexual offences; assaults and other offences against the person; assaults on children.

A number of options are available to the sentencer and the choice that is made of course determines the ultimate experience of each convicted offender. The major *sentences* for adult offenders are imprisonment (sentences of imprisonment may also be suspended in exceptional circumstances); fines; community sentence orders (which include community service, curfews, residence requirements, drug or alcohol rehabilitation, and supervision requirements); and absolute and conditional discharges, which avoid most of the consequences of conviction such as criminal record. In the cases of mentally disordered offenders and of offenders under the age of 21, a cluster of special measures and special institutions including a youth court and youth offender panels exist. In the wake of moral panics sparked by cases such as the killing of James Bulger, custody in special centres has become available for children as young as ten (Ashworth 2005, Ch. 12; Cavadino and Dignan 2007, Ch. 9; Peay 2007). Youth justice is discussed further in Chapter 7.a.

While all offences have a maximum penalty, the punitive trends that characterise modern penal culture have led to the addition of a number of minimum sentences. Before these changes, only murder had a prescribed sentence of life and this is to some extent mitigated via the partial defences of provocation (loss of control) and diminished responsibility. Sentencing discretion has been seriously affected by the 'Dangerous Offenders' provisions in the CJA 2003 (ss. 225–9 as amended by the Criminal Justice and Immigration Act 2008). 'Dangerous offenders' are liable to imprisonment for life, imprisonment for public protection or an extended sentence. Preventive life sentences for dangerous offenders *must* be imposed where four criteria are met: conviction of a serious offence (these include a whole range of violent and sexual offences with maximum sentences of between ten years and life); the court is of the opinion he or she is a dangerous offender (significant risk of reoffending and risk of serious harm to the public); the maximum penalty is life; and the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment (or custody) for life (CJA 2003, Pt. 12). Where a life sentence is not available or not justified the court has the option of imprisonment for public protection (IPP) or an extended sentence but the wording here is 'may' rather than 'must' impose. An IPP operates as a lesser life sentence allowing indeterminacy in relation to release for offences that do not carry a life sentence maximum or for offences that do not meet the criteria for imposing the life sentence where it is available. Extended sentences apply to specified offences that are not 'serious' (which in the Act means carrying a maximum of ten years or life). These include assault occasioning actual bodily harm, affray and some child sexual offences. If the offender is thought to present a serious risk of harm to the public the court must impose an extended sentence of up to

five years for some violent offences and eight for sexual offences. In addition to serving longer in custody before the release those subject to extended sentences remain liable to recall for the remainder of the extended term (Ashworth 2005, pp. 210–18). Partly as a result of these longer sentences the prison population now exceeds 82,000. The impact of these longer sentences will of course be felt in the prison system, as well as for those sentenced, well into the future: 1,100 Extended Public Protection, 1,700 Indefinite Public Protection and 500 life sentences commenced in 2007.

The sentencing powers of magistrates are a good deal more limited than those of Crown Court judges; they may impose a maximum term of six months' imprisonment, or of 12 months if two offences are involved. They may, however, refer cases to the Crown Court for sentence if they feel their powers to be inadequate. The provision in CJA 2003 to increase this to 12 months has not been implemented (s. 154) but magistrates use the power to commit to the Crown Court for sentence in about 8 per cent of cases. The specific dynamics of magisterial justice suggest that, within their limited powers, magistrates may regard themselves as yet less constrained by legislative guidelines than do Crown Court judges:

*Michael Lysaght and James O'Leary 2007 The Panel System: An Introduction, Fourth Edition (Page)*

...[S]tudies have shown that the chief formative influence on sentencing practice in magistrates' courts is not the law, their training or the advice they receive from other professionals, nor even the way similar cases have been decided by that particular court in the past. Instead the principal influence is the 'sentencing culture' of a particular bench, into which new recruits are gradually socialized by watching their more experienced colleagues at work. The ideology which gives substance to this culture is based on a twin belief in the uniqueness of the magisterial role itself, and also the individuality of each particular case. The latter belief explicitly rejects consistency as a virtue in its own right, while the former demands a balancing of public interests against those of the particular defendant in the light of moral judgements that only the magistrate is deemed qualified to make. Because sentencing is viewed by magistrates as a craft or mystery, whose rites are known only to initiates (as opposed to a rational enterprise dedicated to the pursuit of externally defined goals) this renders it both impervious to criticism from outside, and highly resistant to attempts at external control.

Although the breadth of sentencing discretion has been curtailed in the last decade, it nonetheless marks a significant disjuncture in the ideology of the criminal process (Lacey 1987). The values of certainty and consistency which, as we have seen, are supposed to be central to criminal law doctrine are far less evident at the sentencing stage, where they are replaced by a celebration of the judge's power to 'individualise' through finely tuned judgments of seriousness and hence to smooth out some of the wrinkles created by a rigorous application

of substantive law (see Norrie 2001, Ch. 10). Justice is to be done not through adherence to the rule of law, but through sentencers' discretion. The Criminal Justice Act 2003 institutes a general duty to give reasons for and explain the effect of a sentence (s. 114).

The sentencing aspect of the judicial role has significant executive or managerial elements. It is directly policy-oriented in that in selecting between a multiplicity of sentences, the sentencer is likely to be guided by a number of competing goals and visions of the function and justification of criminal justice, as well as by their own social attitudes. Some sentencers may be guided by a notion of desert; others by a desire to deter this and other offenders; others by a belief in the power of punishment to reform; and yet others (perhaps the majority) by an unreflective and largely unarticulated mixture of these goals and others such as denunciation, moral education, incapacitation and atonement. Though the Criminal Justice Act 1991 began the trend towards a desert or proportionality-based approach, it did so in a manner which communicated mixed messages to the judiciary. This ambivalence – or gap between rhetoric and intent – has continued as we have seen with the Criminal Justice Act 2003 introducing longer incapacitative sentences in violent and sexual cases, the continuing relevance of rehabilitative factors to community sentences and to decisions about early release from prison. An offender's previous convictions or failure to respond to a previous sentence may be relevant to the seriousness of a later offence, and offending while on bail be regarded as an aggravating factor. These arguments appear to drive a coach and horses through a desert-based, backward-looking approach by incorporating forward-looking elements such as deterrence within the conception of seriousness.

This reflects a shift in the political climate: the concern with determinate and consistent sentencing which informed the legislation has now been replaced by a far more punitive and deterrent approach in government thinking. There has been a rapid rise in the use of imprisonment from 1993 on (Lacey 1994; Cavadino and Dignan 2007, Ch. 6), where the proportion of people sentenced to immediate custody for indictable offences in the Crown Court rose from 43 per cent in 1990 to 55.9 per cent in 2007, although this is a reduction from the high of 63 per cent in 2000 (Ministry of Justice 2007). 74,037 people were received into immediate custody, this represented 23.7 per cent of those convicted of indictable offences (including those tried at magistrates' courts). Of those sentenced in the Crown Court, the average length of custodial sentences for males aged 21 or over was 24.8 months. England and Wales has one of the highest imprisonment rates in Western Europe with 152 prisoners per 100,000 population, after Spain at 161 and Luxembourg at 155, while Portugal had 104, Scotland 149, Germany 88, France 96 and Sweden 74 (International Centre for Prison Studies 2007).

The inevitably purposive aspects of sentencing, along with the explicit discretion it involves, therefore make it a rather different enterprise from decision-making on questions of law, and it is generally neglected by textbook writers



on criminal law. This neglect is unfortunate, since sentence is the conclusion of all trials resulting in a conviction, and since punishment is a key part of our social conception of criminal law. In many instances, the interplay between the questions of sentence and criminal law is such that the latter cannot be understood without some consideration of the former. For example, the distinction between murder and manslaughter developed and has been maintained largely because of the existence of a mandatory, fixed sentence for murder (formerly the death penalty, currently life imprisonment: see further Ashworth and Mitchell (eds.) 2000). There is also a close relationship between the form of criminal law and the control of discretion at sentencing and other stages (Thomas 1978). If sentencing discretion were to be curtailed by attaching fixed sentences to particular offences, this would necessitate a refinement of offence definitions. Without such a refinement, sentencing reform could result in crudeness and effective disparity through false uniformity in the sentencing of very different cases within one broad offence definition. For example, in the case of theft, one offence definition currently covers everything from the casual theft of £1 to the planned theft of £1 billion: hence it is difficult to see how sentencing guidelines could be articulated with the legal definition of theft. If such offence definitions were to be refined, then the prosecutor would have greater discretion in choosing the charge, and a stronger lever in plea-bargaining. There would also be an increase in the jury's power to convict of one offence rather than another, through an increase in the number of 'lesser included offences' (i.e. less serious offences, such as manslaughter, whose elements are included in the offence charged, such as murder, and which it is therefore appropriate to leave to the jury as an alternative verdict.) Disparity, uncertainty, inefficiency and injustice in sentencing have been important objects of academic and political debate over the past decade. Our perplexity about how to resolve these problems illustrates, among other things, the interrelationship between different stages of the criminal process and the danger of causing unforeseen shifts in the balance of power within the process by tinkering with one part without thinking about implications for another (Wasik and Pease 1987; Ashworth 2005, Ch. 13): it is important to view criminal justice as one, albeit complex and diverse, set of processes.

Over the last 150 years, notwithstanding the statistical preponderance of non-custodial and financial penalties, imprisonment has come to represent the 'paradigm' punishment in modern societies. In 2007, about 900,000 offenders were fined, 55,000 received custodial sentences, and 200,000 received some form of community sentence. But the trend, notwithstanding the criticisms of influential figures in the judiciary and successive Chief Inspectors of Prisons, is towards a greater use of custody: in 2000, the average prison population was 64,600; in 2003 it was 72,000 and had risen to 82,000 by 2009. Hidden within these global figures, their needs all too often ignored in a system in which they make up a mere twentieth of the prison population, are 4,387 women prisoners – a figure rising at twice the rate of male imprisonment. As Foucault



reminds us in the following passage, the birth of the prison and the shift from corporal to carceral punishments is closely tied to the emergence of the modern legal order:

Michel Foucault 1977 *Discipline and Punish*, transl. A. Sheridan (Allen Lane), pp. 130–1

Broadly speaking, in monarchical law, one might say that punishment is a ceremonial of sovereignty; it uses the ritual marks of the vengeance that it applies to the body of the condemned man; and it deploys before the eyes of the spectators an effect of terror as intense as it is discontinuous, irregular and always above its own laws, the physical presence of the sovereign and of his power. The reforming jurists [of the late eighteenth century], on the other hand, saw punishment as a procedure for requalifying individuals as subjects, as juridical subjects; it uses not marks, but signs, coded sets of representations, which would be given the most rapid circulation and the most general acceptance possible by citizens witnessing the scene of punishment. Lastly, in the project for a prison institution that was then developing, punishment was seen as a technique for the coercion of individuals; it operated methods of training the body – not signs – by the traces it leaves, in the form of habits, in behaviour; and it presupposed the setting up of a specific power for the administration of the penalty. We have, then, the sovereign and his force, the social body and the administrative apparatus; mark, sign, trace; ceremony, representation, exercise; the vanquished enemy, the juridical subject in the process of requalification, the individual subjected to immediate coercion; the tortured body, the soul with its manipulated representations, the body subject to training. We have here the three series of elements that characterize the three mechanisms that face one another in the second half of the eighteenth century. They cannot be reduced to theories of law (although they overlap with such theories), nor can they be identified with apparatuses or institutions (though they are based on them), nor can they be derived from moral choices (though they find their justification in morality). They are modalities according to which the power to punish is exercised: three technologies of power.

In the recent history of sentencing theory (though not, in the last decade, of practice) there has been a growing emphasis on a move away from imprisonment through the development of alternative forms of ‘community correction’ such as community service. This development has been justified in more or less equal measure by humanitarian and by economic and other pragmatic considerations (Garland and Young 1983). Its more troubling ramifications in terms of the extension of surveillance and control into the community at large are only just beginning to be assessed. The introduction of electronic tagging is further stimulating debate about these implications. As Foucault observed, however, there is a strong continuity between the penal power of the prison and that of the forms of surveillance made possible both by social knowledges such as pedagogy and psychiatry and by new technologies such as electronic monitoring:

**Foucault, *Discipline and Punish*, pp. 227–8**

The public execution was the logical culmination of a procedure governed by the Inquisition. The practice of placing individuals under 'observation' is a natural extension of a justice imbued with disciplinary methods and examination procedures. Is it surprising that the cellular prison, with its regular chronologies, forced labour, its authorities of surveillance and registration, its experts in normality, who continue and multiply the functions of the judge, should have become the modern instrument of penalty? Is it surprising that prisons resemble factories, schools, barracks, hospitals, which all resemble prisons?

[pp. 301–2] [P]erhaps the most important effect of the carceral system and of its extension well beyond legal imprisonment is that it succeeds in making the power to punish natural and legitimate, in lowering at least the threshold of tolerance to penalty.

The quest for cheaper and more humane non-custodial penalties must be set in the context of a more general malaise or even crisis in modern institutions of punishment: a sense of crisis which underpins recent swings of policy as between a focus on community-based penalties, diversion from the formal criminal process and resort to administrative penalties such as fines on the one hand, and punitive, imprisonment-oriented approaches, made economically possible by an expansion of the prison system through privatisation, on the other. In the following passage, Garland reflects on both this crisis and its relationship to the modern legal order outlined by Foucault:

**Garland, *Prison and Punishment in Modern Society* (Oxford University Press), p. 8**

[D]espite their institutional girding and a historical entrenchment stretching back to the early nineteenth century, a growing sense of doubt, dissatisfaction, and sheer puzzlement has now begun to emerge around our modern penal practices. The contemporary period is one in which penological optimism has given way to a persistent scepticism about the rationality and efficacy of modern penal institutions. This shift of attitude began to emerge toward the end of the 1960s when rising crime rates, growing prison unrest, and a collapse of faith in the rehabilitative ideal combined to undermine confidence in 'penal progress' and the inevitability of 'penal reform'. The new era has been one of continuing crisis and disruption in a penal system which no longer takes seriously the rehabilitative values and ideologies upon which it was originally based. Within this context it is becoming the conventional wisdom of criminologists, penologists and social scientists that contemporary methods – particularly that of imprisonment – appear increasingly to be 'irrational', 'dysfunctional' and downright counter-productive. Like the crime it is supposed to deal with, punishment is nowadays seen as a chronic social problem. It has become one of the most perplexing and perpetual 'crises' of modern social life . . .

[pp. 7–8] Ever since the development of prisons in the early nineteenth century, and particularly since the emergence of a penological profession later in that century, there has

been an implicit claim – and eventually a public expectation – that the task of punishing and controlling deviants could be handled in a positive way by a technical apparatus. It seems to me that this basic claim has now been put into question.

The question that arises today is not one of institutional adjustment and reform. It is a more basic question which asks whether the social processes and ramifications of punishment can be contained within specialist institutions of any kind. This is, in a sense, a crisis of penological modernism. It is a scepticism about a penal project that is as old as the enlightenment with its vision of punishment as one more means of engineering the good society, of organizing institutions so as to perfect mankind. After more than two centuries of rational optimism, even our 'experts' have begun to recognise the limits of social engineering and the dark side of social order. Our engineered world is facing its imperfections and is less optimistic, less confident... Lacking a new vocabulary... [c]ontemporary proponents of 'the justice model' or of 'general deterrence' have revived the liberal discourse of eighteenth-century jurisprudence, raising basic questions about the right to punish, the limits on state power, the responsibility and dignity of the offender, the nature of criminality, the depiction of human nature, and so on. There have also been important attempts to reintroduce questions which had previously been silenced by institutional operations, such as the role of the victim, or the responsibilities of the community in causing and preventing criminality. Notably too, there has been a re-emergence of moral arguments that claim that punitive (as opposed to correctional) measures can be a proper and defensible form of reaction to crime, a form of thinking which has been markedly absent from most twentieth-century penal discourse.

These newly revived forms of thinking about punishment are significant, not because they represent solutions to the current malaise, but because they indicate the extent of it...

It is not, then, only social scientists who are nowadays led to doubt the grounding and rationale of modern modes of punishment. The very staff of the criminal justice institutions are themselves increasingly perplexed as to what they are about. Consequently, it is not an idle or an 'academic' question that is being pursued when we seek to understand the foundations, forms, and effects of penal measures as they exist today. It is, on the contrary, a pressing practical issue.

Notwithstanding doubts about its proper role, imprisonment remains an important sentence even for offences of moderate seriousness, and one feature of how imprisonment is administered will serve as a graphic illustration of the tensions which Garland identifies. This is the system of *early* release (Ashworth 2005, pp. 254–61, Gullick 2004). For those sentenced to terms of less than 12 months this is institutionalised in 'custody plus' (CJA 2003, s. 181). This mandates a custodial period of between two and 13 weeks, and a licence period of at least 26 weeks with the result that the maximum proportion of any sentence of under 12 months that may be spent in custody will go down from 50 per cent to 33 per cent. Automatic release (on licence for the remainder) after serving half the sentence applies to all other determinate sentences (CJA s. 244). On top of this prisoners may apply under for up to 135 days release



under curfew monitored by electronic tagging. Parole is no longer relevant for determinate sentences begun after 2005. It is relevant for life and extended for public protection offences. Decisions about these prisoners and about the release of life prisoners are made on the basis of criteria such as the likelihood of their reoffending.

There is a close connection between the early release system and Garland's argument. This lies in the fact that, while the system of early release has its roots in a rehabilitative belief that choosing the right moment for release from prison would increase chances of the offender's reform, its reality exists in pragmatic concerns with costs and prison overcrowding (Carlisle 1988). Even with the new scheme under the 2003 Act, the government has needed to resort to ad hoc early release in order to ease prison overcrowding. Former Lord Chief Justice Lord Woolf describes 'a situation of the judges sending people into prison by the front door and the executive releasing them by the backdoor and that doesn't make sense' (*The Daily Telegraph* 26 February 2009). The reforms which attempted to restore 'truth in sentencing' by establishing a more consistent framework for the relationship between articulated sentence and actual release date, continue to destabilise the legitimacy of law and order policy, particularly during periods in which governments emphasise their punitive credentials. It is a graphic illustration of the ultimate subservience of principle to pragmatism in criminal justice.

Finally, it is worth noting two disjunctures between the framework of sentencing and punishment and common understandings of criminal justice. First, debates about the relative propriety and importance of imprisonment and of community-based penalties tend to obscure the fact that the most common penalty over the last 100 years – though currently in decline – has been the fine (Bottoms 1983). It seems that the administrative nature of financial penalties sits as unhappily with the moralistic overtones of criminal justice today as it did when the nineteenth century judges struggled with the question of whether the emerging summary offences were really 'criminal'. Secondly, although the apparent rationale of current sentences (like that of criminal law itself) appears to be individualistic – oriented to the deserts, the reform potential, the deterrence or the incapacitation of an individual offender – contemporary penalty and criminalisation appear to be increasingly geared to the identification of problem populations and the control of particular groups. Some commentators have gone so far as to interpret the emergence of a 'New Penology': '[T]he New Penology . . . is actuarial. It is concerned with techniques for identifying, classifying and managing groups assorted by levels of dangerousness. It takes crime for granted. It accepts deviance as normal. It is sceptical that liberal interventionist crime control strategies do or can make a difference. Thus its aim is not to intervene in individuals' lives for the purpose of ascertaining responsibility, making the guilty "pay for their crime" or changing them. Rather it seeks to regulate groups as a strategy of managing danger' (Feeley and Simon 1994, p. 173; see also Rose 1999). In the view of these American authors, the



emergence of actuarial justice is closely tied to the existence of an underclass, and its distinctive marks are incapacitation and preventive detention. While these developments may be less advanced than in the United States, Britain too has recently witnessed the development of a number of policies and practices focussed upon what are constructed as 'high-risk' groups: young black men, paedophiles, 'problem families' living on housing estates; suspected terrorists. We should not let the individualism of criminal justice discourse blind us to their emergence, any more than we should allow the individualistic framework of criminal law doctrine to obscure our view of the broad structures of power which shape the implementation of criminal law and the conduct of the criminal process.

In concluding this assessment of the criminal process, it is worth asking ourselves the extent to which these interlocking processes constitute a coherent 'system'.

Andrew Ashworth and Mike Redmayne 2003 *The Criminal Process* Third edition (Oxford University Press), pp. 17-18

Although many who speak and write about criminal justice tend to refer to 'the criminal justice system', it is widely agreed that it is not a 'system' in the sense of a set of co-ordinated decision-makers... [M]any groups working within criminal justice enjoy considerable discretion, and... are relatively autonomous. Nonetheless, the inappropriateness of the term 'system' should not be allowed to obscure the practical interdependence of the various agencies. Many depend on other agencies for their case-load or for their information, and decisions taken by one agency can impinge on those taken by others. Thus, to take a few examples, the Crown Prosecution Service depends entirely on the police for its case-load, and largely on the police for information, although some information is now being supplied by the Probation Service. Decisions taken by the Crown Prosecution Service affect the case-load of the courts, and may constrain the powers of magistrates' courts and of defendants to determine mode of trial...

References to systems and interdependence are, however, very much in the managerial mode. The criminal process impinges directly on victims, suspects and defendants... A defendant who has been questioned by the police, charged, kept in police custody, remanded by the court, perhaps offered a plea bargain, and then tried in court is already likely to feel 'punished' irrespective of whether a guilty verdict and sentence follow. A person who is acquitted after such a sequence of events may well feel 'punished' by the process to which he or she has been subjected, even if relieved at the outcome... [This] accords with the results of American research by Malcom Feeley, encapsulated in the title of his book *The Process is the Punishment* (1979). Suspects and defendants often feel that the way in which they are treated is equivalent to punishment, in the sense that it inflicts on them deprivations (of liberty, of reputation) similar to those resulting from a sentence... For present purposes, it is sufficient to make the point that the pre-trial process is a process to which defendants are *subjected* by officials who have the power of law behind them...

Victims are also individual citizens whose interests should be protected. There is no shortage of empirical research findings that victims have been and are being treated in the criminal process in ways that can be described as 'punishment'. In the language of victimologists, victims who report crimes are often subjected to 'secondary victimization' at the hands of police, prosecutors and courts... [T]he pre-trial process is a process to which victims of crime, too, are subjected by officials.

#### FURTHER READING

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# Foundations of Criminal Law

## 1.3.a. Due process and human rights

We suggested in Chapter 1 that modern criminal law is best understood in relation to a distinctive set of procedures. This focus on 'due process' has been driven over the last 150 years both by the expansion of criminal law's scope and by liberal ideas about the rights of individuals vis-à-vis the state. More recently, the salience of due process has been thrown into relief by the incorporation of the European Convention of Human Rights (ECHR) into domestic law through the Human Rights Act 1998 (HRA). Under this legislation, the courts must, wherever possible, interpret domestic law in a way which conforms to the standards embodied in the Convention: where they are unable to do so, they must make a declaration of incompatibility. At this point, the onus shifts to Parliament to decide how to respond.

The Human Rights Act provides a distinctive foothold for internal critique of criminal law, by introducing within criminal law standards which were previously external to it. In the other chapters of this book, we shall consider the various ways in which human rights standards may affect the substantive criminal law. Here we are concerned with the implications of the Human Rights Act for criminal procedure and for the ideals of due process which are central to the legitimisation of modern criminal law. Rights such as that to a fair trial, to be presumed innocent, or not to be subject to degrading treatment have implications for prosecution procedure, trial process and punishment. The *rule of law or principle of legality* and the *presumption of innocence* are two of the most important doctrines which inform discussions of due process in criminal law and which have formed the objects of legal challenges on the basis of human rights standards in relation to the fairness of trials and other aspects of the criminal process.

The most immediately relevant parts of the HRA from the point of view of due process are Articles 5–7 ECHR. Article 5 provides that: 'Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.' For our purposes, the most important of 'the following cases' are 'the lawful detention of a person after conviction by a competent court' and 'the lawful

arrest or detention of persons for the purposes of enforcing court orders and bringing prosecutions'. Further subsections of the Article instantiate guarantees in relation to arrest and detention, providing for example a right to be brought promptly before a court to establish the legality of detention, and to be tried within a reasonable time or released pending trial. Article 6 guarantees the right to a fair trial: 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' (publicity being however subject to exceptions justified in the interest of 'morals, public order or national security in a democratic society', or of juveniles or the protection of the private life of the parties). This Article also enshrines the presumption of innocence, providing that 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law', and specifying a number of minimum defendants' rights in relation to adequate and timely information of the relevant charges against her, adequate time and facilities for preparing the defence, to defend herself, to examine witnesses against her, to have access to legal advice and, where necessary, interpretation. Article 7 instantiates the principle of legality: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed' (though the Article makes an exception to this principle of non-retroactivity for acts which are 'criminal according to the general principles of law recognised by civilised nations'). Further articles of relevance to criminal law and procedure include the guarantees of a right to respect for private and family life (Art. 8); freedom of thought, conscience and religion (Art. 9); freedom of expression (Art. 10); the right to life 'Everyone's right to life shall be protected by law' (Art. 2); the prohibition on torture or inhuman or degrading treatment or punishment (Art. 3).

The ideals of the rule of law and of due process captured in Articles 5, 6 and 7 of the ECHR have a special significance for criminal law: both the legitimacy of substantive criminal laws and the fairness of the procedures through which they are enforced are seen as especially important given criminal law's distinctively coercive methods. The rule of law is generally conceived in terms of a cluster of procedural requirements: laws should be consistent, of general application, certain in their effects, clear, publicised and prospective rather than retrospective in application. These requirements are combined with the principle of equality before the law – the idea that all citizens, including the rulers or lawmakers, should be subject to law – and with the principle of legality – the idea that laws should be created in accordance with constitutional procedure. These values serve to imbue law with legitimacy and authority whilst leaving open the determination of its content. The presumption of innocence and the associated burden of proof beyond reasonable doubt are seen as necessary to the realisation of the rule of law in the field of criminal justice. Their importance is illustrated by the fact that they are the procedural features in terms of which criminal



law is often defined: 'due process' seems a natural concomitant of both moral-retributive conceptions of criminal law and liberal conceptions of the citizen's rights against the state. Yet, in practice, requirements of 'due process' have to compete with the imperatives of the instrumental, regulatory conception of the criminal process which sees such procedural safeguards as costly barriers to the efficient pursuit of crime control (Packer 1968: see below). How far does criminal law in fact meet the procedural ideals which it sets for itself; to what extent do such ideals structure or confine power wielded in the name of criminal justice; and what additional safeguards have been provided by the incorporation of the European Convention?

### 1.3.a.i. Legal ideology and the rule of law

The rule of law has long enjoyed a central place in legal ideology: it is seen as both constraining political power and legitimising legal power.

J. Brewer and J. Styles 1980 *An Ungovernable People* (Hutchinson), p. 14

... [T]he notion of the 'rule of law' was central to seventeenth and eighteenth century Englishmen's understanding of what was both special and laudable about their political system. It was a shibboleth of English politics that English law was the birthright of every citizen who, unlike many of his European counterparts, was subject not to the whim of a capricious individual but to a set of prescriptions that bound all members of the polity. Such a characterization of the English 'rule of law' will not, of course, pass muster as an accurate description of the *modus operandi* of the legal process, but it did serve as an idealization, a potent 'fiction'... which commanded widespread assent from both patricians and plebeians. The purchase of this ideology of the 'rule of law' had several important consequences... Those in authority were constrained to some extent by their obligation to act in accordance with this ideology... Because authority derived its legitimacy from the rule of law, 'the law' was used as a standard by which to judge the just exercise of authority. Authorities therefore chose to limit themselves in order to acquire greater effectiveness: they traded unmediated power for legitimacy.

The ideal of the rule of law is therefore central to prevailing understandings of the relationship between citizen and polity in modern societies:

L. Farmer 1997 *Criminal Law, Tradition and Legal Order* (Cambridge University Press), p. 6

The relationship between liberal moral and political philosophy and the criminal law would seem to be a product of the struggle against absolutism in the eighteenth century. Repressive and violent laws and institutions were attacked by reform-minded philosophers and lawyers. In Europe this led to the drawing up of the great penal codes of the Enlightenment according to new measures of restraint, certainty and humanity in punishment. Legal

limits were imposed on the exercise of power in the same period as the boundaries of the modern nation state were drawn, establishing a range of both internal and external constraints on sovereignty. The demand that the criminal law respect the principle of legality, that the criminal process be subjected to rules and constraints, and that punishment be administered only in measured and determinate amounts, set the terms of the compact that was established between the criminal law and modernity. This very history, if we accept it, suggests that this is far from being a 'necessary' relationship – only that it has been perceived as fundamental to a certain characterisation of the modern state.

Though English criminal law has never been fully codified, there is a close link between the rule of law ideals of certainty, accessibility and limited government on the one hand and the ideal of a codified criminal law on the other. Although the project appears now to have been abandoned, this link finds vivid expression in the Law Commission's arguments for codification (Law Commission 1992, p. 2, and Law Com. No. 311 2008).

In thinking about the rule of law, we need to assess both its status as a modern ideal of democratic governance *and* its role in legitimising a certain form of state power. In reflecting on the relationship between the rule of law and the perceived legitimacy of legal systems, it is worth considering the capacity of the rule of law simultaneously to structure political power and to legitimise laws whose impact is so dramatically unequal that they risk being regarded as fundamentally unjust. The delicate balance between legitimacy and power is well illustrated by the social historian, E. P. Thompson, in his study of the Black Act of 1723. This statute, which dealt with poaching, enacted broad offences with draconian penalties: it was a piece of legislation which, in Thompson's words (1975, p. 197), 'could only have been drawn up and enacted by men who had formed habits of mental distance and moral levity towards human life – or, more particularly, towards the lives of the "loose and disorderly sort of people"'. Yet Thompson's study testifies also to the sense in which the rule of law genuinely constrains political power:

E. P. Thompson 1973, *Whigs and Hunters* (Routledge), p. 239–41

... [W]hat we have observed is more than the law as a pliant medium to be twisted this way and that by whichever interests already possess effective power. Eighteenth-century law was more substantial than that. Over and above its pliant, instrumental functions it existed in its own right, as ideology; as an ideology which not only served, in most respects, but which also legitimized class power. The hegemony of the eighteenth-century gentry and aristocracy was expressed, above all, not in military force, not in the mystifications of the priesthood or of the press, not even in economic coercion, but in the rituals of the study of the Justice of the Peace, in the quarter-sessions, in the pomp of the Assizes and in the Theatre of Tyburn.

Thus the law . . . may be seen instrumentally as mediating and reinforcing existent class relations and, ideologically, as offering to these a legitimation. But we must press our definitions a little further. For if we say that existent class relations were mediated by the law, this is not the same thing as saying that the law was not more than those relations translated into other terms, which masked or mystified the reality. This may, quite often, be true but it is not the whole truth. For class relations were expressed, not in any way one likes, but *through the forms of law*, and the law, like other institutions which from time to time can be seen as mediating (and masking) existent class relations . . . has its own characteristics, its own independent history and logic of evolution.

. . . It is inherent in the especial character of law, as a body of rules and procedures, that it shall apply logical criteria with reference to standards of universality and equity. It is true that certain categories of person may be excluded from this logic (as children or slaves), that other categories may be debarred from access to parts of the logic (as women, or, for many forms of eighteenth-century law, those without certain kinds of property), and that the poor may often be excluded through penury, from the law's costly procedures. All this, and more, is true. But if too much of this is true, then the consequences are plainly counterproductive. Most men have a strong sense of justice, at least with regard to their own interests. If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just. And furthermore it is not often the case that a ruling ideology can be dismissed as a mere hypocrisy; even rulers find a need to legitimize their power; to moralize their functions, to feel themselves to be useful and just . . . The law may be rhetoric, but it need not be empty rhetoric.

. . . [T]here is a very large difference, which twentieth-century experience ought to have made clear even to the most exalted thinker, between arbitrary extra-legal power and the rule of law. And not only were the rulers . . . inhibited by their own force . . . but they also believed enough in these rules, and in their accompanying ideological rhetoric, to allow, in certain limited areas, the law itself to be a genuine forum within which certain kinds of class conflict were fought out. There were even occasions . . . when the Government itself retired from the courts defeated. Such occasions served, paradoxically, to consolidate power, to enhance its legitimacy, and to inhibit revolutionary movements. But, to turn the paradox around, these same occasions served to bring power even further within constitutional controls.

Thompson's reminder of the sophistication of the legal form and his warning against a crude assumption that law straightforwardly serves the interests of the ruling class are well taken. However, as we shall see in our discussion of criminal law doctrine later in this Chapter, the appeal to 'universality and equity' in the application of legal standards serves to obscure significant respects in which criminal law falls short of its own ideals of certainty and predictability. For example, as McBarnet notes in her study of criminal trials:



Urmann McGarrett 1981 *Corruption* (Macmillan) pp. 161–4

Case law is discretionary and particularistic; it does not operate at the level of general rules. What is more . . . it does not make law until *after* a dispute has made it into an issue. Of course there are precedents to constrain judgments. But they need only constrain the justification of the decision rather than the decision itself. Indeed, the discretion invested in judges, and the fact that the case comes before them only after dispute, only because 'informed lawyers disagree' and can make out a case for both sides, means 'a judge's decision either way will not be considered a failure to perform his judicial responsibilities'. What Hart calls the 'open texture of law' allows wide scope in the use and applications of precedent . . . The doctrine of precedent may thus be placed more aptly in the rhetoric rather than the actual procedure of justice. The doctrine of precedent may tell us where the ideology of the rule of law is grounded and how it is maintained, but it tells us very little about the practice of case law – not just because of judicial techniques to use and avoid precedent but because of the nature of the ideology of precedent and the post hoc discretionary particularistic form of the case law method. The result is that the law is so far from being certain as to be almost impossible to pin down . . .

McBarnet concludes that we should be more sceptical than Thompson about the constraining power of the rule of law. Rather, we should see it as an ideology of justice which is external to law yet which allows contradictions, gaps and uncertainties in law to be managed by representing the criminal process, and in particular the trial process, as a politically neutral one which generates 'objective' determinations of fact and law.

The positivist vision of the criminal law as a determinate body of rules which can be applied straightforwardly and even-handedly so as to generate the predictable and objective legal conclusions envisaged by the rule of law is further put into question by an understanding of the way in which facts are constructed in the criminal process. Empirical studies of courtroom practices illuminate the dynamic nature of criminal law's constitution of 'truth' through a set of processes which depend upon both the credibility and articulacy of particular witnesses and the power of cultural assumptions which shape the jury's and magistracy's interpretation of evidence. Less socially confident defendants will have greater difficulty in giving evidence, while the testimony of some classes of witness – 'sexually experienced' women giving evidence in rape cases, for example – are regarded with suspicion by lawyers, judges and juries (see further Section V).

W. L. Farneth and M. A. Feldman 1981 *Reconstructing Reality in the Courtroom* (Lawrence) pp. 31–3

It appears initially that the principles of justice introduced into formal adjudication processes such as trials are obvious. Everyone knows that adjudication procedures are designed to guarantee due process, to promote fair and impartial judgments, and to decide questions



of fact in uniform and objective ways . . . However, the ways in which stories represent the incidents in legal disputes produce often radical transformations of 'reality' that are hard to reconcile with commonsense understandings about objectivity. Judgments based on story construction are, in many important respects, unverifiable in terms of the reality of the situation that the story represents. Adjudicators judge the plausibility of a story according to certain structural relations among symbols in the story. Although documentary evidence may exist to support most symbolizations in a story, both the teller and the interpreter of a story *always* have some margin of control of the definition of certain key symbols. Therefore, stories are judged in terms of a combination of the documentary or 'empirical' warrants for symbols and the internal structural relations among the collection of symbols presented in the story. In other words, we judge stories according to a dual standard of 'did it happen that way?' and 'could it have happened that way?' In no case can 'empirical' standards alone produce a completely adequate judgment . . .

*Declan Roche 2003 Accountability in Restorative Justice (Oxford University Press), pp. 115-16*

Storytelling is sometimes objected to on the basis that it is a subjective process that is inconsistent with the goal of finding the objective truth. This was one of the criticisms of the emphasis on narrative in the South African Truth and Reconciliation Commission (SATRC 1998: vol 1(5), para 35). Underlying such objections is the popular belief, questioned by restorative justice, that there is a discoverable truth about events which exists independently of people's subjective opinions. This belief is partly sustained by the adversarial formal justice system, where truth is won, in Paul Rock's words, 'dialectically and agonistically'. Trials work by reducing and reconstructing 'the indeterminacy and muddle of everyday life' into bleak choices between innocence or guilt, truth or falsehood, this or that account. In such a contest, it is usually the narratives of the least powerful which are rejected in favour of those of the dominant. Restorative justice aims to do something quite different, attempting to create a multi-layered truth reflecting people's different, and sometimes conflicting, perspectives.

[pp. 84-5] In many cases, communication difficulties reflect some underlying form of inequality and domination. In an abusive relationship, power imbalances may well prevent a victim of abuse speaking up and negotiating with her abuser. A long history of oppression can work to affect the communicative ability of whole groups and communities. Australian linguists and anthropologists have long observed 'the very common Aboriginal conversational pattern of agreeing with whatever is being asked, even if the speaker does not understand the question'. This pattern has been described as a strategy of accommodation (that Aboriginal people have developed) to protect themselves in their interaction with Anglo Australians. Aborigines have found that the easiest method to deal with white people is to agree with whatever it is that the Anglo-Australians want and then to continue on with their own business.

This understanding of the trial process as involving the construction of plausible and persuasive stories, rather than the discovery of pre-existing, objective

truths, suggests that we should be wary of the view that procedural safeguards are necessarily effective in ensuring the fairness of the process. What does 'equality before the law' amount to given inequalities in the storytelling and other resources of those who come to the courtroom? The release of the 'Guildford Four' in 1989 after 15 years of wrongful imprisonment marked the beginning of a series of high-profile miscarriage of justice cases. Following an extensive public campaign which included startling revelations about failures in the investigative, preparatory, forensic and indeed trial processes, the Home Secretary had finally referred the Guildford Four case back to the Court of Appeal, at which point the DPP declined any longer to support the convictions. The Four had difficulty in telling their stories at all levels of the criminal justice system (see McKee and Franey 1988). As one of them, Carole Richardson, recalled shortly after their release:

Then other people, important people, started saying we were innocent too. I was happy they were actually standing forward and had the guts to say, well we think this is wrong. But at the same time there was something in me that kept crying out, 'I've been saying the same thing for years'. Why should it take ex-Home Secretaries and Cardinal Hume and people like that to get something done? The truth's the truth, whoever says it. [*New Statesman and Society*, 10 November 1989, p. 15.]

These miscarriages led directly to the establishment of the Criminal Cases Review Commission and to some changes in the powers of the Court of Appeal which we discuss in more detail in Part a.iii. below. The challenge in delivering real as opposed to merely formal 'equality before the law' needs to be borne in mind as we look in more detail at one of the central procedural safeguards of the criminal process.

### 1.3.a.ii. The presumption of innocence: in search of 'the golden thread'...

The idea that people accused of criminal offences should be presumed innocent until proven guilty beyond all reasonable doubt is a core tenet of criminal law doctrine, and finds direct expression in the European Convention on Human Rights, Article 6(2) of which provides that 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'. Indeed, we take it so much for granted, at least did until regular human rights challenges forced the question on lawyers' attention, that we have tended to ignore the fact that the concrete meaning to be attached to the presumption is very much an open question. For example, does the fact that judges can now, under certain circumstances, invite a jury to draw adverse inferences from a defendant's exercise of his or her right to remain silent offend the presumption of innocence? And what of the use of custody for suspects refused bail; the pressure on people charged to plead guilty; the imposition of 'strict' liability without proof of fault? The centrality of the trial to the criminal process has always been exaggerated

but has been further eroded in the last 20 years as Ashworth and Zedner argue (2008, see Chapter 1.a.iii). We are also apt to forget the presumption's historical specificity. In the following passage, Allen traces the history of the presumption of innocence in English criminal law, and argues that it plays a key role in constituting popular images not only of criminal law but also, more broadly, of national culture.

C. K. Allen 1931 *Legal Duties and Other Essays in Jurisprudence* (Oxford University Press), pp. 253-94

If the average Englishman [sic] was asked what he considered to be the outstanding characteristic of English criminal law, or indeed of the whole legal system, he would probably answer without a moment's hesitation: 'A man is presumed to be innocent until he is proven guilty.'

[T]here is no doubt that the theory of our law and the temper of our tribunals insist on a... presumption of innocence. This is often thought of and spoken of as one of those primordial British institutions which have roused writers like Fortescue and Blackstone to such eloquent enthusiasm. It is the purpose of these observations to show that it is a very modern growth, not older, indeed – at all events, in the sense in which it is now understood – than the nineteenth century.

I have been unable to discover, however, that the dogma 'A man is presumed to be innocent until he is proved guilty', in the form of a brocard, anywhere occurs before the nineteenth century... On the whole, then, it is safe to say that before the beginning of the nineteenth century there was no explicit *presumption* of innocence, although there was a growing realization that circumstantial evidence should be regarded with caution when a man's life and property were at stake; and there was also a certain amount of pious generalization in favour of merciful acquittal rather than hasty condemnation.

... [I]t was not until the end of the nineteenth century that the prisoner obtained, amid the gravest doubts of many merciful and intelligent persons, the last privilege of giving evidence in his own behalf. These [pre-existing] disabilities of the prisoner are so well known that they need only a brief reference. He was neither able to say anything on his own behalf, nor, in cases of felony (though it was otherwise with misdemeanours), to be represented by counsel. He had no access to books, no means of knowing the exact charge which was to be brought against him, the manner in which it was to be presented, nor the witnesses who would testify to it. The evidence given against him was subject to hardly any of the rules of relevancy and admissibility which have become settled in the nineteenth century. He was always in danger of being convicted on the mere confession of an accomplice, which was regarded as particularly damning evidence. His trial was extraordinarily summary, never extending beyond a day, and execution usually following upon judgment with irreparable celerity. His inability to call sworn witnesses in capital cases was perhaps the most remarkable of these handicaps, and nothing shows more clearly the prejudice against the man who stood in conflict with the Crown; for the theory (though it was doubted) seems to have been that it was unseemly and smacked of insubordination that witnesses should be sworn against the Crown. Even complacent writers like Blackstone



could not regard the rule without indignation, and it could be justified only on the most sophistical grounds . . .

In sum, then, we may conclude that four hundred years ago in all criminal trials of which we have any record, the dice were loaded heavily against the accused. The presumption of innocence was not only absent from, but antagonistic to, the whole system of penal procedure. How and why have we come to hold the contrary view so strongly that it is one of the most unquestioned axioms in the whole of our law?

I believe the true explanation does not lie in ethics. It lies in the profound change which has taken place in the organization of society . . .

Allen goes on to argue that the presumption was made possible by the reduced fear of lawlessness which accompanied more settled social conditions in England after 1688 – an observation which resonates with Farmer’s argument cited above. These social changes facilitated the development of a systematic law of evidence which was grounded in the recognition of the rights of the individual accused.

*Nicola Lacey 2000, *Commons, Crime and Chancery from Mill Houses to Town of the D'Urbervilles* (Oxford University Press), pp. 12–13*

In the early 18th Century, most criminal trials were a highly non-technical affair: a conversation between the accused and the court – trial, as John Langbein has put it, as altercation. Levels of lawyers’ involvement – with the important exception of treason trials and certain other highly technical areas such as forgery – were low: felony defendants had no right to be represented by Counsel until 1836, and though judges were increasingly balancing prosecutors’ resort to lawyers by exercising their discretion to allow counsel to engage in examination of witnesses from the middle of the 18th Century, they had no right to address the jury until the passage of the Prisoners’ Counsel Act in 1836. The average length of a criminal trial in the last decades of the 18th Century has been estimated at between 20 and 30 minutes, with Assizes hearing between 20 and 30 cases a day. This in turn lends weight to the judgment of one of the most influential historians of the period that the criminal trial operated up to the early 19th Century on something far closer to a presumption of guilt than a presumption of innocence (a doctrine which, like the special criminal standard of proof, in any case received no judicial formulation until the late 18th century).

While treatises and commentaries on criminal law and its doctrines had of course existed for several centuries, their impact on run-of the mill cases can all too easily be over-estimated, particularly in the light of the dominance of trial before Justice of the Peace already noted. Here we run into the problem which animated John Baker’s fascinating Clarendon Lectures in 2000: ‘How can we understand legal history . . . if the authoritative sources, the case-law found in the reports and the records, even the statutes, do not tell us what the law truly is or was?’ While, as Baker acknowledged, this problem is relevant even to contemporary legal scholarship, it is a particular issue in relation to periods and areas of legal practice in which there is reason to think that the law’s canonical, doctrinal body was a particularly poor indicator of its living, institutional body. And this is certainly



the case in relation to criminal law of the 18th Century. Until well into the 19th Century, there was neither systematic law reporting nor formalised legal education, and there was no regular system of appeals through which points of law could be tested until 1908. The law of criminal evidence, too, was still developing throughout the period, and would not be put together in systematic form until the late 19th Century. As Schramm aptly sums up the position, “an inchoate notion of the standard of proof in criminal cases” led to the expectation that a man would not be convicted unless the evidence of his guilt was plainly manifest, and it was believed that the “facts” of the case which emerged from the accused’s admissions would in some way guarantee the discovery of the truth’.

Happily, a detailed historiography, based not only on law reports and treatises but also on judges’ notes and contemporary eyewitness accounts, now gives us some insight into the actual practice of 18th Century criminal law. This suggests that the overwhelming bulk of evidence was either eye-witness testimony or evidence as to the defendant’s or complainant’s character and reputation. Such evidence was focused on the accused’s reputation and social position, but inferences about disposition appear to have been a natural corollary. Since the accused’s confrontation with the jury was the kernel of the trial, wherever direct evidence of conduct was ambiguous, the jury’s assumptions about his or her character (and that of witnesses) were central to the chances of exculpation: to judgments of credibility, to the reception of pleas for mercy, and to the likelihood of partial verdicts – all crucial matters in a trial often focused on the key question of whether the death penalty would apply or not.

Nonetheless, at a rhetorical level, the English criminal process is eloquent in declaring its conformity to the full trappings of ‘due process’. This is illustrated in *Woolmington* (1935) – a case which has become something of a legal legend. The appellant was convicted of the murder of his wife, who had recently left him. He claimed that he accidentally shot her when attempting to induce her to return to him by threatening to shoot himself. In his summing-up to the jury, Swift J said that once it was proved that he had shot his wife, this was presumed to be murder unless Woolmington could satisfy the jury that the killing was an accident. Woolmington was unsuccessful in his appeal to the Court of Criminal Appeal and then appealed to the House of Lords. In a judgment whose elaboration of ancient English authorities once again illustrates the link between the image of due process, the common law and conceptions of national culture, Viscount Sankey allowed the appeal. He affirmed the presumption of innocence in a striking rhetorical flourish which continues to echo through legal doctrine:

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity [which has to be proven by the defendant on a balance of probabilities] and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence, given

by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. It is not the law of England to say, as was said in the summing-up in the present case: 'if the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing it was a pure accident.'

The decisive terms in which the House of Lords affirmed the presumption of innocence should not blind us, however, to exceptions to it. Even restricting our view to laws of evidence, these exceptions are significant. Viscount Sankey's casual reference to 'any statutory exception' renders the 'golden thread' a thin one, and it is a thread which the legislature has not hesitated to break when instrumental concerns have militated towards less stringent procedural safeguards. For example, section 7 of the Children and Young Persons Act 1933, which creates the offence of selling cigarettes to a person under 16, provides that 'it shall be a defence for a person charged to show that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence'. And section 74 of the Police and Criminal Evidence Act 1984 provides:

- (1) In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court . . . shall be admissible in evidence for the purpose of proving that that person committed that offence, where evidence of his having done so is admissible, whether or not any other evidence of his having committed that offence is given.
- (2) In any proceedings in which by virtue of this section a person other than the accused is proved to have been convicted of an offence by or before any court . . . he shall be taken to have committed that offence unless the contrary is proved.

This amounts to a reversal of the criminal burden of proof and imposes on the accused the heavy onus of proving that a conviction to which he was not a party was in fact wrong. As the accused will have been a stranger to the events leading to that conviction, he will often be badly placed to discharge this burden. Another relevant provision is section 101 of the Magistrates' Courts Act 1980, which provides: 'Where the defendant . . . relies for his defence on any exception, exemption, proviso, excuse or qualification, whether or not it accompanies the description of the offence in the enactment creating the offence . . . the burden of proving the exception, exemption, proviso, excuse or qualification shall be on him, and this notwithstanding that the information . . . contains an allegation negating the exception, exemption, proviso, excuse or qualification.'

As Zuckerman notes: 'A burden as heavy as this can hardly be consistent with the golden thread' (Zuckerman 1989, p. 152).

An illustration of the courts' pre-HRA approach to such statutory exceptions may be drawn from the law on unlawful drugs. In *Hunt* (1987), the appellant pleaded not guilty to an indictment charging him with possessing a Class A controlled drug contrary to section 5(2) of the Misuse of Drugs Act 1971. Hunt told the police that he had bought the powder which he was charged with possessing in Shaftesbury Avenue and that it was amphetamine sulphate. The only other evidence for the prosecution was contained in the report of an analyst which was by agreement read out to the jury. The report showed that the powder was not amphetamine sulphate and that it contained morphine. At the trial Hunt's counsel submitted that there was no case to answer, because the prosecution had called no evidence as to the proportion of morphine contained in the powder, whereas regulations made under the Act exempted certain preparations where that proportion was not more than 0.2 per cent. The judge ruled against the submission, and Hunt changed his plea to guilty. The Court of Appeal held that if the appellant wished to escape conviction the burden lay on him to prove on a balance of probability that the preparation of morphine fell within the relevant exception contained in the Misuse of Drugs Regulations 1973. As it was obvious that the appellant neither intended to nor could discharge this burden of proof, the Court of Appeal upheld the conviction.

In the House of Lords, Hunt relied on *Woolmington*, and in particular on the passage from Viscount Sankey's judgment quoted above: he argued that in using the phrase 'any statutory exception' Viscount Sankey was referring only to statutory exceptions in which Parliament used express words to place the burden of proof on the accused – a technique to be found in several other sections of the Misuse of Drugs Act. Lord Griffiths rejected this general argument, affirming that 'a statute can, on its true construction, place a burden of proof on the defendant although it does not do so expressly', and that the only question was the question of construction: whether Parliament had intended to shift the burden of proof in any particular instance. In this instance, he construed the statute not to have shifted the burden of proof onto the defendant because of the seriousness of the offence and the fact that the issue – like that in *Woolmington* – related to the existence of an essential ingredient of the offence. Lord Griffiths argued that in construing such statutory provisions, the courts should be slow to interpret the burden as having been imposed on the defendant where that burden would be difficult to discharge. He also implied that section 101 of the Magistrates' Courts Act (quoted above) does not necessarily apply merely because a term such as 'exemption' or 'proviso' appears in a statute. However, the House of Lords' acceptance that the principle that criminal offences must be proven beyond reasonable doubt may be derogated from *by implication* is arguably a serious fraying of the golden thread (see further Williams 1987; Mirfield 1988).



Since the passage of the Human Rights Act, the question of the legality of such presumptions has, not surprisingly, been challenged.

Ian Dennis, 'Reverse Onuses and the Presumption of Innocence: In search of Principle' [2005] *Criminal Law Review* 901

The courts have repeatedly struggled with a simple question: in what circumstances is a reverse onus in a criminal case compatible with the presumption of innocence under Art. 6(2) of the Convention?

It is important to define this question more precisely. A reverse onus may be defined as a burden on the defendant to prove some matter the effect of which is that he is not guilty of the offence charged. Such an onus might relate to criminal liability in different ways. It might require the defendant to prove the absence of one of the elements of the *actus reus* of the offence, or the absence of a specified *mens rea*, or the existence of a defence...

The presumption of innocence in Art. 6(2)... is the foundation of the fundamental rule of criminal law that the onus lies on the prosecution to prove the defendant's guilt of the offence charged beyond reasonable doubt. The problem which then arises is that on the face of it a reverse onus is inconsistent with the presumption. Unless the presumption can be qualified it would seem to require the prosecution to prove any and all matters comprising the guilt of the defendant. This in turn presents a difficulty for a court in upholding a reverse onus because under s. 6 of the HRA it is unlawful for it to act in a way which is incompatible with a Convention right.

However, the European Court of Human Rights has held that Art. 6(2) does not state an absolute rule. The presumption of innocence can be qualified, provided certain conditions are fulfilled. The Strasbourg and the domestic case law now seem to agree that there are two criteria to be satisfied: first, whether the reverse onus is imposed in pursuance of a legitimate aim, and secondly, whether it is proportionate to the achievement of that aim...

The domestic courts have had considerable difficulty in settling how these criteria are to be applied. They have rejected any general rule on reverse onuses and said that each case has to be decided according to its particular circumstances. But the law cannot stop at this point: courts and lawyers need to know the relevant factors to be taken into account in decisions on the allocation of the burden of proof. They also need to know how these factors are to be weighed and whether there are general principles to structure decision-making. Clear guidance is all the more essential given the importance of what is at stake...

The difficulty the courts have had with this issue of the compatibility of reverse onuses is easily demonstrated. There have been no less than four cases on the subject in the House of Lords in six years: *R v. DPP Ex p. Kebeline*, [2000] 2 A.C. 326; *Lambert*, [2002] 2 A.C. 545; [2001] UKHL 37; [2004] UKHL 43. *Johnstone*, [2003] 2 Cr.App.R. 493; [2003] UKHL 2814; *Sheldrake v DPP*, [2004] UKHL 43...

It is useful to begin with some further clarification of the nature and scope of the problem. A crucial distinction at the outset is between the 'legal' burden, sometimes called



the 'persuasive' burden, of proof and the 'evidential' burden. A defendant who bears a legal burden will lose if he fails to persuade the fact-finder of the matter in question on the balance of probabilities. An evidential burden in relation to a matter is a burden of adducing sufficient evidence to raise an issue regarding the existence of the matter. The burden of disproof will then fall on the prosecution in accordance with the normal rule. The significance of the distinction in this context is that evidential burdens are regarded as compatible with the presumption of innocence. Unlike legal burdens they do not require the accused to assume the risk of being convicted because he fails to prove some matter relating to his innocence. Building on this distinction the courts have held that if they find a legal burden imposed by a reverse onus provision to be incompatible with Art. 6(2) they can use the interpretative power under s. 3 of the HRA to 'read down' the legal burden to an evidential burden. The use of s. 3 is the preferred solution to any issue of incompatibility of legislation with the Convention. A declaration of incompatibility under s. 4 of the HRA has been said to be the last resort and to be avoided if it is at all possible to interpret the legislation in a way that is Convention-compliant.

... It makes no difference whether the statute provides that x is to be presumed against the defendant unless he proves the contrary, or whether the statute states that it is a defence to prove x...

It is submitted that when a challenge is made to the compatibility of a reverse onus the present law requires a three-stage process of decision-making.

1. Interpretation of the statute: does the provision in question, interpreted in accordance with the ordinary principles of construction, place a burden on the accused? If so, is it a legal or an evidential burden? If it is evidential no further inquiry need be made about compatibility with Art. 6(2). If it is a legal burden, the court must move to stage 2 to assess the question of compatibility.
2. Justification of the reverse onus: does the provision in question serve a legitimate aim and is it proportionate to that aim? If the answer is Yes the provision is an acceptable qualification to the presumption of innocence. The defendant will then bear the burden of proof on the matter in question, although to a lower standard of proof than the prosecution (namely the balance of probabilities). If the answer is No the court must move to stage 3.
3. Reading down the provision: if the reverse legal burden cannot be justified can the court 'read down' the burden to an evidential one, using s. 3 of the HRA? If it can it should do so. If it cannot the court should make a declaration of incompatibility of the provision under s. 4 of the HRA.

However, although the problem is circumscribed, it is a problem on a large scale. There are numerous reverse onuses in the criminal law. Many of them are imposed expressly by the legislation. Ashworth and Blake suggested a few years ago that express reverse onuses are to be found in around 40 per cent of all indictable statutory offences [1996]. They extend across the entire range of seriousness, up to and including murder, where the defendant bears the burden of proving the statutory partial defence of diminished responsibility...

... The main conclusions of this inquiry can now be summarised. The imposition by statute of an onus on the defendant in relation to a criminal charge raises a potential issue of compatibility of the onus with the presumption of innocence in Art. 6(2) of the ECHR. The issue is resolved by a three-stage process of decision-making.

The first stage of the decision-making process deals with the question whether a statute imposes a burden of any kind on the defendant, and, if so, whether it is a legal or an evidential burden. This question is settled by ordinary principles of statutory construction. These include the effect of s. 101 of the Magistrates' Courts Act 1980, as explained and expanded by Edwards and Hunt. If the burden is an evidential one no problem of compatibility with Art. 6 arises. If the burden is a legal one, the issue of compatibility must be considered.

The second stage of decision-making requires a court to decide the issue of compatibility according to whether the reverse onus (legal burden) is justified as a proportionate measure in pursuance of a legitimate aim. It is at this stage that the main problems and uncertainties arise. The debate is almost entirely about proportionality... A search for principle suggests that issues of moral blameworthiness should be proved by the prosecution. These issues will include, in addition to the relevant prohibited acts, any requisite culpable mental states, any objective fault such as negligence, and the unavailability of any common law defences raised by the defendant. Exceptionally, legal burdens can be placed on defendants to prove formal qualifications to do certain regulated acts, and in cases where the defendant accepts the burden of proof of exculpation by virtue of voluntarily participating in a regulated activity from which he intends to derive benefit...

If the reverse onus is justified as proportionate to a legitimate aim no further decision is necessary. If it is not justified according to these criteria the third stage of decision-making requires the court to read down the legal burden to an evidential burden if it is possible to do this using s. 3 of the HRA. On the basis of *Sheldrake* it seems that it will almost always be possible to do this; it is hard to envisage a case that would not come within the scope of Lord Bingham's reasoning. Accordingly a declaration of incompatibility of a reverse onus will almost never be necessary.

In recent years, notwithstanding well-publicised miscarriages of justice, the rules of evidence celebrated by Allen and by the judges in *Woolmington* have come under attack as being unduly *favourable* to defendants. They have been modified by statute – for example, allowing adverse inferences to be drawn from the fact that an accused has exercised his or her right to silence (not to testify) in court (Criminal Justice and Public Order Act 1994, ss. 34–7). As Quirk (2009, p. 62) puts it:

The contradictory responses of the state to miscarriages of justice are epitomised in the creation of the Criminal Cases Review Commission (CCRC). The first publicly-funded body in the world established to review suspected wrongful convictions was proposed in the aftermath of the notorious Birmingham Six case. Yet on the very day the CCRC started work, the Criminal Procedure and Investigations Act 1996 came into force, restricting defence access to unused material and provoking fears of future miscarriages of justice.

The work of the CCRC is discussed further below in 3.a.iii. Even in the earlier era which Allen would have seen as marking the height of its institutional realisation, the presumption of innocence, broadly conceived, was honoured more often in the breach than in the observance. Furthermore, the basis for this pattern lies deep in the structure of the constitution.

Beyond the formal laws of evidence, there are many practices in the criminal process which sit unhappily with the presumption of innocence. Practices such as remand in custody and plea-bargaining, which are seen as crucial to efficiency and crime-control, appear to contradict the presumption. Criminal sanctions are on occasion imposed in response to breaches of civil orders, in contradiction of the principle of legality (for example under anti-social behaviour orders under section 1 of the Crime and Disorder Act 1998: discussed in Chapter 5.d).

The weight attached to the presumption of innocence, like other features of due process, is closely related to the images of criminal law discussed in the first section of this Chapter, and in particular to arguments about the proper functions of the criminal process. This relationship, as well as the further connection between the presumption of innocence and the rule of law, is illustrated by Packer's famous distinction between competing 'crime control' and 'due process' models of criminal justice:

**Herbert Packer 1968 *The Limits of the Criminal Sanction* (Stanford University Press), pp. 150-72**

The value system that underlies the Crime Control Model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process. The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order and thence to the disappearance of an important condition of human freedom... In order to achieve this high purpose [of protecting social freedom], the Crime Control Model requires that primary attention be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime...

The model, in order to operate successfully, must produce a high rate of apprehension and conviction, and must do so in a context where the magnitudes being dealt with are very large and the resources for dealing with them are very limited. There must then be a premium on speed and finality. Speed, in turn, depends on informality and on uniformity; finality depends on minimizing the occasions for challenge. The process must not be cluttered up with ceremonious rituals that do not advance the progress of a case... The criminal process, in this model, is seen as a screening process in which each successive stage - pre-arrest investigation, arrest, post-arrest investigation, preparation for trial, trial or entry of plea, conviction, disposition - involves a series of routinized operations whose success is gauged primarily by their tendency to pass the case along to a successful conclusion...

The presumption of guilt is what makes it possible for the system to deal efficiently with large numbers, as the Crime Control Model demands. The supposition is that the



screening processes operated by police and prosecutors are reliable indicators of probable guilt. . . . The precise point at which this occurs will vary from case to case; in many cases it will occur as soon as the suspect is arrested, or even before, if the evidence of probable guilt that has come to the attention of the authorities is sufficiently strong. But in any case the presumption of guilt will begin to operate well before the 'suspect' becomes a 'defendant'.

The presumption of guilt is not, of course, a thing. Nor is it even a rule of law in the usual sense. It simply is the consequence of a complex of attitudes, a mood. If there is confidence in the reliability of informal administrative fact-finding activities that take place in the early stages of the criminal process, the remaining stages of the process can be relatively perfunctory without any loss in operating efficiency. The presumption of guilt, as it operates in the Crime Control Model, is the operational expression of that confidence.

It would be a mistake to think of the presumption of guilt as the opposite of the presumption of innocence that we are so used to thinking of as the polestar of the criminal process and that, as we shall see, occupies an important position in the Due Process Model. The presumption of innocence is not its opposite; it is irrelevant to the presumption of guilt; the two concepts are different rather than opposite ideas. . . .

The presumption of innocence is a direction to officials about how they are to proceed, not a prediction of outcome. The presumption of guilt, however, is purely and simply a prediction of outcome. . . .

If the Crime Control Model resembles an assembly line, the Due Process Model looks very much like an obstacle course. Each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process. . . . The Crime Control Model, as we have suggested, places heavy reliance on the ability of investigative and prosecutorial officers, acting in an informal setting in which their distinctive skills are given full sway, to elicit and reconstruct a tolerably accurate account of what actually took place in an alleged criminal event. The Due Process Model rejects this premise and substitutes for it a view of informal, non adjudicative fact-finding that stresses the possibility of error. People are notoriously poor observers of disturbing events – the more emotion-arousing the context, the greater the possibility that recollection will be incorrect; confessions and admissions by persons in police custody may be induced by physical or psychological coercion so that the police end up hearing what the suspect thinks they want to hear rather than the truth; witnesses may be animated by a bias or interest that no one would trouble to discover except one specially charged with protecting the interests of the accused (as the police are not). Considerations of this kind all lead to a rejection of informal fact-finding processes as definitive of factual guilt and to an insistence on formal, adjudicative, adversary fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him. Even then, the distrust of fact-finding processes that animates the Due Process Model is not dissipated. The possibilities of human error being what they are, further scrutiny is necessary, or at least must be available, in case facts have been overlooked or suppressed in the heat of battle. How far this subsequent scrutiny must be available is a



hotly controverted issue today. In the pure Due Process Model the answer would be: at least as long as there is an allegation of factual error that has not received an adjudicative hearing in a fact-finding context. The demand for finality is thus very low in the Due Process Model...

The most modest-seeming but potentially far-reaching mechanism by which the Due Process Model implements these anti-authoritarian values is the doctrine of legal guilt. According to this doctrine, a person is not to be held guilty of crime merely on a showing that in all probability, based upon reliable evidence, he did factually what he is said to have done. Instead, he is to be held guilty if and only if these factual determinations are made in procedurally regular fashion and by authorities acting within competences duly allocated to them. Furthermore, he is not to be held guilty, even though the factual determination is or might be adverse to him, if various rules designed to protect him and to safeguard the integrity of the process are not given effect...

In this concept of legal guilt lies the explanation for the apparently quixotic presumption of innocence of which we spoke earlier. A man who, after police investigation, is charged with having committed a crime can hardly be said to be presumptively innocent, if what we mean is factual innocence. But if what we mean is that it has yet to be determined if any of the myriad legal doctrines that serve in one way or another the end of limiting official power through the observance of certain substantive and procedural regularities may be appropriately invoked to exculpate the accused man, it is apparent that as a matter of prediction it cannot be said with confidence that more probably than not he will be found guilty.

Beyond the question of predictability this model posits a functional reason for observing the presumption of innocence: by forcing the state to prove its case against the accused in an adjudicative context, the presumption of innocence serves to force into play all the qualifying and disabling doctrines that limit the use of the criminal sanction against the individual, thereby enhancing his opportunity to secure a favourable outcome...

Note the resonance between Packer's 'crime control' and 'due process' models and, respectively, the regulatory and moral-retributive conceptions of criminal law canvassed in Chapter 1. In Packer's terms, Ashworth's and Blake's research suggests that the English system has been moving steadily in a 'crime control' direction. But the opposition between these two poles may be less than clear. McBarnet (1981) has argued that Packer's analysis of two competing models is misleading in that many features of the criminal process which we think of as elements of 'due process' in fact operate in a way which is functional to 'crime control' (for further critical discussion of Packer, see Ashworth 1998, 24–9). In sum, improved safeguards for suspects and defendants in the investigation and trial process have been matched by greater police powers in dealing with suspects, and restrictions on the right of silence (against the recommendation of the Royal Commission). It seems that the 'golden thread' must be reinterpreted as, at best, a dotted line of somewhat paler hue. One graphic and tragic illustration of this lies in a number of appalling

miscarriages of justice brought to light over the last 25 years and to which we now turn.

### 1.3.a.iii. Miscarriages of justice

The ultimate quashing in 1989 of the convictions of the 'Guildford Four', convicted of murder by bombing a pub in 1976, and concern about the case of the Maguire 7, convicted that year of possessing explosives allegedly linked to the same bombings, gave rise to a public outcry which prompted the appointment of a Royal Commission on Criminal Justice in 1991. In 1991, the convictions of the 'Birmingham Six' (*McIlkenny and others* 1991) and the 'Tottenham Three' (*Silcott, Braithwaite and Raghip* 1991) were quashed on similar grounds of what amounted to grave breaches of due process: the Maguires followed in 1992, Judith Ward (*Ward* 1993) and the 'Cardiff Three' (*Paris, Abdullahi and Miller* 1993) in 1993. The last group had been convicted in 1990 of the murder of a Cardiff prostitute. Their convictions were quashed by the Court of Appeal on the ground that the nature and length of police interviews – conducted after the safeguards of the Police and Criminal Evidence Act 1984, which included the tape recording of police interviews of suspects, were in place, as had not been the case with the other miscarriages of justice – was such that they should not have been admitted as evidence. Perhaps most startling is that the police employed these techniques knowing that they were being recorded, suggesting not only that they thought they were behaving properly, but that they were working in an institutional culture which tolerated or even encouraged that belief. It is unlikely that the police will leave quite such an obvious evidence trail in future; 15 people, including 13 serving and retired police officers, were tried in 2009 for offences ranging from conspiracy to pervert the course of justice and perjury in relation to the Cardiff Three case.

A welter of procedural and human rights issues were raised in these miscarriage cases: poor standards and failures of disclosure of evidence by forensic experts; fabrication or falsification of evidence by police officers; oppressive police conduct during questioning. Furthermore, the failure of most of the cases at initial appellate hearings, as well as the difficulty of achieving a further reference back to the Court of Appeal, revealed failings in the machinery available for investigating possible miscarriages of justice. The genesis of the miscarriages therefore lay not merely in individualised wrongdoing or error, but also in pervasive features of the criminal process. These cases could not be explained away as aberrations, but prompted general questions about the conduct of contemporary criminal justice. While the main failings lay in the design and conduct of the criminal process and in rules of evidence rather than in criminal law itself, these cases also illustrate the interdependence of law and procedure in the effective establishment of the presumption of innocence. In this respect, the terms of reference of the Royal Commission are instructive:

... a Commission should forthwith issue to examine the effectiveness of the criminal justice system in England and Wales *in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent, having regard to the efficient use of resources.* (Royal Commission on Criminal Justice, 1993, Cm 2263, p. i, emphasis added).

These terms of reference represent the goals of convicting the guilty and acquitting the innocent as of equal importance, rather than according the priority to the acquittal of the innocent which 'the golden thread' would appear to dictate: furthermore, each of these goals is set up as being on a par with that of managerial efficiency. In short, the terms of reference tend towards Packer's crime control model rather than towards the due process model which one might have expected to be uppermost in the government's thinking in the aftermath of the miscarriages of justice. Given the varying conceptions of 'due process' or 'justice' which different groups in society expect the criminal justice system to deliver, and which make it all but impossible for a legal community to acknowledge that some miscarriages of justice are an inevitable side effect of the all too human process of criminal justice, it is difficult to find a satisfactory resolution to this problem:

**Richard Nobles and David Schiff 2000 *Understanding Miscarriages of Justice* (Oxford University Press), pp. 16, 37–8**

The general conception of miscarriage of justice, which is shared by the diverse communities of lawyers, media, politicians and in general social communication, is not injustice *per se*, but wrongful conviction...

The legal community generally expresses a commitment to due process as a value in addition to that of truth... Due process provides an alternative basis to truth for deciding whether convictions are wrongful or not. Intolerance to breaches of rules, standards of procedure, and rights are presented by lawyers to themselves and to those outside the law as evidence of law's commitment to justice...

By contrast to the legal community, the media's attachment to due process is weaker than its attachment to truth. Rights, which make no contribution to the factual correctness of a verdict, can be seen as technical and lacking merit. The media's dominant understanding of miscarriage of justice is that those who are factually innocent cannot rightfully be punished, *whatever the process which led to their conviction*. This understanding of miscarriage of justice has the ability to threaten the legitimacy of criminal justice, and to promote that perception of crisis, because it creates the possibility of putting criminal justice itself on trial...

In this context it is perhaps not surprising that the Royal Commission's recommendations on the reform of the criminal process were both piecemeal and relatively modest. The most significant in terms of implementation was the establishment of the Criminal Cases Review Commission (CCRC) for the consideration and referral to the Court of Appeal of miscarriage cases. In all but the



most exceptional circumstances there is an expectation that the usual appeal processes have been exhausted. Under the Criminal Appeal Act 1995 the Court of Appeal must quash a conviction that they think is unsafe (although they have the power to order a re-trial). But there is a reluctance to interfere with the decision of the jury (in the case of the Birmingham Six appeals reluctance was replaced by complete intransigence in the face of overwhelming evidence) and often the reasons for the miscarriage do not emerge until long after the appeal has taken place. The CCRC can refer a case to the Court of Appeal so long as it 'considers that there is a real possibility that the conviction . . . would not be upheld were the reference to be made' (Criminal Appeal Act 1995, s. 13). The CCRC has resources and powers – for example to call for disclosure from public bodies – to investigate in depth. Advances in DNA technology and cold case reviews have led to a steady stream of 35–40 referrals each year. But the fact that only 70 per cent of referrals are successful suggests that the task of predicting the 'real possibility' of success can be hit and miss; the jurisprudence of the Court of Appeal has undoubtedly developed during this period (Elks 2008).

The tensions between wrongful or unsafe convictions in the sense of mistaken identity and wrongful or unsafe convictions because of grave procedural or legal errors remain. While the previous uncritical reliance on unrecorded and/or unreliable confessions has gone, other causes of miscarriages including lack of access to any or to good legal advice in the police station, inadequate disclosure of prosecution material, and poor trial tactics continue. Incompetence and inefficiency is possible at any stage as the release of Sean Hodgson after 27 years in prison in 2009 shows. The evidence that was to show incontrovertibly that he was innocent had not, his lawyers were assured in 1998, been destroyed but had lain in a Forensic Science Service warehouse. Added to these systemic weaknesses are clear cases of abuse of power such as the illegal abduction of a suspect from another country by members of the Secret Intelligence Service (Mullen 1999). A further injustice is caused by the criteria for early release which can indirectly exclude those who continue to protest their innocence (Naughton 2008).

The government, however, convinced that there was a serious problem of too many quashed convictions on what it saw as spurious procedural grounds proposed that the Court of Appeal's powers under the Criminal Appeal Act 1995 should be restricted to cases of 'factual' miscarriages (Home Office 2006). Despite unanimous opposition from the judiciary, the Criminal Bar and the Law Society, the CCRC, Liberty, and JUSTICE, the Criminal Justice and Immigration Bill included amendments to that effect. Fortunately, mindful that the whole Bill might be lost in the face of such opposition, the government caved in. The CJI Act 2008 does however restrict appeals where there has been a change in law between conviction and appeal to those where it would be 'appropriate' (inserting new s. 16C in the Criminal Appeal Act 1968. See further Elks 2008, Ch. 7).



### 1.3.b. Concepts in criminal law

Over the last 150 years, scholars of criminal law have devoted an enormous amount of attention to the so-called ‘general part’ of criminal law. The ‘general part’ consists of the rules, principles and doctrines which apply across the whole range of specific criminal offences: the components of criminal conduct and responsibility, general defences, principles of inchoate and participatory liability. At one level, the ‘general part’ is an aspect of the doctrine of criminal law itself. But, as we shall try to show in this section, legal doctrines are by no means independent of the normative theories of criminal law which we considered in Chapter 1. For criminal law doctrine contains a powerful set of assumptions – sometimes made explicit by judges and legal commentators, but sometimes left implicit – about not only the general structure of but also the rationale for criminal liability. The framework of criminal law doctrine is closely articulated with the ideal of the rule of law and with the modern conception of the legal subject as an individual invested with rights against the state. However, we shall also see in criminal law doctrine traces of the tension between instrumental and moral functions of criminal law reflected in the theories discussed in the first Chapter.

Our discussion will question some assumptions prevalent in both judicial discourse and standard texts. These include a pretension as to the objectivity and completeness of doctrinal analysis; a faith in the capacity of the conceptual framework to generate determinate answers to substantive questions of law; and a belief in the timeless validity of the ‘general principles of criminal law’. By contrast, we aim to illuminate the openness and flexibility of doctrinal categories; the partiality of legal interpretations sailing under the banner of ‘objectivity’; the historical specificity of the values embedded in doctrine; and the structural tensions lying within the doctrinal scheme. Our method here is analogous to what has been termed ‘immanent’ or ‘internal’ critique – an approach to the interpretation of legal doctrine which looks within law itself, scrutinising it closely, for examples of emergent or embedded values which are not accounted for by, or which are actually inimical to, its professed ideals. In this way, critical scholars seek to question legal doctrine *from within law as it has traditionally been understood*, exposing both its historical contingency and its relationship with a wide range of extra-legal social forces. In the following passage, Norrie gives a succinct account of the direction and motivation of this method:

Alan Norrie 2001 *Crime, Reason and History* (Cambridge University Press), p. 8

[T]he modern criminal law was formed in a particular historical epoch and derived its characteristic ‘shape’ from fundamental features of the social relations of that epoch. Its principles therefore are historic and relative rather than natural and general. Furthermore

these principles were established in the crucible of social and political conflict, and bear the stamp of history in the always-contradictory ways in which they are formulated. Historical analysis shows that, far from being free-standing foundations for a rational criminal law, the central principles of the law are the site of struggle and contradiction. This can only work its way through the legal rules themselves. Thus it is that the fate of law as a rationalising enterprise is tied up with the nature of law as a social, historical force.

Our first task is to describe the doctrinal model of criminal law and liability. Inevitably what we shall be producing here is a model, for we cannot hope to discuss every small point of detail. Furthermore, since commentators on criminal law themselves display some ambivalence about the status of the traditional story about 'the general principles of criminal liability' – at one moment pointing out laws' failure to meet them, yet at the next reproducing the core assumptions of the traditional principles (see further Norrie 2001, Ch. 1) – any attempt to produce a critique of this method is vulnerable to the criticism that it is simply responding to a caricature. Our view is that such critique is worthwhile because, although most commentators acknowledge the incomplete realisation of general principles in criminal law, their accounts nonetheless proceed within the framework set by the 'general principles', and construe departures from them as minor irregularities which could and should be removed (cf. the analysis of the presumption of innocence above). It is this view that we want to challenge. In doing so, we hope to equip the reader with the critical tools central to the detailed interpretation of particular fields of criminal law which occupy the following chapters.

The 'general part' has to do not so much with the substance as with the structure of criminal liability: it represents the conceptual building blocks out of which legal reasoning constructs arguments for and against liability. Summed up very simply, the 'general part' portrays the conditions of liability as being divided into two main elements; 'actus reus' or the 'external'/'conduct' element; and 'mens rea' or the 'mental'/'internal'/'fault' element. The paradigm of criminal liability therefore consists in a person subject to criminal law performing or causing the 'actus reus' of the offence with the requisite 'mental element', in the absence of any relevant defence.

Implicit in this paradigm is the idea of the subject as a rational agent with capacities of both cognition and self-control, and hence the idea of criminal liability as rooted in individual agency. In accordance with the precept of formal equality before the law, the legal subject is constructed as a gender-less, race-less, class-less individual abstracted from its social situation. Linguistic convention, however (reversed in this book), is one among many clues to its implicit masculinity, to say nothing of its ethnicity or socio-economic position (Allen 1988; MacKinnon, Kennedy 1992; Lacey 2001). This abstract subject is a person of 'normal' capacities: of 'sound mind' and of sufficient age to appreciate the implications of their actions (English criminal law draws this line at 10:

Crime and Disorder Act 1998, s. 34). To give a simple example, theft is defined in the Theft Act 1968, section 1, as the dishonest appropriation by a person of property belonging to another with intent permanently to deprive that other of it. Without going into detailed questions of interpretation at this stage, the appropriation of property belonging to another constitutes the 'actus reus' of this offence, whilst the dishonest intent permanently to deprive constitutes the 'mens rea'. The core assumption of doctrine is that both 'actus reus' and 'mens rea', seen as analytically separate concepts, are necessary conditions for conviction of an offence. The basic building blocks out of which criminal liability is constructed are therefore, on the face of it, very simple: in the case of a capable legal subject, 'actus reus' + 'mens rea' = offence.

This basic account has to be refined not only by the introduction of principles of excuse, justification and mitigation but also by the supplementary concepts of inchoate and participatory liability and by (what are conventionally seen as) the exceptions of 'strict' and 'vicarious' liability. To illustrate once again with the example of theft, if a defendant stole under duress such as threats to her life, her conduct may be excused. If she stole to feed a child who would otherwise have died of starvation, her conduct might (though this is controversial) be held to be justified under a doctrine of duress of circumstances. If she can prove on a balance of probabilities that she comes within the legal definition of insanity, this fundamental incapacity will also lead to her acquittal. She can be convicted of attempting or conspiring with others to commit theft, or of encouraging another to do so, or for some combinations of these activities, even if she never completes or even partially performs the 'actus reus' as defined by the Theft Act 1968. And she may be convicted as an accomplice to theft even if she was not involved in the actual theft if, for example, she participated by supplying necessary equipment or giving valuable knowledge or advice, knowing that it would be used to steal. The many offences of 'strict' liability (such as driving without insurance) can be committed without any proof of 'mens rea'. And even where the person convicted has not accomplished the 'actus reus' herself but is in a relationship of authority or responsibility towards the person who has done so, the law may in certain circumstances hold her 'vicariously' liable for that other person's acts. Our preliminary equation therefore needs to be reformulated as 'actus reus' committed by a capable subject + 'mens rea' [modified by principles of inchoate, participatory, strict and vicarious liability] – defence = offence.

These elements are usually brought together under the heading 'general principles of liability'. One way of looking at these principles is as a set of interpretive postulates developed within the common law and applied by the courts to both common law and statutory offences (the latter now making up the vast bulk of criminal law). Their denomination as 'general principles' reflects the idea that the scheme is a rational, coherent and even-handed one which is both generally realised in criminal law and justified in terms of political morality. In modern codified systems and indeed in the Law Commission's various (ill-fated) draft codes (Law Commission 1985, 1993) these 'general principles' therefore tend to occupy a central position. It is important to bear in



mind, however, that the quest for a 'general part' of criminal law is a specifically modern one. If we look back to one of the first systematic statements of the common law of crime, that of William Blackstone, first Vinerian Professor of English Law at Oxford in the mid-eighteenth century, we see a very different picture:

David Lacey, 'In Search of the Responsible Subjects of Criminal Law' (2001) 64 *Modern Law Review* 350, pp. 359–60

A structural as well as a content analysis of [William Blackstone's *Commentaries on the Laws of England*, published in the 1760s, James Fitzjames Stephen's *History of Criminal Law* and his *Digest of Criminal Law (a Draft Criminal Code)* from the 1880s and Glanville Williams' *Criminal Law, The General Part*, from 1953, produces] some . . . striking contrasts. Most obviously, the idea of a general part is missing from Blackstone's text and – more significantly – exists only in sketchy form in Stephen's; while each of them spends only about 10% of their text considering rules and principles applicable across offences (including not only the requirements of conduct and responsibility but also defences and matters such as the nature of penalties, inchoate offences such as attempt and liability for secondary participation), Glanville Williams' text – which provides the model for almost all subsequent commentaries and many attempts at codification – almost exactly reverses the proportion. For both Blackstone and Stephen, it is the so-called 'special part' – the criminal offences themselves – which are, as it were, where the theoretical action is. Their observations about general conditions of liability are focussed on the nature of voluntary conduct and defences rather than on responsibility; these observations are very brief, and are elaborated mainly in relation to particular offences. Even Stephen's earlier *A General View of the Criminal Law of England*, contrary to what today's reader might assume from its title, has only one chapter, spanning a mere 24 of the book's nearly 500 pages, which discusses individual responsibility and which corresponds with the 'general part' in Williams' sense.

This, I would argue, does not entail that either Blackstone's or Stephen's account lacks rationality, coherence or system. Indeed, if we look at the ways in which they organise their material, we perceive a perfectly systematic approach, as well as learning a great deal about how they saw their field. Let me take just one example. For Blackstone – a great champion of the common law, and writing as statute law was set to become an increasingly significant force – the challenge was to present the common law of crime as rational and reasonably systematic in terms not of the arcane procedural distinctions for which common law was (in)famous but rather of the interests it protected and the values it upheld. Blackstone therefore presented criminal law in a way which spoke to these issues, grouping offences not on terms of their distinctive procedural characteristics but in terms of substantive concerns which could be seen as adding up to a coherent sense of 'public wrong': offences against God and religion, offences against the king, offences against public order; offences against the person and property. He then elaborated these in relation to exemplary fact situations which spoke to the important legal issues of his time.

From the point of view of late Twentieth Century legal philosophy, Blackstone's *Commentaries* certainly do look a bit chaotic; there are few articulations of anything we would



recognise as general principles, let alone any sustained reflection on the nature of voluntary conduct, individual responsibility or the specific excusing conditions which might undermine ascriptions of responsibility. But Blackstone's exemplary method of elaboration and analysis makes a great deal of sense in its own terms... He is – from a late Twentieth Century perspective – spectacularly uninterested in the question, 'what makes it fair to hold an individual responsible for a crime'. But... this should not come as any surprise when we reflect upon criminal justice institutions and socio-political conditions in mid-Eighteenth Century England.

Today, by contrast, academic and judicial discussion of criminal liability is seen as an enterprise of rational justification which focusses on the structure rather than the substance of criminal law, constantly reaching towards the ideal of presentation and development of criminal law as a certain, fair and consistent system – as opposed to *ex post facto* rationalisation of the decisions of powerful interests. For example, in both Ashworth's *Principles of Criminal Law* (2006) and in Simester and Sullivan's *Criminal Law: Theory and Doctrine* (2007), the general part occupies twice as much space as the 'special part' (i.e. actual criminal offences). The relatively weak constitutional constraints on our 'sovereign' Parliament, though recently strengthened by the passage of the Human Rights Act, might be thought to pose problems for this view of criminal law as in the case of the inroads on the presumption of innocence discussed above. But a focus on the *structure as opposed to the content* of criminal liability as the basis for the rationalisation of criminal law doctrine – like the focus on criminal procedure rather than the substance of criminal law in the attempts at definition considered in Chapter 1 – makes good sense in a world in which criminal law is used for a huge diversity of regulatory as well as quasi-moral purposes, and in which both the expanding terrain of criminal law and value-pluralism have undermined the kind of substantive consensus to which Blackstone could appeal in his content-based rationalisation of criminal law. The extent to which today's view of criminal law as a principled body of doctrine is defensible must ultimately be judged in the light of further discussion in chapters dealing with actual offences. It is, however, useful to look critically at each main element of criminal law doctrine in turn, so as to get a clearer idea of how the standard story fits (and fails to fit) together.

### 1.3.b.i. 'Actus reus'

Alan Norrie 2001 *Crime, Reason and History* (Cambridge University Press), p. 110

Acts, omissions and causes represent the bedrock of the law of 'actus reus'. Like 'mens rea', 'actus reus' is not a tightly defined concept but rather a loose 'common denominator'

which denotes the requirement that every crime requires an external element. Accordingly, it is best described negatively:

'All that can be said, without exception, is that a crime requires some external state of affairs that can be categorised as criminal. What goes on inside a man's head is never enough in itself to constitute a crime' (Williams 1983, 146)

This formulation indicates an immediate point of connection between the common law and the positive side of liberal values, for it is made clear that it is no crime to think criminal thoughts. Against this, it must be pointed out that the practical impact of this libertarian stance is blunted by the wide way in which the law draws certain criminal categories, such as conspiracy.

The 'actus reus' is that *element of the definition of an offence* which consists in the behaviour which the defendant engages in, seen from an external point of view: abstracted from its meaning or significance for the defendant herself. In some crimes, the 'actus reus' consists simply in an action or piece of behaviour – 'appropriation' of property belonging to another; hiring an '18' video to a child; having sexual intercourse with a person without their consent. But, as the last example shows, the 'actus reus' may comprehend a complex of elements which may include a 'mental state'. This may be the mental state of another person (such as lack of consent of the victim in rape) or of the defendant herself (as, arguably, in the case of careless driving, where carelessness may be at once a quality of the driving and an attitude or state of mind of the defendant). The latter example illustrates the difficulty of distinguishing between 'actus reus' and 'mens rea'; between 'external' and 'mental' elements. Should we regard 'careless' as part of the description of the quality of the *action*, and thus an aspect of the 'actus reus'? Or should it be seen as referring to an attitude of 'practical indifference', which rather represents the 'mens rea' requirement? Is it possible or necessary to classify every element as either 'mens rea' or 'actus reus'? What is the utility of doing so if the analytical clarity promised by doctrine is illusory even in the case of a simple offence such as this?

The 'actus reus' requirement of some offences consists wholly or partly in causing a particular result, as in the case of murder and manslaughter – causing the death of a person – or in causing death by dangerous driving. These are known as 'result crimes'. Sometimes, as in the case of causing death by dangerous driving, the offence will specify the type of causal action required with some precision. In other cases, such as murder, no such precise specification is made. In yet others, an offence may be committed in alternative ways, with special legal consequences such as maximum penalties attaching to each. An example would be the Criminal Damage Act 1971 under which the 'actus reus' of general criminal damage (s. 1(1)) simply consists of destroying or causing damage to property belonging to another, whereas causing such damage by means of fire (s. 1(3)) constitutes the special offence of arson, and carries a greater maximum

penalty. There is no general rule, therefore, as to the precision with which the 'actus reus' of an offence will be specified in its statutory formulation, let alone in the precedents which establish it where a common law offence is involved.

The causation requirement can itself throw up problems both at a theoretical level and in terms of generating workable legal tests. In most actual cases, criminal law is not much exercised by problems of causation. We are usually able to make 'common sense' judgments: if Ann shoots Bill and Bill dies, we infer that Ann caused Bill's death. If Clive sets fire to Diane's house and Eric is injured trying to put out the fire, we say that Clive's act was a cause of Eric's injury. But even this second, simple example begins to reveal one of the major problems of causation – the fact that results or events have a myriad of causes, in the sense of conditions necessary for their realisation: conditions 'but for' which the outcome would not have eventuated. In attributing legal liability, we must choose among this multiplicity, although we need not necessarily select only one cause as legally relevant. For example, if Ann shoots Bill who then receives inept medical treatment from Helen and dies, who is causally responsible for Bill's death – Ann, or Helen, or both? On what criteria should we decide? If Clive sets fire to Diane's house and John then douses the fire with petrol, who is causally responsible for Eric's injuries in trying to put out the aggravated fire? If Fred and Gill both shoot Kay simultaneously and Kay dies, which of them has caused her death?

The straightforward 'but for' test of causation, which asks whether the result would have occurred but for the intervention of Ann, Helen, John, Fred or Gill, does not offer a satisfactory basis for selecting the *legally relevant* cause, for it will identify the very multiplicity of causes which is the problem. It will, for example, pick out not only Ann's shooting and Helen's negligence, but also the gun's being loaded and Bill's having been in a particular place at a particular time. Moreover, the test cannot help us to decide when an 'intervening' cause should be said to wipe out the legal effects of prior causal conduct or events: to 'break the chain' of causation. Several suggestions have been made as to possible criteria for selection; 'substantial' causes, 'efficient' causes and 'continuing' causes have all been proffered at one time or another. But these tests are difficult to apply with any precision. Hart and Honoré (1985) suggest that criminal law focuses in particular on voluntary human conduct, further selecting among human causes in terms of the unusual nature of a particular but-for cause – we select for legal liability those but-for causes which represent 'abnormal' behaviour. But this approach begs criteria of 'abnormality' and, in common with other tests, attracts the suspicion not only that policy factors in fact drive courts' decisions, but also that aspects of 'mens rea' – an attribution of fault – may creep in to the question of 'actus reus' by the back door, sully the purity of the doctrinal structure. For one obvious way of fleshing out ideas of 'abnormality' and 'substantiality', and hence of selecting legal causes, is to do so in terms of degrees of responsibility or culpability; the person to whom we attribute causation is the person whom we regard as



blameworthy. For example, in *Roberts* (1971), the defendant assaulted a woman passenger in his car. She was injured when she jumped from the moving car to escape. Despite her arguably extreme reaction, which might have been seen as interrupting the 'chain of causation' between Roberts' assault and her injury, Roberts was held liable for assault occasioning actual bodily harm. What is more, criminal law occasionally deploys a notion of causation wider than that of 'but for' cause. For example, when a person is held liable for aiding and abetting another person's crime, for example by lending a burglar a ladder, the prosecution must prove that the defendant gave assistance: the rationale for liability turns in part on the quasi-causal idea that such assistance made the commission of the offence more likely. But the prosecution is not required to prove that the offence would not have been committed but for the assistance of the ladder. In a recent civil decision which has potential relevance for criminal causation, the House of Lords has also moved beyond individualised, but-for causation, holding that a person who had contracted a fatal disease as a result of exposure to risk at successive places of employment, but who could not prove which of those employers had contributed, and in what proportions, to the disease, could nonetheless recover against them (*Fairchild* 2002). It is impossible to assert that English criminal law adheres to any coherent and consistent doctrine of causation: 'Causation is not a single unvarying concept to be mechanically applied without regard to the context in which the question arises' (House of Lords in *Kennedy* 2007, see further Section VI). The question remains whether it can be as clearly categorised as an issue of 'actus reus' as traditional conceptualisation suggests.

Thirdly, some offences require an 'actus reus' which consists not of 'conduct' but of a 'status' or 'condition'. This is true, for example, of the famous case of *Larsonneur* (1933). This case concerned a defendant who, being 'an alien to whom leave to land in the UK has been refused', was found in the UK (Aliens Order 1920). Such so-called 'status offences' are often portrayed as exceptional, but the difficulty of distinguishing between them and 'conduct' or 'result' offences can be demonstrated by examples such as driving with an excess of alcohol in the blood. This could be conceptualised as 'being found drunk in the process of driving' (status) or as 'doing the act of driving with an excess of alcohol' (conduct). Such examples not only show the difficulty of drawing any clear analytical distinction, but also question the significance of such a distinction, could it be drawn. Also of interest in this context is the status 'common prostitute', which can be attributed exclusively to women by the police under section 1 of the Street Offences Act 1959 (*DPP v. Bull* 1994). The criteria for this designation are obscure, and it is effectively impossible for the woman to challenge, yet it has the important legal consequence of liability to conviction for what would otherwise have been lawful behaviour (Edwards 1984, pp. 53–77; Smart 1985).

Finally, a related complication must be added in terms of criminal law's attitude to liability for omissions. In general, doctrine affirms that liability is



imposed only for acts, and not for omissions (see Ashworth 1989). The basis for this is the libertarian argument that the coercive powers of law must only be invoked in response to positive actions, or else law would become unduly burdensome and intrusive on individual freedom. Is this a strong argument? It seems unlikely that many of us would regard liability for failure to pay our taxes as more burdensome than, say, a law prohibiting us from engaging in a form of sexual conduct to which we were strongly disposed. But there is a further, technical reason why omissions liability is thought to be problematic. For it entails the possibility of multiple liability wherever there is no particular reason for attributing responsibility (or causation) to one rather than another person. For example, in a case where a person has drowned in the presence of many people in a public swimming pool, it becomes very difficult to circumscribe the ambit of liability in a manageable way: should we hold responsible everyone within sight of the incident; everyone within ten yards; every strong swimmer in the vicinity? The individualistic conceptual structure of criminal liability here creates a practical problem which is intimately linked with English law's reflection of the norms of an atomistic society which is relatively little concerned to promote mutual or collective responsibility. There is an interesting contrast here with the systems of the continent of Europe, which encompass a variety of omissions-based offences. One example is the offence with which the 'paparazzi' arrested at the scene of the fatal accident of Dodi al Fayed and the Princess of Wales in Paris in 1997 were charged: that of 'failing to assist a person in danger' (for discussion, see Cadoppi 1993).

However, English criminal law does impose liability for omissions not only in a vast range of statutory offences, many of them regulating corporate conduct, but also under the common law in two 'exceptional' types of case. The first might be called *relational*: where there is some statutory or relational basis for a duty to act, such as a parental duty of care and support for a child, or an assumed duty of care for a relative, an omission to act which results in legally recognised harm may incur liability. For example someone who assumes responsibility for an incapacitated relative and then fails to act once they become aware that the relative is in a dangerous state of health may be liable for homicide should the relative die as a result (*Stone and Dobinson* (1977)). The existence of the duty serves to defeat the presumption against curtailment of individual freedom. The second might be called *situational*: criminal liability may be imposed where an initial inadvertent action results in a dangerous or harmful situation which the defendant later knowingly fails to avert when the opportunity presents itself. A good example would be one in which the defendant has accidentally caused a fire and, on later discovering it, neither calls the fire brigade nor takes any steps to put it out (*Miller* (1983)). In such a case, liability may be imposed for the omission on the basis either of an imputed duty to act, flowing from 'responsibility' for minimising even the harms which we cause faultlessly, or on the theory that the whole sequence of events constitutes a 'continuing act' (*Fagan v. MPC* (1969)).

Despite the ability of criminal law doctrine to rationalise and accommodate these cases, the general exclusion of liability for omissions continues to raise important conceptual and practical problems. This is in part because whether or not behaviour is to be regarded as an act or as an omission is often an open question, depending simply on how we choose to describe it. To take a simple example, should we regard a person holding a china vase who stops tensing her muscles so as to let the vase drop as actively breaking the vase, or as simply failing to hold it? Would our answer be different if the vase were suddenly and unexpectedly thrust into her arms? Is the switching off of a life-support machine an act which causes death or an omission to sustain life, and does it make any difference if the machine is disconnected accidentally and then deliberately left unconnected (see *Airedale Trust v. Bland* (1993))? Can we make any decision about these issues purely within the framework of 'actus reus' analysis? It is apposite here to point out that all offences of negligence – careless driving, for example – are in an important sense offences of omission, in that they consist in a failure to take due care. The very large number of offences which can be committed negligently or which are of strict liability subject to a 'due diligence' defence – about 50 per cent of offences triable in the Crown Court, on the basis of Ashworth and Blake's research (1996) – further calls into question the idea of omissions liability as exceptional.

This leads us directly to the question of what, if anything, unites the category, 'actus reus'. Even excluding, for the moment, special principles concerning participatory, inchoate and vicarious liability, it seems impossible to say anything more than that 'actus reus' consists of *the legally defined elements of the offence which do not consist (exclusively) in the defendant's state of mind*. This rather negative definition is not very illuminating, but does it at least have the recommendation of accuracy? Even here, a look beyond simple cases to examples such as conspiracy, where the actus reus involves 'agreement', stretches the credibility of the definition. In the quest for a more substantial conception, exponents of the 'actus reus'/'mens rea' analysis have further attempted to conceptualise 'actus reus' in terms of voluntary human actions. This view coheres with a liberal theory of the limits of criminal law – a theory which is suspicious of coercive state intervention, particularly where that intervention represents any attempt to impose positive duties by means of criminal law.

The conception of 'actus reus' as voluntary action, however, immediately raises difficult questions about the boundaries between 'actus reus', 'mens rea' and defence. For, as we shall see, the concept of voluntariness is also central to one widely accepted theory of 'mens rea' and to the rationale for several defences. To take a practical example which demonstrates this problem, it is generally argued that voluntariness is a requisite feature of 'actus reus' because it is necessary even for offences of 'strict' liability which do not require proof of 'mens rea'. Someone who drives 'carelessly' whilst being attacked by a swarm of bees, or (arguably) who drives without a licence whilst in a hypnotic trance, might well be acquitted on the basis that they had not truly acted: that the

event in question could not really be said to be an action of theirs. But this is neither the only nor even the most obvious analysis in all cases. If, for example, a defendant injures someone whilst in a hypnotic trance or whilst sleepwalking, we could rationalise their being excused in three ways. In the first place, we might excuse them on the basis that it was not truly their voluntary action. Secondly, we could argue that they did not have the requisite mental element of intent or recklessness as to the injury. Thirdly, we could argue for their acquittal in terms of a super-imposed defence of 'automatism', where the defendant behaves without her mind being truly engaged in her actions (see below). We may be inclined to treat the trance cases as ones of automatism, and cases of sheer physical compulsion, such as reflex actions when being attacked by bees, or being physically pushed, as ones of lack of 'actus reus'. Or we might argue that the defence of automatism *amounts to* a denial of 'actus reus', conceptualising the harm as an 'event' rather than an 'action'. Nothing within the theory of 'actus reus' as presented by criminal law doctrine inclines us one way or another in determining any of these questions.

The apparently unitary category of 'actus reus', then, is difficult to rationalise in a way which is consistent with the diversity of actual criminal laws. In terms of standard doctrine, however, the core concept of 'actus reus' consists in positive, voluntary human action or omission to fulfil a positive duty, according to the definition of an offence, as extended by the principles of inchoate, participatory and vicarious liability, and excluding the elements of the offence which are solely concerned with the defendant's mental state. We shall return to the problematic borderlines between 'actus reus' and 'mens rea' and between 'actus reus' and justification below.

### 1.3.b.ii. 'Mens rea'

Andrew Ashworth 2006 *Principles of Criminal Law* Fifth Edition (Oxford University Press), pp. 158-9

The essence of the principle of 'mens rea' is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences. This approach is grounded in the principle of autonomy: individuals are regarded as autonomous persons with a general capacity to choose among alternative courses of behaviour, and respect for their autonomy means holding them liable only on the basis of their choices. The principle of 'mens rea' may also be claimed to enhance the constitutional values of legality and rule of law, by reassuring citizens that they will only be liable to conviction and to the exercise of state coercion against them, if they knowingly cause a prohibited harm.

The category 'mens rea' plays a perhaps yet more crucial part in traditional doctrine than does that of 'actus reus'. This is for the simple reason that the



legitimacy of modern criminal law is fundamentally premised on the notion of individual responsibility. As the passage from Ashworth shows, it is relatively easy to produce a formal definition of 'mens rea', as 'the requirements stipulated in the definition of an offence as to the defendant's mental state with respect to the elements of the "actus reus"'. However, the attempt to get beyond this formal approach towards an account of what really unifies 'mens rea', whether in terms of autonomy or other conceptions of responsibility, is, as we shall see, rather more problematic than Ashworth implies. Moreover, the formal approach itself is open to criticism, given that it is sometimes unclear in criminal law doctrine whether matters pertaining to the defendant's mental attitude – a mistaken belief which is relevant to the existence of the 'actus reus', for example – should be regarded as a defence rather than as a lack of 'mens rea'. More substantially, as we shall argue below, this approach is subject to criticism on the basis that it presupposes an unrealistically dualistic approach to human behaviour, dividing physical and mental elements which cannot meaningfully be separated.

*Wanda Grier, 1800: Women, Culture and Character: From Moll Flanders to Fanny Hill* (Oxford University Press), pp. 17–20

To today's criminal lawyer, beyond its highly discretionary nature and the spectacular features of the 'Bloody Code' which threatened (though much more rarely exacted) the death penalty for a vast range of even minor property offences, perhaps the most striking aspect of the 18th Century criminal process was the fact that it appears to have operated quite effectively without anything approaching the technical doctrines of responsibility-attribution which form the backbone of criminal law today. Today, the state's responsibility to prove not only criminal conduct but individual responsibility for that conduct lies at the heart of criminal law's legitimation as a system of justice rather than one of sheer force: the fairness of criminalization and punishment is fundamentally premised on the idea that an offender's capacities of understanding, awareness and self-control were engaged at the time of the alleged offence. In the 18th Century, by contrast, though culpability requirements such as having acted 'maliciously', 'wickedly', 'feloniously' or 'animus furandi' had long been discussed by commentators and asserted by judges as aspects of many common law offences, notably murder and theft, these were very far from equating to the psychological and capacity-based requirements of 'mens rea' with which we are familiar today.

Social institutions like criminal law require, as Stephen Shapin has put it, 'sources and grounds of legitimacy: every institution needs a bit of culture that testifies to "its rightness in reason and in nature"'. So the lack in the 18th Century of what is central to legitimation in contemporary criminal law is significant. It is always tempting, as John Baker noted, to 'read the past backwards', and many modern commentators have assumed that 'mens rea' is already an archetypal feature of English criminal law by this period. But there are both practical and conceptual reasons to question this assumption. First, in the light of the



features already mentioned – speed of trial, lack of legal argumentation, predominance of lay justice – it seems unlikely that the run-of-the-mill 18th Century trial process could have managed evidence of ‘mens rea’ in the modern, psychological, capacity-based sense as a formal object of proof. Second, and more fundamentally, as Jeremy Horder has argued, features of early modern criminal law such as the ‘malice principle’, though already subject to technical analysis in legal treatises, operated in significantly different ways from modern, notions of ‘mens rea’, and invited not the finding of a ‘state of mind’ but rather a non-dualistic evaluation of the conduct in question founded in what George Fletcher has called a ‘pattern of manifest criminality’. Ideas of ‘mens rea’ developed over a long period of time, and much of the conceptual groundwork was laid across the terrain of criminal defences. But it is important to note that long-standing defences which would today be interpreted in largely psychological terms, and which even abut on mental incapacity defences, had a very different meaning in their original context. The classic example here, as Horder’s important study revealed, is that of provocation, which in early modern criminal law constituted not an excuse based on loss of self-control but a partial justification for homicide which was rooted in a distinctively gendered system of honour. In the next section, I shall argue that commentators’ mis-reading of early modern legal concepts derives from a failure to appreciate not only the distinctive legal/conceptual framework illuminated by Horder, but also the fact that this framework itself proceeded from a highly distinctive world-view.

How, then, did the early modern system of responsibility-attribution work? Beyond a baseline assumption of capacity (which could be displaced by evidence of manifest insanity), the trial was firmly focused not on internal questions about the defendant’s state of mind but rather on the external ‘facts of the matter’. Where evidence about conduct was questionable, the patterns of attribution based on local knowledge about character and reputation which dominated the pre-trial process also informed the trial itself. In effect, a judgment of criminal responsibility was a judgment of bad character – or, perhaps more accurately, proceeded on the basis of a default assumption of bad character which could on occasion be rebutted by convincing evidence of good character. The legitimization of the 18th Century criminal trial rested fundamentally in this grounding in common sense evaluations: this was what provided its ‘rightness in reason and nature’. Hence the need for the jury to assess the defendant’s credibility as a witness in a direct and unmediated way was at the core of the resistance to allowing representation by counsel. Most 18th Century criminal trials were not driven primarily by criminal law: rather, they involved a very human process of judgment, shaped by prevailing cultural assumptions about guilt and innocence, good and evil, sanity and madness, credibility and unreliability. Notwithstanding the radical reconstruction of the criminal process in the first half of the 19th Century – the abolition of many of the capital statutes, the creation of the police, the consolidation of the law of evidence and so on – the legal doctrine of capacity-based individual responsibility as an object of proof in the court room was still developing right through to the mid-20th Century – a much slower process than has been assumed by many historians of criminal law.

The treatment of what we would today call mental incapacity defences is particularly instructive here, for it illustrates that even when matters of mental capacity were before

18th Century criminal courts, their handling was very different from that which a modern lawyer might expect. Though rules excluding the testimony of witnesses on grounds of incompetency were already developing in the 18th Century, there was no statutory recognition of an insanity defence until 1800, and no elaborated common law definition of insanity until the *McNaghten* rules were formulated in 1843. Of course – as remains the case today – many potential insanity cases would have been filtered out of the criminal process long before they came to trial. But, as records show, significant numbers of putatively insane defendants nevertheless reached the courts: Joel Peter Eigen has identified 331 cases before the Old Bailey between 1760 and 1843 in which issues of mental derangement were raised as possible defences. And when such cases did reach the courts, their disposal was shaped by common-sense jury assumptions about madness and its implications for the vicious will which underpinned culpability. That there is little sign of any analysis of the definitions of insanity discussed by treatise writers like Hale or Blackstone in most of the run-of-the-mill cases reported in the Proceedings of the Old Bailey should come as no surprise given the usual absence of defence lawyers. And while medical testimony was gradually emerging as a relevant matter, it was in its early forms itself closely articulated with various forms of lay knowledge and understanding, as indeed was to be expected in an era in which the formal organisation of the medical profession was far from having gained a monopoly over broadly medical practice.

In the criminal law of England and Wales, there is held to be a presumption (one which flows directly from the liberal concern with individual freedom) that some element of ‘*mens rea*’ will be required for conviction of any offence, unless it is excluded by clear statutory wording. This common law ‘principle’ finds expression in many leading cases and formed a centrepiece of the Law Commission’s Draft Criminal Code (Law Commission 1989, Clause 20). Exceptions are supposedly recognised by the courts only in the case of ‘regulatory’ offences – offences of relatively low gravity with no real stigma attaching to conviction and only moderate penalties. They usually concern areas of conduct – selling food or running a manufacturing process, for example – which are voluntarily entered into and which entail discrete risks; where the costs of obtaining proof of ‘*mens rea*’ are prohibitive or out of proportion to the moral risk of unjustly convicting an innocent defendant; and/or where the imposition of strict liability promises to afford a substantial gain in terms of deterrence and public protection. Instances of strict liability are thus marginalised as exceptional, relatively non-serious and calling for special justification.

No wonder, then, that the serious cases of strict liability which cannot be explained away have occupied a large amount of doctrinal attention. The context which has drawn most attention in this respect, is that of sexual offences, many of which are defined in terms of age, for example rape, sexual penetration or sexual assault of a child under 13 (Sexual Offences Act 2003, ss. 5–7). In *R v. G* (2008) the House of Lords held that strict liability as to age was justified. As Baroness Hale put it:

44. ... Even if a child is fully capable of understanding and freely agreeing to such sexual activity, which may often be doubted, especially with a child under 13, the law says that it makes no difference. He or she is legally disabled from consenting.

45. There are a great many good reasons for this: ... It is important to stress that the object is not only to protect such children from predatory adult paedophiles but also to protect them from premature sexual activity of all kinds. They are protected in two ways: first, by the fact that it is irrelevant whether or not they want or appear to want it; and secondly, by the fact that in the case of children under 13 it is irrelevant whether or not the possessor of the penis in question knows the age of the child he is penetrating.

46. Thus there is not strict liability in relation to the conduct involved. The perpetrator has to intend to penetrate. Every male has a choice about where he puts his penis. It may be difficult for him to restrain himself when aroused but he has a choice. There is nothing unjust or irrational about a law which says that if he chooses to put his penis inside a child who turns out to be under 13 he has committed an offence (although the state of his mind may again be relevant to sentence). He also commits an offence if he behaves in the same way towards a child of 13 but under 16, albeit only if he does not reasonably believe that the child is 16 or over. So in principle sex with a child under 16 is not allowed. When the child is under 13, three years younger than that, he takes the risk that she may be younger than he thinks she is. The object is to make him take responsibility for what he chooses to do with what is capable of being, not only an instrument of great pleasure, but also a weapon of great danger.

This starkly contrasts with the same court's decision in 2000 in a case arising under the 1956 Sexual Offences Act (which the 2003 Act has now replaced). *B v. DPP* (2000) concerned a 15-year-old boy who had repeatedly asked a 13-year-old girl for oral sex: he was charged with inciting a child under 14 to commit an act of gross indecency. The question was whether his mistaken belief that the child was 14 meant that he should be acquitted; in other words, was a fault element of knowledge or belief about the girl being under 14 a requirement of the offence? The statute included no explicit 'mens rea' word such as 'knowledge' or 'belief', and on the basis of earlier authorities the trial judge ruled that the boy's mistake did not remove liability. The House of Lords held that because of the seriousness of the offence and its broad scope (in particular the fact that it could cover consensual behaviour), the courts should not find that the presumptive mens rea requirement had been displaced. The statute included no express rebuttal of the presumption, and there was no rebuttal by necessary implication; nor would strict liability in relation to age further the purposes of the statute. The Law Lords argued that any implication of a reversal of the presumption must be 'compellingly clear', and drew on other recent cases to assert that the law was moving generally towards a 'subjectivist' approach which judged defendants on the basis of the facts as they believed them to be, rather than on the basis of what a reasonable person would have believed in the



circumstances. An honest belief that the girl was 14 would therefore suffice to remove 'mens rea', whether or not there were reasonable grounds for the belief.

The House of Lords in *B v. DPP* supported the assumption that the pre-sumption in favour of a 'mens rea' requirement can only be displaced by clear statutory words or by necessary implication, in offences pertaining to social health and public safety. The displacement would be most likely where the gains in protection or deterrence from strict liability are likely to be significant; where the offender is one of a class to whom legislation is directed and who engage in the relevant activity voluntarily and for profit; where penalties are low, and where stigma attached to conviction is low (see also *R v. K* 2001, Horder 2002). This followed up Lord Scarman's earlier statement in *Gammion v. AG of Hong Kong* (1984):

[T]he law relevant to this appeal may be stated in the following proposition: (1) there is a presumption in law that mens rea is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is 'truly criminal' in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern; public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

What, then, does the presumption of a requirement of 'mens rea' amount to? A more technical way of approaching this question is to give an analytical account of the various *forms* of 'mens rea' requirement to be found in statutory offence definitions and case law. First, there may be a requirement of *intention*. The clearest case of intention is 'direct' or purposive intention: a decision to bring certain consequences or states of affairs about in so far as it lies within one's powers to do so and with the aim of so doing. However, criminal law also recognises 'oblique' intention, allowing the jury to make a finding of intention when the defendant has done an act in the knowledge that a particular result will or is virtually certain to occur (*Moloney* (1985); *Woollin* (1998); see Norrie 2001, Ch. 3). As we shall see, criminal law doctrine purports to draw a sharp distinction between intention and motive, and holds the latter to be generally irrelevant to the attribution of criminal liability.

Secondly, there may be a requirement of *recklessness*. Recklessness divides into two sub-categories: those which are 'subjective' in the sense that they judge the defendant on the basis of what she herself thought, foresaw or knew, and those which are 'objective' in the sense that they judge the defendant against the standard of what a reasonable person would have thought, foreseen or known. So a recklessness requirement may be in the '*subjective*' sense of foreseeing a



risk which it is unjustifiable to take and going ahead regardless (*Cunningham* (1957)). Alternatively, recklessness may be understood as embracing not only subjective, conscious risk-taking but also 'objective' recklessness: failing to give thought to a risk in circumstances in which that (unjustifiable) risk would have been obvious, either to the defendant ('*partially subjective recklessness*') or to the 'reasonable' person ('*objective recklessness*', *Caldwell* (1981)). In some cases, the recklessness requirement has been expressed in terms of the idea of 'wilful blindness' or practical indifference: concepts which, as we shall see, blur the boundary between 'subjective' and 'objective' forms of 'mens rea' (*Satnam* (1984)). The decision in *Caldwell* – which was mainly confined to the offence of criminal damage – caused much consternation to academic commentators and was eventually overturned by the House of Lords in *R v. G* (2003). This reinstated 'subjective' recklessness as the default version. Of course, it is always open to an Act to indicate otherwise. *Caldwell* or objective recklessness has the potential for injustice if it ignores the capacity of a defendant to appreciate the consequences of her actions. Children or those with learning difficulties should not be judged on the same standards as adults. But often the arguments about *Caldwell* recklessness overstated the problem. For example the case of *R v. G* concerned an 11 and 12 year old who took some old newspapers from the backyard of a shop, set fire to them and left them beneath a wheelie bin. The fire spread causing £1 million of damage. They did not foresee this. But was it necessary that they should have foreseen the subsequent damage if they realised that putting a match to newspaper (which did not belong to them) would cause damage to the newspaper or to the bin? Part of the problem arose from seeing the issue as one concerning extensive damage to the building rather than the lesser damage to the paper or the bin. And part of the problem comes from the very low age of criminal responsibility and part from the very broad definition of criminal damage (see further Chapter 12). Debating it as an issue of a vital dividing line between subjective and objective recklessness served here as a hidden rhetorical brake on these otherwise net-widening aspects of our criminal law.

Thirdly, there may be a requirement of *gross negligence* or of *negligence*, in the sense of a more or less serious deviation from a 'reasonable' standard of care or behaviour (*Andrews v. DPP* (1937)). Recklessness in the second sense may also constitute negligence, but not all instances of negligence will count as instances of recklessness, as they may involve not failures to perceive risk but rather negligently mis-assessed risks which have been perceived (*Chief Constable of Avon v. Shimmen* (1986)).

In addition to these forms of 'mens rea' related to consequences, *knowledge of or belief in circumstances* are forms of 'mens rea' central to conduct crimes such as rape and are often requirements in crimes which combine result and non-result aspects, such as causing criminal damage with intent to endanger life or being reckless as to life being endangered under section 1(2) of the Criminal Damage Act 1971.

The fine distinctions between result-oriented forms of 'mens rea' are best illustrated by an example. Imagine that Zoe roller-blades down a crowded slope, creating an obvious and serious risk of injury to other people. If she does so meaning to hurt someone she has a 'direct' intention, and if the slope is so crowded that she realises injury is inevitable, although her aim may be simple enjoyment and she would like to avoid the injury, she has an 'oblique' intent. If she is aware of a risk of injury (i.e. something less than a virtual certainty), she is 'subjectively' reckless. If she gives no thought to the possibility of the risk, and it would have been obvious to her had she done so, she is 'partially subjectively' reckless and quite possibly 'subjectively' reckless on the 'practical indifference' view of that test (see below); whereas if it would not have been obvious to her but would have been so to a 'reasonable person' she is 'objectively reckless', and also negligent if her behaviour constitutes a serious departure from 'reasonable' standards of conduct. If, finally, she considers the possibility, but, because she has an 'unreasonable' faith in her roller-blading skills, decides that there is no risk, she is negligent, but she is not reckless in any of the relevant senses.

It is worth noting that the precise way in which the 'mens rea' requirement relates to the defendant's conduct is generally left open in offence definitions. For example, it seems sensible to assume that the 'mens rea' requirement for the common-law offence of murder is 'intention to kill or cause grievous bodily harm to a person' rather than 'intention to kill or cause grievous bodily harm to a specific person'. Yet this assumption is put into doubt by the existence of a convention known as the doctrine of 'transferred malice' (*Latimer* (1886); *Pembilton* (1874)). According to this doctrine, a particular kind of 'mens rea' vis-à-vis one object can be 'transferred' where conduct in fact has its impact on another object of the same kind. Thus a blow aimed at Amy which hits Bob will attract liability, whilst it will not necessarily attract liability if it lands on a piece of property rather than a person. If 'mens rea' requirements are not tied to specific objects, why is the doctrine of transferred malice necessary? The example also illustrates the leeway we have already noted in terms of how we describe a person's actions and attitudes: nothing in logic tells us whether Clare, who aims a gun at Denis, should be said to 'intend to kill Denis', or to 'intend to kill a person'. Interesting questions about both the doctrine of transferred malice and criminal law's conception of the objects to which it can be applied are raised by the *Attorney General's Reference (No. 3 of 1994)* (1997). In this case, a man had stabbed a woman whom he knew to be carrying his child: as a result of the attack, the child was born prematurely and died three months later. The House of Lords declined to apply the doctrine of transferred malice so as to hold the defendant liable for the child's murder, on the basis that it would be straining the doctrine to transfer the defendant's malice first from the mother to the foetus and then from the foetus to the child. This decision appears to have been driven by an understandable concern to limit the ambit of criminal liability; but it is not clear that the court's reasoning was compelled by the logic of the doctrine itself.

The openness of both actions and offence definitions to alternative descriptions allows legal doctrine to represent what are in fact contradictory positions as coherent and logical. For example, doctrinal insistence on the irrelevance of motive can be at once maintained and by-passed by conceptualising motive as an aspect of intent where this is thought by judges or commentators to achieve the 'right' result (*Court* (1987)). Two contrasting cases serve to illustrate this fundamental indeterminacy. *Steane* (1947), a British citizen, issued propaganda broadcasts for the German government during the Second World War. He was charged with doing acts intended to assist the enemy in war time, but the court described him as having acted not with intent to assist the German government but rather with intent to save his family. On this basis he was acquitted. *Arrowsmith* (*Arrowsmith v. Jenkins* (1963)), who was speaking in a public place on nuclear disarmament, was charged with 'wilful' obstruction of the highway. She was convicted on the basis that she intentionally did acts which in fact caused an obstruction, notwithstanding her 'intention' (acknowledged by the court) to try to help to keep the crowd to which she was speaking from causing an obstruction. Such manipulations are common in cases specifying the precise ambit of 'mens rea' requirements. Neither any principle of logic nor any argument internal to legal doctrine can explain why these offences were interpreted as they were, or why *Arrowsmith's* obstruction was constructed as (legally) wilful whereas *Steane's* assistance was constructed as (legally) unintentional. In each of the cases, the defendant's attitudes could have been conceptualised equally well as 'motives' or as 'intentions', just as the offence requirements could have been interpreted otherwise than they were. Hence, even where defences like duress, necessity or self-defence, which explicitly bring issues of motive into the trial, the courts have ample opportunity to take account of the motives of those with whom they sympathise at the same time as they pronounce motive legally irrelevant. As Norrie notes in the following passage, the alleged irrelevance of motive in criminal law contrasts with its central importance at the sentencing stage.

Alan Norrie 2001 *Crime, Reason and History* (Cambridge University Press), p. 226

With the notable exception of Hall (1960), criminal lawyers have accepted the centrality of the division between intention and motive as a datum of the legal enterprise. While intention is central, motive occupies a peripheral role, scratching an existence at the edges of doctrine. Yet motive remains central to human agency and to broader moral and political claims about the nature of fault. The reason why this 'much more advanced level of ethical criticism' (Hall p. 83) is ignored is that motive introduces the questions of social need and right that would directly challenge the allocation of fault. The focus on intention excludes the motive of those living at the margins of society and those whose political values the existing order wishes to marginalise.



Yet motive does not go away because the law's psychological individualism tells it to, and it persists as a problem within legal doctrine. While generally excluded from the conviction process, it is admitted at the politically more 'safe' stage of sentencing, where its effects are controlled by the application of judicial discretion. It is true that admission of individual particularity at this latter stage threatens to undermine equality of treatment under the ideology of the rule of law. But the administration of such equality through formal legal categories at the conviction stage is so morally inadequate that it can only survive on the basis that individuality is allowed in through the back door of mitigation.

Furthermore, motive remains as a constant challenge to doctrine in 'dramatic' situations such as those associated with duress and necessity, and in circumstances in which the formal categories have not been tightly enough drawn to exclude disruption of the law. In relation to the former situations, the strategy is to establish certain exceptional excuses which operate above and beyond the 'normal requirements' of 'mens rea'. These permit a measure of 'special' justice, while legitimating its denial in the majority of cases... In relation to the latter, the law can either use the distinction between motive and intention to fend off 'political' challenges to an 'apolitical' system, or seem to find some abstract formulation to neutralise the direct moral-political challenge of the disruptive or troublesome citizen.

These cases reveal a central element of legal practice, although one that is normally presented as peripheral. It is the political use of a depoliticised or demoralised individualism to exclude moral and political challenges to the order of things.

As in the case of intention and motive, technical arguments about forms of 'mens rea' sometimes obscure important questions. One such set of questions has to do with the assumptions and attitudes which inform the conduct of legal trials. Even in the tiny proportion of jury trials, judges, as we shall see, have considerable influence over the determination of guilt or innocence through the framing of their direction to the jury. It is therefore largely judges and magistrates, and hence predominantly privileged, white, middle-aged, middle-class (and in the case of judges, male) 'persons', whose judgment is decisive. Where 'subjective' tests are used, the socially skewed nature of the legal forum is important because it is likely to result in different levels of credibility for different defendants' stories and in differential inferences about what the defendant's attitude or state of mind was. Where 'reasonableness' tests are in play, doctrine veers between the application of an entirely 'objective' standard which fails to investigate who is the 'reasonable person' (Allen 1988), and modified 'objective' tests in which certain aspects of the defendant's particular characteristics are indeed taken into account as in provocation (see Section VI). The operation of 'objective' tests in fact results in highly discretionary regulation. The tribunal here is effectively constructing the standard against which the defendant is judged: the legal process goes on to legitimise that standard as 'objective' and neutral.

At its most extreme, traditional doctrine represents the criminal lawyer's enterprise as a search for a coherent conceptual scheme of neatly analytically



defined instances of 'mens rea' which, if only legislatures and judges would recognise and stick to them, would clear up all ambiguities and uncertainties in criminal law and make for near-perfect clarity and predictability. But this emphasis on formal virtues – an emphasis which is firmly entrenched in the Law Commission's codification project – disguises the real basis for the hold of the 'mens rea' principle, which has to do with a (stated or unstated) normative view about the function of 'mens rea' in *justifying* the imposition of criminal liability. This normative issue is captured by reference to 'mens rea' as 'the responsibility requirement' or, as in Ashworth's case, as based on 'the autonomy principle', and it is to this normative aspect that we now turn.

The normative function of 'mens rea' in traditional doctrine is, put simply, to ensure that responsibility for the 'actus reus' can fairly be laid at the door of the defendant – or in Fletcher's terms (Fletcher 1978), that the act is attributable to the defendant. The 'mens rea principle' has been defended vigorously by those who take a moral-retributive approach to criminal justice. They see it primarily in terms of the expression of moral condemnation and judgments of individual blameworthiness, and they tend to discuss 'mens rea' in terms of fault, culpability and blameworthiness. 'Mens rea' has also been upheld by those who take a utilitarian or instrumentalist view of the system. They see proof of 'mens rea' as important to the deterrability of potential offenders and hence to the preventability of crime: someone who does not realise what they are doing cannot be deterred by the threat of punishment. It is also important to those who take the view that criminal justice can only be understood in terms of a combination of backward-looking and instrumentalist elements. Whichever view is taken, it cannot be doubted that 'mens rea' in liberal doctrine is the linchpin of the asserted legitimacy of coercive state intervention towards individuals in response to 'criminal' acts.

One of the most persuasive exponents of this argument for legitimacy is H. L. A. Hart (1968). On his view, it is justifiable to hold persons accountable only for actions which they could have avoided, in the sense that they knew and understood what they were doing (including relevant circumstances and conditions) and had the capacity to control their actions. They must, in other words, have had a fair opportunity to do otherwise than they did. This notion of 'capacity-responsibility', with its cognitive (relating to understanding) and volitional (relating to self-control) aspects, is argued by Hart to underlie the 'mens rea' requirement by representing the only fair terms on which the ends of the penal system may be pursued. By responding only to genuinely voluntary human action, criminal law allows individuals the greatest possible freedom to plan their lives so as to avoid punishment. Hart's account crystallises the liberal conception of a world of free individuals whose interests are potentially in opposition to, and must be respected by, the collectivity in the form of the state. One important feature of this account is that it effects a reconciliation of the two aspects of criminal law: on the one hand, it resonates with the instrumental approach, in that it regards the overall justifying aim of the system

as the reduction of criminal harms; on the other, it speaks to the quasi-moral aspect, in that it sets out stringent conditions – fair terms – on the basis of which the state's regulatory ambitions can be pursued. But, as we shall see, it gives little guidance in terms of when the value of fairness should be sacrificed for the instrumental gains to be had by imposing strict liability or fully 'objective' forms of 'mens rea' such as negligence: while, on Hart's view, it may well be fair to punish the objectively reckless or negligent person for their failure to reach a reasonable standard of care or conduct, his argument cannot justify the fully objective approach often taken in English law, which penalises the defendant irrespective of whether she was in fact *capable* of reaching this standard.

It is also interesting to note that Hart's analysis, in rationalising the imposition of liability for negligence, attenuates the link emphasised by doctrine between responsibility and act. If the defendant is really responsible for the failure, for example, to meet a reasonable standard of care, is not the outcome of that failure fortuitous? For instance, if a driver sets out on a journey in an absent-minded, indifferent and inattentive state, whether she has an accident or not, or is seen to be driving negligently, may well depend on chance factors such as how much traffic she encounters: the resultant 'criminal act' depends rather on such external factors than on any direct relationship with her degree of responsibility. Pursued a little further, this argument also calls into question the doctrinal insistence on the responsibility/act equation in cases of 'subjective' 'mens rea'. If, for example, you intend to steal something you desperately want and, unexpectedly, a benefactor gives it to you, you have no need to steal it. Once factors of risk and luck are accorded their place in the world of human actions, the outcome of even intentional and 'subjectively' reckless acts can be seen as, in a significant sense, fortuitous. It is hardly surprising that criminal law doctrine fails to address these issues, for they lead directly to questions about the relevance of social factors in grounding 'responsible' action, and therefore call into question the justifiability both of criminal law's focus on the abstract individual and of its claim to constitute a just and rational system.

The moral conception of 'mens rea' issues is quite naturally (although *not* necessarily) a dualistic approach to 'mens rea' and 'actus reus'. On a dualist view, 'mens rea' is cast in terms of 'subjective' mental states such as intention, foresight, knowledge and belief; these are seen both as separate from the realm of acts and as the basis on which individuals are responsible for those acts (Duff 1987; Duff 1990, Ch. 6). Much ink has therefore been spilt trying to accommodate within the dualist account the 'objective' forms of 'mens rea', such as 'objective' recklessness and negligence, which judge the defendant's responsibility in terms of failure to meet an 'objectively' determined standard rather than in terms of subjective mental states. It is difficult, after all, to conceptualise 'failure to meet a standard' as a 'state of mind'. We should notice, however, that the theory of capacity responsibility is not in fact tied to an analysis in terms of aware mental states. Hart argues that negligence liability can be accommodated on the basis that the defendant is held responsible for their failure to do something

(Hart 1968, pp. 136–57). Duff, by contrast, moves beyond a dualist approach in his conceptualisation of ‘objective’ recklessness and negligence as the practical attitudes such as indifference and inattention. In the case of such attitudes, the offender’s agency is substantially engaged: ‘wilful blindness’ or ‘practical indifference’ are ‘subjective’ in the sense that they judge the defendant’s own attitude rather than judging her by reference to an ‘objective’, ‘reasonable person’ test. But, unlike recklessness in the sense of foresight, practical indifference is not subjective in the sense of being psychological – of representing an aware mental state (Duff 1983; Duff 1990, Ch. 7). Whatever its attractions or drawbacks as a normative theory (Lacey 1988, Ch. 2), however, it is not clear that Duff’s non-dualist approach provides a persuasive rationalisation of the existing contours of criminal law (Gardner and Jung 1991). The closest English criminal law has come to adopting a ‘practical indifference’ test is in the offence of rape (see Chapter 15).

In the context of ‘mens rea’, then, current doctrine appears to suffer from two major shortcomings. First, a combination of dualism and a narrow reading of philosophical accounts of capacity responsibility militates to designate ‘subjective’ ‘mens rea’ in the sense of intent, foresight, knowledge and belief as the paradigm forms of ‘mens rea’. Negligence and ‘objective’ recklessness tend to be marginalised as instances of ‘mens rea’, just as, *a fortiori*, strict liability offences are marginalised as peripheral instances of crime. Yet, turning doctrine back on its own subject matter, we find that, in terms of numbers of offences, those of strict or objective liability constitute at least half of the more serious offences (those triable in the Crown Court) and the large majority of all offences. And when one takes into account patterns of the enforcement of criminal law, the preponderance of doctrinally ‘non-standard’ cases increases, investing these types of offences with overwhelming practical significance. Conversely, we must avoid making the simplistic assumption that these doctrinal categories reflect actual levels of ‘fault’ or ‘responsibility’ in law enforcement. In practice, ‘subjective’ recklessness can turn out to be a very thin form of ‘culpability’, just as many of those charged with offences of ‘strict’ liability are selected for prosecution precisely because some degree of fault has been involved. The ‘subjective’/‘objective’ dichotomy itself, therefore, must be subjected to critical scrutiny (see Wells 1982).

Secondly, criminal law doctrine is unsuccessful in its attempts to construct a unitary category of ‘mens rea’. In fact, it hardly gets beyond a very general statement in terms of ‘mens rea’ having to do with the aspects of the defendant’s practical attitudes towards her actions proof of which is required for specific offences. This general statement has the normative implication that it is these requisite attitudes which render it fair to hold the defendant accountable for her actions in criminal law. This, of course, leaves open the possibility that criminal law employs a plurality of different attitudes as bases of attribution, and that the emerging patterns of these approaches as providing significant clues to both moral and instrumental aspects of criminal justice in particular periods. As we



shall see in Section IV, precisely such an analysis has been developed by Fletcher, who argues that the development of criminal law is marked by shifting patterns based on 'manifest criminality', 'subjective liability' and liability for 'harmful consequences' (Fletcher 1978, Chs. 1–5; see in particular p. 388). These patterns articulate the relationship between 'conduct' and 'fault' elements in radically different ways.

### 1.3.b.iii. The 'actus reus'/'mens rea' combination

Andrew Ashworth 2006 *Principles of Criminal Law* (Oxford University Press), p. 87

Another implication of the principle of autonomy, and its emphasis on choice and control, is the principle of correspondence. Not only should it be established that the defendant had the required fault...; it should also be established that the defendant's intention, knowledge or recklessness related to the proscribed harm.

According to criminal law doctrine, it is the *coincidence* of 'actus reus' and 'mens rea' which constitutes and justifies criminal liability. This requirement has two aspects. First, it implies the temporal coexistence of 'actus reus' and 'mens rea' – an 'actus reus' at one moment and 'mens rea' at another do not standardly combine to form criminal liability. If on Monday I conceive an intention to kill someone but think better of it on Tuesday, and then accidentally run that person over on Wednesday, I am not guilty of murder. Even if I still have the intention, I will not be guilty if the killing is a genuine accident. Secondly, the idea of coincidence between 'actus reus' and 'mens rea' implies that there must be a combination of external and mental elements with respect to each aspect of the offence. These implications of doctrine raise several discrete problems.

Leaving aside for the moment the offences of strict liability which doctrine treats, perversely, as exceptional, let us begin by examining the principle the 'mens rea' requirement should run to and coincide with each element of the 'actus reus'. A consideration of a range of substantive offences reveals that this is in fact the case in only a tiny proportion. In the vast majority, offence definitions fall short of this paradigm in one or both of two respects. In the first type of case, no 'mens rea' may be required as to some element or elements of the 'actus reus'. A good example here would be the offence of 'assaulting a police officer in the execution of his duty' under section 89(1) of the Police Act 1996, in which knowledge of the victim's being an officer so acting is not a requirement for conviction. In the second type of case, 'mens rea' is required as to a lesser result than that identified by the 'actus reus'. A good example here would be the offence of maliciously wounding or inflicting grievous bodily harm on a person under section 20 of the Offences Against the Person Act 1861, in which recklessness is required only as to the risk of bodily harm, not as to *grievous* bodily harm (see *Parmenter* (1991)); or indeed murder, in which intent to cause



grievous bodily harm, falling short of an intent to kill, will suffice. These are generally characterised as offences of 'partial "mens rea"'. Yet, as a matter of logic, they could just as well be described as offences of 'partial strict liability'. It is hard to escape the conclusion that their denomination as the former rather than the latter serves to legitimise them as firmly within the framework of the 'general principles'. Once such examples are added to those of total or substantial strict liability (not to mention those of negligence or 'objective' recklessness), the paradigm picture of criminal liability presented by doctrine begins to look insecure – indeed it begins to look marginal. As Ashworth's and Blake's research (1996) shows, a culpable practical attitude merely to some element of the offence usually suffices to ground liability in criminal law: proof of an aware, culpable mental state with respect to each element of the 'actus reus' is only exceptionally required.

Problems also arise from the requirement of a temporal coincidence between 'actus reus' and 'mens rea'. Particular difficulty is caused by cases where no such coincidence exists, but where the 'actus reus' of an offence is either preceded or succeeded by the existence of 'mens rea', perhaps accompanied by some other action or, typically, by an omission. In such cases, the paradigm of temporally fitting mental state to act is difficult to apply, and traditional doctrine has to be manipulated into a position where it can accommodate them. Two examples should suffice to illustrate the remarkable flexibility of criminal law doctrine in this respect. In the first, *R v. Miller* (1983), the defendant fell asleep holding a lighted cigarette which then set light to a mattress. Shortly afterwards, he awoke to find the mattress ablaze, whereupon he left the building without taking any steps to put out the fire. In doctrinal terms, the case therefore involved two incidents: an unconscious act followed by a conscious omission. The courts considered two strategies for rationalising the imposition of liability. The first did so in terms of the existence of a situational duty to act arising where a person's unconscious omission has created a danger. The second involved interpreting the sequence of events as constituting one continuous act so as to connect 'actus reus' and 'mens rea'. The House of Lords adopted the former rationale for imposing the liability which was intuitively called for. In a second example, *Thabo Meli v. R* (1954), the defendants assaulted their victim, intending to kill him: in fact they failed to do so, but later unwittingly killed him by throwing the supposed corpse off a cliff. In this case, the idea of a connected sequence of events implementing a preconceived plan was employed so as to marry 'actus reus' and 'mens rea' and allow liability.

If, in cases such as these, doctrinal analysis can be manipulated to extend the time frame on which the law focuses, why should that time frame not be extended in other cases, too (Kelman 1981)? Why should legal analysis not concern itself with *how* a defendant came to be in the situation in which she has apparently acted negligently, recklessly or intentionally, asking for example whether a person who committed theft formed the intention to steal because she was starving, or whether the person who was provoked to kill had childhood or

other experiences which made her more likely to lose self-control? This might, of course, lead to significant extensions and reductions of liability, according to the circumstances of different cases. As Norrie suggests in the passage on motive quoted above, exactly these kinds of factors *do* in fact enter into legal judgments, as well as into quasi-legal judgments such as the decision to prosecute for a 'strict' liability offence. Doctrine generates no coherent account of which time frame is settled upon in which instances.

Finally, the 'actus reus'/'mens rea' framework builds into criminal law doctrine a deep commitment to philosophical dualism – the idea that a person's thoughts and her actions are separate and separable in our descriptions and analyses. On this view, we first of all describe what the defendant did, in terms of 'colourless acts', and then infer from that what was in the defendant's mind. Yet in practice we do not react to human behaviour in this way, but rather make a global judgment which encompasses act and attitude, rather than separating mental state and behaviour (Duff 1987; Duff 1990, Ch. 6). This less dualistic approach is reflected in judicial statements of offence definitions, occasional statutory examples, and the Law Commission (1989, s. 18) draft code's practice of citing 'mens rea' adverbially rather than adjectivally – intentionally killing, rather than killing with intent. This emergence in law and doctrine of an alternative approach to grounding attribution casts doubt on the adequacy of the analytical framework of 'mens rea' and 'actus reus' taken as two separate but necessary components for criminal liability. At the level of practice, these arguments question the adequacy of the doctrinal account in which judges look at the act and infer the mental state in a two-stage process. They also underline the fact that legal decisions are inevitably influenced by a context richer than that acknowledged as relevant by technical rules of law. Moreover, we can quite easily cite instances where the 'actus reus'/'mens rea' distinction is extremely hard to apply. For example, in the case of conspiracy, the agreement between conspirators seems to be both 'actus reus' and 'mens rea'. This is just one among many instances of the difficulties inherent in a dualistic approach.

### 1.3.b.iv. Exemption, justification and excuse

George Fletcher: 1978 *Rethinking Criminal Law* (2003 reprint, Oxford University Press), p. 759

The notions of justification and excuse have... become familiar figures in our structured analysis of criminal liability. Claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor. A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act. For all this apparent simplicity, the notions of justification and excuse lend themselves to considerably more refinement.

The definition of criminal liability in terms of the coincidence of 'actus reus' and 'mens rea' needs, as we have seen, to be refined by adding one further condition: absence of any exemption, justification or excuse via one of the 'general defences' (Fletcher 1978, Chs. 9 and 10; Norrie 2001, Part IV). Particular illustrations of these defences will be given in the other chapters of this book; for the moment, it is the place of defences in general criminal law doctrine which will occupy our attention.

Within criminal law defences, the doctrinal importance of a distinction between exemptions, excuses and justifications is less than clear. However, we shall employ the distinction in the following analysis, because it serves to point up some of the most interesting and difficult issues which defences raise for the conceptual framework of criminal law doctrine. Exemptions, justifications and excuses may all result in acquittal, although they enter at different levels of the legal argument. The difference lies in the *rationale* of the acquittal. A plea of exemption such as insanity goes to the defendant's capacity to be addressed as a normal subject of criminal law: if a defendant's mental capacity is such that fundamental questions can be raised about her cognitive or, perhaps, volitional capacities, it might be argued that they are not even the kind of subject whom criminal law aspires to address. By contrast, a plea of justification such as self-defence goes to the 'actus reus' in the sense that it renders *the act itself* not wrongful – not within the scope of criminal law's prohibition. Since – the argument goes – we all have a right to defend ourselves, an injury caused in legitimate, genuine and reasonable self-defence does not constitute the sort of behaviour which criminal law seeks to prohibit, prevent or condemn. Excuses, on the other hand, go to 'mens rea' and are personal to the particular defendant. They represent a defect in the defendant's understanding or control, though the action is still one which criminal law seeks to prohibit. In other words, excuses excuse *actors*, whereas justifications justify *acts*. This distinction is reflected in Ashworth's treatment of justifications within the conduct element of offences and excuses as within the fault element (Ashworth 2006, Chs. 4 and 6 – though he, like most commentators, elides exemptions and excuses).

Prime examples of excuses are mistaken beliefs and duress, which may be held to prevent the attribution of responsibility for an 'actus reus' to the defendant. In all cases it is up to the defendant to produce evidence for the excuse; only in the cases of insanity (and diminished responsibility) – arguably an exemption rather than an excuse, but conventionally treated as an excuse – is the formal legal burden of proof, on a balance of probabilities, on the defendant. In other cases, once this evidential burden is met, it is up to the prosecution to dispel any reasonable doubts which may have been raised as to the defendant's guilt. Supplementary to the doctrines of excuse and justification there exists a category of formal mitigation. This category is exemplified by the law on partial defences to murder and suicide pacts under the Homicide Act 1957 sections 2, 3 and 4. Each of these, if made out, reduces the defendant's liability from murder



to manslaughter, in recognition of some special difficulty which she met in accommodating her behaviour to criminal law standards.

The ideas of excuse and justification, like other features of doctrine, turn out to raise some very tricky questions. If, for example, the justificatory argument of self-defence genuinely removes the action from the ambit of criminal regulation, should it not rather be seen as a feature of a (refined) definition of the offence? Or, if it is (as is the practice) rather 'grafted on' to the 'actus reus', why is this so, and in what sense does it signify a removal from the real scope of criminal prohibition? Similarly in the case of excuses, conceptual neatness is unattainable because the boundary between existence of excuse and lack of 'mens rea' is very difficult to draw. The distinction often turns on how we describe both the definition of offences and the conduct in question, and, as we have seen, each process is open-ended in a way rarely confronted by traditional doctrine. Think again of the facts in *Steane* (1947), who claimed that he made the broadcasts in question because he was subjected to threats to the safety of his family. Nothing *in principle* determines whether a court should analyse these facts in terms of existence of the excuse of duress – preventing the move from action to attribution of responsibility despite the existence of 'mens rea' – or whether it should analyse them in terms of a denial of 'mens rea'. (In fact it was this latter analysis which was adopted, because of legal uncertainty as to whether the duress defence actually applied to the specific offence with which Steane was charged.) It seems unlikely that this kind of indeterminacy can be resolved by meticulous drafting, by codification, or by careful judicial reasoning.

The blurring of the line between 'mens rea' and excuse is problematic for several further reasons. First of all, the standard of liability may be 'objective' or 'subjective' depending on how we classify the issue. A good example here is the law on mistake. At one stage, the courts were inclined to hold that a genuine mistake about the existence of the elements of the offence removed 'mens rea', and hence had to be determined subjectively wherever the 'mens rea' requirement was itself a subjective one. In the crime of rape, a genuine mistake as to the victim's consent entailed, before 2003, that the defendant lacked mens rea, even if the mistake is based on patently unreasonable grounds. By contrast, where mistake relates not to a 'mens rea' element but rather to issues of defence (such as whether one is being attacked or threatened) courts have sometimes concluded that the mistake had to be not only genuine but also reasonable (*Tolson* (1889)). This objective approach surfaced briefly in *Albert v. Lavin* (1982), but was not followed by *R v. Williams* (1987) and *Beckford v. R* (1987) (see, contra, *People v. Goetz* (1986)). The current position appears to be that either defence or 'mens rea' may be objectively or subjectively specified according to the particular area of law in question. It remains to be seen, however, whether this issue has been decisively resolved (for a case which suggests that it has not, see *O'Grady* (1987)).

Secondly, it is impossible to generalise about how far excuse is distinct from lack of 'mens rea'. This is because some excuses, such as insanity, intoxication



and mistake, arguably possess the general ability to remove or qualify 'mens rea', whilst others, such as duress, are most easily interpreted as superimposed. The intoxicated killer cannot plead even involuntary intoxication unless it is such as to render her incapable of forming the necessary intent, whereas the defendant who steals under duress nonetheless intends permanently to deprive. This last point is of course subject to the manipulability of the definitions of offences already mentioned. For example, if intent is conceived in terms of purpose, we could say that, by analogy with *Steane*, where a defendant is threatened with death and kills a person as a result, the defendant intended to save herself rather than to kill. But if we define intent less strictly, as encompassing necessary and envisaged means to intended ends, this argument will lead to the conclusion that the defendant intended to kill, because she intended her victim's death as a necessary means to saving herself. On this view, duress must operate as a superadded excuse and not as a removal of 'mens rea'. Because of this difference in the nature of the various excuses, it is difficult to envisage a unitary approach to excuses at anything other than a very high level of generality.

These arguments cannot be dismissed as mere academic technicalities, because the distinction between excuse and lack of 'mens rea' is sometimes of crucial practical importance. This is because particular defendants may be personally excluded from claiming an excuse. For example, voluntary membership of a gang committed to criminal activities of the type the defendant has performed will exclude her from the duress defence even if she has been threatened by a fellow gang member into committing the offence (*R v. Sharp* (1987)). Lack of 'mens rea', by contrast, is available in principle to all defendants (though it is occasionally removed for policy reasons, for example where it is due to voluntary intoxication).

Also problematic for doctrinal accounts of excuse and justification is the *absence* from English law of a number of defences which would seem to be required by the principles underpinning the standard analysis. Mistake of law as an excuse and (with some recent concessions: see in particular *Re A* (2000)) necessity of circumstances as a justification constitute good examples of arguments which appear to exculpate on the basis of general doctrinal principles, yet which criminal law has been unwilling or reluctant to allow as defences. Although some pragmatic arguments can be given for their exclusion, these cannot convincingly be accommodated on the basis of the general normative principles to which doctrine boasts allegiance. Where defences do exist, moreover, questions can be raised about how 'general' they really are: do the terms in which they are drawn up typically make it more difficult for some kinds of defendant to make them out (Allen 1987; Nicolson and Bibbings 2000)? For example, the requirement in the law of self-defence that the defendant's reaction is proportionate and proximate has been persuasively argued to exclude the physically less powerful – young people and women notable among them – from fair access to the defence.

Finally, we may question the line between excuse and justification itself. For example, duress is generally seen as an excuse. But it might equally be argued that where a person, succumbing to a threat of a far greater evil, commits a relatively minor offence – for example, if a person were to steal something so as to prevent someone else from carrying out a threat to kill – that conduct should fall outside the ambit of criminal law's prohibition. Indeed, just such a possibility seems to be contemplated by Lord Hailsham in *Howe* (1987). Why, conversely, should the issue of necessity generally be considered as a possible matter of justification rather than of personal excuse? And does self-defence really make the act 'right' any more than does duress? Here the line might be drawn on the basis of utilitarian considerations such as the need to discourage threats or attacks on the person: a widely available duress defence might encourage the making of threats whereas a strong right of self-defence may increase the likely costs of, and therefore discourage, assault. But it is far from clear that criminal law is consistently driven by such concerns. The distinction between act-regarding and actor-oriented defences is resonant with the moral basis of criminal law doctrine, but it is hard to apply given that actions are inevitably judged contextually, and that in assessing the 'justifiability' of an action, important parts of the context are the actor's attitude and excusing factors. Thus the neat conceptual frame may be useful as a model, but on close inspection we find that its elements shade into one another in a way that ultimately defies the analytical clarity to which doctrine aspires.

### 1.3.b.v. Inchoate offences and participatory liability

Significant extensions in the basic framework of liability lie in the existence of inchoate offences of attempt, assisting and encouraging crime, and conspiracy and in participatory liability. The inchoate form is used increasingly and is evidence of the trend towards preventive offences. Its use is particularly noticeable in anti-terror legislation. Many specific inchoate offences are created by statute, possession offences for example, but here our focus is on the general inchoate offences which can be superimposed onto other indictable offences. For example, anyone who attempts to steal, or who assists or encourages another to steal, or conspires with at least one other person to commit a theft, may be convicted of the relevant inchoate offence and sentenced in the same way as if they or their confederate had in fact committed theft. In other words, inchoate offences could be analysed as discrete instances of offences with their own definitions of 'actus reus' and 'mens rea' which relate to and constitute an extension of the definitions of some other (indictable) offence. The 'mens rea' requirements for inchoate offences in law are more stringent (generally requiring 'specific intent' – intention as to consequences and knowledge of circumstances) than for the completed offence. This might be seen as an interesting, if somewhat mysterious, genre of compensation for the incompleteness of the 'actus reus'.

Several different rationales can be found for inchoate offences: the danger of completed offences posed by inchoate ones; police convenience in being able to arrest well before the completion of the offence; culpability of the defendant (especially where lack of completion is due to external, fortuitous factors). Each of these rationales implies somewhat different contours for inchoate liability. Furthermore, the lines between no liability, inchoate liability and full liability are increasingly hard to draw especially with the introduction of assisting or encouraging crime as stand alone offences. For example, the definition of the 'actus reus' of attempt is that of acts 'more than merely preparatory to the commission of the offence' (Criminal Attempts Act 1981, s. 1(1)). This is a point which can hardly be said to be self-defining. Does someone planning a burglary do acts 'more than merely preparatory' when she recruits accomplices, or hires the getaway car, or drives to the scene, or starts to effect entry? Criminal law simply leaves the decision to the magistrates or the jury. These problems of indeterminacy are exacerbated where mistakes are involved: does someone who thinks they are importing heroin but who is actually importing cabbage leaves commit the offence of attempting to import a prohibited drug (*Shivpuri* (1987))? This is just one of many possible kinds of mistake which may affect attempt and other forms of inchoate liability.

Furthermore, especially in the case of conspiracy, there is an obvious overlap with participatory liability: someone who agrees to assist in a burglary has both conspired to burgle and, if the burglary takes place, acted as a principal in the second degree. This is important because it is legally possible to withdraw at a certain stage from participation in crime, thus escaping liability, whereas no such possibility exists for inchoate offences. For example, someone who has been substantially involved in planning a robbery but who has a change of heart and alerts the police to the plan before the robbery takes place will probably escape participatory liability yet be technically liable for conspiracy. There was until recently a gap in this ever-widening net of liability. Whereas an uncompleted conspiracy amounted to an offence in itself, as did an incomplete incitement, an incomplete assistance to another to commit an offence did not. In other words, where A supplied a weapon to B knowing that B intended to use it to carry out a robbery, A would commit no offence if for some reason B did not carry out the intended offence. It was because of such difficulties that the inchoate offences of assisting or encouraging crime were introduced in 2008 (Serious Crime Act 2007, ss. 44, 45 and 46). At the same time incitement was abolished (see Spencer and Virgo 2008). The diverse forms of behaviour covered by the categories of attempt, assisting or encouraging crime bring us yet further from the original, simple 'actus reus'/'mens rea' model (see further Chapter 10).

In addition to the person who actually commits the 'actus reus' of the offence (the perpetrator), certain other categories of person who have been involved in its production may be held liable as 'principals in the second degree' to the crime and punished in the same way as the perpetrator. Participatory liability, unlike



inchoate liability, is derivative; it depends on there being a principal offender who has committed the 'actus reus' of the substantive offence. These secondary parties are sometimes described as 'aiders, abettors, counsellors and procurers' (Accessories and Abettors Act 1961, s. 1), and their involvement may consist in actions as diverse as providing equipment, encouragement or information, concealing evidence or giving material assistance in the actual commission of an offence. Joint enterprise liability is a close cousin of aiding and abetting. Here a person is liable for the foreseeable though unplanned/unintended actions by one of their confederates when they embark on a crime together (the typical example being where a burglary goes wrong and more – or a different type – of force is used than was planned). These kinds of secondary liability must be distinguished from another form of extended, but primary, liability: someone who does not physically do the 'actus reus' may be liable as a perpetrator or 'principal in the first degree' if she uses another person as an instrument or 'innocent agent' for committing the crime (*Michael* (1840)). Good examples would be the use of a small child or a person under hypnosis to inflict an injury or administer a poison or to steal something. Difficult problems may arise, however, where the agent can only be described as 'semi-innocent': i.e. where she has some but not all of the awareness necessary for the 'mens rea' of participation (*Cogan* (1976)).

The rationale of participatory liability is expressed by commentators and judges both in terms of the culpability of secondary parties and of the social danger presented by accessories to crime. Difficulties arise from the fact that these two rationales do not entail identical approaches to the imposition of such liability (see further Chapter 10.b.). Participatory liability purports to attribute responsibility which is derivative from and dependent upon the 'actus reus' and 'mens rea' of the perpetrator. However, even on a strictly derivative approach, liability for participation does not necessarily depend on the principal's *liability* (she may have an excuse or claim of mitigation which does not cover the secondary party) let alone upon her conviction (she may not be apprehended). Participatory liability complicates the notion of 'actus reus', which must be extended to cover participation. It also diversifies 'mens rea', for the 'mens rea' applicable to participation is not the same as that required for perpetration (*Rahman* (2008)). It consists of foresight or belief about the actions of the principal: for example, knowledge of how a knife supplied will be used; foresight of a weapon being carried by one's co-assailant being used. Participatory liability thus employs a secondary and supplementary 'actus reus'/'mens rea' framework which is grafted onto the structure of primary liability. This in itself takes it some way from the paradigmatic versions of criminal liability that the strict proof of actus reus and mens rea implies. Of course, the answer to this point would be that participation liability has its own mens rea and actus reus albeit piggy-backed on substantive offences. While this is so, it is noticeable that concerns about individual responsibility are drowned out by the shouts about social danger more readily here than in debates about intention or recklessness.



## Conclusion

The purpose of this discussion has been to describe some of the main features of criminal law doctrine, with a view to questioning some of its assumptions (an external critique) and to demonstrating its inadequacy in its own terms (an internal critique). Our internal critique has thrown up a number of ambiguities, indeterminacies and distortions in the picture presented by doctrine, especially when considered in the light of some empirical features of criminal law. The constant refinement and reshaping of the conceptual apparatus of criminal law, an important enterprise for legal doctrine, struggles to produce the rule of law ideals of certainty, coherence and clarity to which it aspires. Our analysis suggests that this situation would remain fundamentally unchanged even by a thorough codification of criminal law: for its basis lies, as Norrie noted in the passage quoted early in this section, in historical forces external to the law itself.

## FURTHER READING

- Andrew Ashworth *Human Rights, Serious Crime and Criminal Procedure* (Sweet and Maxwell 2002).
- Andrew Ashworth and Meredith Blake 'The Presumption of Innocence in English Law' (1996) *Criminal Law Review* 306.
- Antony Duff 'Codifying Criminal Fault', in I. H. Dennis (ed.) *Criminal Law and Justice* (Sweet and Maxwell 1987), p. 93.
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- John Gardner 'The Gist of Excuses' (1998) 2 *Buffalo Criminal Law Review* 575.
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- Nicola Lacey 'Coherence, Contingency and Conceptualism' in Antony Duff (ed.) *Philosophy and the Criminal Law* (Cambridge University Press 1998).
- Richard Nobles and David Schiff *Understanding Miscarriages of Justice* (Oxford University Press 2000).
- Peter Ramsay 'The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State' (2006) 69 *Modern Law Review* 29.
- Paul H. Robinson *Structure and Function in Criminal Law* (Clarendon Press 1997) Parts II and III.

## Section II

# Law, Order and Security

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### **4 Social and Political Constructions of Disorder**

- a. Conceptions of disorder
- b. Legitimate protest or moral panics?
- c. Problem populations

### **5 Securing Order: Pre-emptive Measures**

- a. The trend towards preventive justice
- b. Breach of the peace: arrest and binding over
  - i. Arrest
  - ii. Binding over
- c. Football banning orders
- d. Anti-social behaviour orders

### **6 Public Order: Control Mechanisms**

- a. Controlling mass assemblies
  - i. Marches and demonstrations
  - ii. Trespass
- b. Riot, violent disorder and affray
  - i. Outline of offences
  - ii. Common elements
  - iii. Mental element
- c. Harassment offences
  - i. Public Order Act 1986
  - ii. Protection from Harassment Act 1997
- d. Hate crimes

### **7 Criminal Law and Justice: Emerging Themes**

- a. Territory, technology, youth
- b. Public order and criminal law
- c. Public order and criminal process
- d. Thematic summary



## Social and Political Constructions of Disorder

Over the next two linked Sections we examine a broad range of offences and principles. In this Section, 'Law, order and security', we look first at the concept of public order, followed in Chapter 5 by an examination of the trend towards preventive security-based justice, and then in Chapter 6 we explore the different ways that law attempts to control public order. We conclude with a thematic summary placing public order in the context of criminal law and the criminal process. In Section III we move to a focus on interpersonal violence, before investigating the regulation of drugs and alcohol, the abuse of which underlies much of the regulated behaviour we discuss in these Sections. We end with an account of the different modes of liability that widen the net of criminal enforcement beyond the limits of substantive offences. These are the inchoate offences of attempt, conspiracy and assisting and encouraging crime, and secondary liability (aiding and abetting). All of these, with the exception of attempt, are ways of casting criminal liability beyond the individual offender.

Why public order law? The offences of affray, violent disorder and causing alarm (Public Order Act 1986, ss. 2–5) are as familiar to the police (and courts) as the assault and injury offences under the Offences Against the Person Act 1861 that are discussed at length in all criminal law texts. The powers of arrest that accompany public order offences are frequently used and, in conjunction with other offences, provide the police with a vital practical resource. We have argued that the doctrinal claims of many criminal commentators are overstated, even on the basis of the limited selection of offences with which they deal. Once a broader conception of criminal laws is adopted then the argument that criminal law is organised around general principles such as subjective 'mens rea' becomes strained and implausible. The frantic legislative activity in the broad area of public order in the last two decades corroborates this stance. Public order offences not only affect some of our most fundamental liberties (of expression and association) but also challenge ideas about fair process. Conventional ideas about the boundaries of criminal law and process are tested by extensive anti-terrorist legislation and by the increasing use of



hybrid civil and criminal procedures (as in the Protection from Harassment Act 1997, the Crime and Disorder Act 1998 and the Anti-social Behaviour Act 2003).

The method of criminalisation underpins huge areas of social regulation, including environmental pollution, health and safety at work, social security, tax, reproductive technology, road traffic, financial services and drugs. We cannot cover them all but their existence cautions us against inferring general principles from a very limited range of criminal prohibitions covering mainly indictable offences against the person and against property. There has been a proliferation of new statutory provisions dealing with the perceived social menaces of football hooliganism, possession of combat knives and other weapons, 'travellers', hunt saboteurs, stalkers and anti-social neighbours, all of which supplement (or in some cases overlap with) the existing offences of riot, violent disorder and affray, assault and battery, wounding and causing grievous bodily harm. We seek to show how this area of criminal regulation, which impinges on some of the most contested areas of social life, illuminates our general understanding of criminal law.

Drawing on materials which adopt sociological, historical and political perspectives, we introduce some examples of the diverse social phenomena which have been understood as public disorder. Three themes can be identified in contemporary criminal justice legislation: youth, football and terrorism. We will show how the threats that certain groups are perceived to make to peace and order are amplified by TV, radio and newspapers (and government) leading to demands for action. The action often consists in the creation of more offences (criminalisation), in the expansion of police powers (particularly noticeable in the case of terrorism), and in other forms of regulation (ASBOs, football banning orders). We explore the legislative scheme of public order offences, and discuss the interplay between criminal laws and criminal justice practices. It is noticeable that public order has been a preoccupation of both Conservative and Labour governments in the last quarter century. Yet with the exception of sexual offences, the government has not taken the opportunity to codify or rationalise major offence structures. As we will see in Chapter 8, fatal and non-fatal offences against the person, despite their seriousness, have to a large degree retained the same structure and appearance as in Victorian times (or earlier). Yet vast new legislative frameworks dealing with specific and generic public order and anti-social behaviour offences have been erected, added to, and tinkered with, in this short period.

Garland's 'culture of control' thesis suggests that penal populism is characteristic of late modern societies. In the two extracts that follow, Lacey proposes a more nuanced approach that is more sensitive to cultural differences between nations that have similar politico-legal backgrounds (such as the UK and the US).

(David Garland 2003, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press) p. 3)

We quickly grow used to the way things are. Today more than ever, it is easy to live in the immediacy of the present and to lose all sense of the historical processes out of which our current arrangements emerged. In the USA the public now seems quite accustomed to living in a nation that holds two million of its citizens in confinement on any given day, and puts criminal offenders to death at a rate of two or more per week. In much the same way, the British public no longer seems surprised by the existence of private prisons that house an increasing proportion of Britain's prisoners, and citizens go about their business hardly noticing the surveillance cameras that stare down on the streets of every major city. On both sides of the Atlantic, mandatory sentences, victims' rights, community notification laws, private policing, 'law and order' politics, and an emphatic belief that 'prison works', have become commonplace points in the crime control landscape...

To the moderately informed citizen who reads the papers or watches television news, these are taken-for-granted features of contemporary crime policy... But the most striking fact about these crime policies, is that every one of them would surprise (and perhaps even shock) a historical observer viewing this landscape from the vantage point of the recent past. As recently as thirty years ago, each of these phenomena would have seemed highly improbable, even to the best-informed and most up-to-date observer.

... For at least two decades now, criminal law and penal policy have been working without clear route maps on a terrain that is largely unknown. If this field is to have any self-consciousness, and any possibility of self-criticism and self-correction, then our textbooks need to be rewritten, and our sense of how things work needs to be thoroughly revised.

Lacey raises some important questions about Garland's analysis and introduces a comparative focus.

(Lacey 2000 'Rethinking Lockdown: Is Prison?' in *Revolutions and Lock-ups: The Politics of Crime Control* (Oxford University Press), pp. 197-226)

Urgent questions... occupy the agenda of contemporary comparative criminal justice scholarship. Are we witnessing, as Garland might be taken to suggest, a general move towards a 'culture of control', in which a combination of repressive and managerial criminal justice strategies are becoming increasingly salient to governments' ability to present themselves as effective and, where relevant, electable? If so, can this be explained in terms of the globalization of the world economy, accompanying changes in demographic, employment, and family structure and a consequent diminution in nation states' power to control their increasingly interdependent economies, leading to greater resort to criminal justice policy as a tool of social governance?...

[p. 203] 'How, Whitman asks [in *Harsh Justice* Oxford University Press 2003], has the United States, with its image of itself so strongly bound up with the notion of progress,

civilization, and humanity, ended up with one of the world's harshest and most degrading criminal justice systems? The answer, he suggests, is to be found in social history... To paint with very broad brush-strokes, his explanation is as follows: before the great movements of Enlightenment-inspired reform in the eighteenth and early nineteenth centuries, the criminal justice systems of the continent of Europe, like other social institutions, were inherently status-based... there was a clear and elaborate set of distinctions between high- and low-status penalties... punishment was regarded as an essentially, and justifiably, degrading phenomenon. But [in the Enlightenment]... there was a decisive turn away from these degrading forms of punishment... Through many twists and turns of history, the association of degradation in punishment with an older, uncivilized model of society now decisively rejected, gave birth to and sustained, in both France and Germany, a relatively mild penal system... In the United States by contrast there was never a revolutionary moment in which a key part of the self conception of the new order was a rejection of an older, indigenous, status-based society with its implication of appropriate degradation in punishment... The degradation thesis is not, however, the only explanatory factor in Whitman's account. Alongside it sits an argument about the distinction between 'weak' and 'strong' states... Americans' attachment to status egalitarianism and their general suspicion of state power appear to have conduced to harshness in punishment.

Lacey concludes that Whitman's dual thesis – degradation and weak states – provides an important insight: 'that contemporary differences between the penal systems of relatively similar societies may have long historical roots: roots which, in the light of institutional path-dependence, help to explain the persistence of contrasts even amid an increasingly globalized and intensely economically interdependent world'.

The next extract leads us into a consideration of the forms of public power – political and police – and we will see in Chapters 5 and 6 how they are manifested in pre-emptive measures and public order controls.

Nicola Lacey 2008 *The Prisoner's Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge University Press), pp. 97–105

[S]ystems exhibit markedly variable constitutional constraints on the content of criminal law – constraints which have deep historical roots. In *The Police Power*, Markus Dubber advances a thesis which is of relevance to our understanding of this aspect of the differences in the institutional capacity of liberal democracies to sustain relatively moderate criminal justice policies under late modern conditions. Dubber's argument plays out over a very large historical and spatial canvass, but has an essentially simple structure. Looking back even as far as the city states of classical Greece, Dubber argues, we can discern two markedly different forms of public power: political power and police power. Political power is that through which a society of equals governs itself. It is, in effect, a form of self-government; it



takes place through law and is constrained by the demands of justice, formal equality and so on. Police power, by contrast, derives from the power of the head of a family to govern the resources – animate and inanimate – within his household. It is hierarchical and essentially patriarchal power, discretionary and vaguely defined in its essence, a power of management over persons and things themselves not invested with rights or autonomy. Instrumental and preventive in temper, the police power is oriented to goals such as peace, welfare, efficient use of resources and security. This is not to say that police power is unconstrained: the patriarch is under an obligation to govern his household so as to maximise its welfare; hence feckless or malicious exercises of police power will be regarded as illegitimate. But the nature of these constraints of fitness and prudence are markedly different from the criteria of legitimacy governing the exercise of genuinely political power.

Dubber traces the distinction between political and police power through the centuries and through a wide range of influential legal and philosophical tracts from Aristotle through to Locke, Rousseau, Blackstone and Smith. In England, the emergence of an increasingly powerful monarch, and the expanding reach of the King's Peace, gradually overlaid the police power of landowners with the overarching police power of the monarch. Within this emerging structure, the monarch constituted, as it were, the macro-householder in relation to whom all subjects, including the landowning micro-householders, were regarded as resources to be managed efficiently (and as beneficiaries of the monarch's paternalist obligations). The police power of the monarch lay alongside the political and legal structures which treat persons as formally equal – notably jury trials. Looking far back into the history of early modern England, provisions such as the Statute of Labourers, anti-vagrancy and gaming laws were, Dubber suggests, quintessentially manifestations of the police power rather than of self-government through law. Exquisite status distinctions marked the system at every level: even the main law of serious crimes – the law of felony – found its origins in outlawry, was rooted in the notion of a breach of the feudal nexus, existed primarily to protect the Lords (just as Treason existed to protect the monarch) and was trained primarily on those of low status – the non-householders. Where restitutive or reparative measures were ineffective, the primary resort of the criminal process was explicitly degrading, typically physical, punishment. Such punishments were designed to enact on the subject's body the degradation which, notwithstanding trial by jury, his or her offence implied, without thereby permanently unfitting him for productive labour (hence the prevalence of whipping). Criminal justice and punishment were, on this view, primarily a hierarchical means of managing a population and not an expression of self-governance within a community of equals.

With the gradual emergence of modern sensibilities and a vestigially democratic structure of government, this ambiguity about the status of criminal justice, lying on the muddy border between political/legal and police power, became more troubling. The place of the police power, and its relationship with legal/constitutional/political power, became yet harder to rationalise within an overarching political theory. Imported – ironically but enthusiastically – to the United States by the Founding Fathers, the police power flourishes to this day. Yet it has never been settled within a constitutional or other legal framework which could generate the sorts of accountability consistent with the overall attitude to public power in a



liberal-democratic polity. It would generally be taken as obvious that criminal justice power is legal power: the subjects of modern criminal law have in most systems a panoply of procedural rights, and criminal justice systems are increasingly subject to the overarching regulation of bills of rights enshrined in national constitutions or supra-national legal instruments such as the European Convention on Human Rights. But if we look at the substance of criminal law – what may be criminalized and how – we see, even in a country with as robust a constitutional culture as the USA, something approaching a vacuum in terms of accepted constraints. While the power to punish may be weakly constrained by standards such as the prohibition on cruel and unusual punishments, the power to criminalise remains all but unconstrained. This, Dubber suggests, discloses strong traces of the police mentality which characterised much of the early, pre-modern criminal justice system, particularly that trained on the governance of the lower status members of society.

Despite some discussion of the origins of the concept of police in French thought and of the continental development of a 'police science' in the Eighteenth Century, Dubber does not pursue any sustained comparative analysis. But his argument may certainly be put to comparative use. For the purposes of explaining contemporary differences in attitudes to the proper constraints on penal power, the key point comes with the emergence of modern democratic sentiments and political structures. This is a point at which, as we have seen, the tension between law and police becomes much harder to manage than within the older, status-based societies which preceded the modern era. My suggestion is that there may be another important difference here between modern democracies, several of which, as Loader and Zedner have shown, have not only explicitly deployed the police power as a tool of state governance through a variety of social institutions including the family but also developed a more sophisticated sense of the proper constraints on this exercise than Dubber acknowledges. On the one hand we have societies such as those of continental Europe, whose modern constitutional settlement made explicit the distinction between police and law. These settlements aimed to domesticate the police power within a new political framework, while explicitly differentiating it from legal power. On the other hand, we have societies such as Britain and the USA, which absorbed the police power, unacknowledged, within the new legal power. In these societies, the police power infuses the self-governing, rights-respecting aspects of criminal law with a managerial mentality in which the ends always justify the means: it comes naturally to think of law as the tool of policy rather than as an autonomous system whose doctrinal standards place constraints on power. It is worth examining this distinction in some detail.

In both Britain and the USA, probably the most obvious manifestation of the police power is the existence of widespread regulatory offences in areas such as driving, health and safety, licensing, low-grade public disorder. Many of these *mala prohibita* – things wrong only in so far as they are prohibited by the state – attract strict, no-fault liability. They are often regarded by criminal law scholars as an embarrassing exception to the normal principles governing the law 'real crime' in the sense of *mala in se* or things wrong in themselves. They exist to promote social welfare, and since they do not imply the sort of stigma or the severe penalties attached to 'real crimes' such as murder or theft, the absence of a robust responsibility requirement and suspension of the procedural safeguards which

purportedly characterise the criminal justice system are tolerated. Examine any treatise on criminal law, however, and you will find little about these numerous regulatory offences. Nor will a standard treatise give much space to troubling 'exceptions' to the 'normal' principles of criminal procedure such as anti-social behaviour orders or 'child safety orders', which deploy a formally civil process to invoke a substantively criminalizing power. These absences reflect the difficulty of reconciling regulatory mechanisms with the predominant conception of criminal law as a quasi-moral normative system concerned with wrong-doing and culpability. British and American criminal law therefore encompasses two markedly different sorts of regulatory systems. But because this is rarely acknowledged, there has been little effort either to rationalise the quasi-moral and the morally neutral, instrumental forms of social regulation or – more importantly – to develop a proper account of the limits of the state's regulatory power.

Lacey's reference to 'morally neutral' social regulation is interesting. One question that can be borne in mind throughout the book is whether this is a label that we can attach with confidence to any aspect of criminal law.

#### II.4.a. Conceptions of disorder

When we refer, as we tend to do easily and casually, to 'public order' or 'mass public disorder', what do we mean? This may seem a simplistic question, but the more thought one gives it, the more difficult it seems to be. One possible avenue would be a conceptual one. A straightforward conceptualisation of public disorder is that adopted by Gurr (1976, p. 9): 'manifestations of social disorder that are the objects of concerted public efforts at control'. However, this seems to beg the questions both of what constitutes 'social disorder' and of the criteria on which those efforts at control are based. If we reflect for a moment on general usage and the understandings of order and disorder which are embedded in language, we see immediately a variety of meanings, overlapping at their edges but nevertheless diverse. For example, we sometimes refer to 'the moral/social/political order', using the idea of 'order' more or less synonymously with 'system', to mean something coherent, organised and stable: a system of power relations or norms. Used alone, the word 'order' can conjure up authority and hierarchy – order coerced by the exercise of power – but also ideas of peacefulness, tranquillity and rational organisation. We use the phrase 'law and order', which betokens not only the idea of authoritatively imposed peace, but also a certain mentality of authoritarianism. Conversely, the notion of 'disorder' conjures up a variety of images: chaos, lack of organisation, lack of coherence, system or regularity, even abnormality – perhaps corresponding to an idea of 'order' as a 'natural' state of things.

In using the idea of public order or disorder, we raise the question of whose view of order 'public' order is. Ideas of public order and disorder can be tied to descriptive meanings, for instance signifying merely 'peacefulness in places

to which the public have access', or 'behaviour involving nuisance to the public or in public places', 'mass involvement in behaviour which threatens peace or tranquillity in public places', or 'behaviour causing widespread fear on the part of the public'. However, our use of the concept also typically assumes or asserts a particular, prevailing point of view about what constitutes order, for example, public order relative to institutionally accepted or imposed standards, or public disorder as threatening to the authority and stability of the state. Views differ about what constitutes order in particular contexts. Does 'public order' presuppose a consensus? Or does it rather assume the existence of (political) power to impose a particular conception of order? Who is to say whether a noisy picket line constitutes legitimate expression or an affront to public order? The problem is illustrated by research on football hooliganism:

P. Marsh, E. Rosser and R. Harré 1978 *The Rules of Disorder* (Routledge and Kegan Paul), pp. 1-2, pp. 28-9

The ostensible subject matter of this book is violence and disorder. Our settings are classrooms and the terraces of football grounds. Our dramatis personae are the people who inhabit these places and the people who speak about them in various public ways. Many people believe that there are schoolrooms and football grounds where civilized order is forever on the verge of breaking down. How have they come to believe this? Certainly not by direct experience, for few who 'know' about schoolroom or football violence have been present at its manifestations. Newspaper, radio and television reports are intimately involved in the formation of our images of the places beyond our immediate experience, and the pictures we form of the places featured in our study are no exception. Such reports suggest, often in the choice of vocabulary as much as in overt statement, that classrooms and football grounds are the settings for scenes of anarchy and disorder. But more than that, they imply a specific theory about the genesis of social violence. It is the theory that in these special places gaps widen out in the texture of order and without that order uncontrollable impulses lead to meaningless and violent behaviour.

... As we will show, almost nothing of this popular conception survives a thorough examination of the day-to-day practices and explanations that are vouchsafed for them in vogue about the folk who inhabit these notorious places. Life, as it is lived in the classrooms and on the terraces, has almost none of the characteristics of anarchy and impulsiveness that are often attributed to it...

Not only do we reveal a different interpretation of what is happening but we propose a very different psychological basis for this activity. We have come to see it through the eyes of the people who take part in it. They see their social life as a struggle for personal dignity in a general social framework that daily denies them this dignity. Far from valuing disorder, they are engaged in the genesis of significance for their lives and an order in their actions that is their own. The struggle begins when they see many of the things that seem routine to the rest of us as ways of devaluing them. The official forms of order can seem anomic to



those who are systematically treated as non-persons, since, as they pursue their lives, they have no stake in the society for whose maintenance that order exists...

Order is associated with regularity and uniformity, that is with repetition of the same or similar elements... In general in human contexts orderly behaviour has other features than just regularity. In particular, it seems to be required to be quiet, stable, and relatively slow... [I]t seems also to be a taken-for-granted principle that in human affairs where there is order there is something corresponding to a rule to be looked for in the background of the actions which appear as orderly. Rule-following is the typical mode of action by which the structure of the context of the rule is reproduced in the actions of the people, though we may have to explain their aims or the acts they intend in other ways.

In their study of fans at an Oxford football ground, the authors identify 'hooligan' behaviour as itself 'ordered' in the sense of being rule-bound, involving patterns, roles and even careers, and as constituting a kind of ritualised aggression geared in particular to the assertion of masculinity.

The importance of point of view and the relativism inherent in the concept of order is further illustrated by philosophical reflections on the idea of authority – a notion closely linked, as we have seen, with the idea of public order. Steven Lukes argues that identifying relations of authority 'is an even more complex matter than is often supposed and always involves a process of interpretation' (1987, p. 60). In particular it depends on one's perspective which in turn reflects different social and political roles, for example those of the judge, the bureaucrat or the citizen. Lukes goes on to distinguish between the perspectives of the exercise or holder of authority and those who are subject to it; that of the observer; the official perspective of society, definitively interpreted by judges and other state officials; unofficial and informal understandings of public rules and conventions which form various competing perspectives; the perspective emerging from social consensus, where it exists; and an impersonal, 'objective' perspective, the possibility of which Lukes calls into question. The importance of these different perspectives in understanding the complexity of the issues of social order and disorder is obvious. It also leads us directly to the question of power: who has the power to define and enforce a particular conception of order in any particular context?

Some citizens are marginalised or excluded from the processes of public debate. Citizenship is only fully realised for those individuals and groups with the authority and power to be heard. More than this, it is not merely a question of who is heard but who makes the rules about who is heard. Those from ethnic minorities, the poor, and the 'anti-social' are excluded from genuine participation in the social definition of public order and authority. This issue of marginalisation also calls into question assumptions about the extent of consensus underpinning social conceptions of order and disorder. Can law in our society claim to represent any conception of justice capable of reconciling these conflicting perspectives?



#### II.4.b. Legitimate protest or moral panics?

The issues of power and perspective cannot be resolved by approaching the identification of public order and disorder via a conceptual method. What other approaches might we take to understanding the social phenomena in question? If we are to grasp something of the social meaning of 'public disorder', we must begin by moving to political history, to consider some examples of behaviour understood as constituting public disorder, in response to which public order law has been or could have been used. The examples which follow have been selected principally in the light of contemporary public preoccupations with disorder and debates about the propriety and efficacy of the use of law and police powers to curb unrest and disorder.

Disorder associated with the existence and collective behaviour of gangs is diverse, modern examples including fighting between British National Party and other extreme right-wing groups and anti-racist groups, and between rival groups of football fans. Stanley Cohen's study of societal reactions to the 'mods and rockers' in the 1960s was the first sustained development of the concept of 'moral panic'. While 'mods and rockers' have faded (to be replaced by other folk devils in areas such as drugs and sex offences) the term moral panic has taken a firm hold in modern sociological theory.

*S. Cohen 1972 Folk Devils and Moral Panics (St Martin's Press), pp. 9ff., 28ff.*

Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people... Sometimes the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight. Sometimes the panic passes over and is forgotten, except in folklore and collective memory; at other times it has more serious and long-lasting repercussions and might produce such changes as those in legal and social policy or even in the way society conceives itself.

One of the most recurrent types of moral panic in Britain since the war has been associated with the emergence of various forms of youth culture... whose behaviour is deviant or delinquent... The Teddy Boys, the Mods and Rockers, the Hell's Angels, the Skinheads and the Hippies have all been phenomena of this kind... But groups such as the Teddy Boys and the Mods and Rockers have been distinctive in being identified not just in terms of particular events (such as demonstrations) or particular disapproved forms of behaviour (such as drug-taking or violence) but as distinguishable social types. In the gallery of types that society erects to show its members which roles should be avoided and which should be emulated, these groups have occupied a constant position as folk devils; visible reminders of what we should not be...

The scene of the first Mods and Rockers event, the one that was to set the pattern for all the others and give the phenomenon its distinctive shape, was . . . Clacton, a small holiday resort on the east coast of England . . . Easter 1964 was worse than usual. It was cold and wet, and in fact Easter Sunday was the coldest for eighty years. The shopkeepers and stall owners were irritated by the lack of business and the young people had their own boredom and irritation fanned by rumours of cafe owners and barmen refusing to serve some of them. A few groups started scuffling on the pavements and throwing stones at each other. The Mods and Rockers factions – a division initially based on clothing and life styles, later rigidified, but at that time not fully established, started separating out. Those on bikes and scooters roared up and down, windows were broken, some beach huts were wrecked and one boy fired a starting pistol in the air. The vast number of people crowding into the streets, the noise, everyone's general irritation and the actions of an unprepared and undermanned police force had the effect of making the two days unpleasant, oppressive and sometimes frightening.

I am concerned here with the way in which the situation was initially interpreted and presented by the mass media, because it is in this form that most people receive their picture of both deviance and disasters . . . On the Monday morning following the initial incidents at Clacton, every national newspaper, with the exception of *The Times* . . . carried a leading report on the subject. The headlines are self-descriptive: 'Day of Terror by Scooter Groups' (*Daily Telegraph*), 'Youngsters Beat Up Town – 97 Leather Jacket Arrests' (*Daily Express*) . . . Straight reporting gave way to theories especially about motivation: the mob was described as 'exhilarated', and 'hell-bent for destruction' etc. Reports of the incidents themselves were followed by accounts of police and court activity and local reaction . . .

Cohen goes on to describe the ways in which media reporting exaggerated and distorted the events and created expectations that they would recur, suggesting that the reporting responded to the need to produce 'newsworthy' items on a weekend which was 'particularly dull from a news point of view' (p. 45). His observations about the relationship between media and public opinion are of general importance (pp. 65–6):

... [There was] a striking difference . . . between the mass media and the various types of public opinion. For most dimensions of this comparison, the mass media responses to the Mods and Rockers were more extreme and stereotypical than any of the sample of public opinions surveyed. This is not to say that the mass media images were not absorbed and were not the dominant ones to shape the reaction, but rather that the public coded these images in such a way as to tone down their more extreme implications. In this sense the public could be said to be better informed about the phenomenon than the media or the moral entrepreneurs whom the media quoted.

Cohen argues that such events tend to be followed by a spiral of 'deviance amplification' (p. 18):

An initial act of deviance, or normative diversity . . . is defined as being worthy of attention and is responded to punitively. The deviant or group of deviants is segregated or isolated and this operates to alienate them from conventional society. They perceive themselves as more deviant, group themselves with others in a similar position, and this leads to more deviance. This, in turn, exposes the group to further punitive sanctions and other forceful action by the conformists – and the system starts going round again . . .

Cohen's conclusions about the relation between societal, media and law enforcement reaction and the development of this particular 'public order problem' give pause for thought to students of criminal law. There is also reason to question the conventional wisdom that the incidents had 'no parallel in history':

G. Pearson 1983 *Hooligan: A History of Respectable Fears* (Macmillan), p. 74, pp. 188–9

The word 'hooligan' made an abrupt entrance into common English usage, as a term to describe gangs of rowdy youths, during the hot summer of 1898. 'Hooligans' and 'Hooliganism' were thrust into the headlines in the wake of a turbulent August Bank Holiday celebration in London which had resulted in unusually large numbers of people being brought before the courts for disorderly behaviour, drunkenness, assaults on police, street robberies and fighting. One of the more alarming aspects of these Bank Holiday disturbances was that they highlighted fierce traditions of resistance to the police in working class neighbourhoods, so that not uncommonly policemen attempting to make street arrests would be set upon by large crowds – sometimes numbering two or three hundred people – shouting 'Rescue! Rescue!' and 'Boot him!' . . .

From the early 1600s the streets of London and other cities had been terrorised by a succession of organised gangs – calling themselves the Muns, Hectors, Bugles, Dead Boys, Tityre Tus, Roaring Boys, Tuquoques, Blues, Circling Boys, Bickers, Roysters, Scowrers, Bravadoes, Bawcubites and Mohocks – who found their amusement in breaking windows, demolishing taverns, assaulting the Watch, attacking wayfarers and slitting the noses of their victims with swords, rolling old ladies in barrels, and other violent frolicks. If a servant or waiter should happen to be killed in the act of wrecking a tavern, it was said to have been considered a great joke to inform the proprietor to 'Put him on the bill!'. The gangs also fought pitched battles among themselves, dressed with coloured ribbons to distinguish the different factions . . .

Even in their barest detail these accounts . . . give the lie to simple-minded notions of an era of pre-industrial calm. The streets of Old London – which had neither an effective system of street-lighting nor a police – were perilous in the extreme. As to the allegedly quiet countryside of Merrie England, although the pattern of crime and disorder was appreciably different in ways that corresponded to the altered social landscape of the pre-industrial world, things were no better. The persistent interruption of food riots, the burning of hayricks and barns, smuggling offences, wrecking and coastal plunder, and crimes associated with poaching and trespass are all well documented in the eighteenth century.



The phenomena which Pearson and Cohen discuss have a variety of socio-economic and cultural roots, and they serve to remind us of the diversity as well as the historical pervasiveness of behaviour which can be constructed as a 'public order problem'. We could multiply examples of 'gang' behaviour (such as that of the Mafia and other forms of 'organised crime' syndicates, or risk-taking financiers), not all of which are conventionally thought of as raising 'public order' issues.

Some of the assumptions underlying interpretations of events in terms of the existence of 'gangs' or 'subcultures' are noted by Thompson in his study of the eighteenth-century forest disturbances involving the 'Blacks':

*E. P. Thompson 1973 Gangs and looters (Bengali), pp. 194-5*

What twentieth-century criminologists describe as subculture eighteenth-century magistrates described as gangs. What is at issue is not whether there were any such gangs (there were) but the universality with which the authorities applied the term to any association of people, from a benefit society to a group akin to Fagin's den, which fell outside the law. This was partly self-delusion in the minds of the magistracy, and unwillingness to acknowledge the extent of disaffection with which they were faced: if after enclosure, fences were thrown down - if turnpikes were attacked - if coal-heavers besieged their sub-contractors - if threatening letters were received, it was somehow comforting to assert that these outrages were the work of 'a gang'. And the category was self-fulfilling: if an offender was then picked up, and if information was extorted as to his associates, then it confirmed that the 'gang' had been 'run to earth'. In the silence of terror which might follow their punishment, the authorities would assume further confirmation of the theory of the gang. There had been a kill and the rest of the 'gang' (if any) had 'gone to ground'...

[These critical reflections on the indiscriminate use of the concept of 'gangs']... remain relevant to the question of the Blacks and the Black Act. For the category 'criminal' can be a dehumanizing one: if a group of men are described as a 'gang', then they have been described in such a way as to disallow more careful examination. They are seen... as a threat to authority, property and order.

#### II.4.c. Problem populations

The role of criminal justice systems in controlling problem populations has been well documented. Perceived threats to public order often relate to the behaviour of groups who do not conform to contemporary conventions about lifestyle, such as Roma and other travellers, refugees and 'asylum seekers', drug users, the homeless and skateboarders. Using examples ranging from the 1910-1914 suffragette marches, through unemployment marches in the 1930s to the anti-Vietnam war protests of the 1960s, Waddington's historical review of political disorder in London shows how violence is associated with protesters that have been castigated as 'subversive', 'unpatriotic' or 'communistic' (1992, p. 29).



Earlier examples of social preoccupations with vagrancy related to similar anxieties to those which underlie more recent responses to direct action from hunt saboteurs, animal rights and environmental protesters. Each attracts different, sometimes contrasting, media and police responses. The hunt 'saboteur' contrasts with the 'respectable protester' in the Countryside March (2002). From a criminal law perspective, nothing divides these different forms of group action. It is only through the social, political and police refractions that events acquire their 'disorderly' or 'legitimate' hues.

*A. L. Boier 1985 Masterless Men (Methuen), pp. 9-11, 52*

The legal concept of vagabondage originated in the distinction between the able-bodied and the 'impotent' poor. The division dates from the fourteenth century, when Parliament made masterlessness an offence, but its fullest development came under the Tudors and early Stuarts. Most of the thirteen poor laws passed between 1495 and 1610 had as a first premise the discrimination between those able and unable to work... An Act of 1531, for instance, encapsulated the three characteristics of poverty, fitness for labour, and unemployment by defining the vagabond as any man or woman being whole and mighty in body and able to labour, having no land, master, nor using any lawful merchandise, craft or mastery whereby he might get his living...

Vagrancy charges might also arise under labour legislation. The Statute of Artificers of 1563 provided that if the able-bodied poor refused to work in husbandry, or left work before their terms finished, they could be arrested and imprisoned... the reason for regulating the unemployed was not a shortage of labour, as in the later Middle Ages. Rather it was the rising numbers of able-bodied poor that troubled officials... With vagrants, they were afraid what might happen if they were left to their own devices. The masterless man represented mutability when those in power longed for stability. He stood for poverty, which seemed to threaten their social and political dominance. Fundamentally, in prescribing that the vagrant be employed, governments were preoccupied with a problem of disorder.

The young were a special worry and were singled out in numerous statutes... Beggars were another troublesome group, as might be expected from the learned view of them. State action again began in the fourteenth century as part of an attempt to make the able-bodied work. Tudor governments intensified the campaign, because they linked mendicancy with disorder... The vagrancy legislation also covered a vast array of occupations: pedlars and tinkers, soldiers and mariners, many entertainers, students, unlicensed healers and even fortune-tellers... Wizards and unlicensed healers were accused of fraud, while entertainers, military men and tinkers were thought to cause disruption... Gypsies and the Irish were also treated as vagrants... Both groups were accused of sedition and treason, but by the seventeenth century the Irish were considered the more dangerous. As well as being aliens, they came to England in waves of immigration caused by war and famine. To make matters worse, the native Irish were associated with popery and rebellion... The laws were employed, finally, against disorders that were not even in the statute books under vagrancy... Migrants were also policed under the legislation. When poor relief became law

in the reign of Elizabeth I, officials began 'warning out' immigrants under threat of vagrancy charges. This was to stop them from burdening the poor rates. By law the poor were entitled to succour in their birthplaces or their last places of residence. Because anyone moving to another parish might be eligible for relief in two places it was natural, if inhumane, to query settlement rights and treat claimants as vagrants. The effect was to turn honest immigrants into vagrants by denying them residence rights . . .

Vagrants were a menace to the social order because they broke with the accepted norms of family life. If the ideal was the patriarchal household, they had no part in it, and for that reason they were considered pariahs.

Such preoccupations find their modern counterpart, one might argue, in social security rules which, in effect, make the homeless ineligible for various kinds of benefit. Echoes of the practice of 'warning out' sound in the treatment of economic migrants, asylum seekers and suspected terrorists as well as in the paedophile register first established by the Sex Offenders Act 1997 and associated injunctions. As we have already suggested, it may be tempting to distinguish between 'political' protest and (apparently) indiscriminate 'gang' or hooligan behaviour but this often proves an illusory line.

# Securing Order

## Pre-emptive Measures

### 11.5.a. The trend towards preventive justice

The balance between reacting and preventing in criminal law and justice appears to be undergoing a radical shift. That there have always been elements of prevention is clear from the common law powers of arrest for breach of the peace and statutory binding over orders (see below). As the moral panic literature discussed in Chapter 4 shows us, threats may manifest from all sorts of sources, they will be amplified by media portrayals, and then subject to attempts at containment by governments. The rise in surveillance technology and an increasing emphasis on managing the fear of crime as much as dealing with crime itself have given rise to a number of new measures aimed at establishing a sense of security from threats. Unlike binding over powers, the new preventive orders initially targeted individuals belonging to relatively specific groups. They were intended to be used against football hooligans, sex offenders or suspected terrorists. But they have now taken on new generic forms the clearest example of which is the anti-social behaviour order. All of these have in common that they are aimed at named individuals. Many of these measures are dependent on CCTV surveillance. In the next extract, Zedner captures the overall trend as a move towards pre-crime rather than post-crime.

Lucia Zedner 'Pre-crime and Post-criminology?' (2007) 11 *Theoretical Criminology* 261–81

In a post-crime society there are crimes, offenders and victims, crime control, policing, investigation, trial and punishment, all of which are staples of present criminological enquiry. Pre-crime, by contrast, shifts the temporal perspective to anticipate and forestall that which has not yet occurred and may never do so. In a pre-crime society, there is calculation, risk and uncertainty, surveillance, precaution, prudentialism, moral hazard, prevention and, arching over all these, there is the pursuit of security. Already the criminological lexicon has expanded: though they were scarcely in use just two decades ago, these terms are now commonplace in criminological enquiry. A coincidental facet of the temporal shift to pre-crime is that responsibility for security against risk falls not only to the State but extends to a larger panoply of individual, communal and private agents. The shift is therefore not

only temporal but also sectoral; spreading out from the State to embrace pre-emptive endeavours only remotely related to crime.

Private security is a burgeoning industry, community safety, and personal crime prevention are major platforms of public policy, and the technological paraphernalia of security scatter the social world. According to the British Security Industry Association (BSIA) there are now over 600,000 people working in the UK private security industry; over 4.25 million CCTV cameras in operation; and the estimated turnover of the UK security industry in 2004 was over £5 billion. Private security industry turnover in respect of CCTV has risen from £84 million in 1993 to £509 million in 2005, while turnover in respect of manned security guarding has risen from £530 to £1575 million over the same period ([www.bsia.co.uk/](http://www.bsia.co.uk/)). Figures for North America are even more striking. These developments have sparked a lively debate. Where some see total rupture, others observe more continuity with the past, less radical or more contradictory patterns of change. But no one is any longer pretending that criminology can remain complacent if it is to meet the challenge of these new social ordering practices. The growth of non-state actors in the production of security is such that (if it ever could) it no longer makes sense to focus on the workings of the criminal justice state to the exclusion of private, commercial, communal, voluntary and individual actors. Even within the public sector profiling, offender registers, surveillance, CCTV, situational crime prevention and community safety initiatives all signal a shift in temporal perspective. Equally important is the changing relationship between the public and private spheres. Mechanisms of delegation, of contract and strategies of responsabilization invite enquiry into the new means by which states govern at a distance. Relations between different ventures in security are so complex that the very distinction between public and private is increasingly blurred. Mapping these relations exposes deep ligatures between public and private. The demarcation is transgressed by the contracting out of public services to private providers; by state regulation via the licensing, inspection and auditing of the private security industry; and also by private sponsorship of state policing, for example through the provision of hardware or even vehicles.

In some US states the police are, quite literally, 'brought to you by Toyota'. Concern with the antagonistic, competitive or simply antithetical aspects of the public/private relationship has tended to obscure the degree to which professional interaction, reciprocity, even mutual dependency now characterize working relations between the two.

Of course it is important not to exaggerate these temporal and sectoral shifts. Policing, particularly in its formative years, had a decidedly preventative turn. Garland describes this early preventative orientation as the 'path not taken' (2001, p. 30-2). And yet, although it was later overshadowed by largely reactive practices, prevention was never absent from police beat and patrolling functions. Even in the heyday of the modern criminal justice state, crime control was not exclusively a state function: preventing crime and maintaining social order were tasks shared also by private citizens, communities and private security agents. It is important therefore not to overstate 'the novelty and the "epochal" nature of current trends' and thereby overlook continuities.

This said, the impact of 9/11, of the London bombings and the continuing threat of catastrophic risk has significantly increased the pressure on governments to think and



act pre-emptively. The trajectory towards anticipatory endeavour, risk assessment and intelligence gathering is accelerating.

## 11.5.b. Breach of the peace: arrest and binding over

### 11.5.b.i. Arrest

For all the fancy new preventive security-based powers that have sprung up in the last 20 years, the bottom-line in the police officer's extensive armoury has long been the common law power to arrest a person for breach of the peace (preserved by the Public Order Act (POA) 1986, s. 40(4)) along with the associated court power of bind over. Whenever new powers or offences are introduced it is always worth asking whether they in fact add anything to those that already exist or simply show how much political capital is now associated with the 'war' against crime. Both old and new forms of pre-emptive powers are often couched in broad terms. The threshold for invoking the power to arrest (a power which is not confined to the police but can be exercised by all citizens) is an actual or imminent breach of the peace. There is a breach of the peace whenever harm is actually done or is likely to be done *to a person or in his presence to his property or a person is in fear of being so harmed* through an assault, an affray, a riot, unlawful assembly or other disturbance (*R v. Howell* (1982); *Redmond-Bate v. Director of Public Prosecutions* (2000)). Breach of the peace can take place on private land (*McConnell v. Chief Constable of the Greater Manchester Police* (1990)).

But what about action short of arrest? Action may be taken against persons who are not themselves threatening a breach of the peace if that is necessary to prevent a breach either happening or about to do so. Clearing a path through a group of bystanders to get to the scene of an affray is an example. Until the House of Lords ruled otherwise in *R (Laporte) v. CC Glos* in 2006, the police believed that they had the power to take action short of arrest when they thought it was reasonable to do so even where there was no imminent threat to peace. The case challenged the action of the Gloucestershire police in turning back a bus carrying passengers from London to the Fairford airbase to protest against the Iraq war. The passengers were not allowed to leave the bus until it arrived back in London. In laying to rest this *pre* pre-emptive power, the House of Lords endorsed Lord Diplock's summary in *Albert v. Lavin* (1982):

[E]very citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will. At common law this is not only the right of every citizen, it is also his duty, although, except in the case of a citizen who is a constable, it is a duty of imperfect obligation.

If it has not already occurred, the breach of the peace must be imminent and the action taken must be both reasonably necessary and proportionate. In future the Chief Constable would have to rely on his extensive powers under Part II of the Public Order Act 1986 to ban or impose conditions on demonstrations (see Chapter 6.a.i).

Arrest and action short of arrest for breach of the peace were subjected to scrutiny by the European Court of Human Rights in *Steel v. UK* (1999) which comprised three cases where protesters had been arrested and detained. The court considered that the relevant legal rules provided sufficient guidance with enough precision to satisfy Article 5. In the first case, the applicant, with 60 others, had attempted to obstruct a grouse shoot. She was arrested for breach of the peace for impeding the progress of a member of the shoot by walking in front of him as he lifted his shotgun. She was detained for a total of 44 hours before being released on conditional bail. In the second case, the applicant had taken part in a protest against the building of an extension of a motorway. The protesters had repeatedly broken into a construction site and the appellant was arrested whilst standing under a digger, for conduct likely to provoke a disturbance of the peace. She was detained for approximately 17 hours. In the third case, a group of three applicants had attended a 'Fighter Helicopter II' conference in order to protest with others against the sale of fighter helicopters. They handed out leaflets and held up banners saying 'Work for peace not war'. They were arrested and taken to a Police Station where their custody record stated the 'circumstances' as being that they were acting in breach of the peace. Having been detained for seven hours they were taken before the magistrates who adjourned the hearing through lack of time. The applicants were released and when proceedings were resumed a month later the prosecution called no evidence and the magistrates dismissed the case against them.

The Court concluded there had not been a violation of Article 5(1) of the Convention as regards the arrest and detention of the first two applicants. It found no reason to doubt that the police were justified in fearing that the behaviour of these applicants, if persisted in, might provoke others to violence. However, in relation to the three applicants in the third case, the court held unanimously that there had been breaches of Article 5(1), as the three individuals were conducting an entirely peaceful protest, and the Court found no indication that their behaviour was likely to cause a breach of the peace or to justify the police in fearing that a breach of the peace was likely to be caused.

### 11.5.b.ii. Binding over

Although it gives rise to a power of arrest, there is no offence of breaching the peace. What it can lead to however is a 'binding over' by magistrates (who after all are '*Justices of the Peace*') to be of good behaviour or to keep the peace (Justices of the Peace Act 1361, Justices of the Peace Act 1968, s. 1(7) and Magistrates' Courts Act 1980, s. 115). Over 20,000 such orders are made each year. They

enable a magistrates' court or Crown Court to order any person before the court to enter into a recognisance which may be forfeited by the court if that person fails to keep the peace and/or be of good behaviour within the period of time set by the court. No conviction is necessary nor need an offence be proved. An order can be made at any stage of the proceedings provided the court is satisfied that the conduct of the subject of the order may cause a breach of the peace or be contrary to a good way of life. The power under the 1980 Act allows the court to commit a person into custody if they refuse to be bound over. (Several of the applicants in *Steel v. UK* refused and spent up to 28 days in custody.) The maximum period for detention is six months (by virtue of the general limit on magistrates' powers).

The European Court of Human Rights (ECHR) has held that binding over to be of good behaviour may breach Article 10. The applicants in *Hashman and Harrup v. United Kingdom* (2000) blew a hunting horn and engaged in hallooing with the intention of disrupting the activities of the Portman Hunt. The applicants were bound over by magistrates under the Justices of the Peace Act 1361 to keep the peace and be of good behaviour in the sum of £100 for 12 months. On appeal, the Crown Court concluded that the applicants had not committed any breach of the peace, and that their conduct had not been likely to occasion a breach of the peace. The Court however concluded that the applicants' behaviour had been a deliberate attempt to interfere with the Portman Hunt and to take hounds out of the control of the huntsman. In this respect their actions were unlawful and had exposed the hounds to danger and the applicants were likely to repeat this behaviour. The applicants' actions were *contra bonos mores* and therefore they should be bound over to keep the peace and be of good behaviour.

The ECHR held that the binding over of the applicants was an interference with the applicants' right to freedom of expression under Article 10(1) because the proceedings were brought against the applicants as a result of their protesting against hunting. Such a protest constituted an expression of opinion within the meaning of Article 10(1). That right can be interfered with under Article 10(2) if the interference to be 'prescribed by law' satisfies the 'quality of law' tests developed by the court. The interference was not 'prescribed by law'. The definition of *contra bonos mores* as 'behaviour which is wrong rather than right in the judgment of the majority of contemporary fellow citizens' was inadequate because it failed to give a clear indication of the conduct which was prohibited. One element of quality of law is certainty. The legal rule must be 'formulated with sufficient precision to enable the citizen to regulate his conduct'.

In a consultation paper following *Hashman and Harrup* the government suggested that 'the underlying issues of certainty and fairness' can be resolved by an order that binds over an individual to do or refrain from doing specific activities, rather than 'to keep the peace' or 'to be of good behaviour' (Home Office 2003c, paras. 9.4, 9.5). This has been implemented via the Consolidated Criminal Practice Direction which states in Part III:



In light of the judgment in *Hashman and Harrup*, courts should no longer bind an individual over 'to be of good behaviour'. Rather than binding an individual over to 'keep the peace' in general terms, the court should identify the specific conduct or activity from which the individual must refrain.

When making an order binding an individual over to refrain from specified types of conduct or activities, the details of that conduct or those activities should be specified by the court in a written order served on all relevant parties. The court should state its reasons for the making of the order, its length and the amount of the recognisance. The length of the order should be proportionate to the harm sought to be avoided and should not generally exceed 12 months.

Whether this fully addresses the point that 'contra bonos mores' lacks prescription by law is a moot point. To comply with that requirement the bind over should not specify actions or behaviour that in themselves amount to offences.

### 11.5.c. Football banning orders

Football is a useful case study in public order law and policing. Public order laws are a mixture of generic offences (riot, violent disorder and affray, for example), and more specific provisions. Some of the specific provisions apply to all sporting fixtures (for example, alcohol restrictions), while others directly target football. Football 'hooliganism' became a deep national obsession during the 1980s and 1990s, frequently calling forth a punitive response which tended to unite people of very different classes and political persuasions much more effectively than is the case with more overtly political public order issues such as demonstrations and riots. It was not a one-sided picture, however, as the reactions to the policing of football disorder outside the UK demonstrated. The line between constructing the fans as hooligans on the one hand and heroes victimised by rough 'continental' policing is a shifting and unpredictable one (witness reporting of away Champions League games) underlining the essentially ambivalent attitudes in this area. Football continues to provide an illustrative case study across a number of recurring themes in this chapter and in the book as a whole. We have already touched on some of these: the multi-dimensional character of public order; the effect of moral panics or media-amplified concerns; the prevalence of racism and the intersection of criminal law and justice and human rights. In addition we will see in this part the political utility of an easily identified activity, providing a template for new developments in 'law and order' policing and the close relationship between alcohol and violence. Another theme will be evident as we look at ASBOs and at the use of trespass laws: the development of 'exclusion' as an organising theme in criminal justice policies.

Football hooliganism has a political significance, even stretching beyond its interpretation as an assertion and reinforcement of macho versions of



masculinity. The role of news media in creating public images of football hooliganism has been as important as in the case of the Mods and Rockers, Cohen's original example of a moral panic, and disputes over alleged distortion and exaggeration in reporting of the behaviour of British fans abroad (consider the frequent fortunate coincidence of camera crew being on hand when bar brawls break out) suggest that the news media play a role consistent with the model of 'deviance amplification'.

For a historical perspective on football hooliganism, we turn once again to Pearson:

*G. Pearson 1983 Hooligans: A History of Respectable Fools (Macmillan), pp. 29-30*

There had been a rumbling discontent about misbehaviour at football matches, both on and off the field, throughout the 1920s and 1930s, which came to a head in the late 30s with renewed accusations of declining sportsmanship and crowd disorders...

Behaviour on the terraces was also thought to be deteriorating... Crowd incidents involving pitch invasions, attacks on referees and players, and occasional confrontations between spectators and the police were exciting the same interest. In one typical incident in November 1936, when during a match at Wolverhampton Wanderers, spectators had attacked visiting Chelsea players, there were more violent scenes after the game. Reynold's News described how a 'big and angry crowd' of Wolves fans estimated at 2,000 people gathered outside the officials' entrance protesting at the club's policy of selling its better players. The following week police had to be called to quell disturbances at a number of grounds - including Middlesbrough and Upton Park where the referee was again attacked - and Reynold's News (15 November 1936) thought that 'the FA will soon have to issue another "rough play" memorandum - this time to the spectators!'

Disturbances such as these provided an intermittent focus of attention throughout the interwar years, and a number of grounds were closed because of crowd disorders... In the early 1920s the fierce north London rivalries between Arsenal and Spurs flared into open street battles in which some of the more zealous fans were armed with iron bars and knives. Some years later, to give one final example of the kind of trouble that could break out at football games, the police found it necessary to lead a baton charge against stone-throwers during a contest between Linfield and Belfast Celtic in 1935. In the absence of any sustained historical research into football in this period, it is not possible to say how frequent or how violent these occasions were, or to arrive at a balanced comparison between football disorders in the 1920s and 1930s as against those in more recent years. Nevertheless, it is clear enough that the realities of pre-war football do not find agreement with post-war nostalgia.

Indeed, the history of football as a forum for disorder seems to go back almost as far as the commercialisation of the game in the late-nineteenth century (Pearson 1983, pp. 64-5). Or, are football matches the 'modern equivalents of medieval tournaments' as Alan Clark (mischievously?) suggested (2002, p. 264)?

The place that football 'disorder' occupies in the modern political consciousness is demonstrated in the intemperate language employed by the government and judges. For example, Home Office Circular 34/2000 states:

It is less than a year since the issue of Home Office Circular 42/1999 which provided consolidated guidance on what were then all the existing legislative and administrative measures related to football hooliganism.

Sadly the shameful and utterly reprehensible behaviour of some of the followers of the England football team competing in the Euro 2000 this summer, obliged the government to introduce further legislation to deal with the particular menace of our home-grown football hooligans when abroad.

This is echoed in the language chosen by Laws LJ when he painted the background to the legislation in 2001:

These cases are about statutory measures enacted... to confront *the shame and menace* of football hooliganism... [T]he Public Order Act 1986... was the first measure taken by the legislature specifically to address *the evils* of hooliganism at football matches...

[T]he Acts of 1986 and 1989 (Football Spectators Act)... respond to what was plainly an increasing *barbarism*. The later Act recognised the particular *evil of violence* and drunkenness by British fans abroad [in *Gough and Smith v. Chief Constable of Derbyshire* (2001), emphasis added].

The appellants, Gough and Smith, had challenged 'banning orders' made under the Football Spectators Act 1989 on the grounds that they breached Article 7 of the European Convention on Human Rights. In a case stated, the Divisional Court held that the orders were not penalties and therefore not subject to Article 7. The Court of Appeal upheld this on appeal and the extract here gives a useful overview of the scheme, one of the first to utilise the increasingly common hybrid civil-criminal order.

Article 7 provides:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

*Donohy and Smith v Chief Constable of Derbyshire (2007) EWCA Civ 351*

**Lord Phillips MR:** The appellants... have run foul of the statutory scheme that has been put in place to combat football hooligans. [The judge] made a banning order against each appellant under the Football (Spectators) Act 1989 as amended by the Football (Disorder) Act 2000. The banning orders prevent the appellants from attending certain football matches in England and Wales. They also prevent the appellants from leaving the country when certain football matches are taking place outside England and Wales. The appellants contend that it is not lawful to impose the latter restrictions upon them. They say that the statutory provisions under which they are imposed violate Community law in a manner which renders void those provisions. They further contend that the statutory provisions in question violate certain articles of the European Convention on Human Rights, so that the statutes are incompatible with the Convention.

... The behaviour of a lawless minority at matches within England and Wales has been mirrored by lawlessness on the part of a small minority of those who follow English teams in competitions abroad...

The amended Act, which we shall from now on describe simply as the 1989 Act, provides for the making of a banning order in two different circumstances. The first, under section 14A, is when a court convicts a defendant of one of the scheduled offences i.e. football related violence. The second, under section 14B, is new, and much more far reaching. The order is made on a complaint to a Magistrates' Court by the chief officer of police of the area in which the respondent resides. It must appear to the chief officer and he must prove to the court that the respondent has, within the last ten years, at any time caused or contributed to any violence or disorder in the United Kingdom or elsewhere.

By whichever of the two routes the matter comes before the court, the court must make a banning order:

- (1) If the court is satisfied that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any regulated football matches.
- (2) An appeal lies to the Crown Court against the imposition of a banning order.

Under section 14C, violence is defined as meaning violence against persons or property and includes threatening violence and disorder has a lengthy definition which includes using threatening, abusive, or insulting words or behaviour or disorderly behaviour. There is no requirement for the violence or disorder to be football related.

... A person subject to a banning order is not automatically affected by that order in respect of every prescribed overseas game. The Act provides for an enforcing authority... the Football Banning Orders Authority (FBOA). Its functions include issuing individual notices to those made subject to banning orders. These set out the appropriate conditions and reporting restrictions which apply to each individual having regard to the degree of risk associated with the individual person for the individual match...

We turn to the test to be applied when a person subject to a banning order wishes to go abroad. Before granting permission to do so the FBOA has to be satisfied that there



are special circumstances which justify his being exempted from the effect of the ban and that he would not attend prescribed matches if granted an exemption. This places the onus of proof on the applicant for permission. Nor is it clear what can constitute special circumstances, or the standard of proof to be applied.

In our judgment these statutory provisions, if given their natural meaning, are capable of being applied in a manner which is harsh and disproportionate. If a low standard of proof is applied at the first stage, there is a danger of individuals being made subject to banning orders on evidence which is too slender to justify the restrictions on their freedom which these entail. The requirement to demonstrate special circumstances could also lead the FBOA, or the Magistrates' Court on appeal, to refuse to grant permission to leave the country for a purpose which, while innocuous, would not naturally be said to constitute special circumstances.

However, the question is not whether the statutory provisions are capable of being interpreted in a manner which has disproportionate effect. The question is whether they are capable of being interpreted in a manner that is proportionate. Those who have to apply them are under a duty to give them an interpretation which is compatible with the requirements of European law and of the Human Rights Convention if this can be achieved.

We have concluded that the scheme itself, if properly operated, will satisfy the requirements of proportionality. As a starting point a banning order should only be imposed where there are strong grounds for concluding that the individual subject to the order has a propensity for taking part in football hooliganism . . . We believe that it is proportionate that those who have been shown to constitute a real risk of participation in football hooliganism should be required to obtain permission to travel abroad during periods when prescribed matches are taking place and to demonstrate that the purpose of doing so is other than attendance at the prescribed match or matches. We are not able to envisage a scheme which would achieve the public policy objective that involves a lesser degree of restraint. We consider that the German approach of entering restrictive endorsements in the passports of those suspected of football hooliganism would be difficult to operate in practice and would be liable to have more draconian consequences than the scheme under the 1989 Act . . .

A reverse burden of proof is not incompatible with Community or Strasbourg law where the circumstances justify this . . . We think it reasonable that a person subject to a banning order should be required to demonstrate that foreign travel during the period of a prescribed match is not for the purpose of attending the match. This is because the object of the foreign travel is likely to be within the exclusive knowledge of the would-be traveller, and proof of that object should not involve untoward difficulty at least if an appropriate standard of proof is applied.

It is essential that the appropriate standard of proof at both the first and the last stage of the scheme is appreciated and applied, for compliance with the principles of Community and Strasbourg law depends on this.

Mr Thompson contended that proceedings under section 14B are criminal proceedings and that, in consequence, the criminal standard of proof applies . . . Laws L.J. held that banning orders were not penalties. We endorse his conclusion for the reasons that he gave. We also reject the submission that section 14B proceedings are criminal. They neither require proof



that a criminal offence has been committed, nor involve the imposition of a penalty. We find that the proceedings that led to the imposition of banning orders were civil in character.

It does not follow from this that a mere balance of probabilities suffices to justify the making of an order. Banning orders under section 14(B) fall into the same category as antisocial behaviour orders and sex offenders orders. While made in civil proceedings they impose serious restraints on freedoms that the citizen normally enjoys. While technically the civil standard of proof applies, that standard is flexible and must reflect the consequences that will follow if the case for a banning order is made out. This should lead the Magistrates to apply an exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard...

Thus the necessity in the individual case to impose a restriction upon a fundamental freedom must be strictly demonstrated. The first thing that has to be proved under section 14B(4)(a) is that the respondent has caused or contributed to violence or disorder in the United Kingdom or elsewhere... the standard of proof of this is practically indistinguishable from the criminal standard.

The same is true of the next requirement, that imposed by section 14(4)(b)... The court must be satisfied that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any regulated football matches. In practice the reasonable grounds will almost inevitably consist of evidence of past conduct... The past conduct may or may not consist of or include the causing or contributing to violence or disorder that has to be proved under section 14B(4)(a), for that violence or disorder is not required to be football related. It must, however, be proved to the same strict standard of proof. Furthermore it must be conduct that gives rise to the likelihood that, if the respondent is not banned from attending prescribed football matches, he will attend such matches, or the environs of them, and take part in violence or disorder.

These matters are not readily susceptible of proof. We can well understand the practice that is evidenced by this case of using a football intelligence service to build up profiles of football prominents. Such a practice may well be the only way of assembling evidence sufficiently cogent to satisfy the requirements of section 14B(4)(b). Those requirements, if properly applied in the manner described above, will provide a satisfactory threshold for the making of a banning order. The banning order, in its turn, will be a satisfactory basis for the conclusion that the individual subject to it should not be permitted to go to prescribed overseas matches.

... Provided that the reason for going abroad is other than attendance at the prescribed match, there can be no justification for refusing permission. When considering whether there are special circumstances the FBOA, or on appeal the Magistrates, should do no more than satisfy themselves on balance of probabilities that this is the true position. This should not be something that is difficult to prove, for the bona fide prospective traveller is like to be in a position to produce some evidence of the proposed trip.

Happily, the approach of the FBOA to special circumstances applications appears to accord with that which we have outlined as appropriate. [T]here have been about 80 such applications and all of them were granted. Mr Gough himself applied for and was granted permission to go abroad on holiday during the period of a prescribed match...

37 million people attended football matches in England and Wales in the 2007/8 season. The total number of arrests was 3,842 of which 342 were offences of violence; this amounts to 1.21 arrests per match (inside and outside stadia within 24 hours of the match), involving 0.01 per cent of spectators. Public disorder and alcohol related offences were by far the most prevalent (but nowhere near as frequent as in town centres on Saturday nights). During this time 3,172 banning orders were in place. The Home Office concludes that banning orders work especially since 94 per cent of those whose orders have expired are assessed as no longer posing a risk to football (Home Office Statistics, November 2008). Or could the conclusion be that banning orders are an over-reaction?

### II.5.d. Anti-social behaviour orders

'Anti-social behaviour' has been the catchword of the Labour government's crime strategy since 1997. Anti-social behaviour orders (ASBOs) made their entrance in the Crime and Disorder Act 1998. Football banning orders were an early precursor to the ASBO. The extract from *Gough v. CC Derbyshire* in the previous section is typical of the challenges made to these hybrid civil-criminal orders. While recognising the potential for over-broad and disproportionate use of this type of order, the courts have accepted that they are civil proceedings, their nature is not penal as their purpose was not punitive and they therefore do not require a criminal standard of proof (*Clingham (formerly C) (a minor) v. Royal Borough of Kensington and Chelsea; R (McCann) v. Crown Court at Manchester* (2002)).

#### Crime and Disorder Act 1998

1(1) An application for an order under this section may be made by a relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged 10 or over, namely-

- (a) that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and
- (b) that such an order is necessary to protect relevant persons from further anti-social acts by him.

[(1A) 'Relevant authority' includes local authorities, chief officer of any police force, the chief constable of the British Transport Police Force, and 'registered social landlords'.]...

(10) If without reasonable excuse a person does anything which he is prohibited from doing by an anti-social behaviour order, he is guilty of an offence and liable -

- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both; or

(b) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both.

(11) Where a person is convicted of an offence under subsection (10) above, it shall not be open to the court by or before which he is so convicted to make [a conditional discharge] in respect of the offence.

12,675 orders were issued between 1999 and 2006. 45 per cent of them are breached, and over half of those convicted of breach are subjected to a custodial sentence. The agency applying for an ASBO does not have to prove an intention on the part of the defendant to cause harassment, alarm or distress which as we shall see is the threshold for offences under the Public Order Act 1986. Orders have been used against prostitutes (Sagar 2008) and in domestic disputes (*R (on the application of Rabess) v. Met Police Commissioner* 2007); the overall effect has been to widen the explicit reach of the criminal law by creating 'a personalised criminal law for the defendant for a minimum period of two years, breach of which is a criminal offence carrying imprisonment for up to five years' (Cooper 2003). Conduct which would not attract a prison sentence in itself – such as soliciting for prostitution or begging – becomes subject to imprisonment if an ASBO that contains a condition that it be desisted is breached (Ashworth and Zedner 2008).

'In a desperate attempt to make the ill fated ASBO work' (Ormerod and Roberts 2003, p. 162) the Police Reform Act 2002 extended the original provisions in a number of directions. The local basis of the ASBO was removed so that an order can effectively travel with the person to whom it applies. Magistrates and county courts can now make interim orders (Crime and Disorder Act 1998, s. 1C). Powers were extended in 2003 to include closure notices and orders on premises believed to be used for Class A drugs (Anti-social Behaviour Act 2003). ASBOs are also now available as a sentencing option on conviction for a criminal offence involving anti-social behaviour, or a county court can make one where dealing with an eviction notice (Crime and Disorder Act 1998, s. 1C). Authorised parties can apply for such an order, but significantly the court itself may also take the initiative in making an ASBO.

The Home Office is encouraging a voluntary type of ASBO in the form of an Acceptable Behaviour Contract (ABC). These could perhaps be seen as a sub-criminal caution. 'An ABC is a written, voluntary agreement between a person who has been involved in anti-social behaviour and the police and local services whose role it is to prevent such behaviour. They involve an acknowledgement by the individual that their behaviour is having a negative impact on the community and an agreement to stop that behaviour. ABCs are useful for stopping low levels of anti-social behaviour but their flexibility means they can also be used in more serious situations.' (Home Office 2007)

The Home Office one-day count of anti-social behaviour reports and the typology developed from it speak louder volumes than we can about the breadth of human activity this term comprises.

*Home Office: The one day count of anti-social behaviour,  
September 2003*

Behaviours reported within the one-day count of anti-social behaviour (number of reports)

|                                                        |               |
|--------------------------------------------------------|---------------|
| Drug/substance misuse and drug dealing                 | 2,920         |
| Street drinking and begging                            | 3,239         |
| Prostitution, kerb crawling and other sexual acts      | 1,011         |
| Vehicle-related nuisance and inappropriate vehicle use | 7,782         |
| Intimidation and harassment                            | 5,415         |
| Noise                                                  | 5,374         |
| Rowdy behaviour                                        | 5,339         |
| Nuisance behaviour                                     | 7,660         |
| Hoax calls                                             | 1,286         |
| Animal-related problems                                | 2,546         |
| Abandoned vehicles                                     | 4,994         |
| Criminal damage/vandalism                              | 7,855         |
| Litter/rubbish                                         | 10,686        |
| <b>TOTAL</b>                                           | <b>66,107</b> |

*Home Office 2004, Defining and measuring anti-social behaviour.*

An ASBO can therefore be triggered by a wide range of disparate types of behaviour ranging from the annoying ('inconvenient' parking) to the threatening ('menacing gestures'). Many of the behaviours at the threatening end of the spectrum can give rise to criminal offences in themselves. We have already seen that powers of arrest in relation to breach of the peace and binding over powers are relatively elastic. We will see in Chapters 6 and 8 that both public order and interpersonal violence offences have low thresholds too. The ASBO, and other preventive orders such as terrorism Control Orders, allow individuals to be subjected to behavioural conditions, to be put on notice in much the same way that the very existence of criminal law puts the populace at large 'on notice'. But these conditions strike below the already very low baselines of existing offences, they are granted on civil standards of proof, yet their breach gives rise to criminal penalties. As Ashworth and Zedner comment: 'It is still a concern that the principal evidence in such cases can be untested hearsay . . . that these orders may target low levels of nuisance well below the normal threshold of the criminal law; that the conditions they impose are potentially disproportionate in such cases; and, at the same time, that there is little to stop these orders being used relatively high up-tariff where prosecution would be more appropriate' (2008, p. 30).



**Table 2.1** RDS typology of anti-social behavior

| Misuse of public space                               | Disregard for community/personal well-being                  | Acts directed at people              | Environmental damage          |
|------------------------------------------------------|--------------------------------------------------------------|--------------------------------------|-------------------------------|
| Drug/substance misuse & dealing                      | Noise                                                        | Intimidation/harassment              | Criminal damage/vandalism     |
| Taking drugs                                         | Noisy neighbours                                             | Groups or individuals making threats | Graffiti                      |
| Sniffing volatile substances                         | Noisy cars/motorbikes                                        | Verbal abuse                         | Damage to bus shelters        |
| Discarding needles/drug paraphernalia                | Loud music                                                   | Bullying                             | Damage to phone kiosks        |
| Crack houses                                         | Alarms (persistent ringing/malfunction)                      | Following people                     | Damage to street furniture    |
| Presence of dealers or users                         | Noise from pubs/clubs                                        | Pestering people                     | Damage to buildings           |
| Street drinking                                      | Noise from business/industry                                 | Voyeurism                            | Damage to trees/plants/hedges |
| Begging                                              | Rowdy behaviour                                              | Sending nasty/offensive letters      | Litter/rubbish                |
| Prostitution                                         | Shouting & swearing                                          | Obscene/nuisance phone calls         | Dropping litter               |
| Soliciting                                           | Fighting                                                     | Menacing gestures                    | Dumping rubbish               |
| Cards in phone boxes                                 | Drunken behaviour                                            | <i>Can be on the grounds of:</i>     | Fly-tipping                   |
| Discarded condoms                                    | Hooliganism/loutish behaviour                                | Race                                 | Fly-posting                   |
| Kerb crawling                                        | Nuisance behaviour                                           | Sexual orientation                   |                               |
| Loitering                                            | Urinating in public                                          | Gender                               |                               |
| Pestering residents                                  | Setting fires (not directed at specific persons or property) | Religion                             |                               |
| Sexual acts                                          | Inappropriate use of fireworks                               | Disability                           |                               |
| Inappropriate sexual conduct                         | Throwing missiles                                            | Age                                  |                               |
| Indecent exposure                                    | Climbing on buildings                                        |                                      |                               |
| Abandoned cars                                       | Impeding access to communal areas                            |                                      |                               |
| Vehicle-related nuisance & inappropriate vehicle use | Games in restricted/inappropriate areas                      |                                      |                               |
| Inconvenient/illegal parking                         | Misuse of air guns                                           |                                      |                               |
| Car repairs on the street/in gardens                 | Letting down tyres                                           |                                      |                               |
| Setting vehicles alight                              | Hoax calls                                                   |                                      |                               |
| Joyriding                                            | False calls to emergency services                            |                                      |                               |
| Racing cars                                          | Animal-related problems                                      |                                      |                               |
| Off-road motorcycling                                | Uncontrolled animals                                         |                                      |                               |
| Cycling/skateboarding in pedestrian areas/footpaths  |                                                              |                                      |                               |

Source: Research Development and Statistics Directorate

As we move now to examine public order offences we will see further evidence of preventive measures – in the form of policing that anticipates mass disorder in protests, marches and so on – as well as the marking out of ‘problem’ populations – in the form of trespass powers used against travellers and other ‘wayward’ groups. The overall trend towards what has been called ‘summary justice’ (Young 2008) via police arrests, stops, cautions and penalty notices for disorder is discussed further in Chapter 7.c.

#### FURTHER READING

- Andrew Ashworth, ‘Social Control and “Anti-Social Behaviour”: The Subversion of Human Rights?’ (2004) 120 *Law Quarterly Review*, 263–91.
- Nachman Ben-Yehuda and Pat Carlen (eds.) ‘Moral Panics – 36 Years On Special Issue’ (2009) 49 *British Journal of Criminology* Issue 1.
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## Public Order

### Control Mechanisms

The Public Order Act 1986 (POA 1986) does not constitute a codification of public order law even narrowly conceived. It leaves untouched significant areas such as the common law relating to breach of the peace and has in any event been supplemented by numerous provisions since. Essentially the Act constituted a partial revision and updating of the common law offences of riot, affray and unlawful assembly, and the creation of two new offences of causing fear of violence and of creating harassment, alarm or distress (POA 1986, Pt I). It also revised the law relating to racial hatred (Pt III) and extended police powers to impose conditions on and ban assemblies, requiring for the first time that notice of a wide range of public gatherings be given to the police (Pt II).

Although the division is somewhat artificial because there is an obvious overlap with harassment and hate crimes, we have deferred consideration of offences against the person until the next Section. One of our themes in both this Section and the next is the fluidity in definitions of 'public order' and 'personal violence'. A purely situational or contextual approach would mean looking at all the relevant law in relation to say football, or to environmental protest, in separate sections. But this would mean absurd amounts of overlap since most criminal laws are drafted in general terms. And even those laws passed to deal with a specific problem often end up being deployed in unpredictable directions, an example of which is the use against animal rights protesters of the Protection from Harassment Act 1997, passed to deal with stalking. Another theme is the overlap between offences such that there is often a choice of charge: causing harassment, etc. under s. 5 of the POA 1986 could often be charged as an assault, for example, as could some types of stalking behaviour. The broad principle we have followed is that this Section deals with offences that are designed to deal with group behaviour or public protest, or generally take place in public while Section III considers offences that can be committed in private by one person, although in reality are deployed in public order situations as well. The delineation between public and private space is not an easy one given that many shopping centres, sports arenas and other places of entertainment are privately managed and policed yet could hardly be thought of as 'private' in the same way as a person's dwelling place.

### 11.6.a. Controlling mass assemblies

We examined in Chapter 5 a raft of measures – binding over orders, football banning orders, ASBOs – which aim to pre-empt offences by identifying individuals and subjecting them to conditions. Here we discuss the anticipatory mechanisms used to control groups which gather to protest, or to march, or to rave, or some other purpose that is perceived as threatening public order. For example, we saw how the police can take action, such as arrest, against a person who is breaching or imminently about to cause a breach of the peace. In case this is insufficient, the police have a number of other powers, some of which require prior approval, are geographically and/or time limited. The Criminal Justice and Public Order Act 1994 (CJPOA 1994) considerably restricts freedom of assembly, with powers of stop and search (s. 60), removal of trespassers from private land (s. 61), and the offence of aggravated trespass (s. 68).

#### 11.6.a.i. Marches and demonstrations

Here are some examples of recent protests about war, the environment and globalisation. They give a flavour of the different forms protests and the legal responses to them can take.

[www.greenpeace.org.uk/media/press-releases/greenpeace-anti-war-protesters-convicted-vow-to-appeal](http://www.greenpeace.org.uk/media/press-releases/greenpeace-anti-war-protesters-convicted-vow-to-appeal)

Fourteen Greenpeace volunteers who sought the Attorney-General's full advice on the Iraq war today vowed to appeal after a court convicted them on charges of aggravated trespass and criminal damage.

The volunteers occupied tanks at Marchwood military base in the run-up to war in Iraq. Defence lawyers claimed the Attorney's advice could show that the Government thought war was illegal when the protest took place. But District Judge John Woollard ruled the advice should be kept secret, and that a former Foreign Office official who was prepared to give evidence should not be summoned to court. Today he found the fourteen guilty on all charges. 16 March 2004. [These appeals were unsuccessful – *R v. Jones and others* 2006. This case is discussed further in Chapter 12.e (criminal damage)].

[www.urban75.org/photos/critical/july\\_2006.html](http://www.urban75.org/photos/critical/july_2006.html):

For the past 11 years, on the last Friday of the month, cyclists numbering from a few score to, sometimes, several hundred have gathered near Waterloo bridge in London at 6pm. When some kind of quorum is achieved, they ride around en masse for a couple of hours before dispersing. There is no planned route, no identifiable leader, and no explicit political aim.

Until now, the ride has enjoyed benign policing designed to minimise its impact on other traffic. But last month, officers – themselves on bikes – handed out leaflets explaining that, in future, if the Metropolitan police was not informed in advance about the ride, then it



would be deemed an 'unlawful demonstration' and participants 'liable to arrest'. [On Critical Mass see *R (Kay) v. Met Police* 2008 below.]

[www.guardian.co.uk/environment/2008/dec/09/stansted-plane-stupid-airports](http://www.guardian.co.uk/environment/2008/dec/09/stansted-plane-stupid-airports):

Police today charged 49 protesters [with aggravated trespass], who breached the security fence at Stansted airport forcing the closure of its runway. Members of the group Plane Stupid, which campaigns against climate change and air travel, caused scores of flights to be cancelled and disruption for thousands of passengers. [On aggravated trespass see 6.a.ii below.]

[www.guardian.co.uk/politics/2009/apr/16/g20-protest-policing-tactics-review/](http://www.guardian.co.uk/politics/2009/apr/16/g20-protest-policing-tactics-review/):

The Metropolitan police's tactics for protests are to be reviewed in a wide-ranging independent inquiry announced yesterday, amid growing evidence of violent behaviour by officers at the G20 protests. Denis O'Connor, chief inspector of constabulary, who will carry out the review, said last night he would examine all aspects of the Met's public order policing, including techniques such as kettling – the containment of thousands of protesters inside police cordons for hours at a time.

His inquiry would ask whether the Met had strayed from 'the British way' of policing protest, using minimum force. A second issue will be whether officers are justified and proportionate in 'the use of force' when dealing with protesters. 16 April 2009. [On kettling, see *Austin v. MPC* 2009 below. The Report published in July 2009 is summarised below.]

[www.guardian.co.uk/commentisfree/libertycentral/2009/apr/13/activism-protest](http://www.guardian.co.uk/commentisfree/libertycentral/2009/apr/13/activism-protest)

Today reports have begun to circulate that police have carried out what according to the Guardian 'is thought to be the biggest pre-emptive raid on environmental campaigners in UK history, arresting 114 people believed to be planning direct action at a coal-fired power station'. The arrests don't really come as a huge surprise to me. What we are witnessing today is a massive increase in police surveillance of environmental campaigners and an increasing number of environmental groups being infiltrated by informers. Given the crucial role that photographers and videographers played during the G20 protests in the City of London, it was a bizarre act of timing that on 16 February in the UK, section 76 of the Counter-Terrorism Act 2008 came into effect, allowing for the arrest, fining and imprisonment for up to 10 years of anyone who takes pictures of police officers. Man-marking is only allowed one way! The law will increase the anti-terrorism powers used today by police officers to stop photographers, including press photographers, from taking pictures in public places.

Here we are in the quintessential area of 'public order' law. While it is clear that both 'public order' and public order law encompass a much wider terrain than the traditional protest march or contemporary direct action, it is in relation to these that freedom of assembly and freedom of expression are most commonly exercised or threatened. There have been numerous Human Rights Act challenges to legislative controls of processions and assemblies in the last decade. As we should no longer be surprised to find, the legal framework comprises a legislative kaleidoscope but the main provisions are to be found in the Public Order Act 1986 and the Criminal Justice and Public Order Act 1994. In technical terms, marches are 'processions' and static demonstrations are 'assemblies'. We

will also not be surprised to find that the police often act first only to be challenged later and found to have acted outside their (already very wide) powers. The first example is the requirement in the Public Order Act to give notice of a procession. This raised some points of interpretation in relation to weekly mass cycle events known as Critical Mass.

### **Public Order Act 1986, Section 11**

#### **1. Advance notice of public processions**

(1) Written notice shall be given in accordance with this section of any proposal to hold a public procession intended –

- (a) to demonstrate support for or opposition to the views or actions of any person or body of persons,
- (b) to publicise a cause or campaign, or
- (c) to mark or commemorate an event, unless it is not reasonably practicable to give any advance notice of the procession.

(2) Subsection (1) does not apply where the procession is one commonly or customarily held in the police area (or areas) in which it is proposed to be held or is a funeral procession organised by a funeral director acting in the normal course of his business...

(7) Where a public procession is held, each of the persons organising it is guilty of an offence if –

- (a) the requirements of this section as to notice have not been satisfied, or
- (b) the date when it is held, the time when it starts, or its route, differs from the date, time or route specified in the notice.

(8) It is a defence for the accused to prove that he did not know of, and neither suspected nor had reason to suspect, the failure to satisfy the requirements or (as the case may be) the difference of date, time or route.

#### **Section 12 Imposing conditions on public processions**

(1) If the senior police officer, having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, reasonably believes that –

- (a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or
- (b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do,

he may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions.

*R (on the application of Ray) v. Commissioner of Police of the Metropolis* [2008] UKHL 49

**Lord Phillips of Worth Matravers:** 2. ... The nature of Critical Mass is central to both the narrow and the wider issues. It has been agreed between the parties in the following terms:

‘Critical Mass is not an organisation but the name given to a recurrent event. It takes place in central London ... at the same location ... at the same time (6 pm) [every month as it has done every month since April 1994] ... It is in the nature of Critical Mass that there is no fixed, settled or predetermined route, end-time or destination; where Critical Mass goes, where and what time it ends, are all things which are chosen by the actions of the participants on the day’

3. ... [T]he agreed facts suggest that it is an event that takes place spontaneously without any advance planning or organisation by any individual or individuals. The spontaneity of the event and, in particular, of the route that it takes, is an important feature of Critical Mass. Another feature that has been assumed for the purpose of these proceedings is that most who join Critical Mass share a common intention in doing so, which can perhaps be shortly described as promoting cycling.

...

5. These proceedings were initiated by the appellant in response to a circular letter handed to participants in Critical Mass by Superintendent Gomm of New Scotland Yard which included the following assertions:

‘Organisers of public processions are required by law to notify police at least six days before the event occurs of the date, time, proposed route and name and address of an organiser. Failure to do so makes the event unlawful ... These cycle protests are not lawful because no organiser has provided police with the necessary notification. Your participation in this event could render you liable to prosecution. Police policy in facilitating these events is currently under review.’

6. The narrow issue is whether Critical Mass is a ‘procession [which is] commonly or customarily held in the police area (or areas) in which it is proposed to be held’, so that it falls within the exemption granted by section 11(2). The wider issues raise the question of whether, and if so how, section 11 of the 1986 Act applies to events such as Critical Mass.

...

16. I am in no doubt that the Critical Mass cycle rides that take place month after month have so many common features that any person would consider that each month the same procession takes place and, giving the English language its natural meaning, that it is a procession that is ‘commonly or customarily held’ ...

I would identify the common features as follows:

- The procession is made up of cyclists;
- The procession starts at the same place;
- The procession takes place in the Metropolitan Police Area;
- The procession starts at 6pm on the last Friday of every month;

- Those who join the procession do so with a common intention;
- The procession is recognised and publicised by a single name, 'Critical Mass'.
- The procession chooses its route on a follow-my-leader basis.

Section 11 does not require notice to be given of every procession that is capable of creating a disturbance. The fact that, on their natural meaning, the words of section 11(2) are wide enough to exclude some processions in respect of which the police do not have all the information that they would wish is no reason to give those words an unnatural meaning. They should be given their natural meaning so as to apply to Critical Mass as a procession that is commonly or customarily held. For this reason I would allow this appeal.

**Baroness Hale of Richmond:** 46. It is not only cycle rides that can take a somewhat random route, ending up in a place which was not determined at the start. Legal proceedings may do so too. These proceedings were prompted by [the letter from Superintendent Gomm. Passages in the letter were] apparently based upon section 11 of the Public Order Act 1986... If so, they were misleading.

Section 11 does not make the procession itself, or mere participation in it, unlawful. Only the organisers commit an offence, if they fail to comply with the notice requirements or the procession actually held differs from the procession notified. Yet the object of the letter must have been to deter everyone involved from taking part.

47. The letter also proceeded on the basis of several assumptions, some or all of which are questionable for the reasons which others of your lordships have given: first, that the cycle ride was a 'public procession' at all for the purpose of section 11; second, that it was held with one of the three intentions listed in section 11(1); third that it was reasonably practicable to give advance notice of the procession; and fourth that it was not a procession 'commonly or customarily held in the police area' within the meaning of section 11(2).

The appeal was based only on the narrow point of the exemption in s. 11(2) but this was a matter of regret for the House of Lords. Their obiter comments on the wider issue of whether a spontaneous assembly such as Critical Mass comes within the terms of section 11 at all – they thought not – are significant. Lord Phillips noted:

22. I observed at the outset that because of its spontaneous nature and because those who take part in it know where and when it is to start, it seems unlikely that Critical Mass now involves any advance planning or organisation. If that is the true position I do not see how section 11 can have any application to Critical Mass. The obligation under that section is imposed in relation to 'any proposal to hold a public procession' (section 11(1)). An offence under section 11 will be committed by the organisers of the procession only if there has not been compliance with that obligation (section 11(7)). No offence can be committed unless a procession takes place pursuant to an antecedent proposal to hold it. Nor, indeed, can an offence be committed if there are no organisers of the procession. Section 11 can have no application in such circumstances...



23. ... An important general issue does arise, however. What is the position where there are organisers who are proposing to hold, for the first time, a procession such as Critical Mass that has no predetermined route... It was [counsel's] submission that they cannot lawfully do so... that section 11 required notice to be given of the proposal to hold such a procession and that the notice had to include a proposed route. Even if the organisers gave notice of the proposal to hold the procession, the notice would be defective if it did not specify a proposed route, rendering the organisers liable to prosecution if the procession took place.

24. I am unable to give section 11 this draconian effect. The Green and White Papers to which I have referred were at pains to underline the importance of the right to hold processions and the need for any restrictions to respect this right. It is inconceivable that Parliament could have intended by a sidewind to outlaw events such as Critical Mass, had they been within their contemplation. The first such event was, in fact, held after the 1986 Act was enacted.

A procession in itself is not unlawful. Only the organisers are liable to commit an offence if they fail to comply with the notice provisions in section 11. However, as Baroness Hale observed in the *Critical Mass* case, there could be an unfortunate collision with the prohibition introduced in 2005 on demonstrations near Parliament:

53. I am also hesitant about expressing a view upon whether the London CMCR is a public procession at all, if only because this might then raise an issue under section 132 of the Serious Organised Crime and Police Act 2005. The Gomm letter included a warning that

'Demonstrations within a designated area around Parliament must also be notified and anyone taking part in an unauthorised demonstration commits an offence'. That is a correct statement; mere participation in such demonstrations is an offence: see section 132(1)(b). It does appear from the letter of 21 October 2005 that some of the police concerns about the London CMCR (which does not seem to have caused them any significant problems in its previous 11 years) arose because it sometimes rode through the designated area. However, there is an exception 'if the demonstration is (a) a public procession of which notice is required to be given under subsection (1) of section 11 of the Public Order Act 1986 or of which (by virtue of subsection (2) of that section) notice is not required, or (b) a public procession for the purpose of section 12 or 13 of that Act': see section 132(2). I would not, by taking the London CMCR out of the frying pan of section 11, wish to thrust it into the fire of section 132.

Policing a demonstration once it is in action can involve a wide range of generic police powers (to prevent breach of the peace, arrest on reasonable suspicion that an offence has been or is about to be committed) in addition to specific public order provisions. Conditions can be imposed either before (where notice has been given) or at the time of a demonstration (see POA 1986, s. 12 deals with processions, s. 14 with assemblies). Failure to comply with such

conditions will give rise to an offence. Cordoning off protestors, or 'kettling', involves holding people in a manner which could be regarded as an unlawful imprisonment, or at the least to a deprivation of liberty. The House of Lords has held that this public order policing strategy may in some circumstances be lawful. The following case which arose from a May Day demonstration in 2001 was determined by the House of Lords shortly before the controversial policing of the G20 demonstrations in April 2009.

*Martin (FC) (Appellant) v Commissioner of Police of the Metropolis (Respondent) [2009] UKHL 5*

**Lord Hope of Craighead:** 1. One of the features of a vigorous and healthy democracy is that people are allowed to go out onto the streets and demonstrate... The police, on whom the responsibility of maintaining public order rests, seek to facilitate rather than impede their activities. Unfortunately, human nature being what it is, this is not always possible. Sometimes an event attracts people who do not share the peaceful intentions of the organisers. Sometimes it is the organisers themselves whose intentions are anything but peaceful. On those occasions it may be necessary for the police to take control of the event to ensure public safety and minimise the risk of damage to property. The event with which this case is concerned was such an occasion.

2. The ways in which the police will seek to control the event will vary from case to case. In this case their policy was one of containment. Its consequence was that a large number of people were enclosed in the place where they had gathered within a police cordon. They were prevented for many hours from leaving it. Article 5(1) of the European Convention on Human Rights provides that no one shall be deprived of his liberty save in the cases which that article specifies. The appellant was one of those within the police cordon. The question which this case raises is whether the way in which she was treated was incompatible with her Convention right to liberty. Underlying that question is an important issue of principle. The right which is guaranteed by article 5(1) is an absolute right. But it must first be held to be applicable. To what extent, if at all, is it permissible in the determination of that issue to balance the interests of the individual against the demands of the general interest of the community? The appellant submits that it is plain that she was deprived of her right to liberty. She says that the reason why the cordon was put in place and kept there for so long is irrelevant. If she is right, she must succeed in this appeal. If she is wrong, the judge's findings are against her. They show conclusively that the sole purpose of the cordon was to maintain public order, that it was proportionate to that need and that those within the cordon were not deprived of their freedom of movement arbitrarily.

**The facts:** 3. On 1 May 2001 at about 2 pm a crowd of demonstrators marched into Oxford Circus from Regent Street South. They were joined later by others who entered the Circus, or tried to enter it, from all directions. By the end of the afternoon some 3,000 people were within the Circus and several thousands more were gathered outside in the streets that lead into it. The appellant was among those who went to Oxford Circus as part of the crowd to

demonstrate, but she was not one of the organisers. She was prevented from leaving the area by the police cordon for about seven hours . . .

9. There was sufficient space within the cordon for people to walk about and there was no crushing. But conditions within it were uncomfortable. The weather was cold and wet. No food or water was provided and there was no access to toilet facilities or shelter. The appellant, like others who were present, was not adequately dressed for the occasion. She had an 11 month old baby who was in a crèche. She had planned to be on the demonstration for two or three hours before collecting her, but in the event she was prevented from doing so. Nevertheless the judge held that she was not much distressed, but was stimulated by the event. At various times in the afternoon she had a megaphone and told people not to push. She was in the company of friends throughout. When she came out of the police cordon she did not rush home but participated in a TV interview and responded to questions from the press . . .

23. The application of article 5(1) to measures of crowd control is an issue which does not appear so far to have been brought to the attention of the court in Strasbourg. So there is no direct guidance as to whether article 5(1) is engaged where the police impose restrictions on movement for the sole purpose of protecting people from injury or avoiding serious damage to property . . .

37. . . . In my opinion measures of crowd control will fall outside the area of its application, so long as they are not arbitrary. This means that they must be resorted to in good faith, that they must be proportionate and that they are enforced for no longer than is reasonably necessary.

**Conclusion:** 38. I would hold, in agreement with the Court of Appeal, that the restriction on the appellant's liberty that resulted from her being confined within the cordon by the police on this occasion met these criteria. This was not the kind of arbitrary deprivation of liberty that is proscribed by the Convention, so article 5(1) was not applicable in this case.

#### **Lord Neuberger of Abbotsbury:**

. . .

58. The police are under a duty to keep the peace when a riot is threatened, and to take reasonable steps to prevent serious public disorder, especially if it involves violence to individuals and property. Any sensible person living in a modern democracy would reasonably expect to be confined, or at least accept that it was proper that she could be confined, within a limited space by the police, in some circumstances. Thus, if a deranged or drunk person was on the loose with a gun in a building, the police would be entitled, indeed expected, to ensure that, possibly for many hours, members of the public were confined to where they were, even if it was in a pretty small room with a number of other people. Equally, where there are groups of supporters of opposing teams at a football match, the police routinely, and obviously properly, ensure that, in order to avoid violence and mayhem, the two groups are kept apart; this often involves confining one or both of the groups within a relatively small space for a not insignificant period. Or if there is an accident on a motorway, it is common, and again proper, for the police to require drivers and passengers to remain in their stationary motor vehicles, often for more than an hour

or two. In all such cases, the police would be confining individuals for their own protection and to prevent violence to people or property.

59. So, too, as I see it, where there is a demonstration, particularly one attended by a justified expectation of substantial disorder and violence, the police must be expected, indeed sometimes required, to take steps to ensure that such disorder and violence do not occur, or, at least, are confined to a minimum. Such steps must often involve restraining the movement of the demonstrators, and sometimes of those members of the public unintentionally caught up in the demonstration. In some instances, that must involve people being confined to a relatively small space for some time.

60. In such cases, it seems to me unrealistic to contend that article 5 can come into play at all, provided, and it is a very important proviso, that the actions of the police are proportionate and reasonable, and any confinement is restricted to a reasonable minimum, as to discomfort and as to time, as is necessary for the relevant purpose, namely the prevention of serious public disorder and violence. [This case is being appealed in the European Court of Human Rights.]

The review of policing at the G20 summit reveals worrying levels of inattention to human rights in the planning process as well as in the execution of orders on the day. It begins with an outline of the human rights obligations of the police in relation to Articles 9, 10 and 11 of the Convention (freedom of religion, expression and assembly). While there is an acknowledgment that these freedoms already existed in English law, the impression this leaves is that these are new rights which challenge policing practices: 'Balancing the rights of protestors and other citizens with the duty to protect people and property from the threat of harm or injury defines the policing dilemma in relation to public protest' (HMIC 2009, p. 5).

#### *Home Office Inspectorate of Constabulary 2009 Adapting to Protest*

... Police officers were given the instruction to implement an 'absolute cordon, with discretion'. Officers could be forgiven for finding this instruction confusing and difficult to implement

... Images of police officers using force, including distraction techniques, have the potential to undermine the public's trust in police ... [Footnote: 'Distraction techniques are taught to police officers as part of their own safety training. The opportunity to gain better control of an aggressor (e.g. to help apply handcuffs) can be achieved using both unarmed skills (the fist, elbow, palm or heel palm) or by use of the baton']

Presently, MPS public order training focuses largely on dealing with disorder and unrest, with officers in NATO helmets, wearing protective equipment and carrying shields. In relatively few instances are police deployed in this manner and, where they are, this is towards the limits of the spectrum of crowd management. Additionally, officers bring to public order training their individual officer safety skills, developed for everyday policing.



Bringing the two skill sets together has highlighted contrasting approaches to a graduated response to the use of force and associated human rights considerations, which are well evidenced and documented in officer safety training but markedly less well integrated into public order training. [Footnote: It is of note that the MPS public order PSU Commanders Handbook makes no mention of Human Rights.] Overall, this current position raises questions about the preparedness of officers to display a graduation and range of policing styles and tactics, all of which, at different times, may be appropriate for policing protest.

Immediate recommendations of the Review include:

1. In planning future public order operations for protest the police should demonstrate explicit consideration of the facilitation of peaceful protest throughout the planning process and the execution of the operation or operations.

2. In relation to communication with protest groups the police should seek to improve dialogue with protest groups in advance where possible, to gain a better understanding of the intent of the protesters and the nature of the protest activity; to agree how best to facilitate the protest and to ensure a proportionate policing response.

3. In relation to communication with the public the police should develop a strategy to improve communication with the media before, during and after protests to convey a policing perspective of events.

4. Where containment is deployed the police should moderate its impact by ensuring where practicable no surprises. Protesters and the public should be made aware of likely police action in order to make informed decisions.

A release plan to allow vulnerable or distressed persons or those inadvertently caught up in the police containment to exit.

5. Easy access to information for protesters and public regarding the reason for, anticipated duration of, and exit routes from any police containment. This has clear implications for the training and briefing of frontline officers.

6. Early consideration in any review of training should be given by the MPS and ultimately ACPO to undertaking a review of current public order training including an examination of tactics (such as the use of shields and batons) ensuring that they are subjected to medical assessment. Any resulting changes to training should be implemented swiftly to ensure that Public Order training reflects the full spectrum of public order activity including peaceful protest; consistently incorporates relevant human rights principles and standards (as demonstrated with Officer Safety Training) and includes consideration of the individual use of force, such as distraction, in collective action such as public order operations.

11. Providing guidance in a revised ACPO Public Order Manual on the confinement and release of peaceful protesters. The treatment of the spectrum of protest activity in the current ACPO manual is insufficient.

12. In relation to identification of officers the police should ensure officers wear numerals or other clear identification at all times during public order operations and deal with individual officer non-compliance swiftly and robustly.

The follow-up report, *Adapting to Protest: Nurturing the British Model of Policing*, published in November 2009 contains practical guidance to police forces on how to police protests 'by consent'. The G20 demonstrations in April 2009 marked a clear watershed although the full repercussions, including a possible manslaughter charge in relation to the death of a member of the public who was knocked to the ground by officers while he was walking home from work, were still unfolding as this edition went to press.

### 11.6.a.ii. Trespass

While marches and demonstrations on public land come under Part II of the Public Order Act 1986, protests on private land attract the trespass provisions in the Criminal Justice and Public Order Act 1994. Section 61 gives power to evict unlawful campers while section 68 introduced the offence of aggravated trespass. The 1994 Act also introduced into the 1986 Act the concept of a 'trespassory assembly' (POA 1986, s. 14A).

As Sue Campbell explains, the trespass offences in the 1994 Act intended to deal with 'New Age Travellers', have severe implications for Gypsies:

*Sue Campbell, Gypsies: The Criminalisation of a Way of Life? (1996)  
Criminal Law Review 23-27*

Two provisions of the Act, sections 61 and 77, have the combined result that, in the words of the Commission for Racial Equality, 'Gypsies will have two choices: either to become house dwellers or to be criminalised for following a nomadic way of life'...

In January 1992, the official count of Gypsy caravans revealed some 13,500 caravans in England and Wales. A majority of these (two-thirds) are legally sited whilst the remainder live under constant threat of eviction. The introduction of the Caravan Sites Act 1968 was hailed as a progressive and civilised measure. It sought to end the frequent, violent hostilities between Gypsies, the police and landowners arising from illegal occupation of land and was a recognition of Gypsies' right to a legal abode.

... Paradoxically, it might be thought that a permanent site is the last thing that a Gypsy, by definition of nomadic habit, would desire. However, successive post-war legislation had made it illegal for Gypsies to camp on their traditional sites forcing most Gypsies to concede that a sedentary life was preferable to the harassment and trauma caused by constant evictions... With an ever increasing Gypsy population, demand for sites far exceeds supply and this seems to have contributed to the impetus for reform.

The Government has now repealed Part II of the 1968 Act on the ground that it had failed in its purpose of providing sufficient sites to keep pace with the need...

It has been suggested that contributing to the impetus for reform... is the moral panic concerning the activities of large groups of travellers of non-Gypsy origin known as 'new age' travellers whose desire is to 'escape materialism, comfort and social status for a simple

life in the hills and fields of rural England'... Inevitably these two nomadic but culturally distinct groups have, in the public's perception, become entwined.

... Despite repeated ministerial assurances that the section is 'not aimed at the genuine Romany or other Gypsies', it gives considerable discretionary powers to the police in situations where the conditions necessary to trigger the offence could so readily be fulfilled by Gypsies and it is naive to suppose that powers conferred will not be powers used...

Section 62 empowers a constable to seize and remove any vehicle after a reasonable time if he reasonably suspects that any person(s) to whom a direction to leave has been given under section 61 has failed to do so... Thus, the decision to seize what is, in effect, a 'home' is left to the discretion of a constable. In view of the dire consequences of such action for Gypsy families in terms of homelessness and the possible break up of a family, is not a court a more appropriate forum for such a decision to be made?

Section 61 has been held compatible with Articles 3, 6 and 8 of the European Convention on Human Rights (*R (on the application of Fuller) v. Chief Constable of Dorset Police* 2001).

Sections 63 and 64 of the CJPOA 1994 deal with 'Raves', authorising superintendent police officers to issue 'dispersal' orders, entry and seizure of vehicles and sound equipment. As Smith comments (1995, p. 22): 'These are subject to no judicial surveillance, which is, to say the least, perturbing.' Echoes of policing the 1984 miners' strike are seen in section 65, which allows the police to stop a person believed to be travelling to a 'rave' (or 'gathering' in the 'open air' of 100 or more persons as the Act describes it) and direct them to proceed in a different direction. The dispersal power under the Anti-social Behaviour Act 2003 has also been used against protestors and an authorisation in place for one purpose may be used for another unrelated purpose (*Singh* 2006). Dispersal orders and the threat of ASBOs have been used by the police to deter ticket touts at Wimbledon tennis tournament (*The Guardian* 20 June 2009).

Aggravated trespass under section 68, aimed at but not confined to hunt saboteurs, is another offence which seems to overlap with existing powers, in this case with the power to arrest for breach of the peace. The essence of aggravated trespass is 'trespass' (which could be a static assembly on the highway) and doing anything intended to:

- intimidate people and deter them from engaging in a lawful activity;
- obstruct a lawful activity; or
- disrupt a lawful activity.

Additionally, section 69 provides the police with power to direct people to leave the land. The senior police officer present may order people to leave if he or she believes:

- they are committing, have committed or intend to commit an offence of aggravated trespass in the open air; or

- that two or more people are trespassing and are present there with the common purpose of intimidating persons so as to deter them from or obstruct or disrupt a lawful activity.

Failure to leave or return within seven days, having been so directed, is an offence. The Divisional Court upheld the lawfulness of arrests of three protesters who were video-recording a foxhunt. Despite no evidence that there was any intimidation or intent to intimidate, it was held there was sufficient evidence to find that the police had reasonable grounds to believe there was an aggravated trespass. And the words to one, 'You either leave the land or you're arrested', were sufficient direction to all three to leave (*DPP v. Capon*, 1997, discussed by Mead 1998).

The House of Lords, in *DPP v. Jones*, below, took a more robust view of police powers over trespassory assemblies under section 14A of the POA 1986 (as inserted by s. 70 of CJPOA 1994). Any chief officer of police may apply under this section to a local authority for an order prohibiting for a specified period all trespassory public assemblies in a specified area. The consent of the Home Secretary is required before section 14A can be used, and a trespassory assembly is one taking place on land to which the public has no right of access or a limited right of access (this might not cover the public highway but would encompass many shopping malls, educational institutions and other 'public' areas). Nonetheless, the section significantly broadens the effect of the original section 14 and its associated offences, which merely empowered the imposition of conditions on the holding of such assemblies. The offences of organising, taking part in or inciting another to take part in a trespassory assembly which has been banned, are punishable by three months' imprisonment, a level 4 fine and three months' imprisonment respectively (POA 1986, s. 14B). This means that incitement to take part 'is an example of an incitement to commit a summary offence being subject to a higher maximum penalty than the offence itself' (Wasik and Taylor 1995, p. 89). An anticipatory 'stop and redirect' power, similar to that in section 65 in relation to 'raves', allows a uniformed police officer to prevent a person travelling towards a trespassory assembly (POA 1986, s. 14C).

*DPP v. Jones* [1998] 7 All ER 742

**Lord Irvine of Lairg, LC:** ...[T]his appeal raises an issue of fundamental constitutional importance: what are the limits of the public's rights of access to the public highway? Are these rights so restricted that they preclude in all circumstances any right of peaceful assembly on the public highway?

On 1 June 1995 at about 6.40 p.m. Police Inspector Mackie counted 21 people on the roadside verge of the southern side of the A344, adjacent to the perimeter fence of the monument at Stonehenge... He concluded that they constituted a 'trespassory assembly' and told them so. When asked to move off, many did, but some, including the defendants,



Mr. Lloyd and Dr. Jones, were determined to remain and put their rights to the test. They were arrested for taking part in a 'trespassory assembly' and convicted by the Salisbury justices on 3 October 1995. Their appeals to the Salisbury Crown Court, however, succeeded. The court held that neither of the defendants, nor any member of their group, was 'being destructive, violent, disorderly, threatening a breach of the peace or, on the evidence, doing anything other than reasonably using the highway'.

[POA 1986, s. 14A] permits a chief officer of police to apply, in certain circumstances, to the local council for an order prohibiting for a specified period 'trespassory assemblies' within a specified area. An order of that kind may be obtained only in respect of land 'to which the public has no right of access or only a limited right of access'; had been obtained in this case; and covered the area in which the defendants, with others, had assembled.

... The offence with which the defendants were charged is set out in section 14B(2): 'A person who takes part in an assembly which he knows is prohibited by an order under section 14A is guilty of an offence.'

... The central issue in the case thus turns on two interrelated questions: (i) what are the 'limits' of the public's right of access to the public highway at common law? and (ii) what is the 'particular purpose' for which the public has a right to use the public highway?

... There is no suggestion in the Act of 1986 that the making of any order under section 14A(1) in itself defines the limits on the public's right of access to the highway. Rather, the conditions under which it is appropriate to make an order, and the conditions for the breach of such an order, are defined by reference to the existing limits upon the public's right of access. In other words, section 14A presupposes limited rights of access; it does not purport to impose such limits.

I conclude therefore the law to be that the public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass: within these qualifications there is a public right of peaceful assembly on the highway.

Since the law confers this public right, I deprecate any attempt artificially to restrict its scope. It must be for the magistrates in every case to decide whether the user of the highway under consideration is both reasonable in the sense defined and not inconsistent with the primary right of the public to pass and repass. In particular, there can be no principled basis for limiting the scope of the right by reference to the subjective intentions of the persons assembling. Once the right to assemble within the limitations I have defined is accepted, it is self-evident that it cannot be excluded by an intention to exercise it. Provided an assembly is reasonable and non-obstructive, taking into account its size, duration and the nature of the highway on which it takes place, it is irrelevant whether it is premeditated or spontaneous: what matters is its objective nature. To draw a distinction on the basis of anterior intention is in substance to reintroduce an incidentality requirement. For the reasons I have given, that requirement, properly applied, would make unlawful commonplace activities which are well accepted. Equally, to stipulate in the abstract any maximum size or duration for a lawful assembly would be an unwarranted restriction on the right defined. These judgments are ever ones of fact and degree for the court of trial.

Further, there can be no basis for distinguishing highways on publicly owned land and privately owned land. The nature of the public's right of use of the highway cannot depend upon whether the owner of the subsoil is a private landowner or a public authority. Any fear, however, that the rights of private landowners might be prejudiced by the right as defined are unfounded. The law of trespass will continue to protect private landowners against unreasonably large, unreasonably prolonged or unreasonably obstructive assemblies upon these highways.

Finally, I regard the conclusion at which I have arrived as desirable, because it promotes the harmonious development of two separate but related chapters in the common law. It is neither desirable in theory nor acceptable in practice for commonplace activities on the public highway not to count as breaches of the criminal law of wilful obstruction of the highway, yet to count as trespasses (even if intrinsically unlikely to be acted against in the civil law), and therefore form the basis for a finding of trespassory assembly for the purposes of the Act of 1986. A system of law sanctioning these discordant outcomes would not command respect.

However, Home Office research tends to confirm that the overall effect of the legislative flurry of the 1986 and 1994 Acts is to ensure that those charged with policing demonstrations and other gatherings can select from a splendid collection of powers.

*Lord Butler and the January 1998 Trespass and Public Order: Policing under the Criminal Justice and Public Order Act 1994 (Home Office Research Study 1998) pp. 33-4.*

Sections 68 and 69 of the CJPOA are aimed at trespassers who seek to intimidate or disrupt people engaged in a lawful activity on land. These measures . . . determine the line between two freedoms - to pursue a lawful activity and to express an opinion . . . [They] were aimed primarily at the actions of hunt saboteurs and more generally at animal rights protesters seeking to disrupt or obstruct activities such as the shooting of game, horse-racing and angling (see Hansard, Vol 235, col 29) . . . Their application [to environmental protesters] has in fact been one of the most important areas in which they have been applied.

. . . Hunt stewards seek to protect the hunt from saboteurs and other protesters and are encouraged by the British Field Sports Society. Ranging from local farmworkers to ex-soldiers and professional security guards, they may offer their services for no cost or require payment . . .

Police officers' views on stewards were usually negative, since their use was viewed as leading to an escalation of the violence and disorder surrounding the hunt.

'One or two stewards were coming along who I think were worse than the sabs . . . They were no more than glorified thugs.'

'They can't just be allowed to run around unchecked as vigilantes.'

'Luckily the hunt has stopped using stewards. Really they were thugs, they were bouncers.'

**Table 4.1** Cautions and Court Proceedings for Aggravated Trespass and Failure to leave land when directed (s. 69)

|                               |      | Cautions | Prosecutions | Convictions |
|-------------------------------|------|----------|--------------|-------------|
| Aggravated trespass (s. 68)   | 1995 | 7        | 111          | 64          |
|                               | 1996 | 14       | 359          | 211         |
| Failure to leave land (s. 69) | 1995 | 11       | 15           | 12          |
|                               | 1996 | 0        | 27           | 11          |

Significantly, just over half of those prosecuted for aggravated trespass... were convicted. This proportion is relatively low for magistrates' courts in which around 80 per cent of cases resulted in conviction, and reflects the extent to which well-organised groups of defendants contested their cases on the basis that the provisions had been incorrectly used. Those convicted under any of the CJPOA provisions were most likely to be given a conditional discharge or a fine.

The authors conclude that the police would have been present at the kinds of situations covered by their research irrespective of the existence of the CJPOA 1994 provisions. The Act places officers in a 'stronger legal position' to do that which they would previously have done.

### II.6.b. Riot, violent disorder and affray

A tier of offences is laid out in the POA 1986 with riot, punishable with a maximum of ten years, at the head, followed by violent disorder and affray. Their main distinguishing characteristics are that they do not require proof that any injury or damage actually occurred and that they allow groups of alleged offenders to be charged with the same offence.

#### II.6.b.i. Outline of offences

##### Public Order Act 1986, section 1

- (1) Where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot.
- (2) It is immaterial whether or not the 12 or more use or threaten unlawful violence simultaneously.
- (3) The common purpose may be inferred from conduct.

- (4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.
- (5) Riot may be committed in private as well as in public places.
- (6) A person guilty of riot is liable on conviction on indictment to imprisonment for a term not exceeding ten years or a fine or both.

For a serious offence, section 1 is widely drawn. Subsection 1(1) sets the context in which the offence must be committed – the presence of at least 12 people present together (such as commonly happens in a shopping centre, in a bus queue, at a football match, in a law lecture, at an airport and so forth) – who use or threaten violence (see s. 8 below) for a common purpose (which can be inferred from their conduct, s. 1(3)). The offence is committed when any one of those persons actually uses violence.

Since these three offences have common elements, we will outline violent disorder and affray first before giving examples of each.

The essence of violent disorder, the next offence in the hierarchy, punishable by a maximum of five years, is the threat or use of violence where there are at least three people present.

#### Public Order Act 1986, section 2

- (1) Where 3 or more persons who are present together use or threaten violence and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using or threatening unlawful violence is guilty of violent disorder.
- (2) It is immaterial whether or not the 3 or more use or threaten unlawful violence simultaneously.

Affray, like violent disorder, is a triable either way offence, punishable on indictment with three years' imprisonment.

#### Public Order Act 1986, section 3

- (1) A person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.
- (2) Where 2 or more persons use or threaten the unlawful violence, it is the conduct of them taken together that must be considered for the purposes of subsection (1).
- (3) For the purposes of this section a threat cannot be made by the use of words alone.

Affray needs three people (two real and one hypothetical): the person using or threatening violence, the person to whom it is directed and a third person who would have been caused to fear for her safety. Thus, threatening a police



constable will not amount to affray unless a third person would have been caused such fear (*Sanchez* 1996). Using words to command a dog to attack has been held the equivalent of using a weapon and could constitute an affray (*Dixon* 1993). In a significant concession, however, the House of Lords held that carrying petrol bombs did not, per se, amount to affray unless there was a threat to use them directed at another person present at the scene (*I, M and H v. DPP* 2001).

#### 11.6.b.ii. Common elements

Some general comments can now be made. Despite the designation 'public' order offences, none of these offences needs to be committed in public. In each case the conduct must be such as would cause a person of reasonable firmness present at the scene to fear for his personal safety. No such person need be present, however.

'Violence', a key element in riot and violent disorder, is defined in the interpretation section:

#### **Public Order Act 1986, section 8**

... Violence means any violent conduct, so that –

- (a) except in the context of affray, it includes violent conduct towards property as well as violent conduct towards persons, and
- (b) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short).

This almost entirely tautological definition amounts to little more than an invitation to the tribunal to define violence very broadly, and to do so in terms of their own conceptions of the concept, as constructed and influenced by images proffered by media, government and popular culture (see Chapter 7). Its breadth is extraordinary – covering violence to property as well as to the person (s. 8(a)) and extending to conduct capable of, but not necessarily causing, or intending to cause, damage or harm (s. 8(b)).

The Act uses ordinary language to fix its 'legal definitions': violence, harassment, distress, alarm, are common words which hitherto had no technical legal meaning. Their precursors can be found in the ideas of 'threatening, abusive and insulting' conduct introduced by the Public Order Act 1936, which were taken as raising questions of fact rather than questions of law. The frequent use of such words has an important influence on the extent to which the legislation can be seen to be responding to, and thus can assuage, popular fears of disorder as constructed by government and media. The move towards 'ordinary language

legislation' may be seen as an attempt to make legal definitions, at least at the level of rhetoric, correspond to popular understandings of the social problems to which law responds. The basic shape of the legislation is developed incrementally by judicial and prosecutorial discretion, but the symbolic importance of the legislative framework remains.

The offences of riot and violent disorder are inherently inchoate (the 'use' of violence needs, under s. 8, amount only to conduct capable of causing damage to property) and inherently participatory (there is a requirement for a number present threatening or using violence). In *Jefferson* (1994), below, the Court of Appeal endorsed an extensive interpretation of riot and violent disorder, by dovetailing them with the normal participation rules which import liability to those who assist others to commit offences.

*R v. [1994] 1 All ER 210*

[The four appellants were charged with riot, and in the alternative, violent disorder. In the absence of any specific violence by the appellants, the prosecution alleged that by their encouragement they had aided and abetted others in the use of unlawful violence. Two of them were convicted of riot (and sentenced, after a reduction on appeal in relation to one, to 21 months' imprisonment) and two of violent disorder (with sentences of 15 months and six months).]

**Auld J:** On the evening of 21 June 1990 there was serious and widespread public disorder in Bedford. It immediately followed and was occasioned by the victory by England over Egypt in a World Cup football match played that evening. The match, which had been televised, had been watched by many football fans in a number of public houses in the centre of Bedford. They spilled out onto the streets in what began as a celebration of victory but ended in widespread and sustained public disorder involving much violence and damage to property. The disorder, which eventually involved a crowd of about 300 youths, moved around the central area of Bedford. As the crowd moved about there were various individual incidents of violence and of criminal damage, and certain participants in the disorder were observed in various permutations at a number of such incidents. In the result, 30 youths were arrested and variously charged with offences under the Public Order Act 1986 and the Offences against the Person Act 1861...

The prosecution case against all the appellants on the counts of riot and violent disorder was that their presence at various of the specific incidents of disturbance and violence demonstrated a willing and persistent involvement in the disorder. The prosecution maintained that, although there might be no evidence of specific violence by any one of them, their presence at what took place was, and was intended by them to be, an encouragement to others to use violence. In short, the prosecution case was that each of them aided and abetted the violence of the night.

[One ground of appeal was that in relation to riot the indictment itself was defective since it referred to the defendants' using or threatening violence when the offence is committed

only when violence is actually used. This might mislead the jury who have copies of the indictment before them.]

Counsel for the Crown conceded that Count 1 was badly framed. However... he argued that, whatever the defect in the formulation of the count, the judge had directed the jury properly on the essential issues that they had to decide. In our view, counsel for the Crown is correct in his submissions. In so far as the complaint about the particulars is based on their incompleteness, it is difficult to see what further particulars of the use of 'unlawful violence' could have been given. It was plain from the way in which the prosecution put its case and from the judge's direction that the unlawful violence alleged was of a general character among a very large crowd of youths... In so far as the complaint is based on the incorrect impression given by the wording of the count that a threat of unlawful violence alone might constitute the offence, the jury could not have been misled because it was never part of the prosecution case that any of these appellants individually threatened anyone with violence.

[As to the submission that the direction on common purpose was inadequate], the prosecution case from the outset was that the common purpose of all those concerned in the riot, and of each appellant, was to use unlawful violence in celebrating the victory of England... that evening... the jury could have been in no doubt that they could only convict any of the appellants of riot if they were sure that he had used or was a party to the use of violence for the overall common purpose...

Counsel [for the two appellants convicted under s. 2] submitted that the offence of violent disorder, in common with the other offences created by ss. 1, 3, 4 and 5, is confined to the person who actually commits the actus reus by virtue of s. 6 of the Act.

Section 6, in a series of subsections, deals with the mental element respectively required for each of the offences in ss. 1 to 5. The formula in each subsection is the same, namely that a person is guilty of the specified offence 'only if he intends' a particular consequence appropriate to that offence. In the case of violent disorder sub-s. (2) provides that a person is guilty of it 'only if he intends to use or threaten violence or is aware that his conduct may be violent or threaten violence'. Counsel submitted that the scheme of s. 6, in particular the use of the term in the case of each offence 'only if he intends', is to exclude [liability for aiding and abetting]...

In our judgment, the offences created by the 1986 Act may be committed by aiders and abettors as well as by principals... In our view, s. 6 is concerned only with identifying, in statutory form, the requisite mens rea for each of the offences... It does not exclude or cut down in relation to any of those offences the liability of an aider and abettor who is aware of and party to the requisite intent of the principal offender...

In the case of violent disorder... the application of those principles made them guilty under s. 6(2) if they aided and abetted, by encouraging and intending to encourage, others as described in s. 2 intentionally to use or threaten violence or, where appropriate, to use conduct that they were aware might be violent or threaten violence. That is just how the judge put it to the jury. For convenience, we repeat just one of the passages in the summing up in which he put the point accurately, clearly and shortly:

... in order to prove that the defendant participated in this offence by encouraging others it is not enough to prove merely that he was present. It must be proved that he gave encouragement, and did so intending to encourage others to use unlawful violence. ... [after dealing with evidential grounds of appeal the judge concluded] Accordingly, none of the grounds of appeal against conviction having succeeded, each of these appeals against conviction is dismissed.

The combined effect of the inchoate and participatory nature of the offence definitions and the derivative aiding and abetting doctrine applied in *Jefferson* renders these widely defined offences into ones of extraordinary breadth. No specific 'use of violence' need be proved against the defendants.

### 11.6.b.iii. Mental element

#### Public Order Act 1986, section 6

(1) A person is guilty of riot only if he intends to use violence or is aware that his conduct may be violent.

(2) A person is guilty of violent disorder or affray only if he intends to use or threaten violence or is aware that his conduct may be violent or threaten violence.

[(3) and (4) contain similar provisions in relation to the offences in ss. 4 and 5.]

(5) For the purposes of this section a person whose awareness is impaired by intoxication shall be taken to be aware of that of which he would be aware if not intoxicated, unless he shows either that his intoxication was not self-induced, or that it was caused solely by the taking or administration of a substance in the course of medical treatment. [Subsection (5) reverses the burden of proof but otherwise states the general position in relation to involuntary intoxication (see Chapter 10.b).]...

(7) Subsections (1) and (2) do not affect the determination for the purposes of riot or violent disorder of the number of persons who use or threaten violence.

### 11.6.c. Harassment offences

We now discuss the further raft of offences covering disorderly conduct (POA 1986, ss. 4, 4A and 5) and harassment (Protection from Harassment Act 1997).

#### 11.6.c.i. Public Order Act 1986

Sections 4, 4A and 5 of the Public Order Act 1986 contain overlapping offences. We summarise them first before setting out section 5 in full.

##### (a) Section 4: Fear or provocation of violence

- (i) Conduct: Uses towards *another person* threatening, abusive or insulting words or behaviour, or distributes, etc. *to another person* any writing, etc. which is threatening, etc.



- (ii) Circumstances: In public or private unless both inside a dwelling.
- (iii) Mental element: *With intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence . . . or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.*
- (iv) Penalty: six months or level 5 fine.
- (b) Section 4A: Causing intentional harassment, alarm or distress
  - (i) Conduct: Uses threatening, etc. words or behaviour, or distributes, etc. which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress.
  - (ii) Circumstances: In public or private unless both inside a dwelling. Defence to show inside dwelling and no reason to believe conduct would be perceived by person outside or that conduct reasonable.
  - (iii) Mental element: *With intent to cause a person harassment, alarm or distress.*
  - (iv) Penalty: six months or level 5 fine.
- (c) Section 5: Harassment, alarm or distress
  - (i) Conduct: As for section 4.
  - (ii) Circumstance: Within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.
  - (iii) Mental element: *Intends his words, etc. to be threatening, abusive or insulting, or is aware that it may be threatening, etc. or intends or is aware that it may be disorderly.*
  - (iv) Penalty: Level 3 fine.

The main feature to note about section 4 is the extraordinarily broad scope of the offence, which might easily be read as covering heated exchanges between irritated drivers or exuberant behaviour of sports fans in circumstances which most people would think of as falling far short of justifying a criminal response. This underlines the enormous discretion that such offences give to the police and prosecuting authorities in making arrests, framing charges and bargaining guilty pleas. The relatively mild nature of the maximum penalty, although out of all proportion to the seriousness of the offence, can hardly be accounted instrumentally significant, given the pre-existing powers of arrest for subjectively perceived breaches of the peace and the possibility of binding-over orders.

Intentional harassment under section 4A, carrying the same maximum penalty as section 4, was inserted by the Criminal Justice and Public Order Act 1994. Its introduction was prompted by a reported increase in incidents of racial violence and harassment but in its final form it covers a much wider field. While section 4 requires proof of an intention to cause fear or to provoke violence, intention to cause harassment, alarm or distress is sufficient under section 4A. In addition, section 4A demands that harassment, alarm or distress was actually caused.

But it is section 5 of the POA 1986 that touches the depths (or breadths) of this series of offences dealing with behaviour that might cause alarm or distress:

### Public Order Act 1986, section 5

(1) A person is guilty of an offence if he –

- (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
- (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

(3) It is a defence for the accused to prove –

- (a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or
- (b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or
- (c) that his conduct was reasonable.

(6) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Section 5 does not require proof of intent (recklessness is sufficient under s. 6(4)) or consequence. Its most notable features are the breadth of conduct potentially covered and the use of language open to subjective interpretation. This point is emphasised by the explicit introduction of a defence that the conduct was reasonable – probably in recognition of the fact that the bare offence definition could easily cover forms of behaviour (such as street charity collectors or singing in the street) which most people do not think should constitute a crime. Again, the exclusion of actions entirely within, or reasonably thought to be confined to, dwellings, confirms the existence of a limited private sphere into which the law purports not to intrude. It extends to public bars, as a Newcastle landlady discovered. She was fined £400 after displaying in her bar a black and white scarf (Newcastle United's colours) with the words 'Sunderland are Shite'. The scarf was forfeited as a threatening, abusive or insulting sign likely to cause harassment, alarm or distress (*The Guardian*, 3 May 2002).

The trivial nature of the offence, which need not even be directed against another person (*R v. Ball* 1989) underlines the explosion of criminal law into almost any area where the police perceive any kind of threat to authority or 'law and order'. This is reflected in a maximum penalty which is low even as

compared with the already existing power to bind over. Section 5 is frequently dealt with by 'on the spot' fines known somewhat confusingly as PNDs – Penalty Notice for Disorder (Criminal Justice and Police Act 2001, s. 1 as amended). Indeed, the 82,200 issued for this offence in 2006 amounted to over 40 per cent of all PNDs in that year (MoJ 2007) and to double the number of convictions for the offence. The flexibility and manipulability of public order law perhaps reaches its zenith in this section which, in effect, asks the police and the courts to respond ad hoc to any behaviour which they perceive as disorderly, distasteful or inconvenient.

*D Brown and T Ellis 1994 Policing Low Level Disorder: Police Use of section 5 of the Public Order Act 1986 (Home Office Research Study No 135) p. 49*

It was found that the level of use varied considerably and that, while in some areas it was clear that section 5 was being employed in preference to other provisions that covered similar misconduct, elsewhere the new offence was not extensively used. The most frequent use of section 5 was to deal with a broad spectrum of abusive or threatening behavior in public places, although there was also some use to deal with violent or potentially violent situations. Section 5 was also sometimes called in to play to deal with domestic disputes, indecency and football-related disorder... [M]any incidents amounted to alcohol related disorder in and around entertainment centres.

... An important finding was that, in a substantial minority of incidents, police officers were treated as the victims of offensive conduct – a situation that is not precluded by the legislation although it may not have been anticipated. It is for consideration whether the conduct used to justify arrest was always sufficient to alarm or distress police officers. Furthermore, in a third of cases in which members of the public were apparently viewed as victims, there were doubts about whether any real alarm was caused. Police actions in arresting for section 5 offences were not always backed up by action taken later by the Crown Prosecution Service or the courts...

The extent to which section 5 is used in some areas and the circumstances in which arrests are made raise important questions about whether this provision... is being used appropriately...

It is arguable whether in some section 5 cases any useful purpose is served by arresting... When arrest does eventually occur, following the typical spiral of warning/abuse/arrest, it is uncertain whether the reasoning the police use to justify their action can always be sustained. First, in the circumstances in which many incidents occur there are grounds for questioning whether members of the public in the vicinity are genuinely likely to be alarmed or distressed. City centre disorder when licensed premises close at the weekend is a commonplace... Secondly, while much of the bad language and abuse directed at the police themselves may be grossly insulting, it is doubtful whether it is generally such as would be likely to cause alarm or distress except to unduly sensitive officers... Thirdly, if the underlying reason for arresting is to instil respect for the police, it is very doubtful whether this object is achieved.

The deployment of section 5 against those involved in political protest has been challenged under the Human Rights Act 1998.

***Percy v. DPP [2001] EWHC Admin 1125***

[This was an appeal against conviction for a section 5 offence arising from the appellant's behaviour at an American air base.]

**Mrs Justice Hallett:** The appellant is a co-ordinator of an organisation called the 'Campaign for Accountability of American Bases'... She defaced the American flag by putting a stripe across the stars and by writing the words 'Stop Star Wars' across the stripes. She stepped in front of a vehicle and she placed the flag down in front of it and stood upon it. Those affected by her behaviour were mostly American service personnel or their families, five of whom gave evidence of their distress to varying degrees. They regarded her acts as a desecration of their national flag to which they attach considerable importance. The District Judge rejected the appellant's evidence that she was unaware of the effect of her conduct upon those present... The court concluded from her failure to offer any explanation save that 'it was a spontaneous protest' to place the flag on the floor and stand upon it, that her actions were calculated to offend. The court found that the appellant's behaviour with the flag was insulting to American citizens at whom it was directed.

The appellant did, however, satisfy the court that her behaviour was motivated by strongly held beliefs that the 'Star Wars' project was misguided, posed a danger to international stability and was not in the best interests of the United Kingdom.

She failed to persuade the court that her conduct on the balance of probabilities was reasonable... [T]he District Judge... He acknowledged that Article 10 applied and that it protected an individual's right to express views which are unpopular and offensive to others. He highlighted, however, that under Article 10(2) the right is not unqualified. The exercise of the right to freedom of expression carries attendant duties and responsibilities and so may be restricted and made subject to penalties, provided that they are prescribed by law and are necessary in a democratic society (for example, for the prevention of disorder, or for the protection of the rights of others). The court considered in this case the risk of disorder and criminal offences by others to be slight. His only concern, therefore, was as to the protection of the rights of others. So far so good. No one takes exception to his approach to this point.

The District Judge went on to consider, however:

'The need to protect the rights of American service personnel and their families occupying the base to be free from gratuitously insulting behaviour in the ordinary course of their professional and private lives and their right to have their national flag, of significant symbolic importance to them, protected from disrespectful treatment.'

...

He accordingly held that there would be no violation of the appellant's right under Article 10 in convicting her of an offence under section 5.



The questions posed for this court in the case stated are:

- (i) Was the appellant's conviction under section 5 of the Public Order Act 1986 compatible with Article 10 of the European Convention on Human Rights and Fundamental Freedoms?
- (ii) If the answer to question (i) is 'No', should the appellant's conviction under section 5 of the Public Order Act be quashed?

... The right to freedom of expression was well established in the United Kingdom before the incorporation of the Convention. Peaceful protest was not outlawed by section 5 of the Public Order Act. Behaviour which is an affront to other people, or is disrespectful or contemptuous of them, is not prohibited: see *Brutus v. Cozens* (1973) AC 854. A peaceful protest will only come within the terms of section 5 and constitute an offence where the conduct goes beyond legitimate protest and moves into the realms of threatening, abusive or insulting behaviour, which is calculated to insult either intentionally or recklessly, and which is unreasonable.

It is significant in my view that sections 5(3)(c) and section 6(4) of the Public Order Act specifically provide for there to be proof of *mens rea* and for the defence of reasonableness. Even where a court finds that conduct has been calculated to insult and has, in fact, caused alarm or distress, the accused may still establish on the balance of probabilities that his or her conduct was reasonable.

The question of reasonableness must be a question of fact for the tribunal concerned taking into account all the circumstances.

Where the right to freedom of expression under Article 10 is engaged, as in my view is undoubtedly the case here, it is clear from the European authorities put before us that the justification for any interference with that right must be convincingly established. Article 10(1) protects in substance and in form a right to freedom of expression which others may find insulting. Restrictions under Article 10(2) must be narrowly construed. In this case, therefore, the court had to presume that the appellant's conduct in relation to the American flag was protected by Article 10 unless and until it was established that a restriction on her freedom of expression was strictly necessary.

I have no difficulty in principle with the concept that there will be circumstances in which citizens of this country and visiting foreign nationals should be protected from intentionally and gratuitously insulting behaviour, causing them alarm or distress. There may well be a pressing social need to protect people from such behaviour. It is, therefore, in my view, a legitimate aim, provided of course that any restrictions on the rights of peaceful protesters are proportionate to the mischief at which they are aimed. Some people will be more robust than others. What one person finds insulting and distressing may be water off a duck's back to another. A civilised society must strike an appropriate balance between the competing rights of those who may be insulted by a particular course of conduct and those who wish to register their protest on an important matter of public interest.

The problem comes in striking that balance, giving due weight to the presumption in the accused's favour of the right to freedom of expression.

I turn to the way in which the District Judge approached the task confronted him in this case. I remind myself that Ms Percy attended RAF Feltwell intending to protest against the 'Star Wars' project, a matter of legitimate public debate. The message she wished to convey, namely 'Stop Star Wars' was a perfectly lawful, political message. It only became insulting because of the manner in which she chose to convey the message...

The fact that the appellant could have demonstrated her message in a way which did not involve the use of a national flag of symbolic significance to her target audience was undoubtedly a factor to be taken into account when determining the overall reasonableness and proportionality of her behaviour and the state's response to it. But, in my view, it was only one factor.

Relevant factors in a case such as this, depending on the court's findings, might include the fact that the accused's behaviour went beyond legitimate protest; that the behaviour had not formed part of an open expression of opinion on a matter of public interest, but had become disproportionate and unreasonable; that an accused knew full well the likely effect of their conduct upon witnesses; In my judgment, at the crucial stage of a balancing exercise under Article 10 the learned District Judge appears to have placed either sole or too much reliance on just the one factor, namely that the appellant's insulting behaviour could have been avoided. This seems to me to give insufficient weight to the presumption in the appellant's favour, to which I have already referred... Merely stating that interference is proportionate is not sufficient. It is not clear to me from the District Judge's reasons, given in relation to his findings under Article 10, that he has in fact applied the appropriate test... I am driven to the conclusion, therefore, that this conviction is incompatible with the appellant's rights under the European Convention on Human Rights and I would answer the first question posed in the case stated: 'No'.

... the appropriate course, therefore, is simply to quash the convictions.

Percy gives protesters a limited protection and does not address at a more fundamental level the restriction that section 5 places on the freedom to protest. As the research study on aggravated trespass (discussed in Chapter 6.a.ii.) makes clear, those against whom the protests are made – those who are protected by these laws – are often in a position to employ their own security officers, some of whom can be likened to bouncers (Bucke and James 1998). The 'battle' is then enjoined between the security officers and the protesters with the police holding some kind of peace line. Behaviour or language that could well be offensive to a passer-by is not particularly novel or alarming to either the staff or the police. Section 5 gives a default power that can be invoked at any stage. The offence provides a ready made authorisation or excuse for the exercise of the power of arrest.

It might be asked why the trio of offences in sections 4, 4A and 5 is needed to deal with the relatively minor harm of causing alarm or distress, especially when other offences deal with related behaviour, such as inciting racial hatred under section 18, religious hatred under section 29B, the offence of common assault or racially or religiously aggravated assault. Section 5 in particular has attracted a high level of criticism:

**Parliament: Joint Committee on Human Rights 2009 *Seventh Report Demonstrating Respect for Rights? A Human Rights Approach to Policing Protest* HL Paper 47-I, HC 320:2009**

80. A number of witnesses drew specific attention to section 5 of the Act, which criminalises 'threatening, abusive or insulting' words or behaviour in certain circumstances. Some witnesses said this section 'can be used in a way which . . . illegitimately stifles protest' or has a chilling effect on free speech. Liberty provided an example of the police citing section 5 of the Act where a young man demonstrating outside the Church of Scientology's London headquarters was issued with a summons by the police for refusing to take down his sign, which read 'Scientology is not a religion, it is a dangerous cult'. The police alleged that the use of the word 'cult' violated section 5, although they did not subsequently proceed with a prosecution.

81. The Metropolitan Police gave an example of the arrest under section 5 of a protestor at a free speech rally for wearing a picture of a cartoon depicting the prophet Mohammed, which had been published in the Danish press, explaining:

That was during a very tense period . . . we chose to wait until somebody came forward to us and said 'I fear that that will cause a breach of the peace; I am offended by that' and then we took action against the individuals.

82. We asked police witnesses whether they considered that existing police powers under section 5 were too broad or used too often. AAC Allison disagreed, suggesting that 'if [people] felt that we were acting inappropriately or making excessive use of our powers then they had the right to challenge us about it.'

83. As with freedom of assembly, freedom of expression imposes both positive and negative obligations on the state. We were pleased to note that the Home Office Minister, Vernon Coaker MP, accepted that 'the police's job is to try and ensure that you facilitate free speech'. When we asked the Minister about potentially inappropriate uses of section 5, including an example where an Oxford student was arrested for allegedly calling a police horse 'gay', he said 'I do not think section five should be used arbitrarily. It is an important power that the police have.' He added 'You do get these examples that are brought up which do sometimes make people wonder whether the power was used appropriately. I will take those examples back, talk to the police about them and see whether we can clarify and get some guidance out of it.' The Minister agreed to raise with ACPO the examples which we had discussed and 'see what sort of guidance and better support could be given to police officers with respect to the use of section 5.'

84. There is an inextricable and fundamental link between the right to protest and free speech. We are concerned by the evidence that section 5 has, on occasions, been used to prevent people from freely expressing their views on matters of concern to them, and thereby has stifled otherwise legal, peaceful protest. Whilst we agree that people should be protected by existing laws preventing incitement on a number of grounds, free speech in the context of protest and dissent has long been protected by the common law because of

its importance for the functioning of a democratic society. It is inevitable that some protests will cause others to be offended. As one witness told us, 'protest is always going to upset somebody – that is the nature of protest'.

85. Section 5 of the Public Order Act gives the police a wide discretion to decide what language or behaviour is 'threatening, abusive or insulting'. Whilst arresting a protestor for using 'threatening or abusive' speech may, depending on the circumstances, be a proportionate response, we do not think that language or behaviour which is merely 'insulting' should ever be criminalised in this way. Whilst we welcome the Minister's agreement to discuss the examples we raised with ACPO in order to see whether guidance or support to police officers would improve matters, we do not consider that improving guidance will be sufficient to address our concern. We recommend that the Government amend section 5 of the Public Order Act 1986 so that it cannot be used inappropriately to suppress the right to free speech, by deleting the reference to language or behaviour that is merely 'insulting.' This amendment would provide proportionate protection to individuals' right to free speech, whilst continuing to protect people from threatening or abusive speech. We suggest such an amendment:

Harassment, alarm or distress: insulting words or behaviour

To move the following clause:

'(1) The Public Order Act 1986 (c. 64) is amended as follows.

(2) In sections 5(1)(a) and 5(1)(b), the words "abusive or insulting" are replaced by "or abusive".'

## 11.6.c.ii. Protection from Harassment Act 1997

A further offence of harassment to deal with stalking was introduced by the Protection from Harassment Act 1997. Stalking provides yet another example of the moral panic thesis discussed in Chapter 4.b. Stalking, like shoplifting, hooliganism and vandalism, is a social construct rather than a legal category. Before the passage of the 1997 Act, there was no offence directed at stalking, nor does the Act use the term 'stalking' as such. The Act, one of the first to deploy the hybrid civil-criminal formula, provides two criminal offences of harassment and a civil tort.

### Section 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.
- (1A) A person must not pursue a course of conduct –
  - (a) which involves harassment of two or more persons, and
  - (b) which he knows or ought to know involves harassment of those persons, and



- (c) by which he intends to persuade any person (whether or not one of those mentioned above) –
  - (i) not to do something that he is entitled or required to do, or
  - (ii) to do something that he is not under any obligation to do;
- (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other.

A course of conduct must involve in the case of conduct in relation to a single person conduct on at least two occasions in relation to that person, or in the case of conduct in relation to two or more persons conduct on at least one occasion in relation to each of those persons.

Harassing a person includes alarming the person or causing the person distress (s. 7). The course of conduct is not prohibited if the person who pursued it shows that it was pursued for the purpose of preventing or detecting crime, or that it was reasonable in the particular circumstances (s. 1 (3)).

The higher-level offence under section 4, which carries a maximum penalty of five years in prison, is committed where the harasser's behaviour is so threatening that the victim fears violence. The lower-level offence of harassment under section 2, with a six-month maximum penalty, does not require proof of fear of violence. For neither offence is it necessary to prove an intention to cause fear of violence or a sense of harassment; proof that the conduct took place in circumstances where a reasonable person would realise that its effect would be a fear of violence or sense of harassment is sufficient. Under section 7(3)(a): 'a person's conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another, (a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and (b) to be conduct in relation to which the other's knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring' (as inserted by Criminal Justice and Police Act 2001).

In addition to the penalties on conviction, a restraint order can be obtained, breach of which is itself an offence punishable with five years' imprisonment (s. 3(9)). Both offences include a power to search the suspect's property.

The broad scope of the offence definitions, together with the provision for access to the civil courts, including applying for an injunction (s. 4A) makes harassment available well beyond the social problem of stalking. For an early example, an injunction under the Act was served on Newcastle Animal Rights coalition following a peaceful demonstration at a mink farm, banning the group from writing letters, telephoning or demonstrating near the farm ([www.schnews.org.uk/archive/news185.htm](http://www.schnews.org.uk/archive/news185.htm), 15 August 1997). There seems to be some uncertainty as to whether a corporate body can be the victim of

harassment under the Act. Huntingdon Life Sciences obtained, in 2003, a wide-ranging interim injunction preventing protesters from coming within 50 yards of employees' homes and allowing only one demonstration, by a maximum of 25 people, every 30 days outside the company's sites. Protesters are banned from 'assaulting, molesting, harassing, pestering, threatening or otherwise interfering with' those named in the High Court injunction, 'directly or indirectly'. The list of those protected includes the company itself, employees and 'their families, servants or agents' and any person 'setting out to visit them' (*The Guardian*, 16 April 2003). The company in its evidence to the Joint Committee on Human Rights not unsurprisingly favoured the use of injunctions. The Committee seemed to proceed on the basis that these were obtainable under the Act, commenting that the general rule in civil proceedings that hearings will be in public is reversed for applications under the Act:

We appreciate that injunctions bring benefits to those who have experienced violent and intimidatory protest, especially at their homes. However, we are concerned that the Protection from Harassment Act 1997 (which was not designed to deal with protestors, but has developed over time to encompass this area of activity) has the potential for overbroad and disproportionate application. We do not consider that, in the usual course of events, there is any pressing need for applications against protestors to be made without providing the possibility for protestors to make representations on the proposed injunction. This is particularly so given the potential risk of substantial costs faced by protestors who seek to amend or revoke an injunction once it has been granted. (2009, para. 99)

However, a number of cases have doubted whether a company can be a victim of harassment. In *DPP v. Dziurzynski* (2002), the defendant was charged with pursuing a course of conduct which amounted to the harassment of the employees of B & K Universal Group Ltd. In an obiter dictum, Rose LJ said:

I accept of course that the word 'person', unless the contrary intention is shown, is... to be understood, by virtue of the Interpretation Act 1987, as including a body of persons corporate or incorporate. But that said, it seems to me that the legislative history to which, in my view, reference can properly be made when construing what is meant by the word 'person' in section 1 of the Act, points against person here meaning a corporation.  
... As it seems to me, as a matter of statutory construction, this Act was not intended by Parliament to embrace, within the ambit of a criminal offence, conduct amounting to harassment directed to a limited company rather than to an individual human being.

Citing similar cases such as *Daiichi* (2003), Seymour concludes that 'the social problem which prompted the Act suggests that it is concerned to protect interests far removed from the corporate claimants' economic interests, particularly given that they are protected by existing torts' (2005).

The combined effect of the range of harassment offences in the 1986 and 1997 Acts is to introduce a vast discretionary range to prosecutors; to erode further the presumption of innocence by frequent deployment of reverse-onus of proof defences; and to invite fact-finders (magistrates and juries) to interpret terms such as 'threatening', 'abusive', 'insulting', 'harassment', 'alarm' and 'distress' in accordance with their 'ordinary' meaning (see *Chambers and Edwards v. DPP* (1995), following *Brutus v. Cozens* (1973)). The offences are rarely limited to 'public' spaces and, where the offences call for a third party to be harassed, alarmed or distressed (or likely to be), this can be a hypothetical bystander represented by the arresting officer (*DPP v. Orum* (1989)).

#### 11.6.d. Hate crimes

Hate crimes come in two forms, direct and derivative. Incitement to racial or religious hatred or on grounds of sexual orientation are offences in themselves (Public Order Act 1986, Pts III and IIIA, ss. 17–29A–M). Criminal liability ensues where a person uses or publishes words or behaviour or written material that is threatening, abusive or insulting where, having regard to all the circumstances, racial or religious hatred was likely to be stirred up or the person intended to stir up racial or religious hatred. There are also the crimes of possessing racially inflammatory material with a view to publication, and of inciting to racial hatred by the distribution, showing or playing of films, videos, sound recordings and other media, including, generally, broadcasting. The definition of 'racial hatred' means hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins; 'religious hatred' means hatred against a group of persons defined by reference to religious belief or lack of religious belief (s. 29A) and 'hatred on the grounds of sexual orientation' means hatred against a group of persons defined by reference to sexual orientation whether towards persons of the same sex, the opposite sex or both (s. 29AB).

As an aside, we can note that during the passage of the Criminal Justice and Immigration Act 2008 which introduced the sexual orientation hatred amendments, the House of Lords inserted a freedom of speech provision that 'for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred' (s. 29JA). Legislation has also been introduced to protect racial groups in the context of football hooliganism. Section 3(1) of the Football (Offences) Act 1991 makes it an offence to take part in chanting of an indecent or racist nature at a designated football match.

Derivative hate crimes take the form of aggravated versions of common offences. They provide not only sentence uplifts but also re-labelling where the offences are motivated by racial or religious hatred, as Burney explains below.



*Enforcing the Law on Racially Aggravated Offences (2003)*  
*Criminal Law Review 28*

In the Crime and Disorder Act 1998 the Labour Government fulfilled its pledge to legislate against racially motivated crime. This was done by creating a new category of racially aggravated criminal offences (ss. 28–32). The general principle that offences displaying racial aggravation should attract more severe punishment was also codified (s. 82). Subsequently, in the aftermath of the events of September 11, 2001, religion was added to race (Anti-Terrorism, Crime and Security Act 2001, s. 39)... Section 28(4) defines 'racial group' in the same terms as anti-discrimination law: that is 'race, colour, nationality (including citizenship) or ethnic or national origins'; and section 28(2) also protects people victimised by association.

The statute follows common American practice in structuring the law by means of penalty enhancement... [R]ather than creating either a general law against racial violence, or discrete race-directed crimes (such as exist in little-used public order legislation with regard to the dissemination of race-hatred) the statute relies on existing categories of crime which have to be proved alongside the evidence required to classify the offence as racially aggravated and therefore liable for a higher penalty. Nine new offences of violence, public order, harassment and criminal damage, based on pre-existing offences, are thus created in sections 29–32, with new maximum sentences. Several summary-only offences, including common assault, thus become triable by the Crown Court in the aggravated form. Section 82 (now s. 153 of the Powers of Criminal Courts (Sentencing) Act 2000) covers any offence not included in the list of nine specific offences, where racial aggravation is present, as defined in the statute. It must be stated in open court that the offence was so aggravated. For example crimes of violence carrying a maximum of life are sentenced under this general procedure, because there is no scope for enhancement of their maximum sentence, but the sentence imposed should reflect the seriousness of the aggravation.

The 'piggy-backed' structure of racially aggravated offences (RAOs) gives rise to a number of procedural problems... In addition, the definition of racial aggravation is all important. It goes considerably wider than American prototypes, creating conceptual problems for prosecutors and sentencers...

Thus it is not essential to prove a racial motive in order for an offence to be racially aggravated; the two-pronged definition was deemed necessary because of the difficulty of proving motive...

How to treat the nuances of racial hostility was of concern to many of the criminal justice practitioners interviewed, although a great range of opinion was expressed. Within the same court opinions differed: one stipendiary remarked to a researcher:

'Black bastard is everyday language on the streets of London: it must be seen in context.'

But one of his colleagues, when interviewed, said:

'Words can hurt... this sort of language is so common that you should review the case very carefully before deciding to drop the charge.'



Many people said that there was an essential difference between the deliberate targeting of somebody on racial grounds and the use of racial language in the course of an unrelated confrontation. Others pointed out that there was no legal difference, merely a different degree of seriousness which should be reflected in the sentence.

This type of dichotomy was found at all levels amongst all agencies . . .

In order to understand the pressures on the CPS in this type of case we must return to the structure of the RAO legislation. Magistrates cannot return alternative verdicts, so the prosecution has to decide whether to proceed on the RAO charge alone, and risk losing the case altogether even where there is good evidence that the assault, threat or whatever took place with or without any racist addition; or they must offer an alternative, basic, charge, in case the racial aggravation is not proved. It is not permissible to prosecute a basic offence and then introduce evidence of racism; if the ingredients of an RAO are present, that must be the charge.

The interpretation of racial aggravation has been pragmatic and mischief based as is well illustrated in Baroness Hale's speech on behalf of the House of Lords in the following case:

#### *R v. Rogers* [2007] UKHL 8

**Baroness Hale of Richmond:** 4. The issue in this appeal is whether using the words 'bloody foreigners' and 'get back to your own country' can transform the offence of using abusive words and behaviour with intent to cause fear or provoke violence, contrary to section 4 of the Public Order Act 1986, into the racially aggravated form of that offence, contrary to section 31(1)(a) of the Crime and Disorder Act 1998.

5. Sections 29 to 32 of the 1998 Act create racially or religiously aggravated versions of some frequently encountered offences which vary greatly in their intrinsic seriousness: assaults falling short of grievous bodily harm with intent (section 29), criminal damage (section 30), certain public order offences (section 31) and harassment (section 32). If racially or religiously aggravated, the maximum penalties are higher. The justification for treating such conduct more severely than the basic versions of these crimes is helpfully summarized by Ivan Hare ('Legislating Against Hate – The Legal Response to Bias Crimes' (1997) 17 OJLS 415, 416–7):

'The case of principle for an explicit response to the phenomenon rests fundamentally on the realization that crimes motivated by hatred for the group to which the victim belongs are in some sense of a qualitatively distinct order of gravity. This perception arises from intuitive feelings of retribution and from awareness of the impact such offences have on the immediate victims and on society as a whole. In addition to being the target of an act of violence the victim is likely to feel a sense of injustice at having been discriminated against on the basis of his membership of, or association with, a particular group. The more general strain of the argument is that hate crimes entail a threat to public welfare which makes it appropriate to punish them more severely.'

6. The court must first be satisfied that the basic offence has been committed and then that it is racially or religiously aggravated within the meaning of section 28 of the 1998 Act. Subsection (1) provides that the offence is racially or religiously aggravated if either of two different circumstances exists:

‘(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim hostility based on the victim’s membership (or presumed membership) of a racial or religious group; or

(b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.’

One limb is therefore concerned with the outward manifestation of racial or religious hostility, the other with the inner motivation of the offender. Here we are concerned with the former but the point at issue arises in relation to both. Hostility, demonstrated or meant, is required for both, but hostility to what?

7. The point at issue is the meaning of ‘racial group’. This is defined in section 28(4):

‘In this section, “racial group” means a group of persons defined by reference to race, colour, nationality (including citizenship), or ethnic or national origins’

The victims in this particular case were three young Spanish women who were walking back to the home of one of them after celebrating the birthday of another in a local restaurant. The appellant, who is incapacitated by arthritis, was riding a mobility scooter along the pavement on his way home from a public house. An altercation took place as he tried to get past them on the pavement. He then pursued them in an aggressive manner into a local kebab house where they had taken refuge. The jury must have been sure that he had used threatening, abusive or insulting words or behaviour intending them to fear immediate unlawful violence or to provoke it. The only question was whether calling them ‘bloody foreigners’ and telling them to ‘go back to your own country’ demonstrated hostility based on their membership of a racial group as defined in the 1998 Act.

8. It is accepted on his behalf that had he called them ‘bloody Spaniards’ or any other pejorative word associated with natives of the Iberian peninsular, he would have been guilty. But it is argued that the hostility must be shown towards a particular group, rather than to foreigners as a whole. Mere xenophobia, it is said, does not fall within the ordinary person’s perception of hostility to a racial group.

9. This may be true, but the definition of a racial group clearly goes beyond groups defined by their colour, race or ethnic origin. It encompasses both nationality (including citizenship) and national origins...

10. Nevertheless, it is argued for the appellant that the Act requires that the group be defined by what it is rather than by what it is not. Hence it is argued that Spaniards are covered but foreigners, that is the non-British, are not. The same argument would presumably be made about a person who showed hostility towards all non-whites, irrespective of the particular racial group to which they belonged. This cannot be right as a matter of language. Whether

the group is defined exclusively by reference to what its members are not or inclusively by reference to what they are, the criterion by which the group is defined – nationality or colour – is the same.

11. There are . . . other indications that the statute intended a broad non-technical approach, rather than a construction which invited nice distinctions. Hostility may be demonstrated at the time, or immediately before or after, the offence is committed (section 28(1)(a)). The victim may be presumed by the offender to be a member of the hated group even if she is not (section 28(1)(a)). Membership of a group includes association with members of that group (section 28(2)). And the fact that the offender's hostility is based on other factors as well as racism or xenophobia is immaterial (section 28(3)).

12. This flexible, non-technical approach makes sense, not only as a matter of language, but also in policy terms. The mischiefs attacked by the aggravated versions of these offences are racism and xenophobia. Their essence is the denial of equal respect and dignity to people who are seen as 'other'. This is more deeply hurtful, damaging and disrespectful to the victims than the simple versions of these offences. It is also more damaging to the community as a whole, by denying acceptance to members of certain groups not for their own sake but for the sake of something they can do nothing about. This is just as true if the group is defined exclusively as it is if it is defined inclusively.

13. The offences do not require particular words to be used: the necessary hostility could be demonstrated in other ways, such as the wearing of swastikas or the singing of certain songs. But it will normally be proved by the use of some well known terms of abuse. Fine distinctions depending upon the particular words used would bring the law into disrepute. This case shows that only too well but it is easy to think of other examples. 'Wogs begin at Calais' demonstrates hostility to all foreigners, whereas 'bloody wogs' might well be thought to have specific racial connotations. 'Tinted persons' could in certain circumstances demonstrate hostility to all non-Caucasians, while 'blacks' might refer to a particular racial group. But 'black' might equally refer to several different racial groups whose members may have very black skin. All are defined by reference to their race, colour, nationality, or ethnic or national origins, whether there are many, several, or only one such group encompassed by the words used.

14. . . . A case which might be thought to go the other way is *Director of Public Prosecutions v. Pal* [2000] Crim LR 756. There the Divisional Court dismissed the prosecution's appeal when magistrates acquitted the defendant, of Asian origin, who had assaulted the victim, also of Asian origin, and called him a 'white man's arse-licker' and a 'brown Englishman'. It was held that this did not demonstrate hostility towards Asians. But it is difficult to understand why it did not demonstrate hostility based on the victim's presumed association with whites (within the meaning of section 28(2)). That would undoubtedly cover, for example, a white woman who is targeted because she is married to a black man. It may well be that this way of looking at the matter did not feature in the case presented to the Divisional Court . . .

15. The question certified by the Court of Appeal was: 'Do those who are not of British origin constitute a racial group within section 28(4) of the Crime and Disorder Act 1998?' The answer is 'yes', as would it be to the question whether 'foreigners' constitute such a group. Whether the evidence in any particular case, taken as a whole, proves that the offender's conduct demonstrated hostility to such a group, or was motivated by such hostility, is a question of fact for the decision-makers in the case.

16. It follows that this appeal must be dismissed.

In 2007/8 police recorded 4,823 racially or religiously motivated crimes in which somebody was injured, 4,320 crimes without injury, and 26,495 cases of harassment. There were also 4,005 cases of criminal damage related to hate crimes. The typical hate offender is a young white male (most homophobic offenders are aged 16–20, and most race hate offenders under 30) (Home Office 2008). There has been a steady increase in prosecutions: in 2007/8 there were 13,008 cases of racial or religious hatred (compared with 8,868 in 2005/6) and 995 homophobic (cf 600 in 2005/6) (CPS 2008).

#### FURTHER READING

Elizabeth D. Burney and Gerry Rose, *Racist Offences – How is the Law Working?* (Home Office Research Study 244, 2002).

Elsbeth Deards, 'Human Rights for Football Hooligans' (2002) 27 *European Law Review* 206.

Helen Fenwick and Gavin Phillipson, 'Public Protest, the Human Rights Act and Judicial Responses to Political Expression' (2000) *Public Law* 627.

Zoe James, 'Policing Space: Managing New Travellers in England' (2006) 46 *British Journal of Criminology* 470.



# Criminal Law and Justice

## Emerging Themes

### II.7.a. Territory, technology, youth

#### Territory

While the separation between private and public spheres of activity was never as simple as it sounded, we have recently witnessed a rapid decline in the availability of public space, and increasing modes of surveillance (CCTV) both in public streets and in 'private' public areas such as shopping malls and leisure facilities. The concern with surveillance and controlling citizens' activities is seen in our discussion of the array of harassment offences and of regulatory techniques such as the anti-social behaviour order, child curfews and the planned introduction of identity cards (Identity Cards Act 2006). Two distinct types of 'threat' to order can be identified. One type – perhaps the one that springs to mind when the term 'public order' is used – encompasses those threats that arise during specific protests or gatherings such as political demonstrations or sporting events. The second type arises more frequently but in far less organised circumstances from the eruptions of groups of people – often young, often drunk – from pubs and clubs on Friday and Saturday nights. There is then a blurred line between 'public order' in the traditional sense of groups on the streets (which may or may not be pursuing political aims), and 'keeping streets orderly' (which informs much recent legislation) through control of those thought to threaten the peace and quiet of the community. That this is an artificial division is exacerbated by the tendency for laws passed for one purpose to be appropriated for another. The use of the Protection from Harassment Act 1997 against animal rights protesters is one example, while the application of anti-social behaviour orders to prostitutes is another. In addition, young people (particularly those under 18) are particularly vulnerable to this kind of control. The dispersal order provision under the Anti-social Behaviour Act 2003 gives the police specific power to remove to their homes any persons under 16 found in a dispersal area between 9 pm and 6 am (s. 30(6)). Opposition to the proposed national identity card has led the government to pursue a non-compulsory scheme. This suggests that while passive surveillance (as in CCTV) and the monitoring of 'problem populations' are acceptable, widespread active participation which an identity card requires is not.

David Colman, *Civil Liberties and Human Rights in England and Wales* (Oxford University Press, 2002) p. 1016

More worrying, however, than the slowness of the development towards judicial recognition of rights of public access and expression is a movement in the opposite direction in the legislature. Since the early 1990s, Parliament has enacted legislation which has sought to exclude people – individuals or groups – from public areas. Sometimes this is done as a public-order measure, as in the case of several restrictions on freedom of access under the Criminal Justice and Public Order Act 1994. At other times it is said to be to protect children from coming to harm in dangerous places or to control behaviour in public (as in the case of child curfew orders under the Crime and Disorder Act 1998 and powers to combat public drinking under the Criminal Justice and Police Act 2001), or to protect sections of the community against alleged troublemakers (for example by making anti-social behaviour orders under the Crime and Disorder Act 1998). The overall effect is to exclude people from making use of the relatively few genuinely public places still available, and to discourage or prohibit the exercise of freedom of assembly.

### Technology

The new forms of public order law that we have discussed rely on the gathering of information not only by the police but by other public institutions as well. Anti-social behaviour orders are a particularly good example of partnership between the police and local authorities for example. Multi-agency cooperation is now enshrined in the Police Reform Act 2002. Britain leads the world in CCTV surveillance with more than 4 million cameras estimated to be in operation, many of which form part of the now vast private security industry (Crawford 2007, p. 892; Newburn and Reiner 2007, p. 932). Crawford comments that while CCTV was initially rooted in a political ideology of situational crime prevention, 'CCTV cameras not only evoke symbols of security by appearing to perform preventive tasks, but also facilitate the acting out of more traditional expressive and punitive sentiments where criminal acts and disorder are captured on footage . . . CCTV straddles both a preventive logic and a punitive one (2007, p. 892). The more that risk is thought to be controllable through technology and knowledge the more threatening its (inevitable) realisation appears to be:

Chris Smith, *Crime: The Twenty-First Century's Biggest Risk Series in Old Criminal Law* (2007) at *Modern Law Review* 72: 15

A powerful theme in recent theorising about criminal law draws on Ulrich Beck's 'risk society' thesis which provides insights into the role and focus of blame in contemporary society. Risk itself is about external danger: disaster, technological breakdown, and human misbehaviour are all examples . . . Concern with risk is not merely to do with knowledge of probability, it is to do with cultural attitudes to the acceptability of different hazards. The social institutions

associated with law – of which the criminal justice system is emblematic – themselves play a significant role in risk management and the production of risk knowledge. How then do these arguments apply specifically to the risks, dangers or hazards of ‘crime’?...

In their study of the police as knowledge workers, Ericson and Haggerty describe how the police supply risk information to a web of institutions – insurance companies, regulatory agencies, financial institutions, amongst others. Criminologists ‘know’ that the popular image of policing as portrayed in TV and film, and even as reflected in news reporting, is wildly biased in favour of action, detection and contact with ‘criminals’. Arresting suspects is a relatively rare event for most police officers, even detectives spend almost half their time in the office recording investigative work rather than engaging in it. Much of this recording, this production of knowledge, is for internal purposes. If you haven’t arrested someone you can at least produce a paper trail explaining what you have been doing. If you have arrested someone, then preparation of papers in relation to custody decisions, in relation to interrogation, or in preparation for prosecution, is necessary. The provision of information to a complex web of other institutions is a major function of police work. Other social institutions, such as education and health, are similarly engaged in the production and communication of risk knowledge. ‘Institutionalized communications systems form the foundation of contemporary society and provide the governing basis of social life.’ The information is used to establish and monitor, amongst other things, identities: achieved identities such as careers are monitored through record-keeping (in relation to offenders and victims) and through licensing (gun ownership for example), while ascribed identities (age, race, gender etc) are maintained and constructed through the use of categories into which people are fitted. Often these categories of identity are determined externally and the police mould the individual to fit the pre determined boxes. Youth is one obvious identity here. Police interaction with agencies such as schools takes a number of forms but is characterised by systems of risk selection (which areas, which schools, which pupils). Here the interplay between institutions is apparent with knowledge exchanged between schools, social services, individual parents and the police.

### Youth offenders and youth justice

Young people, who are overrepresented as offenders and as victims, are vulnerable to these shifting sands of public space, risk perception, technology, and policing discretion. The framework of youth justice has been transformed since the Crime and Disorder Act 1998 which introduced the Youth Justice Board and proclaimed it the duty of the youth justice system to prevent offending (s. 37). Local authorities were required to form Youth Offending Teams (YOTS) drawing on agencies such as social work, education, health and the police. In terms of diversion from prosecution, cautions were replaced by a system of reprimands and warning for under 18-year-olds. About 85 per cent of 10–11-year-old offenders receive a warning, reducing to 75 per cent of 12–14-year-olds and 40 per cent of 15–17-year-olds. The Act abolished the rebuttable presumption that a child over 10 is *doli incapax* (s. 34) so that any 10–14-year-old who



is prosecuted is assumed to know that it is wrong to break the law. The House of Lords has confirmed that the intention was to abolish the defence altogether not just the presumption (*R v. JTB* 2009).

In terms of formal sentencing, the youth court must make a referral order to the local YOT in relation to any first time offender who pleads guilty. A youth offender panel then 'draws up a programme of behaviour to which the offender is invited to agree' (Ashworth 2005, p. 363). This can involve payment of compensation or undertaking community work. If the offender breaches this, or does not agree to it in the first place the case goes back to the Youth Court. In addition to community orders (including curfews) and custodial sentences, the court can also impose anti-social behaviour orders. Concern about the use of curfew orders – including over-use of prohibitions, lack of consultation with YOTs, failure to pursue less oppressive options such as acceptable behaviour contracts – led to the introduction of ASBO reviews after 12 months and the decision that applications relating to juveniles should be heard by youth court magistrates (Morgan and Newburn 2007, p. 1039).

Whether the stable door has been shut in time is not clear. There were early predictions that the horse would bolt. As Piper argued, an Act addressing 'Crime and Disorder' which concentrates so much on children and young persons 'is clearly endorsing those political and social ideas which emphasise the "danger" of young people's behaviour – the perceived threat from children "out of control" and the potential threat to society if children are not guided into responsible and law-abiding adulthood' (1999, p. 398). And leading criminal justice scholars commented that it was strange that 'a government which purports to be interested in tackling social exclusion at the same time promotes a legislative measure destined to create a whole new breed of outcasts' (Gardner et al. 1998). A higher proportion of those children and young people who are apprehended are now prosecuted (Morgan and Newburn 2007, p. 1043). The number of children and young people being sentenced to custody has almost doubled in ten years (Prison Reform Trust 2007). In February 2007 there were 11,872 under 21-year-olds in prison including 2,418 under 18. Magistrates can imprison children charged with medium-level offences of vandalism, car crime and non-domestic burglary (Criminal Justice and Police Act 2001, s. 130).

Tim Newburn 2007 'Youth crime and Youth Culture' in Maguire et al. *Oxford handbook of criminology* (p. 575).

For at least the last century the key representation of young people has been to see them as a 'problem' – either as a source of difficulties, or as being 'at risk'. Indeed Pearson has charted generalized complaints about 'juvenile delinquency' since at least pre-industrial seventeenth century 'Merrie' England. More distinctively 'modern' forms of complaint about juveniles began to appear during the urban and industrial revolutions of the early nineteenth



century. Although youth cultures in Britain are generally thought of as a post-Second World War phenomenon, they have been observable for far longer. However, just as we must guard against the assumption that the problems of youth are a peculiarly post-war phenomenon so, having discovered parallels for our modern concerns as far back as the seventeenth century, we must not fall into the trap of thinking that it was ever thus. Both continuity and change are visible . . .

The number of known juvenile offenders began to rise substantially from about 1955, as did public concern about youth in general. Young people were beginning to enjoy a degree of autonomy that was significantly greater than that of previous generations, and at the heart of this was their generally increasing affluence. This led to the growth of increasingly spectacular youth styles based around the conspicuous consumption of 'leisure and pleasure', linked with the emergence of what became known as 'mass culture' and the development of its most spectacular offshoot, youth culture . . .

A significant proportion of crime is committed by young people. This, in tandem with adult fears about youthful deviance, leads to young offenders occupying the 'dubiously privileged position', in changing guises, as society's number one folk devil. Though official statistics can only ever provide a crude estimate of juvenile offending, they nevertheless suggest that at least one-fifth of those cautioned ['reprimands' replaced cautions for youth offenders under the Crime and Disorder Act 1998] or convicted in any one year are aged between 10 and 17 and well over one third (37 per cent) are under 21.

. . . Young people . . . are frequently victims of crime. [The BCS shows] that 12-15 year old boys and girls are at least as much at risk of victimization as adults, and for some types of crime, more at risk than adults or older teenagers . . . [Y]oung people are more likely to be the victim of personal crimes (assault, robbery, theft from the person and other personal theft) than those in older age groups.

It is important not to exaggerate the proportion or the severity of crime committed by young people.

Carry Goldson 'Damage, Harm and Death in Child Prisons in England and Wales: Questions of Abuse and Accountability' (2006) 43 *Howard Journal* 449, 451

Contrary to much popular belief, children and young people are *not* responsible for the majority of recorded and detected crime. During 2001, for example, almost 88 per cent of detected crime was committed by adults . . . A more recent statistical snapshot of youth crime in England and Wales was published in November 2005. The 'Offending, Crime and Justice Survey', based upon interviews with 5000 children and young people . . . revealed that 64 per cent of children and young people interviewed had neither committed an offence – or a defined act of anti-social behavior – in the twelve months prior to interview and, amongst the minority 'who did admit to a delinquent act the picture was dominated by the less serious behaviours' . . .

'tough on crime' policies in England and Wales, as elsewhere, bear little, if any, relation to actual patterns of crime. Instead, the 'rush to custody' derives from political machinations as distinct from genuine crime and disorder reduction and/or community imperatives...

[C]hild 'offenders' continue to be particularly targeted. This implies both an abuse of power and the negation of democratic responsibility.

Child prisoners are routinely drawn from some of the most disadvantaged, damaged and distressed families, neighbourhoods and communities... Children for whom the fabric of life invariable stretches across: poverty; family discord; public care; drug and alcohol misuse; mental distress; ill-health; emotional, physical and sexual abuse; self-harm; homelessness; isolation; loneliness; circumscribed educational and employment opportunities and the most pressing sense of distress and alienation, are the very children to be found in penal custody.

Of course not all child offending is public order related but this has been an appropriate place in which to raise the broader questions about the age of responsibility and youth custody. There has been a stereophonic message running through the 'tough on crime' politics of the last decade which associates anti-social behaviour and preventive measures with youthful activities. This discussion concludes with a summary of an independent audit of the reforms of the youth justice system:

*Young Labour and Richard Garsdale 2008 Ten years of Labour's youth justice reforms: an independent audit Centre for Crime and Justice Studies*

Soon after entering government, Labour embarked on a 'root and branch reform' of youth justice 'to prevent offending' and tackle what it described as the emergence of 'an excuse culture' (Home Office, 1997). The 1998 Crime and Disorder Act established a new youth justice system with youth offending teams (YOTs) and a Youth Justice Board (YJB). Since then, spending has substantially increased and a comprehensive reform programme has been delivered.

But ten years on, what has been the impact? This report makes an independent assessment of the reforms. Success, it argues, has been far more mixed and ambiguous than the government often claims.

Youth justice spending: Since 2000–2001, when YOTs were being rolled out across England and Wales and the YJB had taken over responsibility for commissioning custodial places, spending on youth justice has increased in real terms by 45 per cent. Excluding probation, youth justice has received the largest real-terms increase of all the main criminal justice agencies. In 2006–2007, total spending on the youth justice system – money specifically allocated for youth justice by the YJB and the various statutory agencies that contribute to YOT budgets – amounted to £648.5 million. YJB funding accounts for just over two-thirds of this money. Most of the YJB's spending, 64 per cent, purchases custodial places for children. More than ten times more is spent on custody than on prevention, which accounts for

5 per cent of YJB expenditure. An examination of changes in YJB spending shows that the largest real-terms increase of all the main expenditure categories has been on the YJB's operational costs. Funding provided by statutory agencies at local authority level is made up of resources provided by police, probation, education, social services (now children's services), health and local authority chief executives. Social services has provided half of all funding. Since the creation of YOTs there has been a significant deployment of social expenditure into youth justice budgets.

**Verdict:** There has been a substantial increase in expenditure on youth justice, but the relatively small amount spent on prevention projects and the large amount spent on custody is striking, especially given the fact that a significant tranche of youth justice money has been drawn from 'social', rather than criminal justice, budgets. Youth crime: Targets set to reduce self-reported youth offending on paper appear bold and ambitious. However, in reality, the targets committed the government to maintaining self-reported offending by young people at close to the level it had been since 1997. The targets have been missed, although the overall picture is a stable one, with self-reported offending not increasing.

Targets were also set to reduce vehicle crime, burglary and robbery based on the number of children and young people found guilty in court of these offences. Data on performance against the targets have not been published since 2004, so it is not possible to establish whether the targets have been met. However, from the available data, it is clear that all were on course to be met comfortably. It is important to recognise that, given the way these targets have been measured, they do not provide an accurate indication of changing youth crime levels for these so-called 'volume' crimes.

**Verdict:** The government's record on youth crime reduction is less impressive than many would have expected following a wide-ranging programme of youth justice reform and substantial investment. This raises questions about the success of the reforms in making an impact on the number of children and young people who offend, and demonstrates that the youth justice agencies can do little more than regulate youth crime.

**First-time entrants:** The government and the YJB have sought to reduce the number of children who receive a youth justice disposal, either pre-court or at court, for the first time. These children are known as first-time entrants. Meeting the target has proved to be a demanding task against the background of increasing numbers of children being drawn into the youth justice system. Latest figures show that the target may be met. Even if the first-time entrants target is met, it masks the fact that overall, in recent years, the trend has been for more children to be drawn into the youth justice system.

**Arrest to sentence:** Speeding up the time from arrest to sentence was an early priority for the government in 1997, and targets were set for so-called persistent young offenders and for the processing of cases in the youth court. The targets were met ahead of schedule; however, more recently, performance has been mixed. In the youth court, the time taken for guilty pleas has increased and performance against the target for committals has worsened compared to what was achieved four years earlier.

**The use of custody:** Despite regular commitments made by the YJB to reduce the number of children sentenced to custody, the latest targets have not been met. In fact, at present,



performance is deteriorating, with numbers increasing by 8 per cent since March 2003 against a target of a 10 per cent reduction. Further, the introduction of the Intensive Supervision and Surveillance Programme (ISSP) has not led to the intended reduction in custody numbers but appears to have had a net-widening impact.

**Reducing re-offending:** Several targets have been set for re-offending but none have been met. Initial claims of great success had to be corrected and the latest figures show there has been very little progress. The government has been beset with problems in setting, revising and failing to hit its reconviction targets for children. These are partly due to its own lack of clarity about what it is trying to achieve.

**Verdict:** The only success has been in meeting the targets on arrest to sentence and processing cases through the youth court. This raises important questions about the expansion of the youth justice net, in terms of the number of children dealt with for minor transgressions and the number imprisoned, and the intended outcomes of the youth justice reform programme.

### 11.7.b. Public order and criminal law

It is clear by now that, more than in almost any other area, substantive law and police powers and practices in the public order sphere are intertwined. Often powers to intervene are backed by criminal offences on failure to comply, rather than criminal offences being backed by powers to arrest. Examples are the powers to ban trespassory assemblies and those in relation to aggravated trespass. Or, in the case of breach of the peace, a power to arrest and seek a bind over exists without a corresponding offence. Whereas in many areas of crime, the police are dependent on public reporting of incidents, here the police are effectively in a position to define the situation as disclosing an offence in order to justify their actions. In many cases, offences apparently designed to protect members of the public, are used by the police to protect themselves. Section 5 of the Public Order Act 1986 is a fine example. Home Office research concluded that in more than one in ten section 5 arrests the police were the sole victims of the offensive behaviour (Brown and Ellis 1994, p. viii). We have mentioned the use of these powers, including PNDs (Penalty Notices for Disorder), against young offenders and drew together some comments about youth justice after outlining how changes in public space and in technology affect the operation of criminal law.

The following points underline the problematic nature of 'general' principles of criminal law.

1. *Legitimacy:* We have emphasised a number of times that much modern legislation is both broad and overlapping. Picking a way through the public order provisions is challenging and places an individual confronted by the exercise of police power at a major disadvantage. The number of judicial reviews of these powers in the last ten years cannot be explained solely on the grounds that the Human Rights Act now provides a ready set of arguments



as a launch pad. Some of the explanation lies in the form that much of this legislation takes, with amendments and further amendments, additions and subtractions, creating a spaghetti of provisions through which a protestor would find it hard to negotiate especially at the time the power is exercised over them. The Critical Mass example is a good one, for the notices handed out were erroneous in law yet would have deterred many from continuing to enjoy these types of event. Of course, they may inconvenience some people. But the presence of huge numbers of motor vehicles on our roads inconveniences many others daily. Similarly, poorly controlled dogs cause distress to many walkers and joggers. But no one expects that those dog owners should be banned from their customary walks and gatherings in the local park. Similarly, the prospect of being caught in a seven-hour 'kettle' might deter any but the most hardy of protestors. One of the current news items collected at the beginning of Chapter 6 mentions the banning of photographs of police in the Counter Terrorism Act 2008. This is an excellent example of the kind of obscure – even covert – provision that raises questions about legitimacy.

The relevant provision below is followed by the Ministry of Justice *Explanatory Note* that accompanies it.

### Counter Terrorism Act 2008, Section 76

Offences relating to information about members of armed forces etc

(1) After section 58 of the Terrorism Act 2000 (collection of information) insert—  
'58A Eliciting, publishing or communicating information about members of armed forces etc.

- (1) A person commits an offence who –
  - (a) elicits or attempts to elicit information about an individual who is or has been—
    - (i) a member of Her Majesty's forces,
    - (ii) a member of any of the intelligence services, or
    - (iii) a constable, which is of a kind likely to be useful to a person committing or preparing an act of terrorism, or
  - (b) publishes or communicates any such information.
- (2) It is a defence for a person charged with an offence under this section to prove that they had a reasonable excuse for their action.
- (3) A person guilty of an offence under this section is liable –
  - (a) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine, or to both;
  - (b) on summary conviction—
    - (i) in England and Wales or Scotland, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both;
    - (ii) in Northern Ireland, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both.

- (4) In this section 'the intelligence services' means the Security Service, the Secret Intelligence Service and GCHQ (within the meaning of section 3 of the Intelligence Services Act 1994 (c. 13)).
- (5) Schedule 8A to this Act contains supplementary provisions relating to the offence under this section.'

### **Explanatory Notes:**

#### **Terrorist offences**

Section 76 - Offences relating to information about members of armed forces etc.

204. This section inserts a new section 58A into the 2000 Act which creates a criminal offence. The offence is committed when a person either elicits or attempts to elicit information about a member of the armed forces or the intelligence services or a constable, which is likely to be useful to a person committing or preparing an act of terrorism, or publishes or communicates information of that kind. This offence is based in part on the offence in section 103 of the 2000 Act (which ceased to have effect on 31 July 2007 by virtue of the Terrorism (Northern Ireland) Act 2006). A person who is able to prove that he had a reasonable excuse for his actions is able to rely on that as a defence. This must be read with section 118 of the 2000 Act as amended by section 76(3), the effect of which is to limit the burden on the accused to an evidential burden, so that if that person adduces evidence sufficient to raise an issue with respect this defence, the prosecution must then prove beyond reasonable doubt that there is no such defence. The offence is punishable with a maximum sentence of 10 years imprisonment, or to a fine or both.

The offence itself covers a wide range of potential activities – eliciting, attempting to elicit – information about a potentially wide range of people – those who are or have been members of the armed forces, intelligence services or the police – in circumstances which are very wide – is or likely to be useful to a terrorist. It appears to be strict in its liability – there is no need to prove knowledge or belief or suspicion that the person is or was a member of the armed forces etc., or that the information might be useful to a terrorist. The maximum penalty is high. The defence of reasonable excuse places an evidential burden on the defendant (although that is only clear by following through the antecedent legislation or reading the convoluted Explanatory Note). While the provision may eventually be interpreted much more narrowly the essential point is still valid. Until it is challenged – a process that takes time, commitment and resources – it will be a resource that the police can reasonably use to control a broad range of activities. The *Critical Mass* case is a prime example. The House of Lords decision was handed down four years after the police had informed the cyclists (wrongly) that they were committing an offence (*Kay* 2008).

2. *Judicial subjectivity*: The courts have been reluctant to provide clear limits on these overbroad powers. While in the *Critical Mass* case the House of Lords was sympathetic to the rights of cyclists (*Kay* 2008), they did not curtail powers of stop and search under the Terrorism Act 2000 despite those inevitably targeting members of ethnic minority groups (*Gillan* 2006). The

practice of ‘kettling’ or cordoning off protestors has also been given a clear mandate (Austin 2009) although this can involve people – who may not even be involved in the demonstration – being detained for several hours. The judgment as to whether it is ‘proportionate’ is somewhat asymmetrical. It may be hard after the event to counter the police evidence that it was necessary, and in any case, even if it were found not to be, that could only be after the event. Detaining a group of people for hours on end is not a tactic deployed in any other examples of mass control – sports events, outdoor concerts for example. As the *Economist* (hardly a publication known for its radical views) commented of the G20 demonstration: ‘Whether the measures were sensible is another question: many mild-mannered G20 folk heated up after a few hours in the “kettle”. The police know perfectly well that the prospect of kettling puts people off exercising their right to peaceful protest.’ (18 April 2009, p. 30) And in *Singh* (2006) the Court of Appeal held that that a dispersal order obtained to deal with ‘seasonal revellers’ under the Anti-social Behaviour Act 2003 could be used against protestors who happened to be in the designated area and otherwise met the criteria for such a dispersal (s. 30). Especially in relation to the child curfew power under section 30(6), the Court of Appeal has attempted to place limits on this power. The child in question should be involved in, or at risk of being exposed to actual or imminent anti-social behavior (*R (on the application of W by his parent and litigation friend PW) v. Comm of Police for the Metropolis & Others* 2006). Dispersing groups of schoolchildren who had congregated to chat after school on a summer’s afternoon in a designated dispersal area was also held to be inappropriate given that there was no actual behaviour indicating harassment, alarm, intimidation or distress, and no member of the public had complained about their mere presence (*Bucknell v. DPP* 2006).

3. *Specialness*: To what extent do explicit ‘public order’ offences demonstrate any special qualities as instances of criminal law? According to Smith, this is indeed the case:

A. T. H. Smith 1987 *Offences Against Public Order* (Sweet & Maxwell) pp. 1–3

As a general principle we employ the criminal law to prevent harm to certain social interests such as personal safety and physical integrity, and rights in property. The deliberate infliction of harm that the criminal sanction entails is justified as being designed to protect one or other of those interests, or because (to adopt a retributive justification) the offender has harmed such an interest. What is the comparable value in public order that we seek to preserve through the laws of riot, affray, violent disorder and the other, more minor, offences? Our physical integrity and safety are protected by the offences against the person, and the offences against property are designed to safeguard private property from those who would deprive us of it by stealth or violence.



By comparison with these clearly visible social needs, the interests protected by public order law are much more diffuse and indeterminate. Public order law ranges in its extent from the preservation of mere peace and tranquillity as between rowing neighbours or the prevention of unreasonable street exhibitionism – nuisance on the outer margins of criminality – to threats of an altogether different magnitude. When public order and stability are jeopardised as they are in cases of affray and violent disorder, public fear is aroused in the minds of bystanders and witnesses that the conduct impugned may lead to physical harm to persons and property. The interests to be protected are therefore, in a sense, inchoate. In cases of really serious outbreaks of public disorder amounting to riot, the constitutional stability of the country itself may seem to be threatened...

Historically, the offences of group disorder (riot, unlawful assembly and affray) were most unusual in English criminal jurisprudence. In principle criminal responsibility was (and is) individual and personal. Criminal liability attaches only where the individual himself brings about a proscribed harm or encourages another to do so. A person is only rarely liable for what others have done, and then only derivatively. Furthermore, mere presence at the scene of an offence is not sufficient to attract liability: proof is required of encouragement and an intention to encourage. Failure to dissociate oneself from what is happening is apt to be regarded indulgently by the common law, which is reluctant to punish omissions.

The conduct struck at by the group disorder offences is at variance with these principles, or at least places them under strain; the very essence of these offences is that the offender is one of a group of persons whose conduct together is such as to cause public fear and alarm. The law could respond to this in two quite distinct ways; it could compromise with the individualistic principles outlined, and regard presence at the scene of a disorder without more as being in itself reprehensible, but not very serious. Proof of the offender's presence at the scene would suffice. Historically, it is suggested, the common law preferred this course. Riot was regarded as a particularly heinous offence only when it became a challenge to authority after those responsible for preserving order had tried to do so, and the Riot Act had been read. Until then, it was a misdemeanour only.

Alternatively, the law could regard participation in one of the offences of group disorder as being very serious, and seek to build into the definitions of the offences the elements of individual participation. It might then be justifiable to regard the commission of the offence as particularly serious. Several reasons may be offered for adopting the second course. A person who is part of a group will draw courage from the conduct of others in the group, and may well behave in ways that he would not act when alone. His chances of detection are, in the nature of things, rather lower when he can hide in the rabble. Another justification for the second alternative is that where several people are present together acting violently, their weight of numbers in itself increases the dangers to public order inherent in their conduct. A mob is not merely a collection of individuals, but a collective entity. Even though the participants cannot be proved individually to have caused any injury or damage, there is some justification in treating members of a group whose conduct causes such damage as being jointly responsible for what has happened.

The framers of the [1986] Act have adopted this second course.



This is an elegant statement of some of the major principles of traditional criminal law doctrine, and raises some important issues about the special nature of public order law. However, several of Smith's points are open to question. Whilst the argument that the harms addressed by public order law are intangible, inchoate and thus somehow marginal, has some validity, it is in stark contrast to the way in which public order aspects of particular areas of offending are sometimes used to increase their seriousness and to add to arguments for control. Sanders (1988) found that police decisions to push for prosecution in cases of domestic violence were affected in an important way by their perceptions not so much of whether a situation was domestic or not, but rather whether it threatened public order. Of course, these two may be related, in that in a sexist culture, the police are less likely to regard domestic violence against women as raising any kind of public order problem. Far from being on the 'outer margins of criminality', public order problems might be seen as constituting the very core of crime as socially constructed.

Smith is correct to draw attention to the way in which public order offences stretch traditional doctrinal principles of individual responsibility; as we shall see, this is particularly the case given the cumulation of already verging-on-the-inchoate substantive public order laws with principles of secondary liability. However, we should be cautious about accepting the validity of these traditional doctrinal claims in respect of other areas of criminal law. What is more, the extent to which the framers of the Act may genuinely be regarded as having opted for Smith's 'second course', or at least as having lived up to their choice, must be doubted in the light of the definition of riot. In the first place, the required minimum number involved is extraordinarily small, especially in view of the fact that the 'mens rea' requirement is relevant only to the individual defendant. Thus, in theory, a person could be guilty of riot even if she were the only person who could be proved to have intended or been 'subjectively' reckless as to the violence of her conduct (see *R v. Mahroof* 1989 and the succeeding note by J C Smith). Moreover, the facts that the violence or threat of it need not be simultaneous and that common purpose may be inferred from the conduct, make this allegedly very serious offence potentially applicable to a wide range of cases.

Riot, for example, can be committed in 'private' places (the restriction of the lesser offences to acts not committed inside dwellings confirms that the significance of the private sphere is attenuated rather than abandoned), and no 'person of reasonable firmness' need actually be present. The framing of the test in terms of the reactions of a hypothetical reasonable person acts as a positive invitation to the tribunal to interpret the situation in terms of what their own perceptions and judgment would have been. Can such a tribunal distinguish between the person who was defending herself in a disordered situation, one who was fighting with the police, or one who was simply trying to remove herself from the situation? Can a clear distinction between liability for acts and for omissions be maintained in a context where initial presence

may already invoke the court's opprobrium and a willingness to interpret a defendant as having certain predispositions? Is 'subjective' 'mens rea' any real guarantee of fairness to the defendant? All these things seem dubious. Those who participate in politically oppositional events which are known occasionally to lead to disorder do so at the peril of having criminal purposes inferred and finding themselves convicted of very serious offences.

4. *Political*: The relationship between the Public Order Acts and instances of disorder and moral panics raises questions about the pragmatism of explicitly order-orientated legislation, its political functions, and its symbolic aspects. Public order has always been an area in which governments have been tempted to assert their authority by responding to particular events with legislation. The relationship between the Public Order Act 1936 and fascist disturbances is well known and the 1986 legislation shares this reactive quality (Scruton 1985). This process has accelerated in the last 20 years with a battery of offences maintaining the 'peace' between the 'orderly' and the 'disorderly'. The perceived threat to public and private space by disparate (mainly youthful) groups attending 'raves' and 'acid-house parties', disrupting hunting, protesting about road-building and forming bands of 'eco-warriors' is reflected in a stream of statutes, perhaps reaching its apotheosis in the introduction of anti-social behaviour orders.

What is significant about these examples of legislative opportunism and reactivity is that they have resulted in changes which are more important symbolically than in instrumental terms. Obviously, increased police powers under the 1986 and 1994 Acts with respect to the regulation of assemblies and marches, and the extension of criminal law into the area of trespass, are important and material changes. But many other changes add very little in real terms to existing police and legal powers to deal with disorder. The political rhetoric surrounding the Acts, which had very much to do with equipping the police and the courts to deal with increasing lawlessness and threats to authority, emphasised the need for these offences. But, as the experience of the miners' strike in 1984 demonstrates, the police already had all the powers they could possibly have in legal terms, particularly in their power to arrest for actual or anticipated breaches of the peace, which is untouched by the Acts. So these new offences add little to police powers other than in providing substantive offences which mirror more closely public and media constructions of the conduct in question. In the context of spontaneous disorder such as inner-city 'riots', issues of police hardware in the form of water cannon and plastic bullets are far more important to quelling disorder than any kind of substantive law. Even powers to ban or impose conditions in advance are quite inapposite to the prevention or resolution of this kind of disorder. It must be concluded that the passing of the 1986 and 1994 Acts had more to do with the symbolic affirmation of a political commitment to enforcing public order, maintaining public authority and expressing support for the agencies of control than it had to do with instrumental changes in criminal law (Waddington 1991).

5. *Legal method*: Public order law is a useful area in which to consider a general feature of legal method. Whilst any criminal law relates potentially to a great variety of different kinds of behaviour in very different contexts, nevertheless, and inevitably, it constructs the world in terms of a limited number of fixed categories and conceptualisations, into which that diversity of behaviour has to be fitted. These legal categories do not necessarily match the viewpoints or self-understandings of the subjects in question – either members of the public in general, or participants in situations of disorder. Doctrinal insistence on the irrelevance of motive, although unevenly realised, is central to this feature of legal method. For example, what to the participants is a demonstration, an expression of opinion or emotion, a leisure activity or even a lifestyle will, in legal fora, become riot, violent disorder, provocation of violence, criminal trespass or obstruction. Moreover, legal categories systematically suppress the political and value-orientated aspects of the issues which come before the courts. A striking example of this is to be found in the case of *Beatty v. Gillbanks* (1882), which concerned the problem of a peaceful demonstration being met by a hostile and disruptive audience. Discussions of the implications of *Beatty* in later case law (e.g. *Duncan v. Jones* 1936) have tended to concentrate on sophisticated legal arguments about ‘mens rea’ and ‘causation’, obscuring the fact that what is really at issue here is political judgment about weighing the values of public tranquillity against the interests of particular groups in associating and expressing themselves. This in itself is a classically liberal way of constructing the problem – yet even this straightforward human rights issue had to be read, before the Human Rights Act 1998, between the lines of English criminal law discourse.

In the area of public order law we can see clearly how this kind of legal method combines with the legitimising ideology of the rule of law to set up legal definitions as dominant, authoritative and objective. Legal categories encapsulate the authoritative view of what constitutes illegitimate disorder, and, moreover, do so in a way that is not overtly political. The traditional doctrinal story about clear and general rules that are promulgated and applied as announced allows the political sting to be taken out of the suppression of disorder. Political power is exercised with a low profile by means of wide discretionary power at all stages of the criminal process, leaving the law clean of political taint (see Norrie 2001, Ch. 1).

6. *Doctrine*: Some specific features of the offences which we have cited should be noted. We have already discussed the openness of the definition of riot to the discretionary interpretation of the tribunal, particularly in terms of the inference of common purpose and of ‘situational’ ‘mens rea’. The very structure of individual responsibility and liability seems artificial in the context of public disorder situations when a person’s actions can only be assessed and understood in terms of the group situation, which is itself likely to be judged on the basis of standards broader and less susceptible of scrutiny than those contained in the legal definition of riot. The use of the test of a ‘person of



reasonable firmness', which mirrors the use of 'objective' tests of 'reasonableness' throughout the Act, raises a further question about the ideological rather than instrumental significance of the Act's insistence on 'subjective' 'mens rea'. For although 'objective' tests are logically distinct from 'subjective' ones, it can be argued that 'reasonableness' tests directly invite the tribunal to judge on the basis of their own personal assessments (we can hardly assume that they see themselves as unreasonable). A tribunal is bound to judge what they think the defendant did intend or foresee in terms of what they think she must have intended or foreseen, and this is in turn likely to be influenced by what they think they (as 'reasonable people' – or should we say 'reasonable men?') would have been intended or foreseen in the circumstances. Once again, the relevance of their normative judgments about the surrounding context is only too obvious. Furthermore, the offence of riot furnishes a useful example of tensions within criminal law's construction of 'mens rea' between views of crime which stress individual responsibility and those which recognise determining causes of crime.

*A Report 1991 (Race, Unemployment and Punishment (Bluson) pp. 250-1*

Here, I wish simply to consider a piece of reasoning which I would argue is commonplace in criminal courts, although it does not emanate from one. In his Report into the Brixton riots (Cmnd 8427), Lord Scarman details in cause and effect terms the reasons for the 1981 riots in Brixton. The causes are both general and specific, and their conjunction provides the explanation for the occurrence of riot. On the general level, the causes include unemployment, discrimination, housing, environmental conditions, etc: 'Where deprivation and frustration exist on the scale to be found among the young black people of Brixton, the probability of disorder must be strong' (p. 16). Given such a general predisposition, all that is required is a spark to set the tinder ablaze. For example:

Deeper causes undoubtedly existed, and must be probed: but the immediate cause of Saturday's events was a spontaneous combustion set off by the spark of one single incident (p. 37).

Thus, riot is explained in terms of a complex of necessary and sufficient causes. Yet Lord Scarman at one point puts off his determinism and puts on his legal robe:

The social conditions in Brixton, do not provide an excuse for disorder. They cannot justify attacks on the police in the streets, arson or riot. All those who in the course of the disorder in Brixton and elsewhere engaged in violence against the police were guilty of grave criminal offences, which society, if it is to survive, cannot condone. Sympathy for, and understanding of, the plight of young black people are no reason for releasing [them] from the responsibilities for public order which they share with the rest of us (p. 14).

Scarman's drift is ambiguous. In part this appears to be simply a utilitarian argument concerning what society must do if it is to survive. But equally, in part, it appears to be a



retributive argument concerning the guilt and responsibility of young blacks for their actions. If this is so, however, in shifting from an account of the causes of disorder to a discussion of the individual's responsibility for that disorder, he has jumped from a discourse premised upon determinism to one premised upon individual responsibility and freewill. But he cannot have it both ways, for either the acts of young black people are free in a contra-causal sense or they are causally determined, they cannot be both, and no compatibilist compromise is available.

My reason for examining Lord Scarman's remarks is that it seems to me that something like this reasoning occurs day in day out in the criminal courts through the two stages of conviction and sentencing. For conviction, the individual is regarded as a free, juridical individual, unhindered by his personal or social conditions. In relation to the sentence, however, considerations of background are admitted as a means of mitigating punishment, and these normally take the form of analysis of the circumstances which led the accused into his current sorry position.

The law's unreflective nature is not a failure of understanding alone. Rather it is a product of the fundamental nature of both the legal form and the law's function. Law is inherently concerned with individual responsibility and individual blame, and therefore it must focus on individual agency to the exclusion of its conditions of existence: law must decontextualise action if it is to attribute responsibility to individuals. If it looks behind agency to, for example, the social conditions of agency as did Lord Scarman in his analysis of urban riot, then it becomes impossible and irrelevant to blame individuals. Similarly, the function of law is to control rational individuals through their conviction, punishment and deterrence. If individuals are not seen in this abstract manner, but rather are placed in context, then this function becomes futile. Justice would entail not the conviction and deterrence of responsible individuals but the reform of anti-social and criminogenic conditions.

These arguments show that 'mens rea' is inevitably read 'situationally'; the responsibility of abstract individuals has in practice to respond to situated persons in particular contexts. Thus, the law falls between two stools: it covertly uses technically irrelevant data about factors such as circumstance and motive in applying legal tests, whilst failing fully to acknowledge the moral relevance of social conditions which the determinist views it partially recognises would dictate.

### 11.7.c. Public order and criminal process

Institutional, state-sanctioned (if not state-directed) responses to public disorder are multifarious, even though they form a relatively small part of the total array of social control of disorder. However, criminal law and, more visibly, agents of criminal justice, acting (at least avowedly) within a legal framework, do exercise a particularly important form of political control. This form is one which, as we have already seen, is crucial in affirming and maintaining the

legitimacy and effectiveness of the state by constructing disorder as 'wicked lawlessness' and responding to it in the 'politically neutral' terms directed by the rule of law ideal. In this section, we direct our attention to the agencies and practices of the criminal process, many of which involve the exercise of wide discretionary powers. These are sometimes explicitly but more often implicitly accorded by law. Again, there are many instances to which we could devote attention: the roles of troops, social workers, community leaders, teachers, politicians (especially the Home Secretary and law officers), trial lawyers and judges would each form a legitimate focus of study.

*Paul T. Williams 1967 Keeping the Peace (Hutchinson) pp. 16-17*

[A] major concern in any discussion of public order is the control of discretion. We shall find that discretionary power abounds in the preservation of public order. It is vested in prosecuting authorities, in senior police officers making decisions of policy or tactics in the control of disturbances, in police officers actually present at the scene of actual or apprehended disorder, in local authorities in such matters as the supervision of public parks and open spaces, in the central government in such matters as the regulation of assemblies in Trafalgar Square and Hyde Park, in magistrates' courts in imposing binding-over orders and in all courts in the process of sentencing. It would be misleading to generalise about such a wide sweep of discretion, and the desirable limits have to be considered in relation to particular issues and problems as they arise. Just as discretionary powers vary so do the methods of controlling or limiting discretionary powers. There are judicial controls, either through control by the courts or police of administrative action or through control by the appellate courts of the action of courts of first instance. Then there are political controls through Parliament, by virtue of the doctrine of ministerial responsibility, and through elected local authorities. Other controls include commissions or committees of inquiry, either into a general problem (such as public meetings) or into a particular event (such as the Sunday Trading Riots); provisions for the hearing of complaints against the police or against administrative authorities; private pressure groups such as the Law and Liberty League (founded in the wake of Bloody Sunday in November 1887) and the National Council for Civil Liberties (founded in the 1930s); and publicity of all kinds through the Press, television and broadcasting, and all media of communication.

This analysis remains just as apposite 40 years on. We concentrate on three areas. The first concerns the role and practice of the police. The police have a legal responsibility to act to stop breaches of the peace, and as 'on the ground' controllers of public disorder and initiators of the criminal process occupy a position of unparalleled importance among other agencies in defining and responding to public disorder. We hope to establish some points of general importance about the role of the police as enforcers and creative interpreters of criminal law. Secondly, we advert to the existence and exercise of a wide area of discretion in deciding which cases to prosecute and what charges to bring. Finally, we shall look at the conduct of trials, the sentencing of public order

offenders and the use, particularly by magistrates (given the dominance of the summary mode of trial in this as in most other areas of criminal enforcement) of the power to award or refuse bail.

In relation to public order policing, the organisation and style of policing and the control of the hardware (such as plastic bullets and water cannon) to which the police have access are particularly important issues. While the Scarman Report into the Brixton riots criticised the Metropolitan police force for inflexibility, it recommended at the same time the expansion of public order training and the availability of specialised equipment such as water cannon, CS gas and plastic bullets (Scarman 1981, paras. 5.72–5.74). However, it is important to remember that debates about styles of policing and police violence are not the only concerns. Surveillance, for example via closed circuit television, is no longer the preserve of the police. Private security firms in shopping centres and other ‘private’ public areas are commonplace (Pease 2002, p. 953). Police use of video cameras at major sporting events can produce still photographs of spectators, which may then be used in compiling files on people who have no criminal record, and the files being nationally available to the police. Each of these practices is of potential application to public disorder situations.

The huge variety of statutory and common law provisions in the public order area also allows the police great freedom of manoeuvre. As we have seen, the Criminal Justice and Public Order Act 1994 (CJPOA 1994) formalised many of the powers which the police had already arrogated to themselves. There is a consistent message across public order laws (and powers) which is their use for relatively trivial purposes. For example, how serious a threat do ticket touts represent? Does it justify the extensive use of dispersal orders during the Wimbledon tennis championships?

In addition, the Police Reform Act 2002 gives power to uniformed police to require the name and address from any person believed to have been acting, or be acting, in an anti-social manner (s. 50). Ormerod and Roberts commented: ‘The potential for abuse by officers repeatedly harassing groups of youths is obvious’ (2003, p. 162). Police actions in low-level public order situations demonstrate a preference for arrest as the means to resolve the problem. Brown and Ellis concluded that section 5 (POA 1986) was over-used in restoring order by arrest, given the powers to arrest for breach of the peace or for being drunk and disorderly that exist. They concluded that the way public order policing is organised in some urban areas also predisposes towards confrontation and arrest when trouble arises. Officers are frequently deployed in groups of six or more in incident vans with the primary aim of responding quickly to instances of disorder. Making arrests provides a tangible measure of the impact of this strategy (1994, p. 51).

The relative weakness of the constraints which legal standards exert over police conduct is shown by evidence of ‘over-policing’ of those from ethnic minorities.



Corrigan, Phillip and Ben Bowling 2007 'Unsettling Racism, Crime, and Criminal Justice' in Maguire et al. (eds.) *The Oxford Handbook of Criminology* (Oxford University Press), pp. 421, 434, 450

Among the various aspects of the relationship between the police and minority ethnic communities, it is the practice of 'stop and search' that has been the most contentious. Under the 1824 Vagrancy Act, the so-called 'sus' law, a person would be arrested and prosecuted by the police and convicted at court for 'loitering with intent' to commit a crime. This highly discretionary power was used extensively and often arbitrarily against black communities . . . After [its] abolition, section 1 of [PACE] permitted an officer to stop and search someone where he or she has 'reasonable suspicion' of wrongdoing. However, allegations that minority ethnic groups were being targeted persisted and when the first 'ethnically coded' statistics on the use of PACE, section 1, were published, a clear picture of disproportionality was revealed, a pattern that persists to this day.

In the year ending April 2004, the police carried out almost 750,000 searches. Of the people stopped, 15 per cent were black, 7 per cent Asian, and 1 per cent of 'other' ethnic origin. Relative to the population as a whole, black people were 6.5 times more likely to be stopped than white people and Asians twice as likely. It should also be borne in mind that these figures conceal very significant differences *within* these crude 'ethnic' categories. In particular, the experiences of white minorities such as the Irish, Travellers, and migrants from eastern Europe – which differ markedly from those of the white majority community – are subsumed in the catch-all 'white' majority.

The use of [s. 60 CPO 1994 which allows search without suspicion where serious violence anticipated] tripled between 1998/99 and 2001/02 reaching rates per 1,000 population of 0.2 for white people, 5.5 for black people, and 3.6 for Asian people; thus black people were 28 times more likely to be searched and Asian people 18 times more likely . . . An arrest was made in only 4 per cent of searches under section 60 . . .

The ethnic disproportionality evident in prison populations can be seen at the entry point to the criminal justice system . . . The over-representation of black people in arrest statistics was evident in all offence categories, but was most striking for fraud and forgery, drug offences, and robbery . . . The over-representation of black people in Britain's prisons is a critical issue . . . The findings of self-report surveys show that black and white people have, in general, an equal likelihood of being involved in crime, with people of Asian origin being much less likely. However, police arrest data, victimization surveys and witness descriptions all point to the conclusion that black people are, in comparison with their numbers in the population, more likely to commit specific criminal offences, such as robbery. A stark example is gun murders, in which about one in three of both victims and suspects are black people. A sense of proportion is also important; the forms of crime in which black people figure prominently are rare and exist alongside other serious crime – such as burglary and city centre violence – in which people from minority ethnic communities are only slightly over-represented, if at all.

In our view, conceiving of racism as a complex and socially situated phenomenon can explain the criminal justice experiences of different ethnic groups. Thus, patterns of



selective enforcement and harsher criminal justice outcomes for black people are consistent with unjustified heightened suspicion of black people based on stereotypes. This contrasts sharply with the stereotype of Asians as passive, conformist and self regulating which – until recent anxiety about terrorism – reflects a very different criminal justice response. For this reason, we reject notions of a uniform, static, and monolithic form of racism in favour of one rooted in historical and spatial specificity.

We need to be aware of the institutional pressures under which the police work – the difficulties with which their institutional duty to quell disorder confronts them, and the pressure to present themselves as an efficient force via satisfactory clear-up rates and other modes of showing that they are ‘tackling crime’. These pressures contribute to a situation in which the police are encouraged to engage in high-visibility actions. For example, the evidence that the police stop and search a disproportionate number of Asian people under section 44 of the Terrorism Act 2000 has led to a huge increase in the number of searches in order to redress the ‘balance’. Lord Carlile, the independent reviewer of the operation of the terrorism laws said that he could ‘well understand the concerns of the police that they should be free from allegations of prejudice, but it is not a good use of precious resources if they waste them on self-evidently unmerited searches. It is also an invasion of the civil liberties of the person who has been stopped, simply to “balance” the statistics “overall”’ (June 2009). Officers in England and Wales used the powers to search 124,687 people in 2007/8, a three-fold increase from 41,924 in 2006/7. Only 1 per cent of searches led to an arrest. Nearly 90 per cent of the searches were carried out by the Metropolitan Police, which recorded a 266 per cent increase in its use of the power. If we are to understand the role that the police continue to play in the construction of the ‘law and order crisis’ and as enforcers and interpreters of criminal law, it is important to understand all aspects of the social, institutional and political context in which the police operate.

Discretion in the charging and prosecution process is especially significant in situations of disorder; typically involving large numbers of people, they invite a policy of selective enforcement. (The charges brought against *Jefferson et al.*, above, are good examples.) Yet the principles on which such a selection proceeds at successive stages – arrest, questioning, charge, final decision to prosecute – remain unarticulated and thus unaccountable. As we have seen, prosecutors may select among a vast array of offences, including not only the public order offences of disorder such as riot, violent disorder and affray but also general offences against the person, and many supplementary provisions covering different forms of obstruction and breaches of the peace. This diversity is not peculiar to public order, but it is especially marked in this area. Convictions and cautions for public order offences rose by 10 per cent to 59,300 in 2007; 207,000 PNDs were issued and, within this group

there were over 70,000 for the offence of causing harassment, alarm or distress (POA, s. 5).

Thus the proportion of public order offenders that are cautioned or subject to Penalty Notices is very high. This emphasises the deployment of these offences as policing tools for restoring or maintaining order 'on the ground'.

*Delia Roberts and Richard Gossie 2007 Punishment before justice? Understanding Penalty Notices for Disorder (Crime and Society Foundation)*

Superficially, PNDs could be considered a progressive and positive development. Individuals are dealt with quickly, without going through the rigmarole of prosecution and a court appearance. Payment of the fine implies no admission of guilt. No criminal record is acquired [although a record is kept should the 'offender' commit a similar 'offence']. But if payment of a fine implies no admission of guilt, for what is the individual being punished? In the twilight world of the PND, an 'offender' is punished for an 'offence' he or she does not have to admit to doing and for which he or she has not formally been convicted. Why might recipients pay a PND in such circumstances? The risk of acquiring a criminal record in the event of an unsuccessful challenge in court is an obvious incentive. So are financial considerations. For an individual on a low-income an £80 PND is a significant penalty; for a stockbroker it may be equivalent to loose change... There are, then, questions to be asked about whether PNDs are necessary, appropriate, proportionate and effective. In addition to this, PNDs operate outside the traditional realms of criminal justice, thus bypassing key protections afforded to members of the public accused of an offence. As such, PNDs erode justice in the name of speedier punishment. Evidence from the pilot phase suggests that PNDs have proved more effective in extending the reach of the criminal justice system than they have in keeping individuals out of it. A striking feature of PNDs during the pilot phase was their widespread imposition in cases that otherwise would not have led to a criminal justice response. Overall, PNDs enabled the police to extend their policing of minor disorder, and not simply to do more effectively what they already had been doing...

Evidence from the pilot areas also suggests that PNDs have been issued in place of cautions... PNDs also have the potential to draw more young people into the criminal justice system. The offence of 'behaviour likely to cause harassment, alarm or distress' is ambiguous and subjective. One person's nuisance is someone else's kick around in the street. In practice it will be difficult for children to be clear about what kinds of behaviour are permissible, and what might lead to PNDs. Arguably the most concerning aspect of PNDs is the scope they offer to fast-track selected individuals towards arrest, prosecution and punishment.

Young has noted a dramatic shift towards summary justice in the last 15 years. Almost a third of notifiable crime was cleared up via non-court processes such as cautions, warnings and penalty notices.

Richard Young 2008 'Street Policing after PACE: The Drift to Summary Justice' in Cape and Young (eds.) *Regulating Policing* (Hart publishing), p. 149

Cautions, penalty notices and cannabis warnings can all be thought of as police-imposed summary justice of a formal kind. But the academic literature on policing has highlighted that summary justice can also be informal, with police actions geared towards 'social disciplining'. By this is meant that the police sometimes use their powers not with the primary purpose of investigating crime or securing the imposition of a formal penalty but rather to impose discipline. Thus, for example, stop and search powers are sometimes deployed to subordinate or deter those individuals and groups perceived to be posing a threat to public order. And the power to arrest under section 5 of the Public Order Act 1986 is sometimes used to uphold police authority and enforce respect 'for the cloth'. A decision to detain and interrogate someone in a police station may be motivated by similar considerations. In other words, in these cases the process becomes the punishment, and (assuming that the process is seen as sufficient punishment) the formally recorded outcome is likely to be 'no further action' (NFA).

The outcome of NFA is particularly likely where the police lacked legal justification for the use of their powers in the first place, as this ensures that there is no independent scrutiny of their actions such as that which a court might engage in. NFA is also a likely outcome where the legal pre-condition for the exercise of a power had little substantive content (as where no individualised or reasonable suspicion is required). This is because in the vast majority of such cases no evidence of crime will be found.

However, another way to avoid independent scrutiny of the use of police powers, or to 'get a result' where sufficient evidence to prosecute is lacking, is to impose a formal penalty which effectively terminates the process prior to the possibility of such scrutiny arising. At the time the Police and Criminal Evidence Act (1984) (PACE) was enacted, the paradigm example of such a penalty was the police caution, and this is so notwithstanding the benign intentions (of avoiding criminalisation) that often underlay its use. Now, the paradigm example is the PND (where, as we shall see, quasi-criminalisation is the intention). The important point, for introductory purposes, is to note that informal and formal forms of summary justice can overlap and feed off each other. This overlap makes it difficult to gauge the extent of social disciplining. Where informal penalties and formal penalties overlap, the original motivation for the exercise of police power is usually impossible to detect.

[p. 163] That the post-PACE developments have witnessed a drift to summary justice can be demonstrated in a variety of ways. First, there has been a massive increase in the extent to which the police use their investigatory powers. As Table 2 shows, in 1986 there were 109,800 recorded stop and searches based on reasonable suspicion leading to 18,900 arrests. By 2004/05 the number of recorded stop and searches had increased eight-fold and arrests had soared to 94,600. It is well known that these figures are not wholly reliable as they are affected by police practices. However, successive sweeps of the British Crime Survey have found a rise in stop and searches from 295,000 people in 1987 to 1.1 million in 2000. Rises in (recorded) stop and searches that do not require reasonable suspicion have



also been marked . . . an increase in CJPO stop and searches of around 600 per cent in under a decade. . . .

The use of the arrest power has also soared. A careful analysis by Hillyard and Gordon found that arrests rose over the whole period from 1981 (1.27m) to 1997 (1.96m), 'with a more rapid increase since PACE became law in 1986'. The Home Office indicated in the late 1990s that 'just under 2 million persons suspected of committing an offence are arrested every year'. Arrests for notifiable offences rose from 1,277,900 in 1999/00 to 1,353,800 in 2004/05. One implication of the huge increase in the use of stop and search and arrest since PACE was enacted is that there has been a corresponding increase in the number of times people experience informal summary justice each year. The 'usual suspects' who routinely come under the purview of the police are now subject to far more social disciplining through the use of formal power than was the case when PACE came into force.

. . . The arrest power in relation to section 5 of the Public Order Act 1986 is often used in a way which blurs social disciplining with 'bringing offenders to justice'. Thus the research by Brown and Ellis found that:

From many of the section 5 cases and from interviews with arresting officers, the impression comes across very strongly that what is at issue in many of the cases in which the police are the targets of abuse or threats is the enforcement of respect for the police. Arrest is a key resource for achieving this end and section 5 is a convenient vehicle because it is very difficult for anyone later to query arresting officers' judgements about whether in the circumstances at the time they were harassed, alarmed or distressed.

When it comes to prosecution the police have the major power in influencing whether a case is ultimately prosecuted, albeit that the Crown Prosecutor's broad discretion is structured by institutional pressure to ensure efficient use of court resources and hence to pick 'winnable' cases. It is the police actions of surveillance, investigation, arrest, and decisions whether to charge which in a real sense 'create' the cases among which the Prosecution Service selects. This is well illustrated in studies showing that cases are not inherently 'strong' or 'weak' but become so by means of the amount of police effort devoted to building up evidence (McConville, Sanders and Leng 1993; Sanders and Young 2007). This is not to say that there are no controls on the construction of cases: charges may be dropped because of problems about police evidence or doubts about the legitimacy of undercover police investigative activities, and confessions may be excluded. But police attitudes and concerns will be highly relevant in shaping the selection of cases that ultimately reach the courts. It is interesting to consider some of the features of (implicit) prosecution policy revealed by public disorder situations.

Approaches to prosecution and diversion of cases are of major importance in constructing social perceptions of public disorder as well as the pattern of legal enforcement. The considerable overlap within the POA 1986 and between



public order offences and other statutes, notably the Offences Against the Person Act 1861, is acknowledged in the Charging Standards for Public Order offences. Charging Standards are agreed between the Crown Prosecution Service and the police for many offences to give guidance as to the appropriate charge arising from any given factual situation. Most of the violence which comes to the attention of the police is committed in public – at weekends, outside pubs, clubs, at football and other sporting events. Many of these events could give rise to public order offences, to criminal damage offences as well as to offences such as assault. The Charging Standard for Public Order offences acknowledges the overlapping nature of these offences, offers guidance on whether the police should proceed under public order offences, under criminal damage offences, or offences against the person (last revised 2007). The prosecution of riot requires the consent of the Director of Public Prosecutions.

Straddling the decision to prosecute and subsequent trial and sentencing is the question of bail. Both the police and courts have the power to issue bail with or without conditions. The use of bail conditions as a form of 'informal' punishment by the courts is thus now well established, and bail conditions were upheld in the case of the non-imprisonable offence under section 5 of the POA 1986 in *R v. Bournemouth Magistrates' Court, ex p. Cross* (1989). The use of 'doorstep' bail (the requirement that a defendant present herself at the doorstep during any curfew imposed when requested by a police officer) was approved in *R (on the application of CPS) v. Chorley Justices* (2002 and Home Office Circular 61/2002). About a quarter of grants of bail are accompanied by conditions mostly to reside at a specified address or not to contact a specified person. The Bail Act 1976 declares a general right to bail (s. 4). Exceptions to this include where the court has substantial grounds for believing that, if released on bail, the defendant would fail to surrender, or commit an offence or interfere with witnesses. The CJPOA 1994 introduced further restrictions on the use of bail (ss. 25–30), curtailing the general right to bail declared by the Bail Act 1976 with two new exceptions. One concerns a person charged with homicide with a previous conviction for such offence, while the other states that a person accused of or convicted of an indictable offence which appears to have been committed while on bail 'need not' be granted bail (ss. 25 and 26). The Criminal Justice Act 2003 tightened up these provisions in the light of the Law Commission's assessment of the impact of the Human Rights Act 1998 (Law Commission 2001) by stating that bail should only not be granted where there is a significant risk of reoffending or failing to surrender. The presumption in favour of bail in these circumstances is nonetheless reversed.

In considering the trial of public order cases it is worth emphasising that, in the vast majority of cases, we are speaking of magistrates' courts. Many of the offences are summary only (causing harassment and alarm under POA 1986, s. 5 for example), and many are triable either way (violent disorder and affray under ss. 2 and 3). Magistrates decide whether to commit triable either-way

offences for trial at Crown Court. The procedure of 'plea before venue' has reduced the number committed for trial but increased the number committed for sentence. If the defendant indicates that she will plead guilty there is a clear incentive for magistrates to retain the trial.

### *Ministry of Justice Consolidated Practice Direction 9.2.1*

#### MODE OF TRIAL

##### **General mode of trial considerations**

(V.51.2) Section 19 of the Magistrates' Courts Act 1980 requires magistrates to have regard to the following matters in deciding whether an offence is more suitable for summary trial or trial on indictment:

- (a) the nature of the case;
- (b) whether the circumstances make the offence one of a serious character;
- (c) whether the punishment which a magistrates' court would have power to inflict for it would be adequate;
- (d) any other circumstances which appear to the court to make it more suitable for the offence to be tried in one way rather than the other;
- (e) any representations made by the prosecution or the defence

##### **Public Order offences**

(V.51.11) Cases should be tried summarily unless the court considers that one or more of the following features is present in the case and that its sentencing powers are insufficient. Magistrates should take account of their powers under sections 3 and 4 of the Powers of Criminal Courts (Sentencing) Act 2000 to commit for sentence;

- (a) Cases of violent disorder should generally be committed for trial;
- (b) Affray;
  - (i) Organised violence or use of weapons;
  - (ii) Significant injury or substantial damage;
  - (iii) The offence has clear racial motivation;
  - (iv) An attack on police officers, ambulance staff, fire-fighters and the like.

In 2007, of the 1,159 proceeded against for violent disorder, 860 were committed for trial at the Crown Court. Of those committed for trial, 146 were less than 18 years old, and seven were under 15. Conversely for 'other public order' either-way offences (most of which are likely to be affray), of 7,911 proceedings, only 2,477 were sent for trial at the Crown Court. We can see these in perspective when we compare the total number found guilty of indictable public order offences in 2007 – violent disorder (684), other *indictable* public order offences (8,284) – with the number of *summary* convictions under the POA 1986 (1,415,904). (There is an inevitable discrepancy in the numbers proceeded against and found guilty; this is accounted for by the timelag between commitment and trial.)

One important feature of the difference between trial by magistrates and that by higher courts has to do with sentencing powers: under the Magistrates' Courts Act 1980 these are limited to a term of six months' imprisonment or a fine of up to £5,000. This is in sharp contrast to the situation with many indictable offences: riot and violent disorder respectively attract maxima of ten and five years and/or unlimited fines; malicious wounding under section 20 of the Offences Against the Person Act 1861, and the lesser section 47 offence of assault occasioning actual bodily harm, both attract maxima of five years. In dealing with offences triable either way (all those mentioned above, with the exception of riot), magistrates have the power to commit to the Crown Court for sentence where they feel that their powers are inadequate (Powers of Criminal Courts (Sentencing) Act 2000, s. 3). The relatively small number of cases which are tried on indictment have often, as Williams also notes, attracted very punitive judicial reactions in the exercise of the wide sentencing powers of the higher courts. We can be fairly confident that general predispositions of sentencers will be relevant in public order sentencing and in particular that the increasing resort to imprisonment, together with the disproportionate tendency to sentence black defendants to terms of custody, will be reflected in the public order area (Hood 1992; Phillips and Bowling 2007).

A useful case study for our analysis of sentencing in the public order area is the Bradford riot which in 2001 resulted in more than a hundred convictions with sentences ranging between four and six-and-a-half years. Allowing four appeals against sentence, but upholding 11 others, the Court of Appeal said that deterrent sentences were necessary. The riot had been serious: it lasted for 12 hours, involved many hundreds of people, missiles had been aimed at police officers, many of whom had been injured, and damage running to many millions of pounds had been caused. The court described as 'unfortunate' the Recorder's statement that he was 'not concerned with the origins of the violence'. If, by that, he meant that the causes of the riot were irrelevant to the court, then he was wrong, said Rose LJ. The Court of Appeal ruled that the riot was almost certainly triggered by the stabbing of an Asian man in central Bradford and that 'the Asian community was understandably concerned to defend itself against right-wing groups'. But what had begun as a spontaneous reaction became marked by premeditation. The riot then became directed at the police. Personal mitigation and good character carried comparatively little weight, as did guilty pleas since video evidence clearly identified the defendants and showed some of their actions. The appropriate sentence for any ringleader would have been around the maximum of ten years' imprisonment; an active and persistent participant who had used petrol bombs should receive a sentence of eight to nine years after a trial; sentences of six or seven years would be appropriate for those who had participated over a number of hours and had thrown missiles which were more dangerous than stones but less dangerous than petrol bombs; those who were present for a significant period and had thrown stones should receive five years after a trial while those who had taken part to a lesser degree



would receive sentences at a lower level (*Najeeb et al.*, 2003). It is not clear why the one-third discount for a guilty plea should be reduced on the ground that technology delivers better evidence, nor how a riot could be both spontaneous and premeditated.

The power to remand in custody or impose conditions on bail, combined with the wide-ranging sentencing discretion and the other informal discretions of judges and magistrates in terms of their demeanour towards witnesses and lawyers, their acceptance or rejection of evidence and so on, gives them considerable scope to shape the outcome of public order (and indeed other) trials. A combination of sentencing and other powers therefore renders the courts powerfully equipped to deal severely and in a highly discretionary way with offenders. The current salience of law-and-order issues, the existence of moral panics and the temptation to single out certain categories of offender as subject to especially punitive treatment render these powers particularly significant in the public order context.

#### 11.7.d. Thematic summary

We have covered considerable ground in this section, exploring conceptions of order and disorder, inclusion and exclusion, from sociological, political and historical perspectives. Because public order is central to the criminal justice system, this analysis is informative for criminal law in general, not just for that part of it that is categorised as 'public order' law. Moral panics and risk society provide useful theoretical concepts when examining criminal law responses to drugs and alcohol (see below Section III), mugging and burglary (Section IV), sexual offences (Section V) and corporate manslaughter (Section VI). Understanding criminal justice policies and practices as products of many interlocking forces is both useful and necessary.

The examples of 'public disorder' we have been considering are merely some of the most significant among a vast array of instances we might have chosen. For example, on a wide view of public disorder, people from different political perspectives might include soliciting for the purposes of prostitution; kerb-crawling or otherwise sexually harassing women; public drunkenness; crimes committed by the police; organised crime; joy-riding; drunken and/or dangerous driving; environmental pollution; and blasphemy. Moreover, we have scarcely touched on terrorism, which is almost universally acknowledged as a major threat to public order, increasingly dominating the criminal justice and due process agenda, and giving rise to broad powers (Walker 2007). The instances we have considered provide the necessary context in which to appreciate the operation and legitimisation of institutionalised legal responses to disorder, and we now draw out some general themes from them.

First, it is clear that notions of public disorder cover an enormous variety of kinds of behaviour, in terms of participants, content, motivations and consequences. This is true even of the idea of public disorder as conventionally used.



Why should an assault or street theft not be regarded as a threat to public order? Theft (under £200) and criminal damage (under £500) are in fact now subject to Penalty Notices for Disorder but that is perhaps more a terminological convention than one indicating a conceptual change. Of more pertinence is that street robberies, constructed as 'muggings' in the 1970s, were seen as a 'law and order problem' in an episode which had all the classic hallmarks of Cohen's moral panic (S. Hall *et al.* 1978).

This example, among others, demonstrates the malleability of the notion of disorder as a threat to state authority and the ways in which it can be appealed to reinforce punitive state reactions to forms of behaviour which, taken as individual instances, would not be seen in nearly such threatening terms. In such contexts, we can see that use of the term 'public' signifies not a particular sphere of activity (already hard to define) but rather the conception of order which prevails: that of the state or particular powerful groups within it. There is no logical barrier to regarding issues such as child abuse or other forms of 'domestic' violence as threatening to public order: the refusal or reluctance so to see them is political and cultural. In other words, this approach exposes the fact that in our society a husband's 'chastisement' (the conventional word is revealing) or 'battering' of his wife is still seen in some quarters as more an expression of a certain aspect of the social order (the patriarchal family) than a threat to it. A similar point could be made about attitudes to racial harassment and their relation to white supremacy. By showing the logical defensibility of a progressive extension of the application of the concept of public disorder, we can expose the contingency of the categories in terms of which the world is conventionally socially and legally constructed.

The second theme which emerges from the texts is that of the importance of 'folk devils' and 'moral' panics in understanding the social construction of public disorder. What is happening in many of the situations considered is the representation of some set of events as a serious and novel threat to the social order. Thus, public fear and anxiety are increased in a way which confirms the 'amplification of deviance' model: a combination of the labelling of certain behaviours as 'deviant' by both the public and the participants and the legitimisation of punitive state responses creates an ascending spiral. This point is well summarised by Hall *et al.*:

S. Hall, C. Critcher, T. Jefferson, J. Clarke and B. Roberts 1978 *Policing the Crisis: Mugging, the State, and Law and Order* (Macmillan), p. 29

What the agencies and the press were responding to was not a simple set of facts but a new definition of the situation – a new construction of the social reality of crime. 'Mugging' provoked an organised response, in part because it was linked with a widespread belief about the alarming rate of crime in general, and with a common perception that this rising crime was also becoming more violent. These social aspects had entered into its meaning. We have entered the realm of the relation of facts to the ideological constructions of 'reality'.

We concluded from [a statistical] examination that the reaction to 'mugging' was out of all proportion to any level of actual threat which could be reconstructed through the unreliable statistics. And since it appeared to be a response, at least in part, not to the actual threat, it must have been a reaction by the control agencies and the media to the perceived or symbolic threat to society – what the 'mugging' label represented. But this made the social reaction to mugging now as problematic – if not more so – than 'mugging' itself. When such discrepancies appear between threat and reaction, between what is perceived and what that is a perception of, we have good evidence to suggest we are in the presence of an ideological displacement. We call this displacement a moral panic.

The pervasiveness of moral panics in the arena of public disorder suggests the importance of 'public order', both perceived and actual, to the stability and continuity of the state and the susceptibility of our society to fears of social dissolution.

A third emerging theme is that of the *historical continuity* of social and public disorder. This is accompanied by a contemporary 'amnesia' about the facts of disorder in successive generations which is material to the construction of folk devils and moral panics. It seems that whatever contemporary example of disorder we pick upon, we can find analogues in almost any period of history. This is not to say, of course, that the struggles and activities of the Chartists, the Luddites, food rioters, the 'Blacks' who roamed the eighteenth-century forests, the garrotters, vagrants, Guy Fawkes and his associates or the suffragettes find exact analogues in current public disorder, nor to deny that public disorder is more widespread in some periods than in others. It is merely to identify the persistence of disorder perceived and interpreted as such by successive societies. In seeking to understand social constructions of disorder in the past, we find certain recurring themes. These include ideas of the young, of 'outsiders' such as immigrants, ethnic minority members, of 'agents provocateurs', of those whose lifestyle deviates from the norm, and of disadvantaged socio-economic groups, any or all of whom are seen as especially implicated in public disorder or as posing a special threat of it. Fears of dissolution of the social order and of social consensus lead to the paradox that wartime is perceived as a period of public order and to the marginalisation of associated forms of disorder such as looting (Pearson 1983, pp. 239–41). Links are drawn between explanations of disorder and anxieties about dissolution of social structures such as the family (for example, explanations of juvenile crime in terms of women working outside the home), about lack of discipline and about failures of education.

Fourth, it is impossible to ignore *the role of news media* in constructing moral panics and other public images of disorder. The evaluative and constructive role of the press, television and radio in selecting, filtering and presenting political, police and public reactions and in producing images of contemporary disorder is amply attested to by the most cursory perusal of reports of industrial action, 'riots' and law and order news generally (see Chibnall 1977, pp. 226ff).

S Hall et al. 1978 *Policing the Crisis: Mugging, the State, and Law and Order* (Macmillan), p. 58

[T]wo aspects of news production – the practical pressures of constantly working against the clock and the professional demands of impartiality and objectivity – combine to produce a systematically structured over-accessing to the media of those in powerful and privileged institutional positions. The media thus tend, faithfully and impartially, to reproduce symbolically the existing structure of power in society's institutional order. This is what Becker has called the 'hierarchy of credibility' – the likelihood that those in powerful or high-status positions in society who offer opinions about controversial topics will have their definitions accepted, because such spokesmen are understood to have access to more accurate or more specialised information on particular topics than the majority of the population. The result of this structured preference given in the media to the opinions of the powerful is that these 'spokesmen' become what we call the primary definers of topics.

This extract leads us to a fifth theme – that of *the importance of perspective*. The idea of disorder is not simply descriptive: the notion of public order imports the idea of a state of affairs or behaviour which is ordered (i.e. acceptable) from a particular (powerful/legal/political) point of view. None of the instances of disorder we have discussed, nor any others we might cite, is 'disordered' in the sense of being chaotic or senseless to the participants – although they may of course be deliberately disordered in the sense of being intended as violations of the established order and authority. Whether we are dealing with intentional civil disobedience, or with peaceful demonstrations, or with football crowd behaviour ('ordered' to the point of being ritualistic), or with apparently un-ordered behaviour such as spontaneous 'riots', at one level or another we are dealing with competing definitions of order. These definitions challenge the established order and assert the legitimacy of alternative conceptions of order, behaviours or forms of life. Because of this, albeit loose, continuity, we can see that any form of behaviour which can be interpreted as a challenge to authority or consensus is susceptible of being socially constructed (whether in terms of a moral panic or not) as a 'public order problem'. Hence, although there is wide agreement that, for example, sedition, riot and mass hooliganism constitute 'public order problems', and although what is conventionally accepted as 'public order law' responds directly to these phenomena, at the margins there is always the possibility of the incorporation of other phenomena (such as 'mugging' or 'picketing'), and this flexibility is matched in legal definitions and enforcement practices.

This insight about the importance of points of view is crucial, but it is obscured by a move that is central to legal discourse: the objectification of a particular point of view. In other words, institutional political reaction, including legal reaction, reflected in the media, sets up the authoritative, politically endorsed conception of order as the conception: public order is that which the state and legal institutions define it to be. A particularly clear example of the



suppression of alternative interpretations and points of view can be seen in the police and media construction of events leading up to disturbances on the Broadwater Farm Estate in Tottenham, North London, in 1985, during which a police officer was killed. (This incident resulted in one of the miscarriage of justice cases discussed in Chapter 3.a.iii.) One of the main incidents represented as foreshadowing trouble and calling forth a massive police response was a march by black people to the police station to protest over recent police action on the estate. A particular focus of protest was an incident in which a woman collapsed and died after her home had been searched without a warrant. The march was portrayed as a menacing incident; what was not explained was that such delegations were a conventional mode of peaceful protest in that community, as was well known to the police (see Gifford 1986). This kind of reporting in turn facilitates the depoliticisation of civil disobedience and other forms of disorder and their construction as 'mere lawlessness', calling for criminal law responses, which are represented as apolitical. The interpretation of moral panics as subject to legal containment and control serves symbolically to allay public anxiety and reinforce consensus notwithstanding its modest instrumental contribution to preventing and quelling disorder. The phenomenon of 'public disorder' becomes (in an apparent paradox which has a hidden logic) a site for the assertion and demonstration of the state's legitimacy and authority.

The examples drawn from the Public Order Acts confirm the political and symbolic significance of criminal laws which proclaim themselves to be concerned with public order. In constructing an authoritative conception of what counts as disorder, and by setting this up in the formal clothing of legal regulation, the law sets the scene for political and social institutions to depoliticise protest and disorder as 'mere lawlessness'. By entrenching a selection of salient 'popular images' such as 'disorder' and 'violence' in the legislation, law enforcement is enabled both to feed moral panics and to respond to popular fears in a way which is comforting and which confirms the power and authority of government. In deconstructing some examples, we hope to have exposed the political aspects of the operation of public order law.

### FURTHER READING

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- Steven Box *Recession, Crime and Unemployment* (Macmillan 1987), Chs. 1–4.
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- Ian Loader and Richard Sparks 'Contemporary Landscapes of crime, order, and control: governance, risk and globalization' in Maguire *et al.* (eds.) *The Oxford Handbook of Criminology* (Oxford University Press 2007), p. 78.



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- Paul E. Mullen and Michele Pathe 'Stalking' in Tonry M. (ed.) *Crime and Justice: A Review of Research* (Vol 29, University of Chicago Press 2002), p. 273.
- Mike Nellis 'News Media, Popular Culture and the Electronic Monitoring of Offenders in England and Wales' (2003) 42 *Howard Journal* 1.
- Tim Newburn 'Youth Crime and Youth Justice' in Maguire *et al.* (eds.) *The Oxford Handbook of Criminology* (Oxford University Press 2007), p. 575.
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- Lord Scarman *The Brixton Disorders* (Penguin 1982).
- Andrew Sanders and Richard Young *Criminal Justice* (Oxford University Press 2007).
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- Lucia Zedner 'The Concept of Security: an Agenda for Comparative Analysis' (2003) 23 *Legal Studies* 153.

## Section III

# Interpersonal Violence; Drugs and Alcohol Abuse; Offence Preparation and Participation

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### 8 Offences Against the Person

- a. The framework
  - i. Assault and battery
  - ii. Occasioning actual bodily harm, wounding and grievous bodily harm
- b. Boundary issues:
  - i. Psychiatric harm
  - ii. Consent
  - iii. Disease transmission
- c. Practice and reform
  - i. Crime patterns
  - ii. Charging practice
  - iii. Reforming offences against the person

### 9 Drug and Alcohol Abuse: Legal Constructions of a Social Problem

- a. Drug and alcohol control
  - i. The nature of the problem
  - ii. Prohibition and regulation
- b. Intoxication and criminal responsibility

### 10 Offence Preparation and Participation

- a. Preparation
  - i. Attempt
  - ii. Conspiracy
  - iii. Assisting and encouraging
  - iv. Inchoate liability, impossibility and patterns of criminality
- b. Participation
  - i. Aiding and abetting
  - ii. Joint enterprise

We have already laid the foundations for this Section since in many cases the disorder offences discussed in Chapter 6 dovetail with those of personal violence (assault, wounding and so on) that form the subject of Chapter 8 below. Arguments about the regulation of drug and alcohol use, including the construction of the dangerous deviant and the doctrinal relevance of intoxication to criminal liability, are then canvassed in Chapter 9. We conclude with an introduction to inchoate and secondary modes of liability. Inchoate modes such as conspiracy, attempt and the recent introduction of offences of assisting or encouraging crime allow liability even though an offence is not complete. Participation or secondary liability (also known as complicity, or aiding and abetting) is a method of attaching liability for completed offences, considerably broadening the circle of liability.

Taken together the three chapters in this Section continue to illustrate the continuity between the narrow, 'literal' conception of criminal law doctrine and the broad, political and 'metaphysical' conception with which we would argue law is equally concerned. We have met the challenge of understanding criminal law in these broad contexts by examining both substantive offences and the conditions for criminal responsibility. One important issue is how criminal law responds to the (not uncommon situation of) the defendant who claims not to have known what she was doing because she was drunk. We could postpone consideration of this until we have analysed all substantive offences but that would distort the overall picture that we need to construct. Similarly, we could proceed as though every offence were committed by a lone actor but that again would fly in the face of social reality and again paint a skewed image of criminal law. It is helpful to see how criminal law deals with those who play a part in the offences committed by others, and also how it responds to those who intend to commit offences but for one reason or another do not complete the job. Preparation offences and rules of secondary participation significantly widen the net of criminal responsibility as we show in Chapter 10.

## Offences Against the Person

It is useful to place interpersonal violence in the context of crime levels as a whole. The Home Office annual report on crime refers to the British Crime Survey (BCS) and to crime recorded by the police:

*Home Office 2009 Crime in England and Wales 2008/9*

### Summary of the main findings

The majority of crimes are property related.

- Vandalism accounts for 26% of all BCS crime (two-thirds of which is vehicle vandalism); criminal damage accounts for one in five (20%) of crimes recorded by the police.
- Vehicle-related theft accounts for 14% of all BCS crime. Offences against vehicles account for 13% of recorded crime.
- Burglary accounts for 7% of all BCS crime and 12% of recorded crime. Violent crime represents around a fifth (20%) of BCS crime. Violence against the person also accounts around a fifth (19%) of police recorded crime.

We focus here on assault and battery, and on the three main general offences under the Offences against the Person Act 1861: actual bodily harm (s. 47), malicious wounding (s. 20), and causing grievous bodily harm with intent (s. 18). The somewhat imperfect hierarchy of the 1861 Act reflects both differences in the seriousness of injury or harm *and* in the mental element. The government initially endorsed the codified set of offences based on the Law Commission's proposals in Report No 218 (1993) but as yet no legislation has been introduced (Home Office 1998).

After setting out the basic framework of these offences we then explore three issues that affect their boundaries: first, the adaptation of the traditional conception of interpersonal violence as an invasion or intrusion of the physical body to include the mental distress induced by anonymous communications (silent telephone calls for example); second, the role of consent; and third, whether these traditional offences should be used to criminalise those who transmit HIV through consensual sexual activity. These last two issues are of course connected. We consent to all kinds of physical activities that would



be regarded as unlawful if we had not consented. What are or should be the limits of our consent? The final part of this Chapter discusses prosecutorial and sentencing practices and proposals for reform.

### III.8.a. The framework

#### Assault and battery

These basic level offences in the hierarchy are not statutorily defined. They are separate summary offences leading on conviction to a maximum penalty of imprisonment of six months or a fine not exceeding level five (Criminal Justice Act 1988, s. 39). Note, however, that the word 'assault' is frequently and confusingly used to embrace both technical assault (causing apprehension of violence) and battery (physical touching).

#### *Assault occasioning actual bodily harm*

##### Offences against the Person Act (OAPA) 1861, s. 17

Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable . . . to [imprisonment for five years].

Moving up the hierarchy, we reach the serious injury offence of malicious wounding in s. 20.

##### OAPA 1861, s. 20

Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of [an offence], and being convicted thereof shall be liable . . . to [a term of imprisonment not exceeding five years].

The offences under sections 47 and 20 are triable either way and, despite malicious wounding being regarded as the more serious of the two, they both carry a maximum of five years. A clear line is drawn between them through the use of prosecution and sentencing guidelines.

Finally, the most serious general offence, wounding or causing grievous bodily harm with intent, is contained in section 18. It is indictment only.

##### OAPA 1861, s. 18

Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person . . . with intent . . . to do some grievous bodily harm

to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of an offence, and being convicted thereof shall be liable . . . to [imprisonment] for life.

The maximum sentence available is increased where assault, actual bodily harm or malicious wounding are charged in their racially or religiously aggravated forms as follows: assault and battery becomes triable either way with a maximum of two years; assault, actual bodily harm and wounding under section 20 have a maximum of seven years (Crime and Disorder Act 1998, s. 29). (Hate crimes are discussed in detail in Chapter 6.d.)

Assault occasioning actual bodily harm is one of a number of 'assault plus' offences (assaulting a police officer in the execution of his or her duty (Police Act 1996, s. 89(1)) is another). The basic concepts in relation to assault and battery apply to these offences. The important point is that once the offence ingredients of assault or battery have been proved, no further mental element is required for 'assault plus' offences (see the extracts from *Venna* 1975, and *Savage and Parmenter* 1992, below). These assault plus offences are sometimes referred to as 'aggravated'. However, since the same term is used in the statutory description for racially or religiously aggravated offences it would lead to confusion to continue to use it as a means of categorising offences, hence we adopt the 'assault plus' formula instead.

### The ladder of harm

The offences under the OAPA 1861 have, for the most part, received wide, flexible definitions from the courts. Actual bodily harm under section 47 comprises any harm whatsoever, however slight; and grievous bodily harm has been defined as 'really serious injury', the example given being that of a broken limb (*DPP v. Smith*, 1961). A wound (the alternative 'actus reus' in both ss. 18 and 20) means merely a break in the skin (*C v. Eisenhower*, 1984). Thus, these very serious offences against the person could in principle be proven in circumstances that anyone outside a legal context would probably interpret as relatively minor or trivial. This area also illustrates the flexibility of some of the basic doctrinal principles regarding 'actus reus'. One example is the liberal principle that criminal regulation should cover actions rather than omissions, out of respect for the freedom of the individual. *Fagan v. Metropolitan Police Commissioner* (1969) clearly demonstrates the ultimate flexibility of this distinction: the common-sense omission to remove the car from the police officer's foot was constructed as an action, on the basis of its interpretation as part of a continuing course of conduct. Hence, criminal law's usual focus only on the isolated, momentary actions of the abstract individual can always be broadened out to include reference to past actions and context when this facilitates the law's coercive functions. As Kelman puts it, legal discourse switches between

momentary and non-momentary time frames and between broad and narrow views of the defendant. It does so in a pragmatic way which is obscured by legal doctrine (Kelman 1981).

We consider whether 'harm' in all three offences includes psychiatric injury in section b.i. below.

### The mental element ladder

In terms of 'mens rea', recklessness is sufficient for assault and battery (and also for assault occasioning actual bodily harm), and for malicious wounding. Wounding or causing grievous bodily harm with intent, requires proof of intention. But reckless as to what and intention as to what in each case does not always follow the logic of exactly mirroring the harm element. The easiest way to see how these have developed is by reading *Savage* and *Parmenter* below. In these combined appeals, the House of Lords considered the relationship between the offences of assault and battery, assault occasioning actual bodily harm and malicious wounding.

The table below summarises the main differences between these offences.

| Offence    | Prerequisite               | Harm element          | Mental element                 | Sentence           |                                                                                           |
|------------|----------------------------|-----------------------|--------------------------------|--------------------|-------------------------------------------------------------------------------------------|
|            |                            |                       |                                | Max.               | Explanation                                                                               |
| Assault    | Cause                      | apprehension of force | Intend or foresee risk         | 6 mths<br>*[2 yrs] | Put person in fear they will be physically touched                                        |
| Battery    | Cause                      | force                 | Ditto                          | Ditto              | Touching                                                                                  |
| OAPA s. 47 | Assault or battery causing | actual bodily harm    | [As for assault or battery]    | 5 yrs *[7]         | More than 'transient and trifling'. Includes psychological harm.                          |
| OAPA s. 20 | Inflict                    | wound or gbh          | Foresee risk of some harm      | 5 yrs *[7]         | Wound is break of skin.<br><br>Gbh is really serious injury. Includes psychological harm. |
| OAPA s. 18 | Cause                      | wound or gbh          | Intend gbh or to resist arrest | Life               | 'Cause' possibly wider than 'inflict' under s. 20.                                        |

\* Where racially or religiously aggravated

### III.8.a.i. Assault and battery

Assault can be broadly defined as putting a person in fear of the application of immediate personal violence, while battery is the application of force to the person (*DPP v. K.*, 1990).

The mental element in assault and battery is intention or subjective recklessness. Assault and battery constitute a good example of the way in which

criminal law often fails to fulfil its own doctrinal ideals. Arguments for the justice of 'subjective' responsibility are premised at least implicitly on that responsibility existing as to the full extent of the 'actus reus'. This restricted 'mens rea' requirement must also be seen in the light of arguments about how courts can be expected to 'find' subjective mental elements. It will be difficult for them to avoid a form of reasoning based on what they think *must* have been in the defendant's mind, which is influenced by what they think *should* have been, and therefore by what they think *would* have been in their own minds in the circumstances. The way in which 'mens rea' is inferred is well illustrated by the following case which affirmed the subjective principle whilst exemplifying its flexibility. *Venna* also contains a classic definition of battery (in this case the word 'assault' is used generally to include 'battery'):

*R v Venna* [1975] 3 All ER 288, CA

[Venna and others were creating a disturbance in a public street. The police were sent for and during a scuffle which ensued as the police sought to arrest him the appellant kicked out with his feet. In so doing he struck the hand of an officer and caused a fracture. He was convicted of an assault occasioning actual bodily harm.]

**James LJ:** . . . [T]he judge directed the jury in these terms . . . :

. . . Counsel on behalf of Venna says, 'Well, he is not guilty of an assault because it was neither intentional nor reckless. It was a pure accident that he happened to hit the officer', and this is quite right. If you hit somebody accidentally, it cannot be a criminal offence. So you have got to ask yourselves, 'Was this deliberate, or was it reckless?' If it was, then he is guilty. To do an act deliberately hardly needs explanation. If you see somebody in front of you and you deliberately kick him on the knee, that is a deliberate act and, no two ways about it, that is an assault but it can equally well be an assault if you are lashing out, knowing that there are people in the neighbourhood or that there are likely to be people in the neighbourhood and, in this case, it is suggested that he had two people by his arms and he knew that he was being restrained so as to lead to arrest. If he lashed out with his feet, knowing that there are officers about him and knowing that by lashing out he will probably or is likely to kick somebody or hurt his hand by banging his heel down on it, then he is equally guilty of the offence. Venna can therefore be guilty of the offence . . . if he deliberately brought his foot down on Police Constable Spencer's hand or if he lashed out simply reckless as to who was there, not caring an iota as to whether he kicked somebody or brought his heel down on his hands.

Counsel for the appellant argued that the direction is wrong in law because it states that the mental element of recklessness is enough, when coupled with the actus reus of physical contact, to constitute the battery involved in assault occasioning actual bodily harm. Recklessness, it is argued, is not enough . . .

On the evidence of the appellant himself, one would have thought that the inescapable inference was that the appellant intended to make physical contact with whoever might try



to restrain him. Be that as it may, in the light of the direction given, the verdict may have been arrived at on the basis of 'recklessness'.

... In our view the element of mens rea in the offence of battery is satisfied by proof that the defendant intentionally or recklessly applied force to the person of another. If it were otherwise, the strange consequence would be that an offence of unlawful wounding contrary to s. 20 of the Offences Against the Person Act 1861 could be established by proof that the defendant wounded the victim either intentionally or recklessly, but if the victim's skin was not broken and the offence was therefore laid as an assault occasioning actual bodily harm contrary to s. 47 of the 1861 Act, it would be necessary to prove that the physical force was intentionally applied.

We see no reason in logic or in law why a person who recklessly applies physical force to the person of another should be outside the criminal law of assault. In many cases the dividing line between intention and recklessness is barely distinguishable...

The relatively clear facts in this case should not blind us to the way in which the trial judge's direction effectively gives with one hand (by stating a general, liberal principle favourable to the accused) and takes away with the other (by drawing inferences rendering that principle inapplicable in the context in question). This approach is continued in the more serious offences of personal violence in the OAPA 1861.

### III.8.a.ii. Occasioning actual bodily harm, wounding and grievous bodily harm

Assault occasioning actual bodily harm is clearly a statutory offence but is not defined in any detail. The essence of the section 47 offence is that the assault 'occasions' (that is, causes) 'actual bodily harm'. Hobhouse LJ said in *Chan-Fook* (1994) that this phrase could 'in the ordinary course' be left undefined: 'The word "harm" is a synonym for injury. The word "actual" indicates that the injury (although there is no need for it to be permanent) should not be so trivial as to be wholly insignificant.'

In terms of harm 'malicious wounding' under section 20 and 'wounding with intent' under section 18 of the OAPA 1861, both require proof of wounding (breaking of the skin) or of grievous bodily harm (really serious injury).

The main questions that have exercised courts arise because the 1861 Act was merely a collation of existing offences drawn together in a statute. It neither codifies nor even consolidates. There are numerous inconsistencies in the language used. In particular three different terms are used to describe the causal relationship between the defendant's act and the resulting harm: 'occasions', 'inflicts' and 'cause'. Do they mean something different? While occasions and cause have been taken to be synonymous, it was thought that 'inflicts' was narrower than cause, but any practical distinction has been eroded initially by a decision that section 20 could be an alternative verdict to section 18 (*Wilson* 1984) and then in *Burstow*, 8.b.i. below (harm caused by silent telephone calls)

and *Dica*, 8.b.iii. below (sexually transmitted HIV). The harm elements themselves have acquired technical meanings rather removed from what might seem their ordinary language meaning – ‘battery’ means a slight touching, ‘actual bodily harm’ is something trivial (and as we see later is not necessarily physical) and ‘wounding’ requires bleeding which in the past may have been life threatening but nowadays often is not. The mental elements are also imprecise. What is the mental element in actual bodily harm? What does ‘malicious’ wounding mean? These questions were considered in *Savage* and *Parmenter* below:

*R v Savage (1997) 1 Cr App R 199, [1997] 1 AC 13*

**Lord Ackner:** ... [T]hese two appeals have been heard together, because they each raise the issue of the mental element which the prosecution have to establish in relation to offences under two sections of the Offences Against the Person Act 1861, viz s. 20, unlawfully and maliciously wounding or inflicting grievous bodily harm, and s. 47, assault occasioning actual bodily harm.

... [S was convicted of unlawful wounding under s. 20. She had thrown a glass of beer at another woman with the result that the woman’s wrist was cut by the glass]. ...

In the course of his summing up the recorder said:

It is alleged that on 31 March Mrs Savage unlawfully and maliciously wounded Tracey Beal. What does this mean? First of all it means that you must find Susan Savage did some unlawful action, unlawful in the sense that it was not in self-defence and it was not a mere accident; malicious in the sense that it was deliberate and aimed against Tracey Beal and that as a result of that unlawful, deliberate act aimed against Tracey Beal, Tracey Beal suffered a wound. ... She went up to her ... and threw deliberately the contents of a pint glass at her. That is an assault, that is an unlawful action aimed deliberately against Tracey Beal. Mrs. Savage admitted it. ... If you were sure that in throwing the liquid from the glass she let go of the glass and it struck Miss Beal, then that is a consequence of her unlawful act. If a wound resulted from it then that is unlawful wounding.

In the Court of Appeal reference was made to *R v Mowatt* [1967] 3 All ER 47 and to the following statement of Diplock LJ, giving the judgment of the court:

In the offence under s. 20 ... the word ‘maliciously’ does import on the part of the person who unlawfully inflicts the wound or grievous bodily harm an awareness that his act may have the consequence of causing some physical harm to some other person. ... It is quite unnecessary that the accused should have foreseen that his unlawful act might cause physical harm of the gravity described in the section, i.e., a wound or serious physical injury. It is enough that he should have foreseen that some physical harm to some person, albeit of a minor character, might result. ...

The Court of Appeal observed that, despite doubts which had been expressed about the above statement of the law, it was binding on the court and that the test imported by

the word 'maliciously' is a subjective and not an objective one. In the opinion of the Court of Appeal, it accordingly followed that the recorder was wrong to direct the jury that 'maliciously' meant deliberate and aimed at Tracey Beal with the result that wound occurred. The recorder omitted to direct the jury that they had to find that Mrs Savage foresaw that some physical harm would follow as a result of what she did. The question as to whether she foresaw that her act was likely to cause some harm, other than wetting Miss Beal with the beer, was a question they should have been asked to consider. In view of this misdirection, the Court of Appeal quashed the verdict and then went on to consider whether they should substitute another verdict.

[The Court of Appeal decided that a verdict of guilty of assault occasioning actual bodily harm, contrary to s. 47 of the 1861 Act should be substituted, and then] gave leave to appeal, certifying the following points of law to be of general public importance:

1. Whether a verdict of guilty occasioning actual bodily harm is a permissible alternative verdict on a Count alleging unlawful wounding contrary to section 20 of the Offences Against the Person Act, 1861?
2. Whether a verdict of guilty of assault occasioning actual bodily harm can be returned upon proof of an assault and of the fact that actual bodily harm was occasioned by the assault?
3. If it is proved that an assault has been committed and that actual bodily harm has resulted from that assault, whether a verdict of assault occasioning actual bodily harm may be returned in the absence of proof that the Defendant intended to cause some actual bodily harm or was reckless as to whether such harm would be caused...

[Parmenter was convicted of four offences under s. 20 for causing injury to his baby son. The trial judge directed the jury as to the meaning of 'maliciously' by quoting from the case of *Mowatt*. The Court of Appeal noted that the judge had 'inadvertently imparted a fundamental change to the principle laid down in *Mowatt*' by asking the jury 'Are we sure that he should have foreseen that some physical harm, albeit of a minor character might result?' Although Diplock LJ uses this phrase in *Mowatt*, the Court of Appeal held that using it out of context would lead the jury to believe they were being asked 'not whether the defendant *actually* foresaw that his acts would cause injury, but whether he *ought to have* foreseen it' (emphasis in original). The Court of Appeal quashed the convictions under s. 20 and then considered whether to substitute convictions under s. 47. It discovered that the Court of Appeal had delivered two judgments on the necessary intent for s. 47 on the same day – *Savage* being one and *Spratt* [1991] 2 All ER 210 the other – and had reached opposite conclusions as to whether foresight is required as to the consequences of the assault.]

[T]he Court of Appeal... certified the following points of law to be of general public importance:

- 1(a) Whether in order to establish an offence under Section 20 of the Offences Against the Person Act 1861 (the Act) the prosecution must prove that the defendant actually

foresaw that his act would cause the particular kind of harm which was in fact caused, or whether it is sufficient to prove that (objectively) he ought so to have foreseen.

(b) The like question in relation to section 47 of the Act.

2(a) For the purposes of the answer to Question 1(a), whether the particular kind of harm to be foreseen may be any physical harm, or harm of (i) the nature, or (ii) the degree, or (iii) the nature and the degree of the harm which actually occurred.

(b) The like question in relation to section 47 of the Act.

It will be observed that some of the certified questions in *R v. Parmenter* overlap with those in *R v. Savage*.

#### [Assault occasioning actual bodily harm]

... Can a verdict of assault occasioning actual bodily harm be returned upon proof of an assault together with proof of the fact that actual bodily harm was occasioned by the assault, or must the prosecution also prove that the defendant intended to cause some actual bodily harm or was reckless as to whether such harm would be caused?

Your Lordships are concerned with the mental element of a particular kind of assault, an assault 'occasioning actual bodily harm'. It is common ground that the mental element of assault is an intention to cause the victim to apprehend immediate and unlawful violence or recklessness whether such apprehension be caused (see *R v. Venna* [above]). It is of course common ground that Mrs. Savage committed an assault upon Miss Beal when she threw the contents of her glass of beer over her. It is also common ground that however the glass came to be broken and Miss Beal's wrist thereby cut, it was, on the finding of the jury, Mrs. Savage's handling of the glass which caused Miss Beal 'actual bodily harm'. Was the offence thus established or is there a further mental state that has to be established in relation to the bodily harm element of the offence? Clearly the section, by its terms, expressly imposes no such a requirement. Does it do so by necessary implication? It uses neither the word 'intentionally' nor the word 'maliciously'. The words 'occasioning actual bodily harm' are descriptive of the word 'assault', by reference to a particular kind of consequence.

[In *R v. Roberts* (1972) 56 Cr App 95, CA] ... Roberts was tried on an indictment which alleged that he indecently assaulted a young woman. He was acquitted on that charge, but convicted of assault occasioning actual bodily harm to her. The girl's complaint was that while travelling in the defendant's car he sought to make advances towards her and then tried to take her coat off. This was the last straw and, although the car was travelling at some speed, she jumped out and sustained injuries. The defendant denied he had touched the girl. He had had an argument with her and in the course of that argument she suddenly opened the door and jumped out. In his direction to the jury the chairman of quarter sessions stated:

If you are satisfied that he tried to pull off her coat and as a result she jumped out of the moving car then your verdict is guilty.

It was contended on behalf of the appellant that this direction was wrong since the chairman had failed to tell the jury that they must be satisfied that the appellant foresaw that she



might jump out of the car as a result of his touching her before they could convict. The court rejected that submission

...

Accordingly, no fault was found in the following direction of the chairman to the jury (at 103):

If you accept the evidence of the girl in preference to that of the man, that means that there was an assault occasioning actual bodily harm, that means that she did jump out as a direct result of what he was threatening her with, and what he was doing to her, holding her coat, telling her that he had beaten up girls who had refused his advances, and that means that through his acts he was in law and in fact responsible for the injuries which were caused to her by her decision, if it can be called that, to get away from his violence, his threats, by jumping out of the car.

Thus, once the assault was established, the only remaining question was whether the victim's conduct was the natural consequence of that assault. The words 'occasioning' raised solely a question of causation, an objective question which does not involve inquiring into the accused's state of mind.

My Lords, in my respectful view, the Court of Appeal in *R v. Parmenter* was wrong in preferring the decision in *R v. Spratt*. The decision in *R v. Roberts* (1972) 56 Cr App R 95 was correct. The verdict of assault occasioning actual bodily harm may be returned upon proof of an assault together with proof of the fact that actual bodily harm was occasioned by the assault. The prosecution are not obliged to prove that the defendant intended to cause some actual bodily harm or was reckless as to whether such harm would be caused.

[What does 'maliciously' import in s. 20?]

... In order to establish an offence under s. 20 is it sufficient to prove that the defendant intended or foresaw the risk of some physical harm or must he intend or foresee either wounding or grievous bodily harm?

It is convenient to set out once again the relevant part of the judgment of Diplock LJ in *R v. Mowatt* [1967] 3 All ER 47 at 50, [1968] 1 QB at 426 [when he said:]

In the offence under s. 20... for... which [no] specific intent is required – the word 'maliciously' does import... an awareness that his act may have the consequence of causing some physical harm to some other person... It is enough that he should have foreseen that some physical harm to some person, albeit of a minor character, might result.

[Counsel] submits that... the section requires foresight of a wounding or grievous bodily harm... and that a person should not be criminally liable for consequences of his conduct unless he foresaw a consequence falling into the same category as that set out in the indictment.

Such a general principle runs contrary to the decision in *R v. Roberts* (1972) 56 Cr App R 95, which I have already stated to be, in my opinion, correct. The contention is apparently based on the proposition that, as the actus reus of a s. 20 offence is the wounding or the

infliction of grievous bodily harm, the mens rea must consist of foreseeing such wounding or grievous bodily harm. But there is no such hard and fast principle. To take but two examples, the actus reus of murder is the killing of the victim, but foresight of grievous bodily harm is sufficient and, indeed, such bodily harm need not be such as to be dangerous to life. Again, in the case of manslaughter death is frequently the unforeseen consequence of the violence used.

The argument that, as ss. 20 and 47 have both the same penalty, this somehow supports the proposition that the foreseen consequences must coincide with the harm actually done, overlooks the oft-repeated statement that this is the irrational result of this piecemeal legislation. The Act 'is a rag-bag of offences brought together from a wide variety of sources with no attempt, as the draftsman frankly acknowledged, to introduce consistency as to substance or as to form' (see Professor J C Smith... ([1991] *Crim LR* 43)).

If s. 20 was to be limited to cases where the accused does not desire but does foresee wounding or grievous bodily harm, it would have a very limited scope. The mens rea in a s. 20 crime is comprised in the word 'maliciously'. As was pointed out by Lord Lane CJ, giving the judgment of the Court of Appeal in *R v. Sullivan* [1981] *Crim LR* 46, the 'particular kind of harm' in the citation from Professor Kenny was directed to 'harm to the person' as opposed to 'harm to property'. Thus it was not concerned with the degree of the harm foreseen. It is accordingly in my judgment wrong to look upon the decision in *R v. Mowatt*... as being in any way inconsistent with the decision in *R v. Cunningham*...

My Lords, I am satisfied that the decision in *R v. Mowatt* was correct and that it is quite unnecessary that the accused should either have intended or have foreseen that his unlawful act might cause physical harm of the gravity described in s. 20, i.e. a wound or serious physical injury. It is enough that he should have foreseen that some physical harm to some person, albeit of a minor character, might result.

In the result I would dismiss the appeal in *Savage's* case but allow the appeal in *Parmenter's* case, but only to the extent of substituting, in accordance with the provisions of s. 3(2) of the Criminal Appeal Act 1968, verdicts of guilty of assault occasioning actual bodily harm contrary to s. 47 of the 1861 Act for the four s. 20 offences of which he was convicted.

[Appeal in *R v. Savage* dismissed; appeal in *R v. Parmenter* allowed in part and conviction of assault occasioning actual bodily harm substituted.]

Thus, at a minimum, section 47 requires a subjectively reckless assault or battery that in fact causes actual bodily harm. No mental element or 'mens rea' is required in relation to the actual bodily harm. 'Malicious wounding' under section 20 requires that the wound or grievous bodily harm be accompanied by foresight of some (not necessarily serious) harm.

The stricter 'mens rea' requirement in section 18, wounding or causing grievous bodily harm with intent, may not be as constraining as might be thought. The intention requirement can be satisfied either by an intention to cause grievous bodily harm or by the alternative possibility of an intention to resist or prevent lawful apprehension. This could have special relevance in

public order cases. Imagine a chaotic situation in which a demonstration has become disorderly and the police respond vigorously. It is not impossible to imagine a court inferring intention to resist arrest where a defendant has caused a wound or grievous bodily harm, even though the injury itself was negligent or even accidental in the heat of the moment. The possible disjuncture between defendants' own understandings of their actions and courts' interpretation in applying the law is very clear even in the case of an offence with a stringent 'mens rea' requirement.

### III.8.b. Boundary issues

#### III.8.b.i. Psychiatric harm

Does stalking, when it takes the form of harassment through silent telephone calls and other non-verbal behaviour, come within the definition of assault, or assault occasioning actual bodily harm? Two hurdles had to be surmounted to bring such cases within the rather archaic language and conception of violence in the common law and statutory framework of offences against the person. The first was whether such conduct amounts to an assault, that is, does it cause an apprehension of immediate violence? In *Burstow* and *Ireland*, the House of Lords cut through the technical interpretation of 'assault' and 'inflict' (the use of this latter word in s. 20 had been thought to imply a technical assault had to accompany the injury) to achieve a more modern understanding of the range of harms covered by these offences.

A second question arose in these appeals: whether 'harm' in sections 47, 20 and 18, covers both psychiatric as well as physical injury. Again, the House of Lords agreed that it should. It could be said, however, that the ease with which appellate courts move from blind adherence to anachronistic statutory forms to blatantly ignoring them does little for confidence in the observance of the principle that criminal statutes should be interpreted strictly in favour of defendants.

Since these cases, the Protection from Harassment Act 1997 provides a parallel or alternative route for victims of stalking in the form of two criminal offences. They can also apply for an injunction breach of which is a criminal offence (see Chapter 6.c.ii).

#### *R v. Ireland, R v. Burstow* [1997] 4 All ER 225, HL

**Lord Steyn:** ... It is easy to understand the terrifying effect of a campaign of telephone calls at night by a silent caller to a woman living on her own. It would be natural for the victim to regard the calls as menacing. What may heighten her fear is that she will not know what the caller may do next. The spectre of the caller arriving at her doorstep bent on inflicting personal violence on her may come to dominate her thinking. After all, as a matter of common sense, what else would she be terrified about? The victim may suffer

psychiatric illness such as anxiety neurosis or acute depression. That the criminal law should be able to deal with this problem, and so far as is practicable, afford effective protection to victims is self evident.

From the point of view, however, of the general policy of our law towards the imposition of criminal responsibility, three specific features of the problem must be faced squarely. First, the medium used by the caller is the telephone: arguably it differs qualitatively from a face to face offer of violence to a sufficient extent to make a difference. Secondly, ex hypothesi the caller remains silent: arguably a caller may avoid the reach of criminal law by remaining silent however menacing the context may be. Thirdly, it is arguable that the criminal law does not take into account 'mere' psychiatric illnesses.

At first glance it may seem that the legislature has satisfactorily dealt with such objections by s. 43(1) of the Telecommunications Act 1984 which makes it an offence persistently to make use of a public telecommunications system for the purpose of causing annoyance, inconvenience or needless anxiety to another. The maximum custodial penalty is six months' imprisonment. This penalty may be inadequate to reflect a culpability of a persistent offender who causes serious psychiatric illness to another. For the future there will be for consideration the provisions of ss. 1 and 2 of the Protection from Harassment Act 1997 [not then in force, see above], which creates the offence pursuing a course of conduct which amounts to harassment of another and which he knows or ought to know amounts to harassment of the other. The maximum custodial penalty is six months' imprisonment. This penalty may also be inadequate to deal with persistent offenders who cause serious psychiatric injury to victims. Section 4(1) of the 1997 Act which creates the offence of putting people in fear of violence seems more appropriate. It provides for maximum custodial penalty upon conviction on indictment of five years' imprisonment. On the other hand, s. 4 only applies when as a result of a course of conduct the victim has cause to fear, on at least two occasions, that violence will be used against her. It may be difficult to secure a conviction in respect of a silent caller: the victim in such cases may have cause to fear that violence may be used against her but no more. In my view, therefore, the provisions of these two statutes are not ideally suited to deal with the significant problem which I have described. One must therefore look elsewhere. It is to the provisions of the Offences Against the Person Act 1861 that one must turn to examine whether our law provides effective criminal sanctions for this type of case.

Making a due allowance for the incongruities in these provisions [ss. 18, 20 and 47] can be described as 'a ladder of offences graded in terms of relative seriousness'... An ingredient of each of the offences is 'bodily harm' to a person. In respect of each section the threshold question is therefore whether a psychiatric illness, as testified to by a psychiatrist, can amount to 'bodily harm'. If the answer to this question is no, it will follow that the Act of 1861 cannot be used to prosecute in the class of cases which I have described. On the other hand, if the answer to the question is yes, it will be necessary to consider whether the persistent silent caller, who terrifies his victim and causes her to suffer a psychiatric illness, can be criminally liable under any of these sections. Given that the caller uses the medium of the telephone and silence to terrify his victim, is he beyond the reach of these sections?



Similar problems arise in the case of the so called stalker, who pursues a campaign of harassment by more diffuse means. He may intend to terrify the woman and succeed in doing so, by relentlessly following her, by unnecessarily appearing at her home and place of work, photographing her, and so forth. Is he beyond the trilogy of sections in the 1861 Act?

. . . There are two appeals before the House. In *Ireland* the appellant was convicted on his plea of guilty of three counts of assault occasioning actual bodily harm, contrary to s. 47 of the 1861 Act. . . The case against Ireland was that during a period of three months in 1994 covered by the indictment he harassed three women by making repeated phone calls to them during which he remained silent. Sometimes, he resorted to heavy breathing. The calls were mostly at night. The case against him, which was accepted by the judge and the Court of Appeal, was that he caused his victim to suffer psychiatric illness. Ireland had a substantial record of making offensive phone calls to women. The judge sentenced him to a total of three years' imprisonment.

Before the Court of Appeal there were two principal issues. The first was whether psychiatric illness may amount to bodily harm within the meaning of s. 47 of the Act of 1861. Relying on a decision of the Court of Appeal in *R v. Chan-Fook* [1994] 1 WLR 689 the Court of Appeal in Ireland's case concluded that psychiatric injury may amount to bodily harm under s. 47 of the 1861 Act. The second issue was whether Ireland's conduct was capable of amounting to an assault. In giving the judgment of the court in Ireland's case Swinton Thomas LJ said (at p 119):

It has been recognised for many centuries that putting a person in fear may amount to an assault. The early cases predate the invention of the telephone. We must apply the law to the conditions as they are in the 20th century.

The court concluded that repeated telephone calls of a menacing nature may cause victims to apprehend immediate and unlawful violence. Given these conclusions of law and Ireland's guilty plea, the Court of Appeal dismissed the appeal. The Court of Appeal certified the following question as being of general public importance, namely 'As to whether making a series of silent telephone calls can amount in law to an assault'. But it will also be necessary to consider the question whether psychiatric illness may in law amount to bodily harm under s. 47 of the 1861 Act. Those are the issues of law before the House in the appeal of Ireland.

In *R v. Burstow* the appellant was indicted on one count of unlawfully and maliciously inflicting grievous bodily harm, contrary to s. 20 of the 1861 Act. . . Burstow had a social relationship with a woman. She broke it off. . . He proceeded to harass her in various ways over a lengthy period. His conduct led to several convictions and periods of imprisonment. During an eight month period in 1995. . . he made some silent telephone calls to her. He also made some abusive calls to her. . . The victim was badly affected by this campaign of harassment. It preyed on her mind. She was fearful of personal violence. A consultant psychiatrist stated that she was suffering from a severe depressive illness. In the Crown Court counsel asked for a ruling whether an offence of unlawfully and maliciously inflicting grievous bodily harm contrary to s. 20 may be committed where no physical violence has

been applied directly or indirectly to the body of the victim. The judge answered this question in the affirmative. Burstow thereupon changed his plea to guilty. The judge sentenced him to three years' imprisonment.

Burstow applied for leave to appeal against conviction... Two questions of law were canvassed before the Court of Appeal. First, there was the question whether psychiatric injury may amount to bodily harm under s. 20. The Court of Appeal regarded itself as bound by the affirmative decision in *R v. Chan-Fook* (1994). The second issue was whether in the absence of physical violence applied directly or indirectly to the body of the victim an offence under s. 20 may be committed. The Court of Appeal concluded that this question must be answered in the affirmative... It will be noted that in neither appeal is there an issue on mens rea: the appeals focus on questions of law regarding the actus reus.

... It will now be convenient to consider the question which is common to the two appeals, namely whether psychiatric illness is capable of amounting to bodily harm in the terms of ss. 18, 20 and 47 of the 1861 Act. The answer must be the same for the three sections.

The only abiding thing about the processes of the human mind, and the causes of its disorders and disturbances, is that there will never be a complete explanation. Psychiatry is and will always remain an imperfectly understood branch of medical science...

But there has been progress since 1861. And courts of law can only act on the best scientific understanding of the day... The civil law has for a long time taken into account the fact that there is no rigid distinction between body and mind. The criminal law has been slow to follow this path... Counsel for the appellants in both appeals submitted that bodily harm in Victorian legislation cannot include psychiatric injury. For this reason they argued that *Chan-Fook* was wrongly decided. They relied on the following observation of Lord Bingham of Cornhill CJ in *Burstow* [the Court of Appeal was bound to follow *Chan-Fook*]:

Were the question free from authority, we should entertain some doubt whether the Victorian draftsman of the 1861 Act intended to embrace psychiatric injury within the expressions 'grievous bodily harm' and 'actual bodily harm'.

Nevertheless, the Lord Chief Justice observed that it is now accepted that in the relevant context the distinction between physical and mental injury is by no means clear cut. He welcomed the ruling in *Chan-Fook*... I would go further and point out that, although out of considerations of piety we frequently refer to the actual intention of the draftsman, the correct approach is simply to consider whether the words of the 1861 Act considered in the light of contemporary knowledge cover a recognisable psychiatric injury. It is undoubtedly true that there are statutes where the correct approach is to construe the legislation 'as if one were interpreting it the day after it was passed': *The Longford* (1889) 14 PD 34... Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes.

Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that 'An Act of Parliament should be deemed to be always speaking'... In cases where the problem arises it is a matter of

interpretation whether a court must search for the historical original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But the drafting technique of Lord Thring and his successors have brought about the situation that statutes will generally be found to be of 'always speaking' variety...

The proposition that the Victorian legislator when enacting ss. 18, 20 and 47 of the 1861 Act, would not have had in mind psychiatric illness is no doubt correct. Psychiatry was in its infancy in 1861. But the subjective intention of the draftsman is immaterial. The only relevant enquiry is as to the sense of the words in the context in which they are used. Moreover, the 1861 Act is a statute of the 'always speaking' type: the statute must be interpreted in the light of the best current scientific appreciation of the link between the body and the psychiatric injury.

For these reasons I would, therefore, reject the challenge to the correctness of *Chan-Fook* [1994] 1 WLR 689. In my view the ruling in that case was based on principled and cogent reasoning and it marked a sound and essential clarification of the law. I would hold that 'bodily harm' in ss. 18, 20 and 47 must be interpreted so as to include recognisable psychiatric illness.

### *R v. Burstow* the meaning of 'inflict' in s. 20

The decision in *Chan-Fook* opened up the possibility of applying ss. 18, 20 and 47 in new circumstances. The appeal of *Burstow* lies in respect of his conviction under s. 20. It was conceded that in principle the wording of s. 18, and in particular the words 'cause any grievous bodily harm to any person' do not preclude a prosecution in cases where the actus reus is the causing of psychiatric injury. But counsel laid stress on the difference between 'causing' grievous bodily harm in s. 18 and 'inflicting' grievous harm in s. 20. Counsel argued that the difference in wording reveals a difference in legislative intent: inflict is a narrower concept than cause...

The problem is one of construction. The question is whether as a matter of current usage the contextual interpretation of 'inflict' can embrace the idea of one person inflicting psychiatric injury on another. One can without straining the language in any way answer that question in the affirmative. I am not saying that the words cause and inflict are exactly synonymous. They are not. What I am saying is that in the context of the Act of 1861 one can nowadays quite naturally speak of inflicting psychiatric injury. Moreover, there is internal contextual support in the statute for this view. It would be absurd to differentiate between sections 18 and 20 in the way argued on behalf of *Burstow*... [T]his should be a very practical area of the law. The interpretation and approach should so far as possible be adopted which treats the ladder of offences as a coherent body of law. Once the decision in *Chan-Fook*... is accepted the realistic possibility is opened up of prosecuting under section 20 in cases of the type which I described in the introduction to this judgment.

For the reasons I have given I would answer the certified question in *Burstow* in the affirmative.



*R v. Ireland: was there an assault?*

The starting point must be that an assault is an ingredient of the offence under section 47. It is necessary to consider the two forms which an assault may take...

It is to assault in the form of an act causing the victim to fear an immediate application of force to her that I must turn. Counsel argued that as a matter of law an assault can never be committed by words alone and therefore it cannot be committed by silence... The proposition that a gesture may amount to an assault, but that words can never suffice, is unrealistic and indefensible. A thing said is also a thing done. There is no reason why something said should be incapable of causing an apprehension of immediate personal violence, e.g. a man accosting a woman in a dark alley saying 'come with me or I will stab you'. I would, therefore, reject the proposition that an assault can never be committed by words.

That brings me to the critical question whether a silent caller may be guilty of an assault. The answer to this question seems to me to be 'yes, depending on the facts'. It involves questions of fact within the province of the jury. After all, there is no reason why a telephone caller who says to a woman in a menacing way 'I will be at your door in a minute or two' may not be guilty of an assault if he causes the victim to apprehend immediate personal violence. Take now the case of the silent caller. He intends by his silence to cause fear and he is so understood. The victim is assailed by uncertainty about his intentions. Fear may dominate her emotions, and it may be the fear that the caller's arrival at her door may be imminent. She may fear the possibility of immediate personal violence. As a matter of law the caller may be guilty of an assault: whether he is or not will depend on the circumstance and in particular on the impact of the caller's potentially menacing call or calls on the victim. Such a prosecution case under section 47 may be fit to leave to the jury.

[The appeals were dismissed.]

Lord Steyn pointed out that liability for an intentional campaign of harassment that does not necessarily cause recognisable psychiatric injury will now be covered by offences under the Protection from Harassment Act 1997. Expert evidence is still required even where the fear and anxiety caused by stalking is clearly manifested in physical symptoms (*Morris*, 1998).

### III.8.b.ii. Consent

In everyday life we consent to many invasions of our bodily autonomy that could amount to battery, and even to actual bodily harm. We hug not only our family but our friends and our colleagues, we shake hands, we play contact sports, we kick-box. Sometimes we undergo dental or medical treatment that amounts to a wound or to really serious injury. If we consent generally no offence is committed, the intrusion is lawful. But consent is not a blanket defence, if it is indeed a defence as such rather than its absence being an element of the offence. We can only consent to actual bodily harm or more serious injury if it falls within an accepted category. Ashworth here provides a succinct account of the main issues.



Andrew Ashworth 2006 *Principles of Criminal Law* (Oxford University Press), pp. 318, 323

In order to explain why offences of violence are regarded so seriously, reference has to be made to the values of physical integrity and privacy, aspects of the principle of individual autonomy. However, individual autonomy has both its positive and negative aspects: on the one hand it argues for liberty from attack or interference, whereas on the other hand it argues for the liberty to do with one's body as one wishes . . . If a person wishes to give up her or his physical integrity in certain circumstances or to risk it for the sake of sport or excitement, should the criminal law allow the consent to negative what would otherwise be a crime?

. . . The judiciary has maintained a restrictive approach, with a low threshold for consensual harm (only common assault), and two criteria ('good reason', 'needed in the public interest') for recognizing exceptions that allow consensual harms. Even if the low threshold is accepted, the approach to exceptions is manifestly unsatisfactory. The two criteria adopted by the judges fail to explain, let alone to justify the categories of conduct included and excluded. There has been no attempt to explain why 'horseplay' should be recognized as an exception when sado-masochism is not. Possible explanations suggest themselves – the disgust of the judges for sado-masochism, the notion that the armed forces contain 'decent people' who sometimes act in 'high spirits' – but these are not principled explanations and are an unworthy basis on which to open a small window of liberty. Plainly the degree of injury caused is not conclusive: in both the 'horseplay' cases [Jones (1986) and Aitken (1992)] there were serious injuries requiring hospital treatment, as there may be in boxing, whereas in *Brown* no medical treatment was required.

Attorney-General's Reference (No 6 of 1980) [1981] QB 715

**Lord Lane CJ:** . . . The point of law upon which the court is asked to give its opinion is as follows: 'Where two persons fight (otherwise than in the course of sport) in a public place can it be a defence for one of those persons to a charge of assault arising out of the fight that the other consented to fight?'

The facts out of which the reference arises are these. The respondent, aged 18, and a youth aged 17, met in a public street and argued together. The respondent and the youth decided to settle the argument there and then by a fight. Before the fight the respondent removed his watch and handed it to a bystander for safe keeping and the youth removed his jacket. The respondent and the youth exchanged blows with their fists and the youth sustained a bleeding nose and bruises to his face caused by blows from the respondent.

The answer to this question, in our judgment, is that it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent.

Nothing which we have said is intended to cast doubt on the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest in other cases.

Lord Lane's statement of the law – which was repeated and approved in *Brown* – raises more questions than it answers. What is it about the public interest that justifies these exceptions rather than any other? If the starting point is in the form of exceptions to a quantitatively based rule (see Roberts, Appendix C in Law Commission *CP 139 1995*) – that one cannot consent to anything more than common assault – the answers are in any case unlikely to address the autonomy and privacy values that Ashworth identifies. Questions about autonomy and consent are central in any discussion of sexual offences and indeed one explanation of the House of Lords' conservatism in *Brown* is connected with its sexual context (although the offences charged were under the OAPA 1861). We discuss autonomy and consent, including *Brown*, more fully in Section V. Consent is also a relevant factor in HIV and other disease transmission cases as we see below.

### III.8.b.iii. Disease transmission

Whatever accusations can be levelled at the OAPA 1861 in terms of its arcane language and irrational offence distinctions, it has given the appellate courts many opportunities for creative statutory interpretation. Or to put the point in a more positive light, it allows us to see the historical and cultural contingency of interpretation. So for example, in *Ireland* and *Burstow* above, Lord Steyn commented that the statute was of the 'always speaking' type and should be interpreted in the light of contemporary knowledge and understanding. Transmission of disease through sexual – or indeed other bodily – contact is not in itself a new phenomenon although our understanding of the processes by which this occurs and the methods by which it can be prevented have considerably advanced. In the HIV transmission cases of *Dica* (2004) and *Konzani* (2005) the House of Lords sidelined the decision in *Clarence* (1888). *Clarence* infected his wife with venereal disease but was held not guilty of inflicting grievous bodily harm under section 20. There were broadly two issues – could infection through consensual intercourse be regarded as an 'infliction' and did consent to intercourse encompass consent to all that went with it – i.e. the risk of being infected. The courts have been diluting the first issue for some time, mainly because the notion that 'inflict' requires an assault introduced a thorn in the side of alternative verdicts when a charge under the more serious section 18 offence was not made out (see 8.a.ii. above). The second issue is the one we consider here. The change is explained more easily by changes in attitudes to

marriage (and to women) than because we have more knowledge about infecting people through intercourse. As with the issue of consent to harm discussed above, these cases highlight the blurred boundary between concepts of sex and violence.

*R v Konzani [2005] EWCA Crim 706*

**Lord Justice Judge:** This is an appeal by Feston Konzani against his conviction . . . on three counts of inflicting grievous bodily harm on three different women, contrary to s. 20 of the Offences Against the Person Act 1861 . . .

. . . In November 2000, the appellant was informed that he was HIV positive. On that occasion, and on subsequent occasions, he was specifically informed of the risks of passing the infection on to any sexual partners, and its dire consequences. Thereafter he had sexual relationships with the three complainants. He did not tell any of them that he was HIV positive, and he repeatedly had unprotected sexual intercourse with them, knowing, that by doing so, he might pass the infection on to them. In consequence, each contracted the HIV virus.

The appellant did not give evidence at trial. He called no witnesses. There was no evidence to contradict the clear statements by each complainant that he had not told them of his condition. It was however formally admitted on his behalf that he acted recklessly by having a sexual relationship with the complainants without using a condom every time he had sexual intercourse with them. It was also admitted that he infected them with the HIV virus, thus inflicting grievous bodily harm on them.

Notwithstanding their evidence that he withheld vital information about his condition from them, and that each complainant expressly denied that she consented to the risk of catching the HIV virus from him, counsel on his behalf addressed the jury on the basis that by consenting to unprotected sexual intercourse with him, they were impliedly consenting to all the risks associated with sexual intercourse. He argued that as infection with the HIV virus may be one possible consequence of unprotected sexual intercourse, the complainants had consented to the risk of contracting the HIV virus from him. Accordingly he should be acquitted. By their verdicts, the jury found that none of the complainants consented to the risk of contracting the HIV virus . . .

**Consent:** Referring to HIV, the judge directed the jury that they had to be sure that the complainant in each individual case:

' . . . did not willingly consent to the risk of suffering that infection. Note that I use the phrase "to the risk of suffering that infection" and not merely just "to suffering it". That is an important point which Mr Roberts rightly drew to your attention in his speech to you this morning. He put it this way, it is whether she consented to that risk, not consented to being given the disease which is, as he put it graphically, a mile away from the former. That is right, but note that I use the word "willingly" in the phrase "willingly consent", and I did that to highlight that the sort of consent I am talking about means consciously.'



He returned to the clear and important distinction between 'running a risk on one hand and consenting to run that risk on the other', pointing out that the prosecution had to establish that the complainant 'did not willingly consent to the risk of suffering the infection in the sense of her having consciously thought about it at the time and decided to run it'. He added that the appellant should be acquitted, if, in relation to any complainant, she had thought of the risk of getting HIV, and nevertheless decided to take the risk. In answer to a question from the jury, he returned to emphasise that before the appellant could be convicted, the prosecution had to prove that she 'did not willingly consent to the risk of suffering that infection', and he repeated that for the purposes of his direction, 'willingly' meant 'consciously'. He again repeated the distinction between 'running a risk on the one hand and consenting to run that risk on the other', adding that the 'willing' consent involved knowing the implications of infection with the HIV virus.

In short, the judge explained that before the consent of the complainant could provide the appellant with a defence, it was required to be an informed and willing consent to the risk of contracting HIV.

. . . Notwithstanding the express and uncontradicted evidence of the complainants, [counsel for the appellant] submitted that as a matter of inference the appellant may have had an honest, even if unreasonable belief, that the complainant was consenting, simply because she had sexual intercourse with him in the circumstances in which she did, and so accepted all possible consequent risks. To support his submission he referred to the decisions of this Court in *Jones* [1986] 83 CAR 375 and *Aitken* [1993] 95 CAR 304. In *Jones* the trial judge declined to direct the jury that the defendants were entitled to be acquitted if the jury decided that they were indulging in 'rough' and undisciplined sport or play, not intending to cause harm, and genuinely believing that the injuries which occurred in the course of the horseplay occurred with the victim's consent. *Aitken* was another situation involving robust, high-spirited, 'horseplay' which resulted in serious injury. We cannot improve on the analysis of these cases by Lord Mustill in his dissenting speech in *R v. Brown* [1994] 1 AC 212, where he said:

'... As a matter of policy the courts have decided that the criminal law does not concern itself with these activities, provided that they do not go too far. It also seems plain that as the general social appreciation of the proper role of the state in regulating the lives of individuals changes with the passage of time, so we shall expect to find that the assumptions of the criminal justice system about what types of conduct are properly excluded from its scope, and what is meant by "going too far" will not remain constant.'

[Counsel] developed a linked complaint that the judge's decision, and his later direction to the jury, in effect deprived the appellant of the jury's consideration whether he had a guilty mind... [F]or the purposes of s. 20 of the 1861 Act, the required mental ingredient of the offence is established if the defendant was reckless in the sense formulated in *R v. Cunningham* [1957] 2 QB 396, as approved in *R v. Savage* [1992] 1 AC 699. In short, if he knew or foresaw that the complainant might suffer bodily harm and chose to take the risk that she would, recklessness sufficient for the purposes of the mens rea for s. 20 was established. In the result, as we have recorded, recklessness was admitted.



[W]e must turn to *R v. Dica* [2004] EWCA Crim 1103, where the issue of consent was addressed (a) in the context of the longstanding decision in *R v. Clarence* (1888) 22 QBD 23 that the consent of a wife to sexual intercourse carried with it consent to the risks inherent in sexual intercourse, including the risk of sexually transmitted disease, and (b) the trial judge's ruling that the consent of the complainants to sexual intercourse with an individual who was known to them to be suffering from the HIV virus could provide no defence.

In *R v. Barnes* [2004] EWCA Crim. 3246, Lord Woolf CJ summarised the effect of the decision in *Dica* in this way. An HIV positive male defendant who infected a sexual partner with the HIV virus would be guilty of an offence 'contrary to s. 20 of the 1861 Act if, being aware of his condition, he had sexual intercourse . . . without disclosing his condition'. On the other hand, he would have a defence if he had made the partner aware of his condition, who 'with that knowledge consented to sexual intercourse with him because [she was] still prepared to accept the risks involved.'

*R v. Dica* represented what Lord Mustill in *R v. Brown* described as a 'new challenge', and confirmed that in specific circumstances the ambit of the criminal law extended to consensual sexual intercourse between adults which involved a risk of the most extreme kind to the physical health of one participant. In the context of direct physical injury, he pointed out that cases involving the '... consensual infliction of violence are special. They have been in the past, and will continue to be in the future, the subject of special treatment by the law'. In his subsequent detailed examination of the 'situations in which the recipient consents or is deemed to consent to the infliction of violence upon him', activity of the kind currently under consideration did not remotely fall within any of the ten categories which he was able to identify. *Brown* itself emphatically established the clear principle that the consent of the injured person does not form a kind of all purpose species of defence to an offence of violence contrary to s. 20 of the 1861 Act.

We are concerned with the risk of and the actual transmission of a potentially fatal disease through or in the course of consensual sexual relations which did not in themselves involve unlawful violence of the kind prohibited in *R v. Brown*. The prosecution did not seek to prove that the disease was deliberately transmitted, with the intention required by s. 18 of the 1861 Act. The allegation was that the appellant behaved recklessly on the basis that knowing that he was suffering from the HIV virus, and its consequences, and knowing the risks of its transmission to a sexual partner, he concealed his condition from the complainants, leaving them ignorant of it. When sexual intercourse occurred these complainants were ignorant of his condition. So although they consented to sexual intercourse, they did not consent to the transmission of the HIV virus. *Dica* analysed two different sets of assumed facts arising from the issue of the complainants' consent, by distinguishing between the legal consequences if, as they alleged, the truth of his condition was concealed from his sexual partners by *Dica*, and the case that he would have developed at trial if he had not been prevented from doing so by the judge's ruling, that far from concealing his condition from the complainants, he expressly informed them of it, and they, knowing of his condition because he had told them of it, consented to unprotected sexual intercourse with him. There is a critical distinction between taking a risk of the various,

potentially adverse and possibly problematic consequences of sexual intercourse, and giving an informed consent to the risk of infection with a fatal disease. For the complainant's consent to the risks of contracting the HIV virus to provide a defence, it is at least implicit from the reasoning in *R v. Dica*, and the observations of Lord Woolf CJ in *R v. Barnes* confirm, that her consent must be an informed consent. If that proposition is in doubt, we take this opportunity to emphasise it. We must therefore examine its implications for this appeal.

The recognition in *R v. Dica* of informed consent as a defence was based on but limited by potentially conflicting public policy considerations. In the public interest, so far as possible, the spread of catastrophic illness must be avoided or prevented. On the other hand, the public interest also requires that the principle of personal autonomy in the context of adult non-violent sexual relationships should be maintained. If an individual who knows that he is suffering from the HIV virus conceals this stark fact from his sexual partner, the principle of her personal autonomy is not enhanced if he is exculpated when he recklessly transmits the HIV virus to her through consensual sexual intercourse. On any view, the concealment of this fact from her almost inevitably means that she is deceived. Her consent is not properly informed, and she cannot give an informed consent to something of which she is ignorant. Equally, her personal autonomy is not normally protected by allowing a defendant who knows that he is suffering from the HIV virus which he deliberately conceals, to assert an honest belief in his partner's informed consent to the risk of the transmission of the HIV virus. Silence in these circumstances is incongruous with honesty, or with a genuine belief that there is an informed consent. Accordingly, in such circumstances the issue either of informed consent, or honest belief in it will only rarely arise: in reality, in most cases, the contention would be wholly artificial.

This is not unduly burdensome. The defendant is not to be convicted of this offence unless it is proved that he was reckless. If so, the necessary *mens rea* will be established. Recklessness is a question of fact, to be proved by the prosecution. Equally the defendant is not to be convicted if there was, or may have been an informed consent by his sexual partner to the risk that he would transfer the HIV virus to her. In many cases, as in *Dica* itself, provided recklessness is established, the critical factual area of dispute will address what, if anything, was said between the two individuals involved, one of whom knows, and the other of whom does not know, that one of them is suffering the HIV virus. In the final analysis, the question of consent, like the issue of recklessness is fact-specific.

In deference to Mr Roberts' submission, we accept that there may be circumstances in which it would be open to the jury to infer that, notwithstanding that the defendant was reckless and concealed his condition from the complainant, she may nevertheless have given an informed consent to the risk of contracting the HIV virus. By way of example, an individual with HIV may develop a sexual relationship with someone who knew him while he was in hospital, receiving treatment for the condition. If so, her informed consent, if it were indeed informed, would remain a defence, to be disproved by the prosecution, even if the defendant had not personally informed her of his condition. Even if she did not in fact consent, this example would illustrate the basis for an argument that he honestly believed in her informed consent. Alternatively, he may honestly believe that his new sexual partner

was told of his condition by someone known to them both. Cases like these, not too remote to be fanciful, may arise. If they do, no doubt they will be explored with the complainant in cross-examination. Her answers may demonstrate an informed consent. Nothing remotely like that was suggested here. In a different case, perhaps supported by the defendant's own evidence, material like this may provide a basis for suggesting that he honestly believed that she was giving an informed consent. He may provide an account of the incident, or the affair, which leads the jury to conclude that even if she did not give an informed consent, he may honestly have believed that she did. Acknowledging these possibilities in different cases does not, we believe, conflict with the public policy considerations identified in *R v. Dica*. That said, they did not arise in the present case.

Why not? In essence because the jury found that the complainants did not give a willing or informed consent to the risks of contracting the HIV virus from the appellant. We recognise that where consent does provide a defence to an offence against the person, it is generally speaking correct that the defendant's honest belief in the alleged victim's consent would also provide a defence. However for this purpose, the defendant's honest belief must be concomitant with the consent which provides a defence. Unless the consent would provide a defence, an honest belief in it would not assist the defendant. This follows logically from *R v. Brown*. For it to do so here, what was required was some evidence of an honest belief that the complainants, or any one of them, were consenting to the risk that they might be infected with the HIV virus by him. There is not the slightest evidence, direct or indirect, from which a jury could begin to infer that the appellant honestly believed that any complainant consented to that specific risk. As there was no such evidence, the judge's ruling about 'honest belief' was correct. In fact, the honest truth was that the appellant deceived them.

In our judgment, the judge's directions to the jury sufficiently explained the proper implications to the case of the consensual participation by each of the complainants to sexual intercourse with the appellant. The jury concluded, in the case of each complainant, that she did not willingly or consciously consent to the risk of suffering the HIV virus. Accordingly the appeal against conviction will be dismissed.

These cases show us that patrolling the line between autonomy and criminal law raises complex issues. As we have seen, injury caused through contact sports is rendered lawful by the implied consent of participants whereas the same level of injury in sado masochism is unlawful despite consent. The issue of consent as such is less straightforward in the sexual transmission of disease cases. Here there is an asymmetry of information – information about health that itself is generally regarded as intensely private – during an act of sexual intercourse – again an activity generally regarded as an intensely private matter. Taken together, *Dica* and *Konzani* establish that consent to intercourse is not the same as consent to the risk of being infected by a sexually transmitted disease. For some commentators this is an inappropriate application of the autonomy principle. Ashworth for example asks: 'If V has unprotected sex without asking D any questions about his sexual health, is not V exercising autonomy by



taking a well-known risk of a sexually transmitted disease?' (2006, p. 319). Taking the same line, Weait, in the following extract, also questions the court's interpretation of recklessness. It is helpful in reading this to keep in mind the distinction between the lack of V's consent (which is lack of consent to the risk of being infected) and D's recklessness in relation to that lack of consent.

*Matthew Weait: 'Knowledge, Admissibility and Consent: R v. Konzani'*  
[2005] *Crim LR* 763

In *Konzani* the Court of Appeal was not, as it had been in *Dica*, concerned directly with the inter-relationship between recklessness and consent, since the appellant had admitted that he was aware of the risk of transmitting HIV to his partners. The sole issue for consideration was whether the trial judge had, on his reading of *Dica*, misdirected the jury as to the meaning of consent...

Although it agreed that an honest belief in consent would, as a general rule, provide a defence, in this context 'the defendant's honest belief must be concomitant with the consent which provides a defence'. The court expressed the view that there was a fundamental difference between running a risk (which some, at least, of the complainants' evidence suggested they were conscious of doing), and consenting to a risk (which Mr Konzani's failure to disclose known HIV status prevented them from doing). As a result there was no legally recognised consent in respect of which Mr Konzani could have had any belief, honest or otherwise.

This is, it is suggested, faulty logic. In *Dica* the Court of Appeal had held simply that a person would have a defence if the complainant consented to the risk of transmission. It is at least arguable that a person who agrees to have unprotected sex with a person about whose HIV status they are uncertain consents to the risk of transmission by the very act of agreeing to have unprotected sex with that person. In *Konzani*, the Court of Appeal seems to have decided that there was a need to explain in categorical terms that this is not how it wanted *Dica* to be interpreted. It did so by reinforcing the connection between recklessness, consent and disclosure and explaining that the allegation in *Dica* had been that the accused

'behaved recklessly on the basis that knowing that he was suffering from the HIV virus, and its consequences, and knowing the risks of its transmission to a sexual partner, he concealed his condition from the complainants, leaving them ignorant of it.'

This, it is suggested, is a somewhat radical interpretation of recklessness, one that extends the meaning of the concept beyond conscious, unjustifiable, risk-taking. Instead, in this context at least, the court appears to be saying that recklessness comprises the additional element of non-disclosure; and because non-disclosure results in ignorance, a person infected by the non-discloser cannot consciously or willingly consent to the risk of transmission. Logically therefore, the defence is not available.

The decision of the Court of Appeal in *Konzani* will satisfy those who reject the argument that people who recklessly transmit HIV should be able to rely on the defence of consent



where their partner(s) are aware of the risk of transmission but to whom no disclosure has been made. However, it is suggested that those who do approve of the decision should acknowledge the fact that they are in danger of reinforcing the idea, contrary to the philosophy behind most HIV prevention campaigns, that we are not responsible for our own health. This is because in confirming that the defence is available only where there is consent to risk (or an honest belief in such consent) the court is implicitly saying that those who do not willingly consent to the risk, but who willingly choose to run the risk, are not to be held responsible for the consequences of doing so. Moreover, those who would identify with the court's reasoning need to recognise that this necessarily means agreeing that disclosure by a partner is the only relevant source of knowledge for the purposes of being able consciously to consent to the risk of transmission, despite the fact that there are other ways in which conscious knowledge of risk can be gained by those to whom HIV is transmitted...

Some commentators, including the present author, have argued that where a person is aware of the risks associated with unprotected sex and has not satisfied him- or herself that a partner is HIV negative (or free from other serious sexually transmitted infections (STIs)) the defence of consent should, in principle, be available. The reason for taking such a position is, primarily, that the transmission of HIV should be seen first and foremost as a public health issue and that everyone, not just those who are HIV positive, has a responsibility for minimising the spread of the virus. To impose criminal liability on those who recklessly transmit HIV or STIs to people who are in a position to protect themselves against infection, and elect not to, sends a message that people are, and should be, entitled to assume that their partners will ensure that transmission does not occur. The very fact that the virus has spread so dramatically in recent years among the sexually active demonstrates that this is simply not the case.

Autonomy... suggests the right of a person to be free from unwarranted and unwanted physical interference... [W]here consent operates as a defence to a charge of assault, or causing bodily harm, it reflects the law's recognition that there exists a sphere (albeit one circumscribed by public policy considerations) in which people should be entitled to freedom from liability because to hold otherwise would result in a significant and unjustified diminution of essential human freedoms. [In assault] the law protects a putative defendant from criminal liability not on the basis that no recognisable harm has been caused, but because of the context in which it has taken place. It follows that in such circumstances the law is not, at least *prima facie*, concerned with protecting, or indeed 'enhancing' the autonomy of the person harmed [as it is for example in rape], but rather with protecting the person who harms from the imposition of unjustified liability. Put simply, it is his autonomy (in the sense of his right to be free from unwarranted interference and condemnation by the state) that the law is concerned to protect.

If the principles underpinning this argument are sound then any departure from them demands strong and careful justification. With respect, the Court of Appeal in *Konzani* not only departs from them but fails to provide any such justification. The court indicates that a complainant's autonomy is not enhanced by exculpating a person who recklessly harms her by transmitting HIV (and, by implication, that it is enhanced by denying such a defendant

the right to assert an honest belief in her consent to the risk of such harm). In so doing it starts from the premise that, in the context of non-fatal offences against the person at least, it is the autonomy of the person harmed that it is the law's function to protect. However, if this were so then those who recklessly harm people should be denied the defence of consent on the basis of honest belief or otherwise, irrespective of the context in which such harm occurs; and yet case law demonstrates that this is not the case. Without explicitly acknowledging this difficulty, the court identifies the failure of a person to disclose his known HIV positive status, and the deception that is thereby practised on a partner to whom he transmits HIV, as the basis for making the distinction...

[T]he cumulative ratio of the two cases is not that a person should be entitled to consent to the risks associated with sexual intercourse, but that she should be entitled to consent to such risks as have been directly or indirectly disclosed to her. It is only in the latter context that a defendant's claim of honest belief in consent can, and should, be legally recognised.

It is interesting that in advancing an autonomy based argument (asserting the autonomy of D as well as of V) that also invokes public health considerations, Weait appears to endorse a paternalistic principle, albeit one that argues for a different outcome than the individualised paternalism of the Court of Appeal in *Dica* and *Konzani*.

### III.8.c. Practice and reform

The inconsistencies in the definitions, gradations and sentence maxima of offences against the person are plain to see, and there is something inherently pragmatic about the way these are operated in practice especially given the large numbers of such offences that pass through the criminal justice process. Much of this is due to the development of Charging Standards by the Crown Prosecution Service (CPS) which seek to draw some clear lines between the blurred edges on the steps of the offence ladder. But clear labelling of offences is important, as are clear statements about the mental element, and the limits of consent. In the extracts that follow we look at the level of offending, at the CPS Charging Standard for offences against the person and at proposals for reform.

#### III.8.c.i. Crime patterns

While offence definitions – i.e. 'the law' – do not necessarily match up with the actual practices of criminal justice, nor do official statistics represent actual levels of offending. The Home Office conducts regular British Crime Surveys. These involve questioning in-depth a cross-section of the population asking them to report their own offending and their victimisation.

The role of the victim in the system is not straightforward.

A. Cretney and G. Davis, 'Prosecuting Domestic Assault: Victims Failing Courts, or Courts Failing Victims?' (1997) 36 *Howard Journal of Criminal Justice* 146

Normative accounts of the criminal justice process rest on the classic conception of crime as an offence against the sovereign authority, with the crime victim as the servant of the criminal justice process rather than its master. These normative accounts cannot be easily reconciled with the burdens placed upon assault victims at every stage of criminal prosecution burdens which the police implicitly recognise in that they respond not to violent conduct per se but to a 'complaint' from an 'aggrieved'. This may not matter greatly where victim and assailant are strangers to one another... But most assaults involve people who are known to one another – neighbours, customers of the same pub, regulars at the same night shelter, members of the same drugs scene... assault victims are permitted to exercise a power of veto over the prosecution; and as far as domestic assault is concerned, so much so the police anticipate that this power will in due course be exercised that they give every opportunity to victims to withdraw their co-operation at the outset. [See Chapter 18 further on domestic violence.]

A survey by Clarkson *et al.* (1994) examined not only the general attrition level for assaults, but also the relationship between the 'culpability' of the offender and the eventual punishment. They found that the main points of 'drop out' were: failure to inform police in the first place; no 'formal' complaint; failure to identify assailant; and failure on the part of victims to sustain interest in the prosecution. What their study showed was that there was little relationship between the seriousness of the attack and the eventual criminalisation.

The three key stages are: (1) reporting (which is largely in the hands of the victim); (2) the police and CPS response; and (3) any court proceedings. Reasons for victims not reporting were that they believed the assailant could not be traced; they were 'marginalised' through drug use or homelessness and were accustomed to victimisation; they were reluctant to have their own conduct scrutinised; or the social costs were too high (i.e. they knew the assailant). As far as the police response goes, the more serious their perception of the offence, the more likely the police are to arrest; they assess the victim's credibility as a witness; and they determine whether it is a 'public' or 'private' matter. Lastly, aspects of the court process itself may contribute to the collapse of the case: for example, delays in bringing the case to court, the burden of the trial process on witnesses and the difficulty in discharging the burden of proof all contribute to lowering the conviction rate.

The British Crime Survey (BCS) and statistics of recorded crime serve nonetheless to show some broad patterns. The categories that each of these uses do not entirely match but the BCS itself has used the same definitions throughout (it began in 1981) which allows for historical consistency. On the other hand, the BCS does not of course record homicide, crimes against those



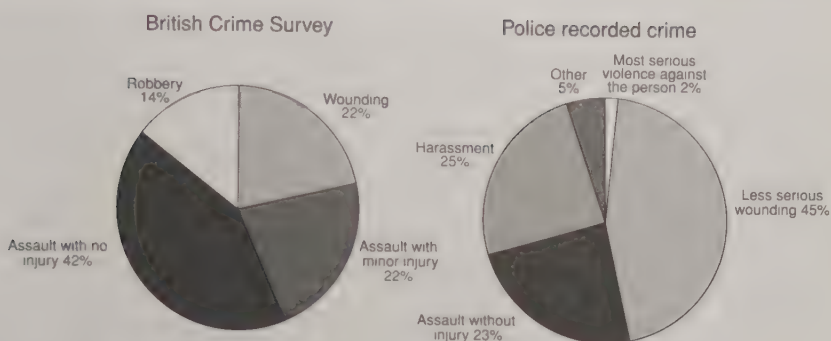


Figure 8.1 BCS and police recorded violence, 2007/8

Home Office (2008) *Crime in England and Wales 2007/8*. Chris Kershaw, Sian Nicholas and Alison Walker (eds.)

under 16 or against those not living in private households. Violence covers as we have seen a very wide range of harms, from pushing and shoving with no physical injury to murder (although we have dealt with non-fatal offences in this Chapter, the statistics on violence include homicide and also robbery). Police recorded crime is divided into 'most serious' (homicide, attempted murder and serious wounding) and other violence (less serious wounding, harassment and assault without injury). The BCS covers wounding, assault and minor injury and assault with no injury. According to the 2008/9 BCS, the most common injuries sustained in violent incidents were minor bruising or a black eye (34 per cent), followed by cuts (15 per cent) and severe bruising (13 per cent). The victim received some form of medical attention in 15 per cent of violent incidents; in 10 per cent of incidents victims received attention from a doctor and around 2 per cent of all violent incidents resulted in an overnight hospital stay (Home Office 2009 Table 3.06).

Overall there has been a significant reduction of 49 per cent in recorded violence since 1995, and in each of the last two years the decrease has been 12 per cent and 6 per cent. The BCS shows that 40 per cent of reported violence causes no injury, and a further 25 per cent involves minor injury; of the rest 22 per cent is wounding and 13 per cent robbery. Similarly, just under half of violent offences recorded by the police involve no injury. Conversely, causing grievous bodily harm with intent accounts for just 2 per cent of all police recorded violence against the person and 5 per cent of violence with injury.

Violence is concentrated geographically and demographically. The 21 local authorities with more than twice the average serious serious violence represent 10 per cent of the population while accounting for 26 per cent of offences. The risk of being a victim is almost twice as high for men as for women and the risk is highest between the ages of 16–24. There is an increased risk among those who spend more time in pubs and wine bars. Victims believed that the offender(s) were under the influence of alcohol in 47 per cent of all violent incidents. While the factors most strongly associated with a higher risk of violence are being young, being male and being unmarried, the risk of domestic violence is



significantly higher for women than for men. Domestic violence accounts for one in six violent incidents measured in the BCS. The overall risk of being a victim of violent crime in the 2008/9 BCS was 3.2 per cent. Men were about twice as likely as women (4.4 per cent compared with 2.1 per cent) to have experienced one or more violent crimes in the year prior to interview (Home Office 2009, ch. 3).

### III.8.c.ii. Charging practice

An important element of discretion, as we have already suggested in relation to public order offences, concerns the choice of charge. Stalking is a good example. A number of different criminal laws could have been invoked in a case such as *Burstow*, including improper use of a public telecommunications system, malicious communication and public nuisance. None of these captures the seriousness of the harm caused in those cases where the victim develops a psychiatrically recognised condition. As a result, charges for assault occasioning actual bodily harm and maliciously inflicting grievous bodily harm under the 1861 Act have become increasingly common. The Charging Standards for Offences against the Person first issued in 1994 are more enlightening than the offences themselves in distinguishing between different injuries. They encourage bottom-slicing so that assaults which could theoretically sustain a charge under section 47 (assault occasioning actual bodily harm) are charged in fact as common assault. The standards raise serious questions about the legitimacy of 'law' (in the form of legislation and case law), and formally acknowledge the broad discretions available at many stages of the criminal justice process.

#### CPS Charging Standard Chapter 5

[www.cps.gov.uk/legal/l\\_to\\_o/offences\\_against\\_the\\_person/#P48\\_1458](http://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/#P48_1458)

Distinguishing common assault/battery from assault occasioning actual bodily harm

(12) In law, the only factors that distinguish common assault from assault occasioning actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861, are the degree of injury that results and the sentence available to the sentencing court.

(13) Where battery results in injury, a choice of charge is available. The Code for Crown Prosecutors recognises that there will be factors, which may properly lead to a decision not to prefer or continue with the gravest possible charge. Thus, although any injury that is more than transient or trifling can be classified as actual bodily harm, the appropriate charge will be contrary to section 39 where injuries amount to no more than the following:

- Grazes;
- Scratches;
- Abrasions;
- Minor bruising;

- Swellings;
- Reddening of the skin;
- Superficial cuts;
- A 'black eye'.

(14) You should always consider the injuries first and in most cases the degree of injury will determine whether the appropriate charge is section 39 or section 47.

(15) There will be borderline cases, such as where an un-displaced broken nose has resulted. Generally, when the injuries amount to no more than those described, at sub-paragraph [46] below, common assault will be the appropriate charge.

(16) However, there may be cases where the actual injuries suffered by a victim would normally amount to common assault, but due to the presence of serious aggravating features, they could more appropriately be charged as actual bodily harm contrary to section 47 Offences Against the Person Act 1861.

(17) Such serious aggravating features would include:

- (a) the nature of the assault, such as the use of a weapon, biting, gouging or kicking of a victim whilst on the ground, or strangulation which is more than fleeting and which caused real fear to the victim; or
- (b) the vulnerability of the victim, such as when the victim is elderly, disabled or a child assaulted by an adult (so that where an assault causes any of the injuries referred to in sub-paragraph (vii), other than reddening of the skin, the charge will normally be assault occasioning actual bodily harm, although prosecutors must bear in mind that the definition of assault occasioning actual bodily harm requires the injury to be more than transient and trifling); or
- (c) other circumstances when though the injuries are relatively minor the existence of aggravating features mean that the sentencing powers of the court may not be adequate . . .

(18) Where a charge contrary to section 47 has been preferred, the acceptance of a plea of guilty to common assault will rarely be justified in the absence of a significant change in circumstances that could not have been foreseen at the time of review.

(46) As stated above, the factors in law that distinguish a charge under section 39 from a charge under section 47 are the degree of injury resulting and the sentencing powers available to the sentencing court . . . Where the injuries exceed those that can suitably be reflected by a common assault a charge of assault occasioning actual bodily harm should normally be preferred. By way of example, the following injuries should normally be prosecuted under section 47:

- loss or breaking of tooth or teeth;
- temporary loss of sensory functions, which may include loss of consciousness . . .
- extensive or multiple bruising;

- displaced broken nose;
- minor fractures;
- minor, but not merely superficial, cuts of a sort probably requiring medical treatment (e.g. stitches);
- psychiatric injury that is more than mere emotions such as fear, distress or panic. In any case where psychiatric injury is relied upon, as the basis for an allegation of assault occasioning actual bodily harm, and the matter is not admitted by the defence, then expert evidence must be called by the prosecution...

### III.8.c.iii. Reforming offences against the person

The reform of offences against the person has been mooted for some time, beginning with the (now defunct) Criminal Law Revision Committee's proposals in 1980, followed by the Law Commission in 1993. Adopting the Law Commission's recommendation for a neater tier of offences, the Home Office published a draft Bill in 1998. At first glance it is ironic that this area of law, the cornerstone of criminal practice in both magistrates' and Crown Courts, remains unreformed in the light of so much legislative activity in the last decade. But however illogical and cumbersome the current law (and therefore at times expensive to administer and causing injustice while offenders await appeals), in most cases – the vast majority of violence comprising as we have seen minor assaults – these are processed via guilty pleas or summary magistrates proceedings. This is a salutary lesson in needing to look at a wider, bigger picture than at offence definitions in order to gain an understanding of how law works.

#### *Home Office 1998 Violence – Reforming the Offences Against the Person Act 1861 (Consultation Paper)*

##### *Draft Offences Against the Person Bill*

##### **Injury and assault**

1(1) A person is guilty of an offence if he intentionally causes serious injury to another.

(2) A person is guilty of an offence if he omits to do an act which he has a duty to do at common law, the omission results in serious injury to another, and he intends the omission to have that result.

(3) ...

(4) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.

2(1) A person is guilty of an offence if he recklessly causes serious injury to another.

(2) ...

(3) A person guilty of an offence under this section is liable –

- (a) on conviction on indictment, to imprisonment for a term not exceeding 7 years;

...

3(1) A person is guilty of an offence if he intentionally or recklessly causes injury to another.

(2) ...

(3) A person guilty of an offence under this section is liable –

- (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years;

...

4(1) A person is guilty of an offence if –

- (a) he intentionally or recklessly applies force to or causes an impact on the body of another, or

- (b) he intentionally or recklessly causes the other to believe that any such force or impact is imminent.

(2) No such offence is committed if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is in fact unacceptable to the other person.

(3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both.

5(1) A person is guilty of an offence if he assaults –

- (a) a constable acting in the execution of his duty, or

- (b) a person assisting a constable acting in the execution of his duty.

(2) For the purposes of this section a person assaults if he commits the offence under section 4.

(3) ...

(4) ...

(5) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both.

6(1) A person is guilty of an offence under this section if he causes serious injury to another intending to resist, prevent or terminate the lawful arrest or detention of himself or a third person.

(2) The question whether the defendant believes the arrest or detention is lawful must be determined according to the circumstances as he believes them to be.

(3) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.



7(1) A person is guilty of an offence if he assaults another intending to resist, prevent or terminate the lawful arrest or detention of himself or a third person.

(2) The question whether the defendant believes the arrest or detention is lawful must be determined according to the circumstances as he believes them to be.

(3) For the purposes of this section a person assaults if he commits the offence under section 4.

(4) A person guilty of an offence under this section is liable –

(a) on conviction on indictment, to imprisonment for a term not exceeding 2 years;

...

### **Meaning of fault terms and of injury**

14(1) A person acts intentionally with respect to a result if –

(a) it is his purpose to cause it, or

(b) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result.

(2) A person acts recklessly with respect to a result if he is aware of a risk that it will occur and it is unreasonable to take that risk having regard to the circumstances as he knows or believes them to be.

(3) A person intends an omission to have a result if –

(a) it is his purpose that the result will occur, or

(b) although it is not his purpose that the result will occur, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose that some other result will occur.

(4) A person is reckless whether an omission will have a result if he is aware of a risk that the result will occur and it is unreasonable to take that risk having regard to the circumstances as he knows or believes them to be.

(5) Related expressions must be construed accordingly.

(6) This section has effect for the purposes of this Act.

15(1) In this Act 'injury' means –

(a) physical injury, or

(b) mental injury.

(2) Physical injury does not include anything caused by disease but (subject to that) it includes pain, unconsciousness and any other impairment of a person's physical condition.

(3) Mental injury does not include anything caused by disease but (subject to that) it includes any impairment of a person's mental health.

(4) In its application to section 1 this section applies without the exceptions relating to things caused by disease.

Although this scheme is undoubtedly neater and more rational than the 1861 Act, it nonetheless attempts the same basic equation, reflecting both seriousness of the injury caused and the culpability in terms of intention or recklessness accompanying that injury. 'Injury' is widely defined which may leave the same need for Charging Standards to ensure that injuries at the bottom end of the band are charged as assaults rather than as one of the injury offences. Horder has mounted a strong attack on the proposed scheme as 'morally sterilized' in conflating such a wide range of possible injuries into such a small range of offences (Horder 1994). In tidying up the house, the Law Commission and the Home Office may have left a skeleton or two in the cupboards.

#### FURTHER READING

- John Gardner 'Rationality and the Rule of Law in the Offences against the Person' [1994] *Cambridge Law Journal* 502.
- Elaine Genders 'Reform of the Offences against the Person Act: Lessons from the Law in Action' [1999] *Criminal Law Review* 689.
- Jeremy Horder 'Rethinking Non-fatal Offences Against the Person' (1994) 14 *OJLS* 335.
- Jeremy Horder 'Reconsidering Psychic Assault' [1998] *Criminal Law Review* 392.

# Drug and Alcohol Abuse

## Legal Constructions of a Social Problem

### III.9.a. Drug and alcohol control

The regulation of drugs and alcohol is instructive as an example of the legal response to, and construction of, a 'social problem'. This particular 'social problem' periodically generates moral panics which result in, and rely upon, the representation of offenders as 'dangerous' and of the relevant activities as presenting a general threat to crime control and to 'law and order'. A number of specific questions can be raised about the criminal regulation of drugs and alcohol. Notable among these are the uneven 'mens rea' requirements under the Misuse of Drugs Act 1971, and in particular the arbitrary distinction between alcohol and other drugs. This division is especially contestable given the facts that alcohol has greater addictive qualities than some of the proscribed drugs under the Misuse of Drugs Act 1971, and is arguably more strongly associated with health and social problems in the UK than is, for example, cannabis (Husak 2002). While the possession of both alcohol and tobacco is generally lawful, their use is highly regulated in terms of those to whom they can be sold and where they can be consumed.

There are many specific offences associated with alcohol and drug use. While alcohol is lawfully available but regulated, the possession of many drugs is prohibited. A large number of people come into the criminal justice system through alcohol-specific offences, for example being drunk and disorderly in public, and offences against the licensing laws, such as selling or serving alcohol to underage drinkers. In the case of illegal drugs, in addition to criminalisation through offences of possession and supply, drug use is financed through theft, robbery, burglary and other offences.

A further question concerns the response of criminal law to the offender who is affected by drugs or alcohol when they commit an unrelated offence; intoxication and criminal responsibility is discussed in part b. of this chapter.

#### III.9.a.i. The nature of the problem

Drug and alcohol (ab)use is currently regarded, in the UK and beyond, as a severe social problem. Alcohol is associated, as we have seen, with football

hooliganism, youth disorder and violence. It is estimated that 65 per cent of murders, 75 per cent of stabbings, and 50 per cent of fights or domestic assaults are committed while the offender is under the influence of alcohol or drugs (South 2007; Home Office 2009). These findings do not of course amount to a causal connection.

Possession offences account for 90 per cent of drug convictions. Most of these result in non-custodial sentences. However, the number of people in prison for drugs offences has multiplied rapidly in the last 20 years and more than tripled between 1991 and 2001 alone from 2,850 to 9,050. By March 2009 the number had reached 10,721 (plus a further 1,703 on remand). Of all women in prison, 30 per cent are there for drugs offences; of female foreign nationals in prison, that proportion increases to 81 per cent (Home Office 2003a: Ch 6). Prison itself produces yet more drug offenders: it has been estimated that a total 525,870 days were added to prison sentences as the result of positive mandatory drugs tests (Simmons 2002: 6). The highest proportion of custodial sentences for possession is for crack with about one-fifth sent to prison. For dealing (supply) offenders, the proportion sentenced to immediate custody is considerably higher (cocaine – 83 per cent, crack – 69 per cent, heroin – 81 per cent, ecstasy – 61 per cent) (Home Office 2005).

*Prison Reform Trust 2008 Key Facts from *Bromley Briefings* Fact File*  
pp. 31–33

- The number of people in prison for drug offences is high and growing. At the end of October 2007, 15% of male sentenced prisoners had been convicted of drug offences. In 1995 drug offences accounted for 10% of male sentenced prisoners. For the sentenced female prison population at the end of October 2007 drug offences accounted for 30% of prisoners, by far the largest proportion. In 1995 they accounted for 27% of the sentenced female prison population.
- There is a much wider group of prisoners whose offence is in some way drug related. Shoplifting, burglary, vehicle crime and theft can be linked to drug misuse. Over half of prisoners (55%) report committing offences connected to their drug taking, with the need for money to buy drugs the most commonly cited factor.
- Epidemiological studies show that around 55% of those received into custody are problematic drug users. That is annual throughput of 70,000 a year, or 39,000 at any one time. According to the Home Office that means around one sixth of problematic drug users are in prison at any one time.
- Many prisoners have never received help with their drug problems. According to the Social Exclusion Unit officers at HMP Manchester have estimated that 70% of prisoners come into the jail with a drugs misuse problem but that 80% of these have never had any contact with drug treatment services.
- Drug use amongst prisoners in custody is reported to be high. A recent Home Office study found that four out of ten prisoners said they had used drugs at least once whilst in their



current prison, a quarter had used in the past month and 16% in the past week. Cannabis and opiates were the drugs most often used.

- In almost half of violent crimes (48%) the victim believed the offender or offenders to be under the influence of alcohol.
- Nearly two-thirds of sentenced male prisoners (63%) and two-fifths of female sentenced prisoners (39%) admit to hazardous drinking which carries the risk of physical or mental harm. Of these, about half have a severe alcohol dependency.
- 44% of young adults (18-24) are binge drinkers. 27% of binge drinkers admitted committing an offence in the past 12 months – compared with 13% of drinkers who did not binge.
- Children who have begun binge drinking by the age of 16 are 90% more likely to have criminal convictions by the age of 30.
- It is common for prisoners who have alcohol problems to also have drug problems. Just over a quarter of male prisoners and about a fifth of female prisoners who are hazardous drinkers are dependent on at least one type of illicit drug.
- In 2002/2003 an estimated 6,400 prisoners undertook alcohol detoxification programmes, and an estimated 7,000 more prisoners undertook detoxification for combined alcohol and drug misuse.
- Misuse of alcohol and irresponsible drinking result in economic and social costs in the region of £18-20 billion per year.

There are three main strands to the 'drugs debate'. One is that it is morally wrong to use them; the second is that their use is harmful; and the third is that there is an association between drug or alcohol abuse and criminal behaviour. In relation to each of these strands, some differentiation between hard and soft drugs is often made.

The proper role of criminal law in enforcing moral values has always generated a lively debate. To what extent should criminal law attempt to reflect moral values or to influence moral attitudes? How effectively can it enforce contested moral views? And should punishment be reserved for those who are 'blameworthy'? The moral argument may be difficult to sustain in the light of increasing evidence that drug use is normal rather than 'deviant'. Some argue a thesis of 'normalisation', i.e. that there are now very few groups of young people who are anti-drug use. Over a quarter of 16 to 24-year-olds reported that they had used cannabis in the last year, while those who report use of ecstasy (6.8 per cent), amphetamines (5 per cent) or Class A drugs in general (8.8 per cent) is significantly lower (Aust *et al.* 2002).

Arguments about the harm of drugs are also difficult to sustain, especially in the light of the availability of alcohol, which is harmful in excess, and tobacco, which is harmful in itself. Increasingly, the argument for legalising cannabis is made on medical grounds, that it is a drug which, far from being harmful, should be available for some treatments. Although medical use does not necessarily

equate with safe recreational use, official attitudes have been ambivalent in the last decade. This leads to the third strand of the debate, that drug use leads to crime. The association with crime is complex.

North South 2007 'Drugs, Alcohol and Crime' in: Maguire et al. (eds.)  
*The Oxford Handbook of Criminology* (Oxford University Press),  
pp. 810, 829

Debates about the drugs/crime relationship generally follow one or other of the following propositions: 'criminal lifestyles may facilitate involvement with drugs'; or 'dependence on drugs then leads to criminal activity to pay for further drug use'. There is no dispute that there is an association between drugs and crime but this is not straightforward. It is straightforward that the very illegality of drugs will make their possession and supply an offence. Thereafter things are more complicated - does drug use lead to crime or does involvement in a criminal lifestyle lead to use of drugs? Heroin and crack users with a serious addiction may be committing a considerable amount of acquisitive crime to fund their habit but at the same time, as Seddon argues 'a link between drugs and crime is in fact only found among a minority of drug users - the 3 per cent or so of illicit drug users who are termed 'problem' users. Within this group, the association is primarily between use of heroin and/or crack cocaine and commission of certain economic/property offences (especially drug selling, shoplifting, burglary and other theft)'. For others, the route to drug use may be through involvement in an array of delinquent and criminal lifestyles, and drugs are just one more commodity bought and sold in the pleasure markets of the late modern illicit economy.

Some studies provide evidence that heroin or other serious drug users would already have been involved in delinquent or criminal activities before they started using these drugs...

Of course, other studies argue that there is a causal link, and that drug use (particularly of heroin) causes crime... The simple resolution of this debate is to agree with Nurco *et al.* (1985), who twenty years ago sensibly suggested that 'the long and continuing controversy over whether narcotic addicts commit crimes primarily to support their habits, or whether addictions are merely one more manifestation of a deviant and criminal life-style seems pointless in view of the fact that addicts cannot be regarded as a homogeneous group.'

... [I]t is alcohol rather than illegal drugs that tends to be linked to aggression and violent crimes... Nonetheless it remains the common conclusion of such research that the existence of a causal relationship between alcohol and violent crime is difficult to substantiate... Research findings suggest that a variety of co-factors may play a significant role in alcohol-related aggression. As with illegal drug consumption, belief about how alcohol is 'supposed' to affect behaviour, coupled with the influences of immediate social context and wider culture are as important for the behavioural outcome as the amount of alcohol consumed.

Toby Seddon 'Drugs, Crime and Social Exclusion' (2006) 44 *British Journal of Criminology* 340

[T]he connection between certain drugs and socio-economic deprivation has ... emerged as a central aspect of the British drug problem.

... Experimentation with illegal drugs today cuts across social class. It has become a commonplace rather than unusual activity. The vast majority of this drug trying involves relatively trouble-free and short-lived teenage experimentation with drugs like cannabis, amphetamine, LSD and ecstasy. Use of heroin and cocaine is rare and is not inevitably problematic either... So what is problematic about drug use and how many people are involved in it? [Problem] drug users [have been defined] as those who 'experience social, psychological, physical or legal problems related to their drug use; it has been estimated that the group represents less than 5 per cent of the 4,000,000 people who take illegal drugs in any one year.

... It is worth emphasising that before the early 1980s, Britain had virtually no drug problem to speak of and certainly not one of any size or significance... During the course of the 1980s, Britain's drug problem - until then relatively small and largely confined to London - was completely transformed in scale and nature... [S]everal towns and cities across the north of England and Scotland started to see rapid upsurges in heroin use...

The socio-demographic profile of the new heroin users was significantly different... They were primarily young unemployed people living in the poorest neighbourhoods and on the most impoverished housing estates. For the first time in Britain, heroin use was very strongly connected with social disadvantage. Alongside this, the epidemic saw a newly forged drugs-crime connection, with many of the users becoming involved in lifestyles involving drug dealing, prostitution and, especially, acquisitive crime...

A further element in the debate is the alleged pathway from soft to hard drug use:

H. Parker 1997, 'Adolescent Drugs Pathways in the 1990s' in J. Braggins (ed.), *Tackling Drugs Together: One Year On* (UKTU), p. 19

... We conducted a five-year study of 550 young people from the age of 14... There are four very clear groups. There are current drug users [22%], most of whom have been using drugs for two or three years; a lovely little group called ex-users [10%], who tried experimenting or using drugs at 14 or 15, and have now decided drugs are not for them...; a group that we call in transition [33%], which is a large group: they may or may not have tried drugs but they do not regard themselves as drug-users, they do not use drugs regularly; and there are some who have not used drugs, but what they have in common is that they think that they will use drugs in the future... the fourth group is abstainers [35%], who have never tried an illicit drug and do not expect to in the future...

Normalisation does not mean that it is normal for all young people to take drugs. It means that those who do not take drugs accept those who do, and accept that drugs are around and do not call the police or tell the teachers...



My conclusion is that while a lot of recreational drug users will get drugs to fit into the rhythms of their life, a minority will turn out to be problem users. The problems will be greater because more drugs are available and because their expectations of what these drugs can do are much greater... The drinks industry might not like this but if you are looking for a gateway drug to drug use it is alcohol.

### III.9.a.ii. Prohibition and regulation

The origins of anti-drug legislation lie in pragmatism and social policy rather than in moral zeal (Ward and Dobinson 1988; Duster 1970). As South comments both 'medical entrepreneurs' and 'moral crusaders' were active in seeking to monopolise and control the supply of drugs. This was reflected too in the emerging polarity 'between the medical view of drug use as addictive or a "disease" and a moral view of it as a vice to be controlled by law and punishment'. (2007, p. 819) But it was concern about the threat to discipline of the allied troops in the First World War that prompted the introduction offences for possession of cocaine and opium.

A wide range of criminal laws and processes impinge upon the use of alcohol and drugs. Criminal laws regulate the way in which specified drugs may be sold, imported or supplied. Licensing regulations control when, where, by whom and for what purposes alcohol may be consumed or supplied. The Licensing Act 2003 (which came into force in November 2005) established a single integrated scheme for licensing premises, dealing with alcohol, regulated entertainment and late night refreshment, and enabled flexible opening hours. The Act also introduced a range of further powers to help crime reduction and police were given expanded powers to close down disorderly and noisy licensed premises. The Act includes penalties for selling alcohol to people who are drunk, for breach of licence conditions, and for selling alcohol to children. The Home Office (2007) reports an overall fall in more serious violent crimes and less serious wounding offences, both involving injury, following the introduction of the Licensing Act 2003: 'Assault with no injury showed lower levels after the Act came in, followed by a rise from around June 2006. In contrast harassment showed increased levels that predated the licensing changes, while the night-time levels of criminal damage rose slightly after the Act came in despite an overall fall in criminal damage. There was also a small but consistent rise for crimes occurring between 3am and 6am, however offences in this time period accounted for only around four per cent of all offences recorded in this study in the year to November 2006. The patterns of recorded crime are influenced by changes in recording practices and policing activities. Specific campaigns have targeted alcohol misuse and led police forces to adopt different practices or to **place greater resources on the street to deal with disorder.**'

The Misuse of Drugs Act 1971 contains the main provisions on the possession and supply of controlled drugs. 'Controlled drugs' are divided into three classes:



Class A includes cocaine, LSD, mescaline and opium; included in Class B are amphetamine and codeine, while Class C includes benzphetamine and pemoline.

Cannabis was reclassified as a Class C drug between 2004 and 2009. The Home Office was influenced by a study that was also sceptical about the pathway from recreational soft drugs use to hard drug addiction (Pudney 2002). It concluded that the reclassification of cannabis from Class B to Class C would be unlikely to lead more young people to progress to more harmful drugs. The Home Office explained the reversion to Class B status thus: 'Classing cannabis in Class B reflects the fact that skunk, a much stronger version of the drug, now dominates in the UK. Skunk has swept many less potent forms of cannabis off the market, and now accounts for more than 80 per cent of cannabis available on our streets, compared to just 30 per cent in 2002' ([www.homeoffice.gov.uk/drugs/drugs-law/cannabis-reclassification/](http://www.homeoffice.gov.uk/drugs/drugs-law/cannabis-reclassification/)).

In relation to each Class of controlled drugs there are five main offences: importation/exportation; supply/possession with intent to supply; production; permitting premises to be used; and possession. The maximum penalties vary according to the Class. For Class A drugs all offences carry a maximum of life imprisonment except permitting premises (14 years) and possession (7 years). For Class B and C drugs all offences carry a maximum of 14 years with the exception of possession. Possession of Class B carries a maximum 5 years and possession of Class C a maximum of 2 years.

Of the 26,938 offenders sentenced for possession in 2007, 12,797 (47 per cent) were sentenced for a Class A drug (most commonly heroin, cocaine, crack and ecstasy), 11,778 (44 per cent) for a Class C drug (mainly cannabis) and 2,363 (9 per cent) for a Class B drug (mainly amphetamines). Very few custodial sentences were imposed for this offence (Sentencing Advisory Panel 2009 Consultation Paper on Sentencing for Drug Offences) with a fine being the most commonly imposed sentence.

Possession under section 5 does not require proof that the defendant knew that the substance in her physical possession was a controlled drug. Section 28 provides a defence, however, that the defendant neither knew nor suspected that the substance was a controlled drug. As explained in *Carrera*, below, there has been a fundamental reconsideration of the defence in the light of the Human Rights Act 1998. In *Lambert* (2001), the House of Lords held that section 28 should no longer be interpreted as placing upon the defendant the *burden of proving* that she did not know suspect nor have reason to suspect that she was in possession of a controlled drug.

*R v. Carrera [or Lozano] [2002] EWCA Crim 2527*

**Lord Justice Pill:** [T]he appellant... was convicted... of an offence of possessing a class B controlled drug (cannabis resin) with intent to supply [and] sentenced to five years'

imprisonment. He appeals against conviction... [He] is a Spanish national who earned his living as a self-employed haulier renting and driving his own lorry. He came to Britain from Spain once a week delivering goods and returned to Spain with goods supplied in this country by regular agents and contacts. [The police] discovered nine boxes containing 162 kilogrammes of cannabis resin with a street value of almost £1 million.

...  
The jury found the appellant not guilty on the count alleging importation. The judge also directed the jury as to count 2... 'That says that the defendant, on 3rd December 1999, had in his possession a controlled drug of class B, namely cannabis resin, with intent to supply it to a person or persons unknown, in contravention of section 4(1) of the Misuse of Drugs Act 1971'...

Since the trial, in the case of *Lambert* [2001] 3 WLR 206, the House of Lords has held that in the light of the Human Rights Act 1998 the law as to burden of proof is not in this context as it had previously been understood to be. That in this context is the combined effect of sections 4, 5 and 28 of the Misuse of Drugs Act 1971. Section 28(2) provides:

'Subject to subsection (3) below, in any proceedings for an offence to which the section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

(3) Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused -

- (a) shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but
- (b) shall be acquitted thereof -
  - (i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or
  - (ii) if he proves that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any offence to which this section applies.'

In *Lambert* Lord Hope stated at paragraph 94:

'I would therefore read the words "to prove" in section 28(2) as if the words used in the subsection were "to give sufficient evidence", and I would give the same meaning to the words "if he proves" in section 28(3). The effect which is to be given to this meaning is that the burden of proof remains on the prosecution throughout. If sufficient evidence is adduced to raise the issue, it will be for the prosecution to show beyond reasonable doubt that the defence is not made out by the evidence...'

As to the burden of proof, [Lord Clyde] also referred, at paragraph 157, to the test laid down in the House of Lords in *Warner* [1969] 2 AC 256 and referred to its undue harshness. He added:

'It seems to me that the proper way by which that harshness should be alleviated is to recognise that the accused should have the opportunity to raise the issue of his knowledge but to leave the persuasive burden of proof throughout on the prosecution. Respect for the "golden thread" of the presumption of innocence deserves no less.'

[T]he burden of proof is a matter of fundamental importance. That appears from Article 6(2) of the Convention:

'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'

... There is no doubt that the appellant in his evidence raised the question of his knowledge so that, in accordance with the decision of the House of Lords, the burden of proof was upon the prosecution with respect to the appellant's knowledge. Having considered the evidence and submissions, we are not satisfied that the jury would inevitably have reached the same conclusion as they did on count 2. We see the force of the prosecution case and its strength but, having regard to the fundamental importance of the burden of proof... a verdict adverse to the appellant upon a proper direction was not inevitable.

For the reasons we have given and as indicated at the close of the hearing last evening, the appeal is allowed and the conviction quashed. [A request for a retrial was not granted.]

#### Contentious Liberty (and) Access Consultation Paper on Controlling Drug Offences, paras 18-32

18. The 2008 UK drugs strategy includes a wide range of custodial and community based adult drug interventions that are built around mandatory testing and assessment and voluntary treatment programmes. Detoxification, treatment, therapy and counselling in custody is supported by drug-free prison wings and voluntary testing programmes to help prisoners abstain from drug use in custody. In the community, drug treatment may be included within a conditional caution, where failure to comply may result in prosecution for the original offence; failure to comply with drug rehabilitation requirements or treatment programmes within a community order will also result in a sanction.

19. A recent study by the UK Drug Policy Commission noted that there is no evidence available that allows reliable comparisons of the effectiveness of different interventions or identifies those offenders who would benefit most from different programmes and suggested that a coordinated research and analysis programme is needed. However, it concluded that there is good evidence available to support the use of some criminal justice based interventions that encourage engagement with treatment and that these can reduce drug use and offending.

20. It also found 'that community punishments are likely to be more appropriate than imprisonment for most problem drug-using offenders', noting that imprisonment can have

unintended negative consequences and that there are many practical issues that can frustrate the delivery of successful drug treatment programmes in prison, particularly for short-term prisoners. It concluded that maximising the use and effectiveness of community sentences is likely to be more beneficial than imprisonment for drug dependent offenders who are convicted of less serious acquisitive crimes or drug possession offences.

21. For many years, deterrence has been considered to be one of the main purposes in sentencing drug offences. The more serious offences such as importation have attracted lengthy custodial sentences on the grounds that these were necessary to discourage the widespread trade in illicit drugs and, in 2007, the average custodial sentence length for importation and exportation of a class A drug was 88.0 months. In *Aramah*, in response to concerns about the large profits to be made from the importation of class A drugs and the enormous harm caused to individual victims and to society as a whole, and with reference to the severity of sentences imposed in other countries, the Court said: '... anything which the courts in this country can do by way of deterrent sentences on those found guilty of crimes involving class A drugs should be done'. This thinking appears to have guided sentencing ever since. A key question is whether that approach has been effective.

28. Research shows that offenders are more likely to be deterred by the perceived risk of being apprehended and convicted than by the sentence that is likely to be imposed. A recent study of 222 offenders convicted of serious drug-related offences found that the risk of prison was viewed as an occupational hazard and was not considered a serious deterrent to involvement in the illegal drugs trade. For those at the top of the supply chain, the considerable financial gains that can be made through importation and exportation offences are likely to far outweigh concerns about the scale of penalties in the unlikely event of conviction.

29. Furthermore, an analysis of the UK drugs policy in general has found no evidence to show that penalties for drug offences have deterred people from using and selling drugs and concludes that imprisoning drug offenders for relatively substantial periods does not appear to represent a cost effective response. The drug trade is a highly resilient market and even where enforcement activity has led to arrests and convictions of high-level dealers, supply is likely to be affected only temporarily; given the lucrative nature of the market, the void will soon be filled.

30. For offenders involved in the possession of illegal drugs, drug use is likely to be heavily influenced by peer pressure, by a lack of awareness of the associated health risks and by the perception that possession and supply offences are not particularly serious; those involved in relatively low levels of supply often also are motivated by their own addiction. The likely sanction for an offence is most unlikely to influence the behaviour of drug-dependent offenders.

31. In contrast, asset recovery measures have been found to be of much greater concern to dealers. The profits that can be made from drug offences are enormous and, where such large sums of money are involved, it would appear that the fear of financial reprisal is of



more concern to offenders than the potential loss of liberty, especially as confiscation orders can target not only the proceeds of crime but also any legitimate assets. The relatively recent 'serious crime prevention order' is also likely to be viewed as a severe sanction by those on whom it is imposed.

32. In comparison with the sanctions available when guideline cases were decided, ancillary orders such as the confiscation order play a much more significant role in the sentencing of drug offences. Under the Proceeds of Crime Act 2002, the Crown Court must consider making a confiscation order in all cases where there is evidence to show that an offender has benefited financially from a crime; a magistrates' court may commit an offender to the Crown Court for sentence with a view to such an order being made. Although a confiscation order is not made at the time sentence is imposed, failure to pay an amount subsequently ordered to be confiscated will result in a separate period in custody.

Although alcohol is legally available, its distribution and consumption is nonetheless subject to extensive regulation. Some laws such as the Licensing Act 2003 concern use in general; many others regulate use in specific contexts – for instance, while driving (Road Traffic Act 1988), while attending sporting events (Sporting Events (Control of Alcohol) Act 1985) or when under 18. The Licensing (Young Persons) Act 2000 made it an offence for any person to sell alcohol to an under-18 on licensed premises, or knowingly to allow another person to do so. And it creates the offence of buying, or attempting to buy, alcohol on licensed premises on behalf of an under-18. The Confiscation of Alcohol (Young Persons) Act 1997 gave police powers to confiscate alcohol from under-age drinkers in public places. We can note in passing the use of an ASBO to ban a man from buying or consuming alcohol anywhere in England and Wales for three years (*The Guardian*, 24 December 2002). Building on the provisions in the Criminal Justice and Police Act 2001, the Home Office has identified a number of strategies to 'tackle alcohol-related' crime (2003b). Penalty notices (on-the-spot fines) were introduced in 2003. The scheme is targeted at low-level anti-social behaviour which typically occurs late at night at weekends, which is often drink-related and is applicable to those aged 18 or over.

### III.9.b. Intoxication and criminal responsibility

What is the criminal law's response to defendants who seek to excuse themselves from liability on the basis of intoxication, whether from alcohol or other drugs? As a question of 'general principle', orthodox doctrine would seem to indicate that intoxication should remove liability whenever it prevents the formation of 'mens rea'; that is, where it has meant that the defendant did not have the requisite intention, foresight, knowledge or belief. However, 'self-induced' intoxication may not be pleaded in this way in most cases.

The judicial history of this rule affords a classic illustration of the malleability of doctrinal principles:

*Director of Public Prosecutions v Majewski* [1997] AC 423, 311

**Lord Elwyn-Jones LC:** ... Robert Stefan Majewski appeals against his conviction on 7 November 1973, at Chelmsford Crown Court on three counts of assault occasioning actual bodily harm and three counts of assault on a police constable in the execution of his duty. He was bound over to come up for judgment when called upon. On 5 December 1973, he was placed on probation for three years. Later he committed a further offence for which he was given an additional sentence of six months' imprisonment for the original offences.

The appellant's case was that when the assaults were committed he was acting under the influence of a combination of drugs (not medically prescribed) and alcohol, to such an extent that he did not know what he was doing and that he remembered nothing of the incidents that had occurred. After medical evidence had been called by the defence as to the effect of the drugs and drink the appellant had taken, the learned judge, in the absence of the jury, ruled that he would direct the jury that on the charges of assault or assault occasioning actual bodily harm, the question of whether he had taken drink or drugs was immaterial. The learned judge directed the jury that in relation to an offence not requiring a specific intent, the fact that a man has induced in himself a state in which he is under the influence of drink and drugs, is no defence. Since the counts for assault did not require proof of any specific intent the fact that the accused might have taken drink or drugs was irrelevant, provided the jury was satisfied that the state which he was in as a result of drink and drugs or a combination of both was self-induced...

The Court of Appeal dismissed the appeal against conviction but granted leave to appeal to your Lordships' House certifying that the following point of law of general public importance was involved:

Whether a defendant may properly be convicted of assault notwithstanding that, by reason of his self-induced intoxication, he did not intend to do the act alleged to constitute the assault...

Self-induced alcoholic intoxication has been a factor in crimes of violence, like assault, throughout the history of crime in this country. But voluntary drug taking with the potential and actual dangers to others it may cause has added a new dimension to the old problem with which the courts have had to deal in their endeavour to maintain order and to keep public and private violence under control. To achieve this is the prime purpose of the criminal law...

[The] case for the appellant was that there was no such substantive rule of law and that if there was, it did violence to logic and ethics and to fundamental principles of the criminal law which had been evolved to determine when and where criminal responsibility should arise. His main propositions were as follows:

1. No man is guilty of a crime (save in relation to offences of strict liability) unless he has a guilty mind.
2. A man who, though not insane, commits what would in ordinary circumstances be a crime when he is in such a mental state (whether it is called 'automatism' or 'pathological

intoxication' or anything else) that he does not know what he is doing, lacks a guilty mind and is not criminally culpable for his actions.

3. This is so whether the charge involves a specific (or 'ulterior') intent or one involving only a general (or 'basic') intent.
4. The same principle applies whether the automatism was the result of causes beyond the control of the accused or was self-induced by the voluntary taking of drugs or drink.
5. Assaults being crimes involving a guilty mind, a man who in a state of automatism unlawfully assaults another must be regarded as free from blame and be entitled to acquittal.
6. It is logically and ethically indefensible to convict a man of assault; it also contravenes s. 8 of the Criminal Justice Act 1967.
7. There was accordingly a fatal misdirection . . .

What then is the mental element required in our law to be established in assault? This question has been most helpfully answered in the speech of Lord Simon of Glaisdale in *R v. Morgan* (1976) at 216:

By 'crimes of basic intent' I mean those crimes whose definition expresses (or, more often, implies) a mens rea which does not go beyond the actus reus. The actus reus generally consists of an act and some consequence. The consequence may be very closely connected with the act or more remotely connected with it: but with a crime of basic intent the mens rea does not extend beyond the act and its consequence, however remote, as defined in the actus reus. I take assault as an example of a crime of basic intent where the consequence is very closely connected with the act. The actus reus of assault is an act which causes another person to apprehend immediate and unlawful violence. The mens rea corresponds exactly. The prosecution must prove that the accused foresaw that his act would probably cause another person to have apprehension of immediate and unlawful violence, or would possibly have that consequence, such being the purpose of the act, or that he was reckless as to whether or not his act caused such apprehension. This foresight (the term of art is "intention") or recklessness is the mens rea in assault. For an example of a crime of basic intent where the consequence of the act involved in the actus reus as defined in the crime is less immediate, I take the crime of unlawful wounding. The act is, say, the squeezing of a trigger. A number of consequences (mechanical, chemical, ballistic and physiological) intervene before the final consequence involved in the defined actus reus – namely, the wounding of another person in circumstances unjustified by law. But again here the mens rea corresponds closely to the actus reus. The prosecution must prove that the accused foresaw that some physical harm would ensue to another person in circumstances unjustified by law as a probable (or possible and desired) consequence of his act, or that he was reckless as to whether or not such consequence ensued.

How does the fact of self-induced intoxication fit into that analysis? If a man consciously and deliberately takes alcohol and drugs not on medical prescription, but in order to escape from reality, to go 'on a trip', to become hallucinated, whatever the description may be and thereby disables himself from taking the care he might otherwise take and as a result by



his subsequent actions causes injury to another – does our criminal law enable him to say that because he did not know what he was doing he lacked both intention and recklessness and accordingly is entitled to an acquittal?

Originally the common law would not and did not recognise self-induced intoxication as an excuse. Lawton LJ [in the Court of Appeal] spoke of the ‘merciful relaxation’ to that rule which was introduced by the judges during the 19th century, and he added, at p. 411:

Although there was much reforming zeal and activity in the 19th century, Parliament never once considered whether self-induced intoxication should be a defence generally to a criminal charge. It would have been a strange result if the merciful relaxation of a strict rule of law had ended, without any Parliamentary intervention, by whittling it away to such an extent that the more drunk a man became, provided he stopped short of making himself insane, the better chance he had of an acquittal. . . The common law rule still applied but there were exceptions to it which Lord Birkenhead LC tried to define by reference to specific intent. ([1975] 3 WLR 401)

There are, however, decisions of eminent judges in a number of Commonwealth cases in Australia and New Zealand (but generally not in Canada nor in the United States) as well as impressive academic comment in this country, to which we have been referred, supporting the view that it is illogical and inconsistent with legal principle to treat a person who of his own choice and volition has taken drugs and drink, even though he thereby creates a state in which he is not conscious of what he is doing, any differently from a person suffering from the various medical conditions like epilepsy or diabetic coma and who is regarded by the law as free from fault. However our courts have for a very long time regarded in quite another light the state of self-induced intoxication. The authority which for the last half-century has been relied upon in this context has been the speech of the Earl of Birkenhead LC in *DPP v. Beard* (1920) who stated, at 494:

Under the law of England as it prevailed until early in the 19th century voluntary drunkenness was never an excuse for criminal misconduct; and indeed the classic authorities broadly assert that voluntary drunkenness must be considered rather an aggravation than a defence. This view was in terms based upon the principle that a man who by his own voluntary act debauches and destroys his will power shall be no better situated in regard to criminal acts than a sober man.

. . . I do not for my part regard that general principle as either unethical or contrary to the principles of natural justice. If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of *mens rea*, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary *mens rea* in assault cases: see *R v. Venna* (1976) per James LJ at 429. The drunkenness is itself an intrinsic, an integral part of the crime, the other part being the evidence of the unlawful use of force against the victim. Together they add up to criminal recklessness. . .



This approach is in line with the American Model Penal Code (s.208(2)):

When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.

Acceptance generally of intoxication as a defence (as distinct from the exceptional cases where some additional mental element above that of ordinary *mens rea* has to be proved) would in my view undermine the criminal law and I do not think that it is enough to say, as did Mr Tucker, that we can rely on the good sense of the jury or of magistrates to ensure that the guilty are convicted...

In the case of voluntarily intoxicated defendants, therefore, the usual principles of responsibility do not apply. No link between 'actus reus' and 'mens rea' need be proven; the 'recklessness' in getting intoxicated is magically linked to the subsequent action in a way which defies doctrinal strictures. The lack of any clear rationale for the distinction between offences of basic and specific intent was acknowledged by the Court of Appeal in *O'Grady* below, in a context that extended rather than restricted the *Majewski* doctrine. Lord Lane suggested that voluntary intoxication may supply not only recklessness but also, where a defence is at issue, intent:

***R v. O'Grady* [1987] 3 All ER 420, CA**

[The appellant was charged with murder but convicted by the jury of manslaughter. He had killed one of his friends during the night following a day in which they had both been drinking heavily. He claimed that he had woken to find his friend attacking him with a piece of glass and had responded in self-defence.]

**Lord Lane CJ:** ... [The judge] gave the classic direction on self-defence. He made no mention of the possibility that the appellant might by reason of intoxication have been mistaken as to the threat posed to him... This was no doubt because no-one had taken the point. Counsel for the prosecution... saw fit to invite the judge to remedy what he plainly regarded as this lacuna in the charge to the jury... The judge then gave this further direction:

It might be a view that you take, I know not, that this defendant thought he was under attack from the other man mistakenly and made a mistake in thinking that he was under attack because of the drink that was in him. If he made such a mistake in drink he would nevertheless be entitled to defend himself even though he mistakenly believed that he was under attack. He would be entitled in those circumstances to defend himself. But if in taking defensive measures, then he went beyond what is reasonable either because his mind being affected by drink or for any other reason, then the defence of self-defence would not avail him because, as I told you earlier on, you are entitled to defend yourself if it is necessary to do so, but the defensive measures that you take must be reasonable ones and not go beyond what is reasonable.

... How should the jury be invited to approach the problem? One starts with the decision in *Williams* (1983), namely that where the defendant might have been labouring under a mistake as to the facts he must be judged according to that mistaken view, whether the mistake was reasonable or not. It is then for the jury to decide whether the defendant's reaction to the threat (real or imaginary) was a reasonable one. The court was not in that case considering what the situation might be where the mistake was due to voluntary intoxication by alcohol or some other drug.

[W]here the jury are satisfied that the defendant was mistaken in his belief that any force or the force which he in fact used was necessary to defend himself, and are further satisfied that the mistake was caused by voluntarily induced intoxication, the defence must fail. We do not consider that any distinction should be drawn on this aspect of the matter between offences involving what is called specific intent, such as murder, and offences of so-called basic intent, such as manslaughter. Quite apart from the problem of directing a jury in a case such as the present where manslaughter is an alternative verdict to murder, the question of mistake can and ought to be considered separately from the question of intent. A sober man who mistakenly believes he is in danger of immediate death at the hands of an attacker is entitled to be acquitted of both murder and manslaughter if his reaction in killing his supposed assailant was a reasonable one. What his intent may have been seems to us to be irrelevant to the problem of self-defence or no...

This brings us to the question of public order. There are two competing interests. On the one hand the interest of the defendant who has only acted according to what he believed to be necessary to protect himself, and on the other hand that of the public in general and the victim in particular who, probably through no fault of his own, has been injured or perhaps killed because of the defendant's drunken mistake. Reason recoils from the conclusion that in such circumstances a defendant is entitled to leave the court without a stain on his character. [The appeal was dismissed.]

The unclear foundations of the *Majewski* case are a shaky basis on which to distinguish between offences where evidence of intoxication is allowed ('specific' intent offences) and those where it is not ('basic' intent offences). It cuts across the doctrinal claims of criminal law that a person is only guilty if they have subjective 'mens rea'. In basic intent offences such as assault, assault occasioning actual bodily harm and malicious wounding, evidence of intoxication is inadmissible, defendants are left with nowhere to go in denying the mental element. It is useful to recall, however, that cases such as *Venna* (1975) and *Savage and Parmenter* (1992) hardly suggest that proving the mental element presents a tremendous challenge to the prosecution. Coupled with the fact that most defendants plead guilty, the number of defendants who are seriously affected by the intoxication rules is probably not huge. The more serious crimes such as murder, wounding with intent, theft and robbery are all offences of specific intent and thus evidence of intoxication is admissible. The assertion that the intoxication debate is more about principle than practice is borne out by the discovery that the level of convictions did not vastly decrease in the

common-law states of Australia, South Africa and Canada when they abandoned the *Majewski* rule (Orchard 1993). The most that can be said about judicial activity in this area is that it shows signs of the severe strain involved in rationalising the irreconcilable. The Court of Appeal in *Hardie* (1984) did make an exception for 'legitimate' drug users:

***R v. Hardie* [1984] 3 All ER 848, CA**

[The defendant set fire to a wardrobe in the flat where he had been living with his girlfriend. Their relationship had recently broken down and because he was upset had taken that day a number of tranquilliser tablets which had previously been lawfully prescribed for his girlfriend. He argued that the effects of the drug prevented him forming the 'mens rea' for an offence under section 1(2) of the Criminal Damage Act 1971. The jury were directed by the judge to ignore evidence about the drug because it was self-administered.]

**Parker LJ:** ... The appellant's evidence was that he had never taken valium before, that he took one at about 12 noon to calm him down, for he was in a distressed state, that it did not have much effect, that he and [his girlfriend] had then gone shopping, that he had taken two more in front of her and she had said, 'Take as many as you like, they are old stock and will do you no harm,' that he had taken two more shortly afterwards, that he may have taken two of the other [diuretic] tablets also, and that shortly thereafter on return to the house he had fallen into a deep sleep and could thereafter remember only periods...

The defence was that the appellant was so affected by the valium that he could remember nothing about the fire and had not the necessary mens rea to constitute either of the offences charged. On the basis no doubt of *Majewski* (1977) and *Caldwell* (1981), the judge directed the jury in effect that, as the valium was voluntarily self-administered, it was irrelevant as a defence and its effects could not negative mens rea...

It is clear from *Caldwell* that self-induced intoxication can be a defence where the charge is only one of specific intention. It is equally clear that it cannot be a defence where, as here, the charge included recklessness. Hence, if there was self-intoxication in this case the judge's direction was correct. The problem is whether, assuming that the effect of the valium was to deprive the appellant of any appreciation of what he was doing, it should properly be regarded as self-induced intoxication and thus no answer...

*Majewski* was a case of drunkenness resulting from alcoholic consumption by the accused whilst under the influence of non-medically-prescribed drugs. *Caldwell* was a case of plain drunkenness. There can be no doubt that the same rule applies both to self-intoxication by alcohol and to intoxication by hallucinatory drugs, but this is because the effects of both are well known and there is therefore an element of recklessness in the self-administration of the drug. *Lipman* (1969) is an example of such a case.

'Intoxication' or similar symptoms may, however, arise in other circumstances. In *Bailey* (1983) this court had to consider a case where a diabetic had failed to take sufficient food after taking a normal dose of insulin and struck the victim over the head with an iron bar. The judge directed the jury that the defence of automatism, i.e. that the mind did not go with the act, was not available because the incapacity was self-induced. It was held that this was wrong on two grounds: (a) because on the basis of *Majewski* it was clearly

available to the offence embodying specific intent and (b) because although self-induced by the omission to take food it was also available to negate the other offence which was of basic intent only.

[Parker LJ then quoted what Griffiths LJ said in *Bailey* [1983] 2 All ER 503 at 507]:

[I]t seems to us that there may be material distinctions between a man who consumes alcohol or takes dangerous drugs and one who fails to take sufficient food after insulin to avert hypoglycaemia. It is common knowledge that those who take alcohol to excess or certain sorts of drugs may become aggressive or do dangerous or unpredictable things; they may be able to foresee the risks of causing harm to others, but nevertheless persist in their conduct. But the same cannot be said, without more, of a man who fails to take sufficient food after an insulin injection. If he does appreciate that such a failure may lead to aggressive, unpredictable and uncontrollable conduct and he nevertheless deliberately runs the risk or otherwise disregards it, this will amount to recklessness... In our judgment, self-induced automatism, other than that due to intoxication from alcohol or drugs, may provide a defence to crimes of basic intent...

In the present instance the defence was that the valium was taken for the purpose of calming the nerves only, that it was old stock and that the appellant was told that it would do him no harm. There was no evidence that it was known to the appellant or even generally known that the taking of valium in the quantity taken would be liable to render a person aggressive or incapable of appreciating risks to others or have other side effects such that its self-administration would itself have an element of recklessness. It is true that valium is a drug and it is true that it was taken deliberately and not taken on medical prescription, but the drug is, in our view, wholly different in kind from drugs which are liable to cause unpredictability or aggressiveness...

[The jury] should have been directed that if they came to the conclusion that, as a result of the valium, the appellant was, at the time, unable to appreciate the risks to property and persons of his actions they should then consider whether the taking of the valium was itself reckless... [The appeal was allowed and the conviction quashed.]

The House of Lords was not in the mood for generosity in the following case in which the defendant argued that involuntary intoxication had led to the commission of the offence:

### *R. v. Kingston* [1994] 3 All ER 133

[The defendant was convicted of indecent assault. He claimed that, unknown to him, his co-defendant had administered sedative drugs to him which meant that he did not realise what he was doing. The Court of Appeal, upholding a defence of involuntary intoxication, quashed the conviction. The prosecution appealed to the House of Lords with a certified point of law of general public importance: (a) whether, if it was proved that the necessary intent was present when the necessary act was done by him, a defendant has open to him a defence of involuntary intoxication; (b) if so, on whom does the burden of proof lie?]



**Lord Mustill:** . . . In academic circles the decision under appeal has not been favourably received . . . [It has been] characterised . . . as surprising, dangerous and contrary to principle. On the other hand there is an instinctive attraction in the proposition that a retributory system of justice should not visit penal consequences on acts which are the ultimate consequence of an event outside the volition of an actor, and that it is not sufficient to acknowledge the special circumstances by mitigating the penalty which would otherwise be appropriate . . . This divergence of opinion reflects a general issue of fundamental importance as well as a more technical question on the law of intoxication. Since the matter is also of increasing practical significance, given the availability of hallucinogenic drugs whose ingestion in very small quantities can lead to behaviour which is bizarre, unpredictable and violent, it must be considered in some detail . . .

The general nature of the case is clear enough. In ordinary circumstances the respondent's paedophilic tendencies would have been kept under control, even in the presence of the sleeping or unconscious boy on the bed. The ingestion of the drug (whatever it was) brought about a temporary change in the mentality or personality of the respondent which lowered his ability to resist temptation so far that his desires overrode his ability to control them. Thus we are concerned here with a case of disinhibition. The drug is not alleged to have created the desire to which the respondent gave way, but rather to have enabled it to be released . . .

On these facts there are three grounds on which the respondent might be held free from criminal responsibility. First, that his immunity flows from general principles of the criminal law. Secondly, that this immunity is already established by a solid line of authority. Finally, that the court should, when faced with a new problem acknowledge the justice of the case and boldly create a new common law defence.

It is clear . . . that the Court of Appeal adopted the first approach . . . that if blame is absent the necessary *mens rea* must also be absent.

My Lords, with every respect I must suggest that no such principle exists or, until the present case, had ever in modern times been thought to exist. [After concluding that there was no authority for the existence of a defence of involuntary intoxication, he continued:]

To recognise a new defence of this type would be a bold step. The common law defences of duress and necessity (if it exists) and the limited common law defence of provocation are all very old . . . I suspect that the recognition of a new general defence at common law has not happened in modern times. Nevertheless, the criminal law must not stand still, and if it is both practical and just to take this step, and if judicial decision rather than legislation is the proper medium, then the courts should not be deterred simply by the novelty of it. So one must turn to consider just what defence is now to be created. The judgment under appeal implies five characteristics.

1. The defence applies to all other offences, except perhaps to absolute offences. It therefore differs from other defences such as provocation and diminished responsibility.
2. The defence is a complete answer to a criminal charge. If not rebutted it leads to an outright acquittal, and unlike provocation and diminished responsibility leaves no

room for conviction and punishment for a lesser offence. The underlying assumption must be that the defendant is entirely free from culpability.

3. It may be that the defence applies only where the intoxication is due to the wrongful act of another and therefore affords no excuse when, in circumstances of no greater culpability, the defendant has intoxicated himself by mistake (such as by short-sightedly taking the wrong drug). I say that this may be so, because it is not clear whether, since the doctrine was founded in part on the dictum of Park J, the 'fraud or stratagem of another' is an essential element, or whether this was taken as an example of a wider principle.
4. The burden of disproving the defence is on the prosecution.
5. The defence is subjective in nature. Whereas provocation and self-defence are judged by the reactions of the reasonable person in the situation of the defendant, here the only question is whether this particular defendant's inhibitions were overcome by the effect of the drug. The more susceptible the defendant to the kind of temptation presented, the easier the defence is to establish.

...[S]ince the existence or otherwise of the defence has been treated in argument at all stages as a matter of existing law the Court of Appeal had no occasion to consider the practical and theoretical implications of recognising this new defence at common law, and we do not have the benefit of its views. In their absence, I can only say that the defence appears to run into difficulties at every turn.

For these reasons I consider that both the ruling and the direction of the learned judge were correct. Accordingly I would answer the first certified question in the negative and would allow the appeal.

Note that Kingston's (rejected) argument that 'mens rea' in the absence of blame should equal no liability, was the mirror of that accepted in *Majewski*, that blame in the absence of (conventional) 'mens rea' equals liability. Was Kingston held responsible, despite the involuntariness of his intoxication, because he was a sex offender? Has there been a shift from individual responsibility for each offence to the labelling 'character' liability inherent in much contemporary regulation of sex offenders?

In the next extract, Gardner presents a theoretical basis for the *Majewski* rule:

G. Gardner, 'The Implications of *Majewski*' (1994) 11 Crim LR 117

The argument of 'logic' or 'principle' against *Majewski* takes the following lines. *Majewski* applies, essentially, to crimes where mens rea is subjective recklessness. Conviction for such a crime requires that the accused adverted to at least the possibility of the actus reus occurring. When the accused was so intoxicated that he lacked such advertence, it is therefore illogical, or contrary to principle, to convict him.

In examining this argument, we must, of course, begin by agreeing that in the crimes in question, the law has adopted advertence as inculpatory. But then the questions begin. For the fact that the law adopts advertence as inculpatory does not necessarily entail that

the absence of advertence must be exculpatory. The law could without contradiction adopt a second inculpatory state, such as intoxication. So the argument of logic or principle must depend on the supposition that the crime may indeed be committed only when advertence is present. Is this supposition in fact true?

On the face of it, of course, the supposition is clearly untrue. As things stand, a full statement of the crime in question would have to refer to inculpation for intoxication as well as to inculpation for advertence . . . The fact that a crime has advertence as a basis for liability thus provides no ground for the supposition that advertence must be its exclusive basis for liability, leaving no room for intoxication.

The Law Commission has considered intoxication more than once. When it first considered this question, it concluded that the present law was illogical and out of step with the requirement that the prosecution should prove all elements of the offence. A number of reform options were advanced, of which the Commission particularly favoured two: abolish the *Majewski* distinction and allow intoxication as evidence in all offences, or replace the present rule with a separate offence of causing harm while intoxicated (Law Commission Consultation Paper (LCCP) 127, 1993). In the resulting Report the Law Commission stepped back recommending (Report 229, 1995) that the status quo should remain, although the law should be placed on a statutory footing. The Commission has published a further Report (2009) which endorses the 1995 recommendations but proposes a redrafted Bill. In an attempt to tidy up a number of areas of uncertainty, the Report develops a method of distinguishing between offences in which intoxication is relevant and those where it is not. Instead of the categories of 'specific' and 'basic' intent offences, there would be a list of integral fault elements that the prosecution must prove, irrespective of the intoxication. The Report also took the opportunity, missed previously, to consider involuntary intoxication, concluding that the *Kingston* approach should be followed.

#### Law Commission 2009 Intoxication and Criminal Responsibility Bill 2009

##### SUMMARY OF RECOMMENDATIONS

##### VOLUNTARY INTOXICATION

##### Recommendation 1: the *Majewski* rule

##### 5.1 There should be a general rule that

- (1) if D is charged with having committed an offence as a perpetrator;
- (2) the fault element of the offence is not an integral fault element (for example, because it merely requires proof of recklessness); and
- (3) D was voluntarily intoxicated at the material time; then, in determining whether or not D is liable for the offence, D should be treated as having been aware at the material time of anything which D would then have been aware of but for the intoxication.

[paragraph 3.35]

**Recommendation 2: the rule for integral fault elements**

5.2 If the subjective fault element in the definition of the offence, as alleged, is one to which the justification for the Majewski rule cannot apply, then the prosecution should have to prove that D acted with that relevant state of mind.

[paragraph 3.42]

**Recommendation 3: the integral fault elements**

5.3 The following subjective fault elements should be excluded from the application of the general rule and should, therefore, always be proved:

- (1) intention as to a consequence;
- (2) knowledge as to something;
- (3) belief as to something (where the belief is equivalent to knowledge as to something);
- (4) fraud; and
- (5) dishonesty.

[paragraph 3.46]

**Recommendation 4 (defences and mistaken beliefs)**

5.4 D should not be able to rely on a genuine mistake of fact arising from self-induced intoxication in support of a defence to which D's state of mind is relevant, regardless of the nature of the fault alleged. D's mistaken belief should be taken into account only if D would have held the same belief if D had not been intoxicated.

[paragraph 3.53]

**Recommendation 5 ('honest belief' provisions)**

5.5 The rule governing mistakes of fact relied on in support of a defence (recommendation 4) should apply equally to 'honest belief' provisions which state how defences should be interpreted.

[paragraph 3.80]

**Recommendation 6 (negligence and no-fault offences)**

5.6 If the offence charged requires proof of a fault element of failure to comply with an objective standard of care, or requires no fault at all, D should be permitted to rely on a genuine but mistaken belief as to the existence of a fact, where D's state of mind is relevant to a defence, only if D would have made that mistake if he or she had not been voluntarily intoxicated.

[paragraph 3.84]

**Recommendation 7 (secondary liability generally)**

5.7 For the doctrine of secondary liability generally (where no joint enterprise is alleged):

- (1) if the offence is one which always requires proof of an integral fault element, then the state of mind required for D to be secondarily liable for that offence should equally be regarded as an integral fault element;



- (2) if the offence does not always require proof of an integral fault element, then the (Majewski) rule on voluntary intoxication should apply in determining D's secondary liability for the offence.

[paragraph 3.92]

Recommendation 8 (secondary liability – joint enterprises)

5.8 Our proposed rule on the relevance of voluntary intoxication to secondary liability generally should apply equally to cases of alleged joint enterprise.

[paragraph 3.99]

Recommendation 9 (inchoate liability)

5.9 If D is charged under Part 2 of the Serious Crime Act 2007 with an offence of encouraging or assisting another person to commit a crime ('the crime'), then if the crime is one which would always require proof of an integral fault element for a perpetrator to be liable, and the allegation against D requires the prosecution to prove that D was 'reckless' for the purposes of section 47(5) of the Act, the state of mind of being 'reckless' should be treated as an integral fault element.

[paragraph 3.104]

INVOLUNTARY INTOXICATION

Recommendation 10 (the general rule)

5.10 D's state of involuntary intoxication should be taken into consideration:

- (1) in determining whether D acted with the subjective fault required for liability, regardless of the nature of the fault element; and
- (2) in any case where D relies on a mistake of fact in support of a defence to which his or her state of mind is relevant.

[paragraph 3.121]

Recommendation 11 (species of involuntary intoxication)

5.11 There should be a non-exhaustive list of situations which would count as involuntary intoxication:

- (1) the situation where an intoxicant was administered to D without D's consent;
- (2) the situation where D took an intoxicant under duress;
- (3) the situation where D took an intoxicant which he or she reasonably believed was not an intoxicant;
- (4) the situation where D took an intoxicant for a proper medical purpose.

5.12 D's state of intoxication should also be regarded as involuntary if, though not entirely involuntary, it was almost entirely involuntary.

## FURTHER READING

John Child 'Drink, Drugs and Law Reform: A Review of Law Commission Report No 314' [2009] *Criminal Law Review* 488.

- C. Clarkson, A. Cretney, G. Davis and J. Shepherd, 'Assaults, the Relationship between Seriousness, Criminalisation and Punishment' [1994] *Criminal Law Review* 4.
- Howard Parker 'Illegal Leisure: Alcohol, Drugs and the Regulation of Modern Youth' in P. Carlen and R. Morgan (eds.), *Crime Unlimited? Questions for the 21st Century* (MacMillian Press 1999), p. 144.
- A. Simester 'Intoxication is Never a Defence' [2009] *Criminal Law Review* 3.
- Nigel South 'Drugs Alcohol and Crime' in Maguire *et al.* (eds.), *The Oxford Handbook of Criminology* (Oxford University Press 2007), p. 810.

## Offence Preparation and Participation

Criminal law recognises two distinct types of involvement in crime which can be described as inchoate modes and complete modes. Inchoate modes are those such as attempt to commit a crime, conspiring with others, and assisting or encouraging others to commit crimes. With the exception of attempt, these inchoate modes are methods of widening the net to include those who help others to commit offences. They are 'inchoate' (which means 'to begin with' or 'to make a beginning') and are not dependent on any offences actually being committed. But just as some people set out to commit offences that are never complete, or encourage or assist others who ultimately do not go on to commit offences, very often offences are committed with the active help – or participation – of others. Participation modes of liability are known by a number of different terms – aiding and abetting, secondary liability, complicity. There is also a specific form known as joint enterprise. What unites these completed forms of participation is that there needs first of all to have been an offence committed and from this follows the secondary liability of the person who participated. Such a person is treated as if they had themselves committed the offence.

We deal with these different modes in the following order:

- (a) Preparation (inchoate):
  - (i) Attempt
  - (ii) Conspiracy
  - (iii) Assisting and/or encouraging
- (b) Participation (dependent on full offence):
  - (i) Aiding and Abetting
  - (ii) Joint enterprise

### III.10.a. Preparation

Those who attempt or conspire to commit crimes or who encourage others to do so are themselves criminally liable (Criminal Attempts Act 1981; Criminal Law Act 1977; Serious Crime Act 2007). This general rule is supplemented by many statutory inchoate offences, where no harm or result need be proved.

Possession of controlled drugs is one such example. There are other more obviously 'inchoate' statutory offences such as possessing articles for use in burglary, theft or cheating (Theft Act 1968, s. 25). The concern to impose inchoate liability discloses a pervasive anxiety about the risk of harm. Conspiracy is a longstanding example while the Serious Crime Act has introduced the inchoate offence of assisting another; until then a person who gave assistance would only become liable if the assisted offence actually took place. In terms of conspiracy, the legislative fashion is to provide conspiracy mode liability within specific statutes. So for example, under the Proceeds of Crime Act 2002 a person commits an offence 'if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates... the acquisition etc of criminal property' (s. 328). This is probably wider than a conspiracy charge.

In general, the incomplete nature of the 'actus reus' of inchoate offences, 'compensated' by a stringent 'mens rea' requirement, is suggestive of a strongly subjective conception of criminality. This is particularly noticeable in attempts.

### III.10.a.i. Attempt

#### Attempt: Act Defined By The Intentional Attempts Act 1969 (1969)

1(1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

(2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.

(3) In any case where—

- (a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but
- (b) if the facts of the case had been as he believed them to be, his intention would be so regarded,

then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence.

Subsection (4) provides that 'attempt', as defined, applies to all indictable offences other than conspiracy and offences of aiding, abetting, counselling, procuring, suborning or assisting. Because attempt is limited to indictable offences there are some specific statutory provisions such as, for example, attempting to drive when unfit to through drink or drugs is an offence (Road Traffic Act 1988, s. 4(1)). There are also preparatory offences drawn in much wider terms than the generic attempt offence such as 'engaging in any conduct in preparation for committing acts of terrorism' (Terrorism Act 2006,



s. 5(1)(a)). The Law Commission lists 56 separate preparatory offences (LCCP 183, 2007, Appendix C).

The maximum penalties for attempts tried on indictment are the same as for the completed offences, and attempts to commit offences triable either way which are tried summarily are subject to the maximum for the completed offence on summary conviction (CAA, s. 4): Section 6 abolishes the offence of attempt at common law. Whilst the statutory definition of attempt is less problematic than is that of conspiracy, the determinacy of the central concept of a 'more than merely preparatory' act may be questioned: significantly, this is left to the magistrates or jury.

The preliminary nature of the conduct element in inchoate offences is counterbalanced by a stringent 'mens rea' requirement of specific intent. This requirement, however, does not extend to circumstances, which may be the object merely of recklessness. For example, on a charge of attempted aggravated arson contrary to section 1(2) of the Criminal Damage Act 1971, it was sufficient for the prosecution to establish a specific intent to cause damage by fire and that the defendant was reckless as to whether life would thereby be endangered (*Attorney General's Reference No. 3 of 1992* (1994)). Furthermore, a question has arisen about whether a 'conditional intent' may in certain circumstances suffice. The way in which this issue has been resolved provides a good illustration of the interaction between doctrinal elements and prosecution discretion in the operation of criminal law:

*The Law Commission, Attempt and Impossibility in Relation to Attempt, Conspiracy and Initement (No. 102, 1980, Appendix 1)*

Theft-related offences, such as attempted theft, burglary, attempted burglary, assault with intent to rob, going equipped for burglary or theft... form a large part of the cases being tried every day in the magistrates' courts and Crown Court...

They all have two features in common-

- (i) each requires proof that the accused 'intended to steal' at the time when he committed the 'actus reus' of the offence;
- (ii) none requires proof that anything has in fact been stolen.

In delivering the judgment of the Court of Appeal in the attempted theft case of *R v. Hussey* (1978), Lord Scarman stated (p. 132) that 'it cannot be said that one who has it in mind to steal only if what he finds is worth stealing has a present intention to steal.'

This simple statement, taken by itself and out of context, was the origin of the difficulties. It gave rise to the doctrine that 'conditional intent' in the sense of 'intending to steal whatever one might find of value or worth stealing' was not a sufficient mental element in these theft-related offences; the prosecution must aver and prove that at the time of attempting, entering as a trespasser, etc., the accused had a settled intention to steal some particular and specified object existing or believed by him to exist in his target area.

In such a form, the doctrine was obviously capable of mischievous results. In particular, it excluded from criminal liability the large majority of sneak thieves and burglars who conduct their operations 'on spec'. Without knowing what a handbag, a package left in a car, or a house contains, they nevertheless proceed in the hope or expectation that they will find something of value or worth stealing there, and intend, in that event, to steal it . . .

. . . [W]ithin a few months of the decision in *R v. Hussey*, submissions that 'conditional intent is not enough' were being accepted by magistrates and Crown Court judges in all these theft-related offences, causing frustration and perplexity to prosecuting authorities and bringing the criminal law into disrepute.

Study of the relevant indictments and transcripts convinced us that . . . the matter could be put right without recourse to legislation, and that the appropriate way to proceed was by way of Attorney General's References to the Court of Appeal under section 36 of the Criminal Justice Act 1972.

The two References were decided by the Court of Appeal as Attorney General's References (Nos. 1 and 2 of 1979) and . . . restore clarity and common sense to the law. Where the accused's state of mind is that of intending to steal whatever he may find worth stealing in his target area, there is no need to charge him with attempting to steal specific objects. In appropriate cases of attempted theft a charge of attempting to steal some or all of the contents of (for example) a car or a handbag will suffice. In cases where the substantive offence does not require anything to be stolen, it is not necessary to allege more than 'with intent to steal'. The important point is that the indictment should correctly reflect that which it is alleged the accused did and that the accused should know with adequate detail what he is alleged to have done.

The statutory definition of the 'actus reus' of attempt exemplifies the practical difficulty of achieving the law's doctrinal ideals of clarity and certainty: the interpretation of 'more than merely preparatory' will inevitably be influenced by the vagaries of particular cases. Despite the best efforts of the courts, who have spoken in terms of acts which demonstrate an 'unequivocal' intention to complete the offence (*Geddes*, 1996; *Nash*, 1999) it would be very difficult to produce principles to constrain tribunal discretion in such an area. Clarkson below comments on the Law Commission's Consultation Paper No. 183 *Conspiracy and Attempts* (2007).

Clarkson, P. (2007) *Attempts: The Law Commission's Consultation Paper No. 183* (2007) 10 *Oxford Journal of Legal Studies* 1.

The leading decision on what constitutes acts which are 'more than merely preparatory' is *Gullefer* [1990] where it was ruled that the defendant had to have 'embarked on the crime proper'. An examination of many of the subsequent decisions suggests that the courts (in most cases) have tended to the view that there can only be an attempt where there has been a 'confrontation' with the victim (in cases of attempted rape, injury/death, kidnapping, false imprisonment, etc.) or with the property (in cases of attempted burglary,

criminal damage, etc.). One can hardly have embarked on the crime proper without at least confronting the victim or property. For example, the defendant in *Jones*, intending to kill, had jumped into his victim's car armed with a loaded gun; he had confronted the victim when he got in the car and was liable for attempted murder. Similarly, in the attempted rape cases of *Attorney-General's Reference (No 1 of 1992)* [1993], *Dagnall* [2003] and *Patnaik* [2000] the defendants were liable; in each of these cases there had been a confrontation with the person the defendant was planning to rape. The same approach has been adopted in a series of attempted burglary cases where the 'crime proper' involves an entry. In *Boyle and Boyle* [1987] the defendants were liable for attempted burglary when they had broken down a door in their effort to gain entry to a building. Similarly, the defendant in *Totsi* [1997] in examining the padlock with a view to gaining entry, had confronted the building and embarked on the process of entry. Again, in *Toothill* [1998] the defendant who knocked at the proposed victim's door was liable for attempted burglary.

On the other hand, in cases where there has been no confrontation the defendants have tended to escape liability. In *Geddes* [1996], the defendant trespassed on to school premises and was waiting in a boy's [sic] lavatory equipped with a knife, rope and masking tape with a view to capturing and restraining a boy when one entered the lavatory. It was held that he could not be liable for attempted false imprisonment as he had not 'actually tried' to commit the offence. The defendant could not have embarked on the crime of false imprisonment without at least confronting a boy. In *Campbell* [1991], the defendant, wearing a partial disguise and carrying an imitation gun and threatening note, was arrested one yard from the door of a post office which he planned to rob. It was held that he had not progressed sufficiently far to be liable for attempted robbery. Robbery involves theft with force or threatened force. Without confronting the cashier he could not be said to have embarked on the crime proper. The defendant in *Gullefer*, who had disrupted a dog race in an effort to have the race declared void so that his stake would be refunded, had not confronted the bookmaker from whom it was alleged he had attempted to steal and so was not liable.

This approach, while it might explain most of the decisions, is nevertheless highly unsatisfactory in that too many offenders (such as those in *Geddes* and *Campbell*) who are on the point of committing the crime have escaped liability. The strictness of this approach is underlined when one recalls that in these cases the Court of Appeal has ruled that the actions of the defendants could not be 'sufficient in law' to amount to an attempt. Even if it had been ruled that these actions could amount to an attempt, there would still be a second hurdle to be overcome in that the jury would then have to consider 'as a question of fact' whether the acts were sufficient for an attempt.

Further, this crude 'confrontation' approach has led to results that are incompatible with the 'embarking on the crime proper' approach. This is best exemplified by the attempted rape cases. In *Patnaik*, a defendant was held liable for attempted rape after he had pushed a woman over a wall, straddled her legs and attempted to kiss her. He had not undone any of his or her clothing. Similarly, in *Dagnall* it was held to be sufficient that the defendant had pulled a woman's hair and pushed her against a fence and told her he wanted to 'fuck her'. These defendants were clearly blameworthy and deserving of punishment. However, it



is difficult to see that they had 'embarked on the crime' of rape. Even in the more clear-cut case of *Attorney-General's Reference No 1 of 1992* where the defendant had lowered his trousers and interfered with the woman's private parts and was in a position to penetrate her had his penis not been flaccid, it is difficult to see, applying the *Gullefer* test, how he could be said to have embarked on the crime proper (which involves penetration) when he had not tried to penetrate the woman. The offence these defendants had committed was a battery or a sexual assault. Cases such as these would now be dealt with under section 62 of the Sexual Offences Act 2003: committing an offence with intent to commit a relevant sexual offence. While these cases should not have been classified as attempted rape under the present law, there is obviously a strong argument that they should be.

According to the Law Commission, there are two main defects to the present law of attempt. First, the 'more than merely preparatory' test of proximity has proved too vague and uncertain. Secondly, many leading decisions such as *Geddes* and *Campbell* have rendered the offence unduly narrow. Too much emphasis has 'been placed on the offence's label ("attempt") - and therefore on the notion of "trying" to commit an offence'. Also, 'too little regard has correspondingly been paid to the underlying rationale for the offence'. Accordingly, the Commission has provisionally proposed a radical overhaul of the law. The present law of attempt should be repealed and replaced by two separate inchoate offences:

- (1) an offence of criminal attempt which would be limited to last acts needed to commit the intended offence; and
- (2) an offence of criminal preparation, limited to acts of preparation which are 'properly to be regarded as part of the execution of the plan to commit the intended offence'.

Clarkson goes on to criticise these proposals as unnecessarily creating two separate offences, the first of which is arguably too narrow and the second too broad. He proposes a general test (backed up with examples) reflecting that the defendant has a similar moral culpability with the person who completes the offence. It should require something more than preparation but also 'a close connection to the commission of the offence in terms of time, location and acts under the control of the accused remaining to be accomplished.'

### iii.10.a.ii. Conspiracy

The inchoate offences of conspiracy and assisting or encouraging another (10.a.iii. below) are based on the notion that acting in concert with others is itself a threat. Thus there is a clear connection between these inchoate forms and participation liability which will follow if the conspiracy or assistance or encouragement results in the commission of an offence. Inchoate forms are, however, often used even though the full offence appears to have been committed because they can be easier to prove. This is particularly so in relation to conspiracy. As we saw above the mental element in attempt can be stricter than for the full offence. On the other hand, sometimes it is not possible to prove causation so that an attempted murder charge will be substituted even though



the intended victim has in fact died. Evidential rules in relation to co-defendants can make it easier to proceed on a conspiracy charge rather than one for the completed offence. The rule that acts and statements of one party to a common purpose may be evidence against the other is an exception to the general rule that a person is not to be prejudiced by the acts or statements of another.

The crime of conspiracy consists, broadly speaking, in an agreement to pursue an unlawful object. A conspiracy is committed even if nothing is done to further the agreement. What is the underlying rationale for this form of liability?

Robert Harell 1974 *Conspiracy and Civil Liberties* (HCLL, London Trust)  
pp. 86-8, 93

In America it is traditional to divide the justifications for having a crime of conspiracy into the 'specific object' rationale and the 'general danger' rationale. The former rationale provides a straightforward explanation of conspiracy as an inchoate offence. Conspiracy attacks potentially criminal conduct, but at an earlier stage than attempt; the conspiratorial agreement derives its criminal character purely from the criminal conduct that is the object of the agreement. Under this rationale the agreement is logically punishable only if the conspiratorial objective is a crime.

The 'general danger' rationale is much broader, and provides a justification for punishing not only combinations with criminal objectives but also combinations whose aims are merely considered to be socially undesirable. The argument rests at bottom on the greater threat from the numbers involved in a conspiracy.

The ambiguity between these two rationales underpins the long and unglorious political history of conspiracy law, in which the boundaries of liability have extended well beyond the contours apparently determined by legal doctrine:

Geoffrey Robertson 1974 *Whose Conspiracy?* (HCLL), pp. 13-18

The crime of conspiracy entered the law of England in 1304, in the form of an act to punish malicious prosecutions... Several centuries elapsed before the political potential of the conspiracy charge was, in the words of one eminent legal historian, 'emphasised by the Star Chamber, which recognised its possibilities as an engine of government and moulded it into a substantive offence of wide scope, whose attractions were such that its principles were gradually adopted by the common law courts...' Before its abolition in 1641, the Star Chamber had established that the essence of the crime of conspiracy is the actual agreement, and hence no overt actions need be proved by the prosecution to obtain a conviction. Moreover, conspiracy... extended to agreements to commit all crimes, however trivial. These two cardinal principles are still being applied by the courts, 300 years later, to situations that Star Chamber judges would never have envisaged...

The most devastating extension of the conspiracy law since the Star Chamber days was to punish, as though they were serious crimes, agreements to do acts which themselves

entailed only civil liability for damages at the complaint of an injured party. The encroachment of this doctrine was stealthy at first, beginning with cases of ‘conspiracy to defraud’ by not paying a civil debt. But in 1832 one judge caught these straws in the wind and wove them into the fabric of the criminal law, in a pattern which has had a baleful influence on judicial thinking ever since. Lord Denman defined a conspiracy as ‘an agreement to do an unlawful act, or a lawful act by unlawful means’. ‘Unlawful’ included actions giving rise merely to civil damages.

The immediate casualties of this formula were the incipient trade unions, whose every strike or picket was elevated into a criminal conspiracy. A conspiracy conviction exiled the Tolpuddle Martyrs, while ‘conspiracy to obstruct an employer and interfere with his lawful freedom of action’, and ‘conspiracy to annoy and interfere with the masters in the conduct of their business’ abound in other nineteenth century industrial cases . . . Finally political pressure forced Disraeli to pass the Conspiracy, and Protection of Property Act 1875, which abolished conspiracy charges in respect of trade disputes . . . but left a loophole which almost a century later was relentlessly exploited by another Tory government to prosecute building workers whose picketing activities . . . were alleged to be conspiracies to intimidate [under s. 7 of the Act] . . .

To the ‘bitter legacy’ bequeathed by use of conspiracy charges to oppress the working class has been added another twentieth century codicil designed to persecute political minorities whose activities amount to no more than innocuous trespass. In 1973 Lord Hailsham decreed that an agreement to commit a trespass – a mere temporary presence on another’s property without permission – constitutes a serious criminal offence if the public interest is deemed to be at stake; a conclusive presumption if the property belongs to those he chooses to term ‘the authorities’ . . . Lord Hailsham approved conspiracy prosecutions of the parties to an agreement [to occupy the Sierra Leone High Commission] which would, if carried out, give an aggrieved individual the right to sue for more than nominal damages . . . or where execution of the agreement ‘invades the domain of the public’. The Sierra Leone Embassy decision, delivered in June 1973, will have a chilling effect on political protest . . .

How has modern criminal law doctrine rationalised the imposition of criminal liability for conspiracies to do things which would not in themselves constitute offences, and the possibility of punishments more stringent than those available for completed offences? The following extract from the case to which Robertson refers illustrates the way in which legal reasoning can accommodate even problematic cases such as criminal conspiracy to commit civil wrongs within the ideological framework of the rule of law:

*Attorney General v. Condon (1968) 1 All ER 1000.*

**Lord Hailsham:** If combinations involving tortious conduct are not all indictable, is there any rational principle on which those which are indictable can be separated from those which cannot?

In my view, there is such a principle, and in my view, the rational principle can be deduced from the nature of the considerations which have led courts over the centuries to decide that they must protect certain wrongs to individuals from acts done by a number which, had they been done by a single wrongdoer, would have given rise to a civil remedy only...

... [A] combination the execution of which has as its object not merely a tort or other actionable wrong, but also either the invasion of the public domain, or the intention to inflict on its victim injury and damage which goes beyond the field of the nominal is indictable, whether the object be achieved by trespass to land, goods or person, by ruin of the reputation through the defamation of character, by the commission of private nuisance, by some contrivance of fraud, by the imposition of force, or by any other means which is tortious. This is in fact the thread which has run through the law from Hawkins Pleas of the Crown to Lord Simon LC's speech in the *Harris Tweed* case (1942), although I do not necessarily indorse the view perhaps implicit in that speech that a combination to injure is necessarily indictable without some element involved in its execution otherwise inherently unlawful... Trespass or any other form of tort can, if intended, form the element of illegality necessary in conspiracy. But in my view, more is needed. Either (1) execution of the combination must invade the domain of the public as, for instance, when the trespass involves the invasion of a building such as the embassy of a friendly country or a publicly owned building, or (of course) where it infringes the criminal law as by breaching the Statutes of Forcible Entry and Detainer, the Criminal Damage Act 1971 or the laws affecting criminal assaults to the person. Alternatively, (2) a combination to trespass becomes indictable if the execution of the combination necessarily involves and is known and intended to involve the infliction on its victim of something more than purely nominal damage. This must necessarily be the case where the intention is to occupy the premises to the exclusion of the owner's right...

Note Lord Hailsham's emphasis on the common law as developing historically in a coherent way; his accommodation of conspiracy law within the liberal 'harm principle'; and his assumption that the commission of any crime 'of course' brings us within a public order arena in which criminal penalties, however dubiously arrived at, can be justified.

The offence of conspiracy in England and Wales is now regulated by a statutory framework: this framework addresses criticism of the common law offence by curtailing its breadth:

### **Criminal Law Act 1977, section 1**

#### **The offence of conspiracy**

- (1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either –
  - (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or



- (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible, he is guilty of conspiracy to commit the offence or offences in question . . .
- (2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place . . .
- (4) In this Part of this Act 'offence' means an offence triable in England and Wales.

The Act seeks to locate conspiracy within the 'general principles' of criminal law doctrine by limiting it to agreements to forms of conduct which are themselves offences, and by limiting the degree of punishment to that which could be imposed for the completed offence. Subsection 3 excludes acts done in contemplation or furtherance of a trade dispute provided that they constitute only a summary offence not punishable with imprisonment. Section 2 excludes liability for intended victims of conspiracy offences and certain other categories such as spouses and persons under the age of criminal responsibility. Section 4 provides that the consent of the DPP (or sometimes the Attorney-General) shall be necessary for conspiracy prosecutions where the substantive offence is a summary one.

Section 5 proceeds to abolish the common law crime of conspiracy. It does so, however, with two significant exceptions: conspiracy to defraud and conspiracies to engage in conduct which tends to corrupt public morals or outrages public decency are retained as distinct offences. Remarkably, in relation to the latter forms of conspiracy, the saving is drafted in conditional terms: section 5(3) provides that 'Subsection 1 above shall not affect the offence of conspiracy at common law *if and in so far as* it may be committed by entering into an agreement to engage in conduct which tends to corrupt public morals or outrage public decency' but would not amount to the commission of an offence if carried out by a single person (emphasis added). This odd wording reflects the legislature's lack of certainty about the state of the common law in this area. Section 5(3) nonetheless preserves the effect of the notorious case of *Shaw*, in which the judiciary asserted its general power to define and uphold social order:

[Shaw had published a booklet entitled 'The Ladies' Directory', which printed the names and addresses of prostitutes and advertisements for the types of conduct in which they engaged, and for which the women paid. He was convicted of living on the earnings of prostitution and of publishing an obscene article. One might have thought that these charges would suffice, but he was also charged with and convicted of conspiracy to corrupt public



morals. The court held that conduct calculated and intended to corrupt public morals was an indictable misdemeanour at common law and that it followed that an agreement to do so was a conspiracy. Viscount Simonds expresses the values underlying the decision.]

... [I]t is said that it is not possible in the twentieth century for the court to create a new head of public policy... 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... When Lord Mansfield, speaking long after the Star Chamber had been abolished, said... that the Court of King's Bench was the *custos morum* of the people and had the superintendence of offences *contra bonos mores* he was asserting, as I now assert, that there is in that court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society.

Lord Reid's famous dissent, in which he asserted that 'where Parliament fears to tread, it is not for the courts to rush in', should be seen in the light of his judgment in the later case of *Knulier*—a case in which the homophobic attitudes of the judiciary, as well as the power of conspiracy charges to convert lawful actions into illegal ones, are all too evident:

***Knulier Ltd v. DPP* [1972] 2 All ER 898, HL**

[Knulers published a magazine which contained on inner pages advertisements inserted by homosexuals for the purposes of attracting sexual partners. The magazine had a circulation of over 30,000, and many copies were read by young students and schoolboys. Knulers was convicted of conspiracies both to corrupt public morals and to outrage public decency. Lord Reid expressed concern that a parliamentary assurance by the 'Solicitor General that conspiracy to corrupt public morals would not be charged so as to circumvent the statutory defence in s. 4 of the Obscene Publications Act' to obscenity charges had not been communicated to the legal profession, but continued.]

Although I would not support reconsidering *Shaw's* case, I think that we ought to clarify one or two matters. In the first place conspiracy to corrupt public morals is something of a misnomer. It really means to corrupt the morals of such members of the public as may be influenced by the matter published by the accused...

I can now turn to the appellants' second argument. They say that homosexual acts between adult males in private are now lawful so it is unreasonable and cannot be the law that other persons are guilty of an offence if they merely put in touch with one another two males who wish to indulge in such acts. But there is a material difference between merely exempting

certain conduct from criminal penalties and making it lawful in the full sense. Prostitution and gaming afford examples of this difference. So we must examine the provisions of the Sexual Offences Act 1967 to see just how far it altered the old law. It enacts subject to limitation that a homosexual act in private shall not be an offence but it goes no further than that. Section 4 shows that procuring is still a serious offence and it would seem that some of the facts in this case might have supported a charge under that section.

I find nothing in the Act to indicate that Parliament thought or intended to lay down that indulgence in these practices is not corrupting . . . So if one accepts *Shaw's* case as rightly decided it must be left to each jury to decide in the circumstances of each case whether people were likely to be corrupted. In this case the jury were properly directed and it is impossible to say that they reached a wrong conclusion . . .

The second count is conspiracy to outrage public decency . . . The crucial question here is whether in this generalised form this is an offence known to the law. There are a number of particular offences well known to the law which involve indecency in various ways but none of them covers the facts of this case. We were informed that charges of this character have never been brought with regard to printed matter on sale to the public. The recognised offences with regard to such matter are based on its being obscene . . . The basis of the new offence, if it is one, is quite different. It is that ordinary decent-minded people who are not likely to become corrupted or depraved will be outraged or utterly disgusted by what they read. To my mind questions of public policy of the utmost importance are at stake here.

I think that the objections to the creation of this generalised offence are similar in character to but even greater than the objections to the generalised offence of conspiracy to corrupt public morals. In upholding the decision in *Shaw's* case we are, in my view, in no way affirming or lending any support to the doctrine that the courts still have some general or residual power either to create new offences or so to widen existing offences as to make punishable conduct of a type hitherto not subject to punishment. Apart from some statutory offences of limited application, there appears to be neither precedent nor authority of any kind for punishing the publication of written or printed matter on the ground that it is indecent as distinct from being obscene.

[Lord Reid enumerates the existing offences involving indecency and rejects any analogy with the proposed new offence:]

I must now consider what the effect would be if this new generalised crime were held to exist. If there were in any book, new or old, a few pages or even a few sentences which any jury could find to be outrageously indecent, those who took part in its publication and sale would risk conviction. I can see no way of denying to juries the free hand which *Shaw's* case gives them in cases of conspiracy to corrupt public morals . . . It may be said that no prosecution would ever be brought except in a very bad case. But I have expressed on previous occasions my opinion that bad law is not defensible on the ground that it will be judiciously administered. To recognise this new crime would go contrary to the whole trend of public policy followed by parliament in recent times. I have no hesitation in saying that the conviction of the appellants on the second count must be quashed.

Lord Reid's limited rebellion against judicial originality was, however, unsuccessful, in that three of the Lords accepted that the offence already existed, albeit that its elements were not satisfied in the present case. *Knulier* provides an excellent example of the capacity of legal doctrine to accommodate and rationalise even parts of institutional history which are radically at odds with its basic tenets. As Robertson comments:

Punishing a man [sic] for merely agreeing to commit a criminal offence can be unfair; punishing him for acquiescing in conduct which only entails civil liability is positively unjust; but what are we to say of the third category of conspiracy, which punishes agreement to do actions which of themselves involve no liability whatsoever? (1974, p. 18.)

[We consider common law conspiracy to defraud in Section IV, Chapter 12.c.].

Moving to statutory conspiracies under the 1977 Act, several further critical observations may be made. Statutory conspiracy – conspiracy, for example, to steal – raises a wide range of doctrinal complexities. For example, the definition of the 'actus reus' in terms of 'agreement' means that it is difficult to separate 'mens rea' and 'actus reus' requirements: evidence of either is bound to tend to proof of both. Furthermore, read literally, the statutory definition would exclude almost all liability, since practically no agreement would necessarily lead to the commission of an offence. The ambiguity about this phrase also renders problematic the purported stringency of the 'mens rea' requirement: in the case of parties who agree to pursue a course of conduct which they realise is likely to lead to the commission of an offence, it will be difficult to distinguish between intention and recklessness. There has also been uncertainty about whether a party to a conspiracy must intend to play an active part in the agreed course of conduct herself (*Anderson* (1986), imaginatively interpreted in *Siracusa* (1989)). Although an 'intended victim' is immune from a conspiracy charge (s. 2(1)), the person to whom drugs are supplied is (for these purposes) not a victim and can be indicted for conspiracy (*Drew*, 2000). These features of conspiracy law mean that it remains among the most uncertain and discretionary areas of substantive criminal law. In particular, the consistency of conspiracy law with rule of law values is called into question by its implications for evidence and procedure:

Robert Spicer 1981 *Conspiracy, Law, Class and Society* (Lawrence & Wishart) pp. 117–9

A major criticism of conspiracy law is that, when the charge is brought, the rules of the game change in favour of the prosecution. Over the centuries a body of special rules of evidence has been built up, which are peculiar to conspiracy trials. The Irish and Chartist cases demonstrate the extent to which political trials, heard at a time when judges were



prepared to admit that trials could be political, have contributed a special body of evidential and procedural rules to the present system. In Pritt's view:

The proof of conspiracy is made easier by the provision of the law of evidence . . . that so long as there is any evidence, however tenuous, from which the agreement might be inferred, the acts and words of any of the alleged conspirators, alleged to have been done or spoken in pursuance of the conspiracy, are admissible in evidence against all the others, on the footing that they are all agents of one another (although, at the time when the evidence is admitted, the jury has not found that there was an agreement – and so some agency – as alleged).

It is extremely difficult for the prosecution to prove conspiracy according to the normal rules of evidence, because direct evidence of an agreement is rarely available. This has led to the development of the doctrine of inference. The judges have repeatedly declared that, so far as proof goes, conspiracy is generally to be inferred from the acts of the parties carried out in pursuance of their agreement. Prosecution strategy is generally aimed at establishing that the accused acted in a certain way and in asserting that such behaviour could only have arisen as the result of a plan of action. In this way, proof of conspiracy is actually easier than proof of other offences. One example is *Hunt*, where Mr. Justice Bayley directed the jury that if ' . . . the circumstances were such that they could not have occurred except in pursuance of a previous plan between the parties', then that implied that there must have been such a plan, and would warrant the conclusion of conspiracy. In this way, standards of proof have been relaxed to such an extent that it has been said that a conspiracy is easier to prove than a normal commercial contract . . .

The Law Commission was silent on this point. In fact, the only comment relevant to rules of evidence was the view stated in its 76th report (Law Commission 1976) that the reason for retaining the offence of conspiracy is to enable the criminal law to intervene at an early stage before a contemplated crime has actually been committed. The Commissioners felt that the necessity for proof of an agreement was a sufficient safeguard against the danger of punishing conduct too far removed from an actual crime . . . Their statements take no account of the fact that most conspiracy charges, far from enabling the law to intervene at an early stage and nip criminal organisations in the bud, are normally preferred after the agreed offence has been committed . . . One of the great myths of English law, comparable with the myths of judicial neutrality, the separation of powers and an unarmed police force, is the fictional assertion that conspiracy has an essentially 'preventive' nature. As a general rule, and certainly in the great majority of cases decided since 1960, conspiracy counts have been tacked on by the prosecution because the relaxation of rules of evidence makes a conviction more likely and increases judicial sentencing power.

Spicer's argument alerts us to the way in which enforcement practice shapes the meaning of criminal law itself. Though a harm or risk-based pattern of criminality may serve to rationalise the formal law on conspiracy, the implementation of the law appears to describe a pragmatic (and often politically marked) pattern which sits uneasily with any coherent theory of criminality.



Extraterritoriality is a notable feature of the modern law of conspiracy. Section 1A, inserted by section 5 of the Criminal Justice (Terrorism and Conspiracy) Act 1998 reversed the earlier rule that conspiring to perform abroad acts which are illegal elsewhere, and would be illegal in the UK, is not criminal. The origins of this provision lie in concerns about 'sex tourism', overlaid with a reaction to the Omagh bombing in Northern Ireland in 1998 (Alltridge, 2000, p. 152).

### III.10.a.iii. Assisting and encouraging

Until the implementation in 2008 of Part 2 of the Serious Crime Act 2007 a third inchoate offence – incitement – sat alongside attempt and conspiracy. Incitement was based on the idea that encouraging or persuading another person to commit an offence was punishable in itself even though no offence was committed. If an offence were committed the inciter would become an aider and abettor (or technically a counsellor) of that offence. As a result of the Law Commission's major review of inchoate and secondary liability, incitement has been replaced and expanded by three offences of 'encouraging or assisting an offence': intentionally encouraging or assisting, encouraging or assisting an offence believing it will be committed, and encouraging or assisting believing one or more offences will be committed (Serious Crime Act 2007, ss. 44–47). The expansion means that it is also now an offence to assist another to commit an offence. This addresses what was perceived to be an anomaly that both those who encouraged and assisted in the commission of an offence could be secondary parties to that offence but only the encourager (inciter) would be liable if the offence were not in fact carried out. These new offences are the only parts of the Law Commission's scheme for inchoate and secondary liability that have been implemented. They have attracted much criticism in terms of their drafting and breadth. We begin by setting out the government's explanation of the offences.

#### *Ministry of Justice 2008 Serious Crime Act 2007: Implementation of Part 2 Circular 2008/04*

Section 44: Intentionally encouraging or assisting an offence.

Section 44(1) sets out what a person must do to commit the offence. He must do an act capable of encouraging or assisting the commission of an offence and intend to encourage or assist its commission.

Section 44(2) provides further definition as to what is meant by 'intention' in this clause, making it clear that foresight of consequences is not sufficient to establish intention.

Section 45: Encouraging or assisting an offence believing it will be committed

The person commits the offence if he does an act capable of encouraging or assisting an offence and he believes both that the offence will be committed and that his act will encourage or assist its commission.

**Section 46: Encouraging or assisting offences believing one or more will be committed**  
 Section 46(1) sets out what a person must do to commit an offence under this section. He must do an act capable of encouraging or assisting one or more offences believing that one or more offences will be committed and that his act will encourage or assist one or more of them. Section 46(2) provides that it is not necessary for a person to have a belief as to which offence will be encouraged or assisted.

Section 46(3) requires an indictment for this offence to specify the offences that it is alleged the accused believed might be committed. For example, if D lends a van to P believing that offences of robbery or arson will be committed, the indictment must specify robbery and arson. However this does not mean that every offence that could have been encouraged or assisted must be specified (Section 46(3)(b)).

#### **Section 47: Proving an offence under this Part**

Sections 47(2) to (4) set out that in order to establish that a person did an act capable of encouraging or assisting an offence under Part 2, it is sufficient to demonstrate that he did an act intending to encourage or assist an act which would amount to the commission of an offence, or believing that an act would be done which would amount to the commission of an offence.

Section 47(5)(a) sets out what must be proved under sections 44, 45 and 46 if the offence that it is alleged a person intended or believed would be encouraged or assisted requires proof of fault. In such cases, it must be proved that the person who provided encouragement or assistance either believed that, were another person to do the act, that person would have the necessary fault (Section 47(5)(a)(i)) or he was reckless as to whether or not another person would have the necessary fault (Section 47(5)(a)(ii)) or he himself would have the necessary fault (if he were to do the act himself) (Section 47(5)(a)(iii)).

Section 47(5)(b) sets out what must be proved under sections 44, 45 and 46 if the offence that it is alleged a person intended or believed would be encouraged or assisted requires proof of particular circumstances or consequences. In such cases, it will also be necessary to demonstrate that a person who provides encouragement or assistance either believed, or was reckless as to whether, were another person to do the act, that person would do so in those circumstances or with those consequences.

Requiring some degree of belief in relation to circumstances or consequences may ensure that a person would not be guilty of an offence of encouraging or assisting a strict liability offence unless he believes or is reckless as to whether those circumstances or consequences exist. For example, D asks P to drive him home from the pub as he has had too much to drink. P is insured to drive D's car but unknown to D and P, P was disqualified from driving the day before. P is committing the principal offence of driving whilst disqualified, despite the fact he is not aware that he is disqualified, as this is an offence of strict liability. Section 47(5) may mean that D is not guilty of encouraging or assisting P to drive whilst disqualified if he did not know or was not reckless as to whether P was disqualified from driving.

Section 47(6) provides that where Section 47(5)(a)(iii) is relied upon (i.e. where fault required for conviction for offences is established because the person who has done an act capable of providing encouragement or assistance has the necessary fault element for

commission of the offence himself), a person cannot escape liability purely because it is impossible for him/her to commit the offence.

Section 47(7)(a) provides that, in relation to section 44 a reference to circumstances or consequences that a person believes includes circumstances or consequences that a person intends. Section 47(7)(b) clarifies what is meant by the word 'intent' in this regard. Section 47(8) provides further definition as to what is meant by the phrase 'doing an act'.

Section 47(9) provides further definition as to what is meant by the phrase 'anticipated offence' in relation to sections 44 and 45.

#### Section 48: Proving an offence under section 46

Section 48 provides further rules in relation to what needs to be proved to establish guilt for an offence under section 46.

Section 48(2) provides that it is sufficient to establish that a person who provides encouragement or assistance had the required belief or recklessness as to fault, consequences and/or circumstances (as required by section 47(5)) in relation to one offence only.

Section 48(3) provides that the offence for which the elements mentioned in section 47(5) are proved must be one of those specified in the indictment. But this is subject to those rules which permit a person accused of one offence to be convicted of another and in particular to section 57 (alternative verdicts and guilty pleas).

#### Section 49: Supplemental provisions

Section 49(1) provides that offences under Part II of the Act can be committed regardless of whether or not the encouragement or assistance has the effect which the defendant intended or believed it would have.

Section 49(2) provides that if a person's act is capable of encouraging or assisting a number of criminal offences, and he either intends or believes that each of those offences will happen, he can be prosecuted and convicted in relation to every offence that he intends to encourage or assist, or believes will be encouraged or assisted.

For example, if D lends P a knife and intends P to use it to enter three different properties as a trespasser (burglary) and to attack V (assault) (and intends or believes that minor harm will result), D may be prosecuted for encouraging and assisting three burglaries and an assault under section 44. Likewise if D lends P a knife and believes he will use it to enter three different properties as a trespasser (burglary) and to attack V (assault) (and believes that minor harm will result), D may be prosecuted for encouraging or assisting three burglaries and an assault under section 45.

Section 49(3) sets out that a person may, in relation to the same act, commit an offence under more than one provision of Part 2.

For example, D lends P a knife and believes that he will enter one property as a trespasser (burglary). He also believes that P will use it to commit another offence which will either be to enter another property as a trespasser or to attack V (assault) (and minor harm would result). D may be convicted under section 45 of encouraging and assisting burglary. He may also be prosecuted and convicted under section 46 of encouraging and assisting burglary or assault.

Sections 49(4) and 49(5) set out that a person cannot be guilty of encouraging or assisting an offence under section 45 or 46 believing that an offence under section 44, 45 or 46 or one of those offences listed in Schedule 3 will happen. The offences listed in Schedule 3 are generally statutory forms of incitement.

Section 49(7) sets out that the requirement that a person believes that a criminal offence, or a number of criminal offences, be committed is satisfied if he believes that the criminal offence, or that one or more criminal offences, would be done if certain conditions are met.

For example, D gives P some money and tells him to give it to X to persuade X to lend them his car. However D tells P that if X will not lend them the car, P should take it anyway. In this situation D believes that a criminal act will be done if certain conditions are met (i.e. if X will not lend them his car).

#### Reasonableness defence

Section 50 sets out that it will be a defence to the offences in Part 2 if the person charged with those offences acted reasonably, that is that in the circumstances he was aware of, or in the circumstances he reasonably believed existed, it was reasonable for him to act as he did.

Section 50(3) sets out a number of factors that the court could consider when determining whether an act was reasonable in the circumstances. This list is not intended to be exhaustive.

Despite this extensive guidance, many legal commentators are perplexed by these provisions.

#### *The Unnecessary and Unintended Complexity and Ambiguity of Criminal Legislation: The Example of the Serious Crime Act 2007*

... The first and most obvious problem about this piece of legislation is that it is so long. To rewrite this area of the law, Part II of the Serious Crime Act employs 24 sections that use between them no less than 3,458 words – or 5,130 if you count the attendant Schedule: a block of text as big as an article in a law review, and over three times the size of the Criminal Attempts Act 1981.

The main reason for the daunting size of this piece of legislation is that the approach it takes to the problem it is supposed to solve is a complicated one: more complicated, surely, than was necessary.

... The gap in the previous law that had been identified, and which this legislation was designed to fill, was the fact that whereas criminal liability existed at the inchoate level for incitement, there was no inchoate liability for facilitation. So if A said to B, 'Go and burgle X's house', A could be prosecuted for incitement, whether B then carried out the burglary or not; whereas if A obtained for B, whom he knew to be a burglar, a copy of X's keys, A could be prosecuted for no criminal offence unless the burglary was then committed, when he would be liable as an accessory to B's completed crime. If this gap in the law was worth filling, which it surely was, then the simple solution would have been to leave incitement well alone and just create a new inchoate offence of facilitation to supplement



it. But instead of that, Part II of the Serious Crime Act has abolished the common law offence of incitement – which everybody understood and nobody much criticised – and has created a new form of inchoate liability that is designed to cover incitement and facilitation too. To make matters even more complicated, a number of statutory offences of inciting specific crimes are preserved.

And then to add to the complexity, the new form of inchoate liability does not consist of one offence, but three . . . These three offences differ from each other not only by reason of the mental element involved, but also, and rather less obviously, by reason of the *actus reus*; because although the offence contained in s. 44 is committed by encouraging or assisting any offence at all, the other two do not apply where what was encouraged or assisted was one of the offences set out in Sch. 3: a list of 50 different offences, to which (of course!) the Act allows the Secretary of State to add or subtract at will. This distinction in the range of the three offences created by ss. 44 to 45 is not obvious to the reader, because instead of being spelt out in the body of those sections, it is buried, almost out of sight, in the depths of s. 49, which the marginal note entitles ‘supplemental provisions’. Having three new offences where only one would do creates complications not just in theory but in practice too, because it enables defendants to argue that they have been charged with the wrong one: and so, in future, we can expect a body of case-law not only about what each of these offences means, but about what the relationship between them is.

However, it is not only the tripartite scheme that makes this legislation less than ‘user-friendly’. It is also the style of drafting, which is over-detailed, convoluted and unreadable.

[An] example of impenetrable drafting is section 47. Entitled ‘Proving an offence under this Part’, this section uses nine subsections and 587 words to (in effect) extend the reach of the offences created by sections 44 to 46. This it does, in essence, by saying that you are to be treated as encouraging or assisting the commission of an offence when you encourage or assist another person in the ‘doing an act’ that constitutes an *actus reus*, and to that end, attempts in s. 47(8) to nail down the concept of ‘the doing of an act’. This says:

- (8) Reference in this section to the doing of an act includes reference to –
  - (a) a failure to act;
  - (b) the continuation of an act that has already begun;
  - (c) an attempt to do an act (except an act amounting to the commission of the offence of attempting to commit another offence).

Can any reader of this paper make sense of the wording of subsection (c)? The authors of this article cannot – and think that if anybody can, they deserve to win a prize.

Spencer and Virgo are by no means lone voices, they are joined by Ormerod and Fortson: ‘Part 2 creates some of the most convoluted offences in decades. In addition to their excessive complexity, we suggest that the resulting scope of liability is too broad and creates an unwarranted incoherence and overlap with secondary liability’ (2009, p. 389).

The Law Commission’s proposal to introduce an inchoate offence of assisting (and to replace incitement ‘encouraging’) was explicitly intended to

complement their as yet unlegislated recommendations on secondary liability (LC 305, 2007). Before we turn to participation modes, there is one more issue to discuss in relation to preparation offences.

### III.10.a.iv. Inchoate liability, impossibility and patterns of criminality

A person may fail to carry through the offence because it is not possible for her/him to do so. It is necessary to ascertain why the attempt has not succeeded in order to determine if s/he can still be prosecuted for attempting to commit an offence. There is a crucial distinction between what is factually impossible and what is legally impossible.

Even if it may not be possible to commit the full offence because the factual basis is not present, if the facts had been as the defendant believed them to be, s/he can be charged with attempting to commit the offence in question (see *R v. Shivpuri* (1986)). We include extracts from this and the case it overruled (*Anderton v. Ryan* (1985)) below.

The House of Lords in *Shivpuri* made it clear that the only kind of impossibility which is relevant to liability is true legal impossibility. Even if the facts were such as the accused believed them to be, then the defendant would still not be committing any offence, having made a mistake about what the law was. If the defendant for example, believed it was an offence to import snuff and does import it, s/he does not commit the offence of attempting to supply a controlled drug, as the importation of snuff is not a crime.

Inchoate offences therefore provide some intriguing examples of the difficulty which criminal law encounters in meeting the requirements of its professed 'general principles' and, in particular, of generating determinate and limited bounds within which citizens may reasonably be expected to confine their behaviour. The primary nature of inchoate liability means that there is no possibility of withdrawal once the 'actus reus' is complete. Indeed, section 5 of the Criminal Law Act 1977 provides that the acquittal of the only other alleged parties to a conspiracy does not necessarily justify quashing the conviction of the remaining defendant. As we have already seen, the scope of criminal liability is further broadened by the possibility of cumulation between these forms of inchoate liability themselves and between them and participatory liability. The Criminal Attempts Act 1981 (s. 1(4)) excludes attempts to conspire or to aid and abet. It also appears that it is impossible to conspire to participate in an offence. However, one can clearly aid and abet an attempt, or counsel an attempt, whereas the aiding and abetting of a conspiracy would probably in any case amount to primary liability for conspiracy. Clearly, wherever cumulation is possible, the ambit of criminal liability reaches into areas very remote from primary liability for the completed offence.

Particularly difficult questions about the rationale of inchoate liability arise out of the extension of liability to cover attempts and statutory conspiracies to do the impossible. These questions are illustrated by an episode in which

the House of Lords changed its mind within a year about the construction of the 1981 Act. The debate about 'impossible attempts' constitutes a particularly instructive example of the tension in modern criminal law between manifest, harm-based and subjective conceptions of criminality:

***Anderton v. Ryan (1985) AC 513***

[The defendant had bought a video which, as she confessed to the police, she had believed to be stolen. There was, however, no evidence that it had been stolen, and the court therefore had to treat it as if it had not. She was convicted of dishonestly attempting to handle a stolen video recorder.]

**Lord Bridge:** Does section 1 of the Act of 1981 create a new offence where a person embarks on and completes a course of conduct which is objectively innocent, solely on the ground that the person mistakenly believes facts which, if true, would make that course of conduct a complete crime?

If the question must be answered affirmatively it requires convictions in a number of surprising cases: the classic case . . . of the man who takes away his own umbrella from a stand, believing it not to be his own and with intent to steal it; the case of the man who has consensual intercourse with a girl over 16 believing her to be under that age; the case of the art dealer who sells a picture which he represents to be and which is in fact a genuine Picasso, but which the dealer mistakenly believes to be a fake.

The common feature of all these cases, including that under appeal, is that the mind alone is guilty, the act is innocent. I should find it surprising that Parliament, if intending to make this purely subjective guilt criminally punishable, should have done so by anything less than the clearest express language, and, in particular, should have done so in a section aimed specifically at inchoate offences . . .

It is sufficient to say of subsection (2) that it is plainly intended to reverse the law . . . that the pickpocket who puts his hand in an empty pocket commits no offence. Putting the hand in the pocket is the guilty act, the intent to steal is the guilty mind, the offence is appropriately dealt with as an attempt, and the impossibility of committing the full offence for want of anything in the pocket to steal is declared by the subsection to be no obstacle to conviction . . .

It seems to me that subsections (2) and (3) are in a sense complementary to each other. Subsection (2) covers the case of a person acting in a criminal way with a general intent to commit a crime in circumstances where no crime is possible. Subsection (3) covers the case of a person acting in a criminal way with a specific intent to commit a particular crime which he erroneously believes to be, but which is not in fact, possible. Given the criminal action, the appropriate subsection allows the actor's guilty intention to be supplied by his subjective but mistaken state of mind, notwithstanding that on the true facts that intention is incapable of fulfilment. But if the action is throughout innocent and the actor has done everything he intended to do, I can find nothing in either subsection which requires me to hold that his erroneous belief in fact which, if true, would have made the action a crime makes him guilty of an attempt to commit that crime.



The defendant was therefore to be regarded not as having attempted to handle a stolen video recorder but simply as having handled a non-stolen video recorder, and hence was to be acquitted. This 'objective' view of criminality (which has something in common with the older 'manifest' pattern) is one in which the absence of a manifestly or objectively criminal act cannot be 'compensated' by a subjective intent:

*Andrew Ashworth, 11th ed. (Cambridge Criminal Law: English Texts), (Cambridge University Press), pp. 138-9*

From the perspective of the major movements that sweep across the terrain of criminal law, there is a close connection between the two doctrinal problems in defining criminal attempts - distinguishing attempts from preparation and impossibility. The critical question that unites them is the elementary issue whether the act of attempting is a distinct and discernible element of the crime of attempting. To say that the act is a distinct element is to require that the act conform to objective criteria defined in advance. The act must evidence attributes subject to determination independently of the actor's intent. In short, there must be features of the attempt as palpable as the death of the victim in homicide or a trespassory taking in larceny. We shall refer to the set of arguments favoring this approach as the 'objectivist' theory of attempts. Though the term 'objective' may have a different connotation in some contexts, we shall use the term to mean a legal standard for assessing conduct that does not presuppose a prior determination of the actor's intent.

The opposing school is appropriately called 'subjectivist', for it dispenses with the objective criteria of attempting. The act of execution is important so far as it verifies the firmness of the intent. No act of specific contours is necessary to constitute the attempt, for any act will suffice to demonstrate the actor's commitment to carry out his criminal plan.

... [O]bjectivists tend to favour a minimalist approach, and subjectivists, a maximalist approach to liability... This means that objectivists tend to draw the line of liability as close as possible to consummation of the offense and tend, further, to be sympathetic to claims of impossibility as a bar to liability... Subjectivists, in contrast, tend to push back the threshold of attempting and reject the relevance of impossibility - a stance that yields a maximalist net of liability.

These 'minimalist' and 'maximalist' approaches relate in turn to whether criminal law is seen as reflecting common judgments about wrongdoing, minimising objective 'dangers' or harms, deterring responsible actors, or punishing subjective fault (Ashworth 2006, pp. 452-5). Fletcher's passage demonstrates that the subjectivist position which is so central to liberal conceptions of the proper limits of criminal law can, paradoxically, rationalise a very wide scope for state intervention. This is demonstrated by the current law on impossible attempts, in which the decision in *Anderton* was reversed in favour of a maximalist, subjective approach:



*R v. Shivpuri* [1986] 2 All ER 334, HL

[Shivpuri was charged with attempting to commit the offence of being knowingly concerned in dealing with and harbouring prohibited drugs under section 170(1)(b) of the Customs and Excise Management Act 1979. He had been found in possession of a suitcase which he admitted he believed to contain prohibited drugs, but which in fact contained harmless vegetable matter. He appealed against his conviction on the basis that he had not done a 'more than merely preparatory' act, given that commission of the offence charged was impossible.]

**Lord Bridge:** The certified question depends on the true construction of the Criminal Attempts Act 1981... It was considered by your Lordships' House last year in *Anderton v. Ryan* [1985] 2 AER 355... That might seem an appropriate starting point from which to examine the issues arising in this appeal. But your Lordships have been invited to exercise the power under the 1966 Practice Statement to depart from the reasoning in that decision... I propose to approach the issue in the first place as an exercise in statutory construction, applying the language of the Act to the facts of the case, as if the matter were *res integra*...

... [T]he first question to be asked is whether the appellant intended to commit the offences of being knowingly concerned in dealing with and harbouring drugs of class A or class B with intent to evade the prohibition on their importation. Translated into more homely language the question may be rephrased, without in any way altering its legal significance, in the following terms: did the appellant intend to receive and store (harbour) and in due course pass on to third parties (deal with) packages of heroin or cannabis... The answer is plainly Yes, he did. Next, did he, in relation to each offence, do an act which was more than merely preparatory to the commission of the offence?... In each case the act was clearly more than preparatory to the commission of the intended offence; it was not and could not be more than merely preparatory to the commission of the actual offence, because the facts were such that the commission of the actual offence was impossible. Here then is the nub of the matter. Does the 'act which is more than merely preparatory to the commission of the offence' in s. 1(1) of the 1981 Act... require any more than an act which is more than merely preparatory to the commission of the offence which the defendant intended to commit? Section 1(2) must surely indicate a negative answer; if it were otherwise, whenever the facts were such that the commission of the actual offence was impossible, it would be impossible to prove an act more than merely preparatory to the commission of that offence and sub' ss (1) and (2) would contradict each other.

This very simple, perhaps over-simple, analysis leads me to the provisional conclusion that the appellant was rightly convicted of the two offences of attempt with which he was charged. But can this conclusion stand with *Anderton v. Ryan*? The appellant in that case was charged with an attempt to handle stolen goods. She bought a video recorder believing it to be stolen. On the facts as they were to be assumed it was not stolen. By a majority the House decided that she was entitled to be acquitted. I have re-examined the case with care. If I could extract from the speech of Lord Roskill or from my own speech a clear and coherent principle distinguishing those cases of attempting the impossible which amount

to offences under the statute from those which do not, I should have to consider carefully on which side of the line the instant case fell. But I have to confess that I can find no such principle . . .

If we fell into error, it is clear that our concern was to avoid convictions in situations which most people, as a matter of common sense, would not regard as involving criminality . . . [T]he distinction between acts which are 'objectively innocent' and those which are not is an essential element in the reasoning in *Anderton v. Ryan* . . . I am satisfied on further consideration that the concept of 'objective innocence' is incapable of sensible application in relation to the law of criminal attempts. The reason for this is that any attempt to commit an offence which involved 'an act which is more than merely preparatory to the commission of the offence' but which for any reason fails, so that in the event no offence is committed, must *ex hypothesi* from the point of view of the criminal law, be 'objectively innocent'. What turns what would otherwise, from the point of view of the criminal law, be an innocent act into a crime is the intent of the actor to commit an offence . . .

Another conceivable ground of distinction . . . would make guilt or innocence of the crime of attempt in a case of mistaken belief dependent on what, for want of a better phrase, I will call the defendant's dominant intention. According to the theory necessary to sustain this distinction, the appellant's dominant intention in *Anderton v. Ryan* was to buy a cheap video recorder; her belief that it was stolen was merely incidental . . . By contrast, in the instant case the appellant's dominant intention was to receive and distribute illegally imported heroin or cannabis.

While I see the superficial attraction of this suggested ground of distinction, I also see formidable practical difficulties in its application. By what test is a jury to be told that the defendant's dominant intention is to be recognised and distinguished from his incidental but mistaken belief? But there is perhaps a more formidable theoretical difficulty. If this ground of distinction is relied on to support the acquittal of the appellant in *Anderton v. Ryan*, it can only do so on the basis that her mistaken belief that the video recorder was stolen played no significant part in her decision to buy it . . . But this line of reasoning runs into head-on collision with s. 1(3) of the 1981 Act . . . This seems to me fatal to the dominant intention theory.

Lord Bridge concludes with a rationalisation of the decision to overrule such a recent case. Assumptions about the values of rationality and coherence underlie his argument, which skilfully weaves together technical analysis and appeals to 'common sense', creating the impression that what might be seen as an extraordinary episode in the court's history is in fact explicable on sound, logical grounds. The integrity of the doctrinal arguments employed are, however, open to question. We should note, for example, the implications of Lord Bridge's argument about the difficulty of reconciling the notion of 'objective innocence' with the law on defences such as mistake, and hence for the distinction between justification and excuse. The critique of the 'dominant intention' theory also seems puzzling given its application to the case of *R v. Steane* (1947), later cited with approval by Lord Bridge himself in *R v. Moloney* (1985).

The rationalisation of doctrinal ‘principles’ illustrated in our extract suggests that the House of Lords’ ultimate decision that mistakes such as Ryan’s and Shivpuri’s do generate the kind of impossibility envisaged by the 1981 Act owes more to policy than to legal logic and statutory interpretation. Although *Shivpuri* to some extent clarifies that law as far as conspiracy and attempt are concerned, the anomalous continued existence of some common law conspiracies means that this area is still covered by earlier case law excluding liability in situations of impossibility (*DPP v. Nock* (1978); *R v. Fitzmaurice* (1983)). There is also a question mark hanging over the offences of assisting and encouraging crimes which have replaced incitement. Incitement could not be committed if the intended offence were impossible. Although it was an anomaly that the impossibility rule continued to apply to incitement when it had been abolished for statutory conspiracy and attempt, the failure of the Serious Crime Act to deal with this explicitly means that it would be open a defendant ‘to argue that Parliament intended the “impossibility rule” to apply to the new offences, as it did to the old one’ (Spencer and Virgo 2008).

### III.10.b. Participation

While criminal law doctrine has remained uncomfortable with group liability, criminological studies have long reflected the group basis of much ‘criminal’ activity: the literature abounds with gangs, criminal associations, organised crime, and criminal subcultures. This contrasts with the preoccupation with individual liability and individual responsibility in traditional conceptions of criminal law. Group-based liability is uncomfortably accommodated rather than clearly embraced. Yet in practical terms its significance is hard to overstate. ‘The doctrine of secondary liability’, the Law Commission comments, ‘has developed haphazardly and is permeated with uncertainty’ (Report 305, 2007, para. 1.12). The Commission argued that the common law has stretched secondary liability partly to cover the gap in inchoate liability that has now been filled with the offence of assisting or encouraging another to commit an offence (Serious Crime Act 2007).

The legal basis for participatory liability lies at common law, but section 8 of the Accessories and Abettors Act 1861 sets out the method of charge. It provides:

Whosoever shall aid, abet, counsel or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.

The Magistrates’ Court Act 1980, by section 44, makes similar provision for summary offences.

Participation in crime as a ‘secondary party’ can take many different forms, such as giving advice, material assistance, equipment or encouragement; it can



take place before the principal offence (when it will be described as counselling or procuring) or at the same time (when it amounts to aiding and abetting); and it leads to full criminal liability for the principal offence and is punishable as severely as principal liability, in the words of the 1861 Act '*shall be liable to be tried, indicted, and punished as a principal offender*'.

### III.10.b.i. Aiding and abetting

We have subdivided our consideration of secondary or participatory liability because joint enterprises – where a group of people agree to commit an offence, in effect taking forward a conspiracy – raise some different questions than where the assistance is given in more indirect form or in the absence of an agreement. The principal offender is the person (or persons) who carry out the offence. It is important to identify the principal offence because secondary liability *derives from* a completed offence, even though the assistance may have taken place beforehand. It is not always necessary however to show who was the principal and who was the accessory (Giannetto (1997)). Gianetto paid W to kill his wife but the prosecution were unable to identify who in fact had killed her. It was enough to convict him to prove that he either was the perpetrator *or* that he had encouraged another to do so.

#### Conduct elements

As to the difference between 'aiding', 'abetting', 'counselling' and 'procuring', the cases are somewhat opaque. The broad distinctions are easy enough to state but these are not mutually exclusive, watertight categories. Each of them denotes a form of helping or assisting with the commission of a crime. Although Lord Widgery said that they should be given their ordinary meaning and that there was a difference between them (*Attorney General's Reference No 1 of 1975*), they are not in fact 'ordinary' words nor is it always possible to find a clear line between them. Counselling is synonymous with encouraging or inciting, procuring means to ensure or produce a result. If D lends his car to his friend knowing that the tyres are defective he has procured the offence of driving with defective tyres. Aiding includes assisting with the commission of an offence, by for example providing equipment, obtaining duplicate keys or security numbers, driving the getaway car. Abetting does not usually venture out from the legal dictionary on its own but is generally used for assistance or encouragement at the time the offence takes place.

Finer points have arisen in relation to causal links between the assistance and the offence, and consensus between the principal and the accessory. So in *Calhaem* (1985) the defendant hired a private detective to kill her rival. The rival was killed. The private detective testified that he did not intend to carry out the plan, merely to appear to do so, but on the spur of the moment he panicked and killed. Calhaem argued that she had not counselled the killing since she was not a substantial cause of it. This morally unattractive argument was dismissed by



the Court of Appeal which rejected the argument that there should be a direct causal connection so long as the act done was within the scope of her authority or advice. The law was summarised in the following way: '(i) Procuring implies causation but not consensus; (ii) "abetting" and "counselling" imply consensus but not causation; (iii) "aiding" requires actual help but neither consensus nor causation' (Smith 2002, p. 147). An alternative argument to support the verdict in *Calhaem* would be that there was in fact a causal link since the killer would not have been on the rival's doorstep armed with a hammer had the defendant not so counselled him.

Doctrinal insistence on liability only for acts and not for omissions becomes, in participation, the injunction that mere presence is insufficient for liability; some active involvement or encouragement is necessary. Yet the distinction between presence and encouragement is exceedingly difficult to draw. The relevance of the issue to public order contexts is illustrated in the old case of *Coney* (1882), in which a spectator at a prize fight was charged with aiding and abetting the assaults involved. The issue was considered more recently in the case of *R v. Allan* (1963). The appellants had been convicted of affray and appealed on the basis of the judge's direction that a person is a party to an affray where, without any prior agreement, 'he unlawfully joins in a fight [between two or more people in a public street that is likely to terrify passers-by or residents] or, being present, chose to remain present, either (a) knowing that his continued presence encouraged the fight, or (b) intending to join in the fight if his help was needed by his side'. Edmund Davies J expressed the opinion of the Court of Appeal in concluding:

The jury were in terms told that a man who chooses to remain at a fight, nursing the secret intention to help if the need arose, but doing nothing to evince that intention, must in law be held to be a principal in the second degree and that, on these facts being proved, the jury would have no alternative but to convict him. In our judgment, that was a misdirection. As Cave J said in *Coney*, 'Where presence is *prima facie* not accidental it is evidence, but no more than evidence, for the jury', and it remains no more than evidence for the jury even when one adds to presence at an affray a secret intention to help.

This is a robust affirmation of some basic doctrinal principles; but how clearly would they apply in the public order context where initial presence at the event may be interpreted by the court as evincing a prior intention or willingness to participate in an offence? It is all very well to draw clear conceptual distinctions between evidential and legal questions, but in practice everything will turn on the making of those evidential inferences. The preconceptions which tribunals and courts are likely to have in the public order area are such that the safeguards prized by doctrine and avowed by the courts may turn out to be worth a great deal less than their face value.

A further issue in relation to 'actus reus' which merits attention is the possibility of withdrawal from participation. Criminal law allows that secondary

parties may escape liability by making an effective withdrawal – but what constitutes an effective withdrawal inevitably relates to the nature of the participation in question. Thus, the giver of encouragement may have to attempt dissuasion; the aider at the scene must not only withdraw her help but make a timely communication of that withdrawal (*R v. Becerra* (1975)). The very idea of withdrawal renders it inappropriate to certain kinds of participants – for example, the procurer or provider of information and advice which cannot be withdrawn or removed, in which case the only possible kind of withdrawal, if indeed there is any, would seem to be physical obstruction or notification to the police. These limitations on the possibility of withdrawal are of particular relevance to those who are marginally involved in situations of public disorder. The person who has been involved at the planning stage may find it impossible to make any satisfactory withdrawal given the effective completion of her participation, and the person present at the scene of disorder may well find it impossible to communicate withdrawal at the time – indeed, the very ideas of ‘common purpose’, ‘contemplation’ and ‘communication of withdrawal of support’ seem inapposite and artificial in the context of disorders involving large numbers of people.

*R v. Jogee* (1993) 7 All ER 955, CA

[The appellant and two others agreed with MA to kill MA's wife for £20,000. The appellant did not turn up at the agreed site of the killing and it was carried out by the two others. All four were jointly charged with the murder of MA's wife. The two others pleaded guilty but the appellant and MA stood trial. The appellants defence was that he never intended the killing to take place and he thought the other two would not go ahead without him. His appeal against conviction was dismissed.]

**Lloyd LJ:** ... [T]he position, on his own evidence, was that he took a leading part in the planning of the murder. He foresaw that the murder would, or at least might, take place. For a time he stalled the others. But he did nothing to stop them, and apart from his absence on the [day of the murder], he did nothing to indicate to them that he had changed his mind.

... [Counsel for the Crown] submits that where a person has given assistance, for example by providing a gun, in circumstances which would render him liable as a secondary party if he does not withdraw, then in order to escape liability he must ‘neutralise’ his assistance. He must ... break the chain of causation between his act of assistance, and the subsequent crime, by recovering the gun, or by warning the victim to stay away, or by going to the police. [Counsel for the appellant] submits, on the other hand, that the Crown must prove that the defendant continued ready to help until the moment the crime is committed; and if there is doubt as to the defendant's state of mind on the day in question, or his willingness to provide further help if required, then the jury must acquit.

As between these two extreme views, we have no hesitation in rejecting the latter.

... In the present case the appellant never told the others that he was not going ahead with the crime. His absence on the day could not possibly amount to 'unequivocal communication' of his withdrawal.

... If the summing-up had been confined to the oral directions given by the judge, the appellant would have had little to complain about. But the judge went on to put his directions in writing... [which] bear the imprint of many minds. Simplicity and clarity have suffered in the process. The directions are as follows:

Q.2 If the answer to Q.1 is Yes, then has the prosecution proved that R's absence alone from the enterprise was not capable of neutralising and did not in fact neutralise the assistance and/or encouragement he had previously given. If Yes, then guilty of murder. If No, then go to Q.3.

Q.3 If the answer to Q.2 is No, has the prosecution proved that by that absence he did not intend to neutralise the effect of what he had previously said and done. If Yes, then guilty of murder. If No, then not guilty.

[T]hese directions were at best confusing and at worst misleading... We are driven to the conclusion that questions 2 and 3 are a misdirection.

But, having said that, a clearer case for the proviso would be hard to conceive. If the jury had been properly directed in accordance with *Becerra* there can be no doubt whatever that the verdict would have been the same, for there was never any suggestion that the appellant had communicated his intention to the other parties, so as to make his withdrawal effective. Accordingly we would dismiss the appeal.

Similarly in *Mitchell* (1999) the Court of Appeal suggested that withdrawal from pre-planned violence requires, where reasonable and practicable, communication to the other party.

### Culpability element

The 'mens rea' requirement for participation has been stated in a number of ways in different cases. It is bound to be a complex element given that it is a form of 'two-dimensional fault' which 'concerns not merely the defendant's awareness of the nature and effect of his own acts, but also his awareness of the intentions of the principal' (Ashworth 2006, p. 422). The difficulty of formulating a test of subjective fault based on knowledge or awareness of another person's intended actions is compounded by the fact that often that other person may act differently from the initial intention. D purchases a hammer from P's hardware store and then uses it to hit V. Under what circumstances is P liable for the offence committed by D? She has 'aided' D's offence which supplies the conduct element for secondary liability. The first part of the 'mens rea' or culpability requirement is generally straightforward: P has intended to carry out the act (supply of the hammer) which provides the assistance. But the second part is more complex. Consider the following variations.



Scenario 1: P knows nothing of D's plans for the hammer – she does not have the 'mens rea'.

Scenario 2: Suppose D says to P when she buys the hammer: 'I think this will be good for hitting my neighbour with, he has been annoying me recently.' Does P now have 'mens rea' given that she knows what D might do with the hammer? The answer is (probably) yes. If P thought D was joking (albeit in bad taste) the prosecution may have difficulty in proving that she realised D may be going to commit the offence.

Scenario 3: D asks P for a hammer saying she needs to teach her neighbour a lesson and hopes that 'giving her car a good bash' will be enough. D then goes on to hit V as well as her car. Is P liable as a secondary party to the injury offence if she realised that D might use the hammer for that purpose? The answer is yes if P does realise that D might go further than the offence of criminal damage.

Scenario 4: D asks P for a hammer so that she could give her neighbour a fright by throwing the hammer at her across the fence. But instead D approaches V directly and hits her on the head. Does P contemplate an offence of the type that was in fact committed? Can the answer be found in the following case?

*R v Maxwell (1979) 1 All ER 1116*

[Maxwell was a member of the Ulster Volunteer Force, a proscribed organisation, and had led terrorists in his car to an inn, which was in fact bombed. He was charged as a principal to the offence of planting a pipe bomb: it was accepted that he had known there was to be an attack but not the precise nature of the offence which would be committed. He appealed against conviction on the ground that he must be shown to have known the type of crime intended to be committed and the kind of means of offence being carried to the scene.]

**Viscount Dilhorne:** [Quoting Lowry LC] in the Court of Criminal Appeal Northern Ireland:] The facts found here show that the appellant, as a member of an organisation which habitually perpetrates sectarian acts of violence with firearms and explosives, must, as soon as he was briefed for his role, have contemplated the bombing of the Crosskeys Inn as not the only possibility but one of the most obvious possibilities among the jobs which the principals were likely to be undertaking and in the commission of which he was intentionally assisting. He was therefore in much the same situation, so far as guilty knowledge is concerned, as a man who had been given a list of jobs and told that one of them would be carried out . . .

The court certified the following point of law of general public importance:

If the crime committed by the principal, and actually assisted by the accused, was one of a number of offences, one of which the accused knew the principal would probably commit, is the guilty mind which must be proved against an accomplice thereby proved against the accused?

The House of Lords dismissed Maxwell's appeal, with the sole proviso (on Viscount Dilhorne's part) that the particulars of the offence should in so far as possible bear a relation to the realities, and with Lord Scarman underlining



the subjective nature of the test. He quoted from Lord Lowry's judgment in the Northern Ireland Court of Criminal Appeal:

The relevant crime must be within the contemplation of the accomplice and only exceptionally would evidence be found to support the allegation that the accomplice had given the principal a completely blank cheque.

[and went on to say] The principle thus formulated has great merit. It directs attention to the state of mind of the accused: not what he ought to have in contemplation, but what he did have. It avoids definition and classification, while ensuring that a man will not be convicted of aiding and abetting any offence his principal may commit, but only one which is within his contemplation. He may have in contemplation only one offence, or several: and the several which he contemplates he may see as alternatives. An accessory who leaves it to his principal to choose is liable, provided always the choice is made from the range of offences from which the accessory contemplates the choice will be made.

This case suggests that P in Scenario 4 above would not be liable, she had not given D a 'blank cheque'. But if the prosecution could prove that she realised D might carry out the attack in a one of a number of different ways she could then be said to have the appropriate 'mens rea'. This affirmation of the 'subjectivity' of interpretive tests is in line with traditional doctrine, but, as we have already suggested, its practical application may not be as different from that of an 'objective' test as the logical distinction suggests. Furthermore, Lord Scarman's formulation illustrates the artificial model of human thought and behaviour on which such tests proceed: not only is the 'contemplation' separated from the action, it is assumed to be a discrete, conscious and above all rational process which can then be subjected to judicial inquiry. Even leaving problems of proof aside, is it really the case that we rationally contemplate all the possible implications of our actions? And if, as we would suggest, we generally do not, does this not reveal that law is in fact engaged in constructing rather than in discovering common purposes and contemplated ends?

### III.10.b.ii. Joint enterprise

Joint enterprise or common purpose liability arises when two or more people agree to commit an offence. It includes cases where they do not commit the offence together as well as those where they do. It may be that a specific robbery or burglary is contemplated, or a gang (usually of youths) is out on the streets looking for rivals. If everything follows according to plan, each person in the joint enterprise is liable irrespective of the actual (or any) physical contribution they may make. So an easy example would be a plan by A and B that B should go to V's house and shoot him dead. If that is what B does, A is also liable. Similarly, if they go together it does not matter whether A shoots or B keeps watch or vice versa. They are both guilty of murder. But of course life is rarely that straightforward. The plan may be vague or contingent, A or B may act in

unexpected ways, and the question that then arises is the liability of the other for so-called unintended consequences, or for departures from the contemplated plan. Unexpected actions on the part of one of the participants potentially sever the link of liability. Thus, when one party to a fist fight draws out a knife which the others do not know existed, their liability will probably stop short of that for the use of the knife. But the situation is less clear if, for example, the existence of the knife is known about but is used for purposes different from those originally contemplated. The joint enterprise doctrine was subjected to searching scrutiny in *Powell/English* in 1997 and again in 2008 in *Rahman* below. When English's appeal was allowed, it was reported in the press as a significant shift in the archaic and restrictive aiding and abetting rules. A close reading of the case leaves us in some doubt as to whether there has been much change of substance. The general rule remains that a participant (P2) in an unlawful enterprise who realises that their accomplice (P1) might kill or cause grievous bodily harm will be liable for murder alongside P1 if P1 does kill, unless the killing was carried out with a wholly unexpected weapon. Establishing whether the use of a particular weapon was within the contemplation of the parties will always be subject to the vagaries of jury fact-finding, as Lord Hutton conceded in *Powell/English*.

It should be explained that there are more murder cases than others not only because of the seriousness of the offence, nor simply because murder carries a mandatory penalty, but also because the culpability element for murder is not confined to intention to kill. It is also sufficient to prove that the defendant intended to cause serious bodily harm. This means that when there is an agreed plan to inflict injury which then gets out of hand, the liability of those who share the common purpose, could become a conviction for murder so long as they realised that causing really serious injury was a possibility. However, the harshness of this rule is mitigated if there has been a 'fundamental departure' from the plan. Such a departure was accepted in English's appeal (*Powell/English*): he agreed to attack V with wooden posts but the death was caused when his conspirator stabbed V with a knife. What is interesting is that, despite the frequency with which these cases reach the highest appellate levels, the House of Lords and the Privy Council have been consistent in maintaining a relatively flexible doctrine which draws into the net of liability those who go along with a group committed to some sort of violence.

#### *R v. Rahman and others* [2008] UKHL 46

[The four appellants were convicted of murder. They were part of a group of youths with a history of dispute with another group. After sighting the other group, they had gathered carrying a variety of weapons including baseball bats, a cricket bat, a scaffolding pole, a metal bar, a table leg and pieces of wood. The deceased defended himself in the fight with some fence wood, but was eventually cornered and then stabbed. The rest of the attacking

group ran off, leaving two of the appellants who were arrested. It was not alleged or proved that any of the appellants had personally struck the fatal blow or blows and they were convicted as accessories or secondary parties to the joint enterprise which culminated in the death of the deceased.]

**Lord Bingham:** 4. ... There was no evidence that any of the appellants inflicted the fatal injuries. The participant who did was probably not apprehended. The prosecution alleged that the role of each appellant in the attack involved either the deliberate and intentional infliction of serious physical harm to the deceased or, by their conduct, the intentional encouragement of others to do likewise; that each appellant shared a common intention that serious bodily harm should be inflicted; and that the circumstances of the attack were such that each of them knew that weapons such as baseball bats, a scaffolding pole and a knife or knives might be used to inflict serious bodily harm.

5. The evidence of each appellant was that he had joined the enterprise with at most an intention to cause serious harm, without knowledge or foresight that anyone else involved in the assault intended to kill, that he did not have a knife and did not know or foresee that anyone else had a knife and that, accordingly, the acts of the primary offender were outside the scope of any joint enterprise to inflict serious bodily harm. The first, second and fourth-named appellants denied participation in the fatal assault. The third-named appellant admitted being present, wearing a balaclava, with intent to join in the assault, but said that before striking any blow he had been stunned by a blow to his head caused by a brick thrown by the deceased's friend.

6. It is accepted that the jury must have found that each appellant participated in the attack either (i) by using violence to the victim, or (ii) by surrounding him to enable others to use such violence, or (iii) by being present intending that his presence should encourage others to attack the victim.

9. ... As the Privy Council (per Lord Hoffmann) said in *Brown and Isaac v. The State* [2003] UKPC 10, para. 8, 'The simplest form of joint enterprise, in the context of murder, is when two or more people plan to murder someone and do so. If both participated in carrying out the plan, both are liable. It does not matter who actually inflicted the fatal injury. This might be called the paradigm case of joint enterprise liability'. It is (para. 13) 'the plain vanilla version of joint enterprise'. Sir Robin Cooke had this same simple model in mind when, giving the judgment of the Privy Council in *Chan Wing-Siu v. The Queen* [1985] AC 168, 175, he said:

'... a person acting in concert with the primary offender may become a party to the crime, whether or not present at the time of its commission, by activities variously described as aiding, abetting, counselling, inciting or procuring it. In the typical case in that class, the same or the same type of offence is actually intended by all the parties acting in concert'.

Countless juries have over the years been directed along these lines, the example of a bank robbery in which the masked robbers, the look-out man and the get-away driver play



different parts but are all liable being often used as an illustration. In this situation the touchstone of liability is the intention of those who participate.

10. But there is what Sir Robin Cooke in *Chan Wing-Siu v. The Queen*, p. 175, called a 'wider principle'. In *R v. Powell (Anthony)*, *R v. English*, above, as Lord Hutton made plain in the opening sentence of his leading opinion, the House had to consider a more difficult question: the liability of a participant in a joint criminal enterprise when another participant in that enterprise is guilty of a crime, the commission of which was not the purpose of the enterprise.

11. ... Drawing on a strong line of authority ... the House held that 'participation in a joint criminal enterprise with foresight or contemplation of an act as a possible incident of that enterprise is sufficient to impose criminal liability for that act carried out by another participant in the enterprise' ... In the case of *Powell and Daniels* the Crown case was that the two appellants knew that the third man was armed with a gun, and the Crown accepted that if the jury did not find that they knew this they would not be guilty of murder. Since the jury convicted, it may be inferred that they found the appellants did have this knowledge.

Possession of the gun was not of itself conclusive, but it was evidence from which the jury could infer that the appellants foresaw (or 'realised' or 'contemplated') that the gun might be used to inflict, at least, really serious injury.

12. In the case of *English* there was what proved to be a significant factual variant. *English* and an associate, *Weddle*, combined to attack a police officer with wooden posts and cause injury to him. In the course of the attack, *Weddle* used a knife and stabbed the officer to death. The question was whether, as a participant in the joint enterprise to attack and injure the officer, *English* was liable for the fatal injury inflicted by *Weddle* with the knife. The factual variant was that, as the Crown accepted, *English* might have been unaware that *Weddle* had the knife ...

13. ... The most recent and detailed consideration of this question was, however, found in the judgment of Carswell J in a non-jury trial in Northern Ireland in *R v. Gamble and Others* [1989] NI 268.

14. In that case four members of the Ulster Volunteer Force had combined to inflict punishment on an allegedly delinquent member of the organisation. The punishment was to consist of knee-capping (the firing of a bullet or bullets into a knee or other joint, so as to cripple but not kill the victim) and a beating. In the event he was killed. A number of bullets were found to have caused wounds which could, but need not, have proved fatal ... [Carswell J] concluded 'Although the rule remains well entrenched that an intention to inflict grievous bodily harm qualifies as the mens rea of murder, it is not in my opinion necessary to apply it in such a way as to fix an accessory with liability for a consequence which he did not intend and which stems from an act which he did not have within his contemplation.'

15. In *R v. Powell (Anthony)*; *R v. English* ... the House held this decision to be correct. The submission for *English* in that case was that to be guilty ... the secondary party must



foresee an act of the type which the principal party committed, and that in English's case the use of a knife was fundamentally different to the use of a wooden post . . .

16. The decision of the House in *R v. English* did not lay down a new rule of accessory liability or exoneration. Its significance lies in the emphasis it laid (a) on the overriding importance in this context of what the particular defendant subjectively foresaw, and (b) on the nature of the acts or behaviour said to be a radical departure from what was intended or foreseen. The greater the difference between the acts or behaviour in question and the purpose of the enterprise, the more ready a jury may be to infer that the particular defendant did not foresee what the other participant would do.

[The appellants argued that although they realised really serious injury might be caused it was clear that the person responsible for the fatal stab must have intended to kill. They therefore did not share the principal's mens rea. In rejecting this argument Lord Bingham went on to say:]

24. Authority apart, there are in my view two strong reasons, one practical, the other theoretical, for preferring the respondent's contention. The first is that the law of joint enterprise in a situation such as this is already very complex, as evidenced by the trial judge's direction and the Court of Appeal's judgment on these appeals, and the appellants' submission, if accepted, would introduce a new and highly undesirable level of complexity. Given the fluid, fast-moving course of events in incidents such as that which culminated in the killing of the deceased, incidents which are unhappily not rare, it must often be very hard for jurors to make a reliable assessment of what a particular defendant foresaw as likely or possible acts on the part of his associates.

It would be even harder, and would border on speculation, to judge what a particular defendant foresaw as the intention with which his associates might perform such acts. It is safer to focus on the defendant's foresight of what an associate might do, an issue to which knowledge of the associate's possession of an obviously lethal weapon such as a gun or a knife would usually be very relevant.

25. Secondly, the appellants' submission, as it seems to me, undermines the principle on which, for better or worse, our law of murder is based. In the prosecution of a principal offender for murder, it is not necessary for the prosecution to prove or the jury to consider whether the defendant intended on the one hand to kill or on the other to cause really serious injury. That is legally irrelevant to guilt. The rationale of that principle plainly is that if a person unlawfully assaults another with intent to cause him really serious injury, and death results, he should be held criminally responsible for that fatality, even though he did not intend it. If he had not embarked on a course of deliberate violence, the fatality would not have occurred. This rationale may lack logical purity, but it is underpinned by a quality of earthy realism. To rule that an undisclosed and unforeseen intention to kill on the part of the primary offender may take a killing outside the scope of a common purpose to cause really serious injury, calling for a distinction irrelevant in the case of the primary offender, is in my view to subvert the rationale which underlies our law of murder.

26. I would accordingly reject the appellants' submission on this point. I would also reject a subsidiary submission that the judge should have explained to the jury what was meant by 'fundamentally different'. This is not a term of art.

The threshold for secondary liability in these circumstances remains at the 'foresight as possible' level; juries will have the opportunity to apply the 'fine distinction' to which Lord Hutton refers between a foresight (which will lead to liability), and one which exonerates only where the weapon or the act fundamentally differs from that person's contemplation. A recent example is *Yemoh* (2009). And the joint enterprise rules survived a challenge of unfairness under Article 6 of the European Convention on Human Rights in *Concannon* (2002). The defendant went with his co-accused to the flat of a man dealing in drugs; he admitted that he suggested to the co-accused that they should rob this man. When they arrived at the flat the door was open and they went in. The defendant asked the man for money and drugs and then punched him. The co-accused subsequently stabbed the man to death but the defendant said he was not present at the time and that he had not known that his co-accused had a knife. The judge, directing the jury on joint enterprise in accordance with *Powell and English*, explained that it was sufficient if they were sure that the defendant foresaw a reasonable possibility that, in pursuit of the common purpose, the co-accused would stab the victim with murderous intent. Both the defendant and his co-accused were convicted of murder. The defendant applied for leave to appeal against conviction on the grounds that it was not fair, within the meaning of Article 6 of the European Convention on Human Rights, that the defendant who did not personally inflict the fatal wounds on the deceased should be convicted of murder when it was not necessary under domestic law for him personally to have intended that the victim should die or suffer really serious injury. The application was refused; these were arguments about substantive law. Provided the criminality established against a defendant equated with the legally prescribed criteria for murder, then he was guilty of murder, and if he was convicted after a fair trial the sentence was prescribed by law.

In 1997 the Criminal Cases Review Commission referred to the Court of Appeal the appalling miscarriage of justice case of Derek Bentley, who was hanged in 1953, barely two months after his accomplice shot a policeman who had intercepted them while carrying out a robbery of a warehouse. Many aspects of the trial and subsequent failure to commute the capital sentence are indefensible. It is probably accurate to conclude that the joint enterprise doctrine contributed to this travesty of justice, but it was by no means the whole of it. It is important to note how much of the strict joint enterprise doctrine survives, and the case as a whole is instructive reading. While judicial training has undoubtedly improved, and the Human Rights Act has introduced a more principled basis for ensuring fair trials, it is useful to be reminded how easily

courts can become swayed by the emotions of the particular case. The contemporary concern (obsession) with terrorism provides a compelling analogy. Killings of police officers are always taken seriously, as are those of children. But the language used of football hooligans, as we saw in Chapter 5.c., is enough to cause us to pause before assuming that judges could never again emulate Lord Goddard's disrespect for a defendant.

*R v. Derek William Bentley (deceased) [1998] 1 WLR 2516*

**Lord Bingham of Cornhill CJ:** On the evening of November 2, 1952 Police Constable Sidney Miles was shot dead in the execution of his duty on the roof of a warehouse in Croydon. Two men were charged with his murder: Christopher Craig, who was then aged 16, and Derek William Bentley, who was 19. On November 17, 1952 they were committed to stand trial on December 9 at the Central Criminal Court, where they were tried before Lord Goddard CJ and a jury. They were convicted on December 11, in Bentley's case with a recommendation to mercy. The trial judge passed on each the only sentence permitted by law: on Craig, because of his age, that he be detained during Her Majesty's pleasure; on Bentley, sentence of death. An appeal by Bentley against conviction was dismissed by the Court of Criminal Appeal . . . on January 13, 1953. He was executed on January 28.

The Criminal Cases Review Commission has referred the conviction of Derek Bentley to this Court under section 9 of the Criminal Appeal Act 1995 . . .

On July 29, 1993 the appellant was granted a royal pardon in respect of the sentence of death passed upon him and carried out. We have no function to perform in relation to that sentence, although some of the fresh evidence reviewed in section III below has obvious relevance to that aspect of the case.

Rarely has the Court been required to review the safety of a conviction recorded over 45 years earlier. In undertaking that task we conclude:

- (1) We must apply the substantive law of murder as applicable at the time, disregarding the abolition of constructive malice and the introduction of the defence of diminished responsibility by the Homicide Act 1957.
- (2) The liability of a party to a joint enterprise must be determined according to the common law as now understood.
- (3) The conduct of the trial and the direction of the jury must be judged according to the standards which we would now apply in any other appeal under section 1 of the 1968 Act.
- (4) We must judge the safety of the conviction according to the standards which we would now apply in any other appeal under section 1 of the 1968 Act.

Where, between conviction and appeal, there have been significant changes in the common law (as opposed to changes effected by statute) or in standards of fairness, the approach indicated requires the Court to apply legal rules and procedural criteria which were not and could not reasonably have been applied at the time. This could cause difficulty in some cases but not, we conclude, in this. Where, however, this Court exercises its power to receive



new evidence, it inevitably reviews a case different from that presented to the judge and the jury at the trial . . .

We must first consider the case that was presented to the judge and the jury at the trial . . . Since one of the grounds of appeal . . . asserts that 'there are such irreconcilable inconsistencies and improbabilities in significant parts of the evidence of certain police officers as to raise a real doubt as to the reliability and truthfulness of their evidence', it will be necessary to consider parts of the evidence given at the trial in some detail.

The main thrust of the prosecution case was straightforward. Craig had deliberately and wilfully murdered PC Miles and the appellant had, to use prosecuting counsel's words in opening, 'incited Craig to begin the shooting and, although technically under arrest at the actual time of the killing of Miles, was party to that murder and equally responsible in law'.

In order to prove the appellant's participation, the prosecution relied heavily on what counsel described as 'the most important observation that Bentley made that night', namely 'Let him have it, Chris'. That was said to be a deliberate incitement to murder Detective Constable Fairfax, who had just arrested the appellant. It led, it was said, to Craig immediately firing at and wounding DC Fairfax. Counsel said in opening:

'It was spoken to a man who he, Bentley, clearly knew had a gun. That shot began a gun fight, in the course of which Miles was killed; that incitement . . . covered the whole of the shooting thereafter, even though at the time of the actual shot which killed PC Miles, Bentley was in custody and under arrest.'

Craig's defence was that he was not guilty of murder, but guilty only of manslaughter because, although he had pulled the trigger and fired the shot, he had intended only to frighten the police officers and the killing had been an accident . . . In reality, the case against Craig that he had deliberately murdered PC Miles was very strong; and on the law as it then stood any verdict other than guilty of murder in his case would have been perverse.

The appellant's case was that he had not incited Craig to fire the gun and had at no time been party to its use. He had not known that Craig had a gun until the first shot was fired and he had not used the words 'Let him have it, Chris' or any words which amounted to an incitement to use the gun. He had been standing with DC Fairfax for an appreciable time, making no effort to get away from him and behaving in a wholly docile manner, when Craig had fired the fatal shot. He had not participated in the murder . . .

[Counsel for the appellant] submitted that the trial judge's direction to the jury, read as a whole, was unfairly adverse and prejudicial to the appellant, put unfair pressure on the jury to convict and failed adequately to put the appellant's case to the jury . . .

At the outset of his summing-up the trial judge described the case as a terrible one, which on any showing it plainly was, and urged the jury in conventional terms to approach it in as calm a frame of mind as they could. He then continued:

'Here are two lads, one of 16 and one of 19, admittedly out on a shop-breaking expedition at night, armed with a Service revolver, a dreadful weapon in the shape of a knuckle-duster, and two knives which may or may not be described as daggers - one of them I should think certainly could be - and the result is that a young policeman is shot dead



while in the execution of his duty. You may think it was almost a miracle that others were not shot too. One of them, we know, Sergeant Fairfax, was wounded, but fortunately only slightly.'

... The trial judge... turning to the case of the appellant, directed the jury on the legal approach to the liability of a party to a joint enterprise...

'Now let us see what the evidence is with regard to Bentley. The first thing that you have to consider is: did Bentley know that Craig was armed? Now, you know, because I sit on the Bench and you sit in the jury-box it is not necessary that we leave our common-sense at home. The great virtue of trial by jury is that jurymen can exercise the common-sense of ordinary people. Can you suppose for a moment, especially when you have heard Craig say that why he carried a revolver was for the purpose of boasting and making himself a big man, that he would not have told his pals he was out with that he had got a revolver? Is it not almost inconceivable that Craig would not have told him, and probably shown him the revolver which he had? That is quite apart from what Bentley said afterwards. I should think you would come to the conclusion that the first thing, almost, Craig would tell him, if they were going on a shop-breaking expedition, was: "It's all right. I've got a revolver with me."

Then see what Bentley had on him. Where is that knuckle-duster? Apparently it was given to him by Craig, but Bentley was armed with this knuckle-duster. Have you ever seen a more horrible sort of weapon? You know, this is to hit a person in the face with who comes at you. You grasp it here, fingers go through - I cannot quite get mine through, I think - and you have got a dreadful heavy steel bar to strike anybody with; and you can kill a person with this, of course. Then did you ever see a more shocking thing than that? ... Here was Craig armed with a revolver and that sheath knife. Hand me that sheath knife - the big one. One wonders, really what parents can be about in these days, allowing a boy of 16 - they say, perhaps, they do not know, but why do not they know? - to have a weapon like this which he takes about with him? It is not a new one, you can see; it is pretty well worn. That was the thing that Craig was taking about. Where is the other knife? Here is Bentley with a smaller knife, but you can feel it is sharp and pointed. What is he carrying that with him for in his coat, not even with a sheath on it?

Can you believe it for a moment although Bentley had said he did not know Craig had the gun? You are not bound to believe Bentley if you think the inference and common sense of the matter is overwhelming that he must have known that he had it. Now, of course, the most serious piece of evidence against Bentley is that he called out, if you believe the evidence, to Craig "Let him have it, Chris!", and then the firing began, and the very first shot struck Sergeant Fairfax. Gentlemen, those words are sworn to by three police officers - Sergeant Fairfax, Police Constable McDonald, and Police Constable Harrison; they all swear that they heard Bentley call that out, and that then the firing started...

And then the judge gave the direction... concerning the conspicuous bravery of the police officers, to which reference has already been made.

The trial judge then reminded the jury of the evidence and the alleged admissions of the appellant and at page 138A of the transcript continued:

'Then in his statement he said: "I didn't know he was going to use the gun." Again, if he said that, it shows that he knew it. If he knew that he had the gun, can you believe he did not know he had ammunition? Why did he have ammunition? Why did he have the gun? Why did he have the ammunition? You will remember that at one stage the officers said that Craig on the roof told them that he had a 45 and lots of ammunition. I think they said something about "blowing your head off" – "He'll blow your head off". Then later in his statement he said he did not know "Chris" had a gun till he shot. That, of course, is quite inconsistent with what he said earlier in his statement. You can have the statement when you go to your room, if you like. He did say "I didn't know he was going to use the gun", and then he said afterwards "I didn't know Chris had one until he shot". It does not seem very consistent, but, as I say, the real thing is, is it not, as a matter of common sense, can you believe for a moment that if Bentley had gone on that expedition with this boastful young ruffian who said he carried a gun for the purpose of making himself out bigger than he was, he would not have told Bentley he had the gun? What had he got the gun for, and what did Bentley think he had the gun for?'

The trial judge then observed that that was the whole case. He proceeded to summarise Craig's defence in four sentences, and the appellant's in two:

'In the case of Bentley, Bentley's defence is: "I didn't know he had a gun, and I deny that I said 'Let him have it Chris'. I never knew he was going to shoot, and I didn't think he would".'

The judge then made reference to the appellant's denial as that of a man in grievous peril...

Their Lordships realise that the judge's task in this type of trial is never an easy one. He must of course remain impartial, but at the same time the evidence may point strongly to the guilt of the defendant; the judge may often feel that he has to supplement deficiencies in the performance of the prosecution or defence, in order to maintain a proper balance between the two sides in the adversarial proceedings. It is all too easy for a court thereafter to criticise a judge who may have fallen into error for this reason. However, if the system is trial by jury then the decision must be that of the jury and not of the judge using the jury as something akin to a vehicle for his own views. Whether that is what has happened in any particular case is not likely to be an easy decision...

The killing of PC Miles had, very understandably, aroused widespread public sympathy for the victim and his family and a strong sense of public outrage at the circumstances of his death. This background made it more, not less, important that the jury should approach the issues in a dispassionate spirit if the defendants were to receive a fair trial, as the trial judge began by reminding them. In our judgment, however, far from encouraging the jury to approach the case in a calm frame of mind, the trial judge's summing-up, particularly in the passages we have quoted, had exactly the opposite effect. We cannot read these passages as other than a highly rhetorical and strongly worded denunciation of both defendants and of their defences. The language used was not that of a judge but of an advocate (and

it contrasted strongly with the appropriately restrained language of prosecuting counsel). Such a direction by such a judge must in our view have driven the jury to conclude that they had little choice but to convict; at the lowest, it may have done so.

These complaints formed no part of the appellant's appeal against conviction. We do not know why not. We question whether, in the light of the authorities to which we have referred, this summing-up would have been thought acceptable even by the standards prevailing at the time. Complaint was made on appeal of the trial judge's failure to put the appellant's case adequately to the jury, but this ground of appeal was dismissed; the court, it seems, held that 'the idea that there was a failure on the part of the Chief Justice to say anything short of what was required in putting that sort of case to the jury is entirely wrong'...

It is with genuine diffidence that the members of this Court direct criticism towards a trial judge widely recognised as one of the outstanding criminal judges of this century. But we cannot escape the duty of decision. In our judgment, the summing-up in this case was such as to deny the appellant that fair trial which is the birthright of every British citizen.

[His lordship then moved on to consider the doctrine of joint enterprise:]

At the trial the Crown relied... on two doctrines of the common law. [The first, constructive malice, was abolished by the Homicide Act 1957, section 1(1).] By the second doctrine, a participant in a joint criminal enterprise is held liable for the acts of another participant pursuant to and within the scope of the joint criminal enterprise. The application of this doctrine could make the appellant liable for what Craig did. Mr Fitzgerald argued that the trial judge's direction to the jury on ... joint enterprise, so far as it related to the appellant, was wrong in law.

[T]he trial judge directed the jury in these terms:

'Well, now I turn to Bentley. Members of the jury, these two youths are tried together, and they are both tried for the murder of the policeman. It is quite unnecessary, where two or more persons are engaged together in an unlawful criminal act, to show that the hand of both of them committed the act... where two people are engaged on a felonious enterprise – and warehouse-breaking is a felony – and one knows that the other is carrying a weapon, and there is agreement to use such violence as may be necessary to avoid arrest, and this leads to the killing of a person or results in the killing of a person, both are guilty of murder, and it is no answer for one to say "I did not think my companion would go as far as he did".'

Now you can only judge whether there is an agreement to use such violence as may be necessary by looking at what happened and all the circumstances of the case, but I do remind you that it is no excuse and no defence to say "I knew he was carrying a loaded revolver" – if you find he was – "that he was carrying a loaded revolver, or a revolver, but I didn't think he would use it". If one is carrying a revolver and the other knows that he intends to use some degree of violence, it is no answer, if that violence results in death to say "Well, I didn't think he would go as far as that". What you have to consider is: is there evidence from which you can properly infer that these two youths went out with a common purpose not merely to warehouse-break but to resist apprehension, even by



violence if necessary? That is all. It is, as I repeat, no answer, if you come to that conclusion, for one to say: 'Yes, but I didn't think he would go as far as he did'. '[T]he trial judge added:

'Then in the car first of all he said: "I knew he had a gun" – that is sworn to by three officers – "I knew he had a gun, but I did not think he'd use it". As I have told you, if he knew he had a gun, and knew he was taking the gun for protection in their common unlawful enterprise, or to prevent arrest by violence, Bentley is as guilty as Craig; he is as guilty in law as Craig.'

It seems to us, in the light of those authorities binding on the trial judge, that his direction to the jury was in accordance with the law as it then stood and was, if anything, favourable to the appellant. But it was argued that later developments in the law governing the liability of secondary parties to joint criminal enterprises, in particular the recent decision of the House of Lords in *R v. Powell* and *R v. English* rendered his direction unsound. The relevant law is in our judgment summarised with sufficient accuracy for present purposes in the following propositions advanced on behalf of the Crown:

'(i) Where two parties embark on a joint enterprise to commit a crime and one party foresees that in the course of the enterprise the other party may carry out, with the requisite mens rea, an act constituting another crime, the former is liable for that crime if committed by the latter in the course of the enterprise

...

(ii) Where the principal kills with a deadly weapon, which the secondary party did not know that he had and of which he therefore did not foresee use by the principal, the secondary party is not guilty of murder.

(iii) If the weapon used by the primary party is different to but as dangerous as the weapon which the secondary party contemplated he might use, the secondary party should not escape liability for murder because of the difference in the weapon, for example if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill or vice versa (*R v. English*, above at 286DE and 30GH, per Lord Hutton).

(iv) The secondary party is subject to criminal liability if he contemplated the act causing the death as a possible incident of the joint venture unless the risk was so remote that the jury take the view that the secondary party genuinely dismissed it as altogether negligible ...'

Even if we undertake the anachronistic exercise of applying those principles to the trial judge's direction to the jury in 1952, the soundness of that direction is not in our view invalidated. Nothing in his direction suggested that the appellant could be liable if he did not know that Craig had a gun, nor did he suggest that the appellant could be liable if he did not foresee the use of the gun. His direction was founded on the premise of an agreement between the appellant and Craig to use such violence as might be necessary to avoid arrest: this would plainly embrace use of the gun, even if the appellant did not intend that the gun should be fired, or fired so as to cause injury, and did not expect the gun to be



fired unless the firing was regarded by the appellant as a wholly remote possibility. On the basis of ... the law of joint enterprise as it now stands, the trial judge's direction in the passages we have quoted was in our judgment correct.

That is not, however, the end of the matter. [T]his was a case calling for a very careful direction and review of the evidence relevant to, first, the existence and nature of any agreement or understanding between Craig and the appellant; secondly, the scope and purpose of such agreement or understanding; and, thirdly, the duration and possible termination of any such agreement or understanding. This last matter was of particular importance, since the appellant's defence at the trial rested strongly on the contention that if, contrary to his assertion, there had ever been any joint agreement to resist arrest by violence, he had dissociated himself from it. Reliance was placed on a number of facts already mentioned above: the absence of any struggle or resistance or attempt to escape by the appellant following his seizure by Detective Constable Fairfax; his compliant surrender of the weapons on his person; the fact that he was under arrest for a significant period, perhaps 15 minutes, before Police Constable Miles was shot; and the number of observations attributed to the appellant by the police officers: 'That's all I've got guv'nor; I haven't got a gun'; 'He'll shoot you'; 'He's got a 45 Colt and plenty of bloody ammunition too'; 'I told the silly bugger not to use it'; 'You want to look out; he'll blow your heads off'; 'Look out, Chris; they're taking me down', and, of course, the important but possibly ambiguous statement (if made): 'Let him have it, Chris.'

The circumstances in which a party to a joint enterprise may claim to have abandoned or withdrawn from that enterprise was the subject of consideration by Sloan JA, sitting in the Court of Appeal of British Columbia, in *Whitehouse* [1941] 1 DLR 683 at 685 where he said:

'... After a crime has been committed and before a prior abandonment of the common enterprise may be found by a jury there must be, in my view, in the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime ... [I]t seems to me that one essential element ought to be established in a case of this kind: where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is "timely communication" must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences.'

... Whether, properly directed, the jury would have found that the appellant had done enough to withdraw and signify his withdrawal from the enterprise which they must have

found to exist between him and Craig we cannot know. But this was an important limb of the appellant's defence, and it is in our view clear that the trial judge should have given the jury a careful direction on it. He gave none.

... The Crown case throughout was that the appellant was under arrest (or 'technically under arrest', which must be the same thing) at the time when Police Constable Miles was shot; and it is very difficult to see how any answer given by the appellant could have any bearing on the legal question whether he was under arrest or not. In any event, when asked in cross-examination whether he was not under arrest at the time, he simply answered 'I was standing there, sir'. It is quite true that for much of the time after his initial seizure he was not physically held, and he agreed that he had been free to run away if he had wanted to, but this was in itself evidence of potential significance supporting the suggestion that, for him, the criminal enterprise was over. We feel bound to say that, in our judgment, the Court of Criminal Appeal failed to grapple with this ground of appeal, which should have succeeded.

For all the reasons given in this section of the judgment we think that the conviction of the appellant was unsafe. We accordingly allow the appeal and quash his conviction. It must be a matter of profound and continuing regret that this mistrial occurred and that the defects we have found were not recognised at the time.

As we mentioned earlier, the Law Commission has undertaken a major review of inchoate and participatory liability (LC 300, 2006 and LC 305, 2007), and also separately considered complicity in homicide (LC 304, 2006). The proposals in LC 300 have been partly implemented by the introduction of the offences of assisting and encouraging in the Serious Crime Act 2007. In relation to secondary liability the Commission is concerned that there should be 'parity of culpability' between the secondary and the principal offender. Other than in joint enterprise examples, the current law does not always achieve this. Proposed are two types of participatory liability. Under clause 1 of the draft Bill 'D would be liable for a principal offence committed by P if D assisted or encouraged P to perpetrate the conduct element of the principal offence and *intended* that the conduct element should be perpetrated. This would have the effect of narrowing the scope of secondary liability in cases where D and P are not parties to a joint criminal venture' (LC 305, 2007, para. 1.48, emphasis added). In relation to joint ventures (clause 2): 'A joint criminal venture is formed when the parties agree to commit an offence or when they share with each other a common intention to commit an offence. D would be liable for any offence (agreed or collateral) that he or she foresaw might be committed as a possible result of the venture. The mere fact that that D was not present when the offence was committed or that he or she would rather that it was not committed would not in itself preclude a jury finding that the offence fell within the scope of the joint venture' (para. 1.51). The overall result would be to narrow aiding and abetting but not joint venture liability.

In summary, inchoate and secondary modes extend the subjective doctrinal principles of personal responsibility to cover a range of activities at various degrees of distance from the perpetration of the conduct elements of criminal offences. And referring back to Chapter 6, the cumulation of secondary liability with the group offences of riot, affray and violent disorder under the Public Order Act 1986 increases the flexibility of an already broad and inclusive area of criminal regulation. Serious questions can be raised as to whether the full extent of participatory liability can be justified either as necessary to reduce social danger or as responding to culpable conduct.

#### FURTHER READING

- Alan Norrie *Crime, Reason and History* (2nd edn., Butterworths 2001), Chs. 2 and 3.
- K. J. M. Smith *A Modern Treatise on the Law of Complicity* (Clarendon Press 1991).
- K. J. M. Smith 'Withdrawal in Complicity: A Restatement of Principles' [2001] *Criminal Law Review* 769.
- G. R. Sullivan 'Participating in Crime: Law Com No 305 – Joint Criminal Ventures' [2008] *Criminal Law Review* 19.
- Celia Wells 'Girls, Gangs and Fears' in Nicolson and Bibbings (eds.) *Feminist Perspectives on Criminal Law* (Cavendish Publishing 2000), p. 123.
- William Wilson 'A Rational Scheme for Participating in Crime' [2008] *Criminal Law Review* 3.

## Section IV

# Property and Propriety

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### 11 Defining and Defending Private Property

- a. Conceptions of property in social and political thought
- b. Shoplifting
- c. Occupational and 'white collar' crime and conceptions of fraud
- d. Burglary

### 12 Constructing Property in Criminal Law

- a. Theft
  - i. The history of theft
  - ii. Contemporary conceptions of theft: ordinary language through the looking glass
- b. Fraud
- c. Conspiracy to defraud
- d. Burglary
- e. Criminal damage
- f. Duress, necessity and property
- g. Respect for property?

### 13 Property Rights and Criminal Enforcement

- a. Crime prevention
  - i. Situational prevention
  - ii. Diversifying and privatising control
  - iii. Money laundering
- b. Enforcement patterns: 'real' crime and 'intangible' property



In this Section, comprising Chapters 11, 12 and 13, we examine criminal law's regulation of property. Both the importance of the social institution of property and the prevalence of property offences, which constitute three-quarters of recorded crime (Home Office 2009), make this a highly significant field. It is also a vast field, encompassing many different kinds of terrain, and even a partial survey such as that offered here can be disorienting. In what follows, therefore, we focus upon a number of specific themes which may help to illuminate the landscape.

First, following on from the theme of the last two Sections, much of our discussion is concerned to examine the relationship between property crime and perceived risk or threats to the prevailing social order. In this context, patterns of enforcement of property offences vary as between offences which are seen as more or less threatening to social order, closer or more distant from our ideas of 'real' crime – for example, tax evasion or corporate fraud on the one hand versus shoplifting or social security fraud on the other. These varying levels of enforcement are facilitated by the wide discretion of the police and specialised regulatory bodies; they illustrate both the blurred boundaries between property and public order offences and the potency of legal conceptions of 'real' crime.

Second, the field of property offences illustrates the fragility of social consensus about the lines to be drawn between 'criminal' and 'non-criminal' behaviour. Particularly in commercial arenas, the boundary between 'entrepreneurialism' and 'sharp practice' is a fragile one. The same goes for shoplifting from and frauds of 'big' business which are often justified as essentially victimless. Throughout the chapter, we shall see how criminal law's reliance on partially defined concepts such as 'dishonesty', and its delegation of decisions about the existence of dishonesty to magistrates and juries, both proceed from and serve to obscure social ambivalence about what counts as property crime. Similar ambivalence is exemplified by the uneasy relationship between criminal and civil regulation of property which surfaces at a number of points in the following pages.

Third, we shall explore the ways in which widely recognised social influences on property offending – notably economic conditions and the prevailing distribution of wealth – raise difficulties for criminal law's individualistic framework, and prompt questions about how responsibility for property crime should be attributed. If it is mainly the relatively poor who commit 'real' property crime such as theft or burglary, should this unsettle the law's focus on responsibility as solely individual and not also social? Should poverty or injustice be held 'responsible' for property crime? The illustration of this third theme is assisted by the inclusion of an analysis of the defences of duress and necessity – defences which are relatively rarely applied to property crimes, yet whose underlying rationale raises difficulties for prevailing conceptions of individual criminal responsibility in the property area.

Finally, we shall use the field of property offences to explore shifting doctrinal patterns in the attribution of criminal liability over the last 250 years. Drawing on Fletcher's conception of different 'patterns of criminality' (Fletcher 1978),

we shall consider the contemporary balance between manifest, subjective and harm or risk-based conceptions of the basis for criminal liability. Our focus on this theme, which arises with particular force from an analysis of the history of theft, reinforces our earlier discussion of the inchoate offence of attempt in Chapter 10.

These themes are pursued across three chapters. Chapter 11 looks at the different ways of defining property and at the range of methods of regulating or protecting it. This then prepares the background for consideration of a selection of property-related offences including theft, fraud, burglary and criminal damage. In each of the context-based Sections of the book we introduce some issues of general application across criminal law. The defences of duress and necessity in Chapter 12 follow on nicely from the discussion of the notion of lawful excuse in relation to criminal damage. The key cases here have arisen from protests against the Iraq war (*Jones* (2006)) and climate change direct action (the Kingsnorth acquittals 2008) illustrate yet again the blurring between categories of public order and other offences. Chapter 13 examines prevention, asset recovery and enforcement strategies. Situational crime prevention is also to the forefront in the area of property crime, whether through immobilisers and alarms on cars (contributing to a large reduction in vehicle-related crime) or more sophisticated methods to deter cyber crime. As with many other areas of criminal regulation, not all property offences are in the hands of the police. Specialised agencies such as the Serious Fraud Office, the Serious Organised Crime Agency and the Financial Services Authority play an increasingly important role, overseen by the National Fraud Strategic Authority (NFSA 2009).



## Defining and Defending Private Property

### IV.11.a. Conceptions of property in social and political thought

The institutions of private property and the 'free market' through which it is exchanged are core components of modern Western societies. In liberal thought, the model of individual property rights underpins the general conception of personal rights; the 'ultimate' human right is often seen as one of self-ownership, and the paradigm of the free individual is the actor in the market. The protection of private property rights is therefore an important concern of criminal regulation, and the perceived success of the criminal justice system in this respect is central to judgments about its efficacy and legitimacy. Criminal law's regulation of property takes place within a framework of civil law, which sets up property rights in laws relating to land tenure, ownership of personal goods and transfers of ownership by contract, gift or succession: criminalisation of property crime is therefore just one among a range of legal arrangements which underpin the conditions of trust and security of expectations which allow a market economy to flourish. Most of the time the idea of what counts as legally protected property is uncontested – whether it is tangible items such as a car, a mobile phone – or intangible such as a bank account – but technological developments such as the explosion in economic activity conducted via the internet have raised further questions. A further challenge comes from medical advances (and markets in medical services) which has revived debate about rights of ownership over human tissue.

The allocation and organisation of resources is a pressing issue for any society, and the question of property is accordingly a prominent theme in the history of political thought. Theories of private property are, in particular, a central feature of the liberal conceptions of political order which developed in Western countries during the eighteenth century. For liberals, individual entitlements to property have been seen as of both instrumental and intrinsic value. Instrumentally, private property is often argued to conduce to the efficient management of resources and even to the greatest human happiness. There are various approaches to the ethical justification for private holdings in property: some liberals have argued that rights in property derive from original appropriations in a state of nature when nothing is owned, followed by just



(typically market) transfers since (see Nozick 1974), while others have argued that private ownership constitutes an essential aspect of the expression and realisation of human personality (see Waldron 1988; MacPherson 1978).

The emergence of these liberal ideas marked a move away from an explicitly hierarchical era in which property relations were seen as matching a status-based social order. In this era the 'lower' classes enjoyed only minor acquisitions of property: most private wealth inhered in the landed aristocracy (and later in an emerging bourgeois class), while a limited amount of land was recognised as subject to common use. Since the eighteenth century, a different conception of the social role of private property has developed, notably in the area of commerce and the market. For the modern liberal, each and every individual has an equal capacity to hold property rights, to enter the market as a contracting party. Yet in assessing their justice, liberalism continues to focus on the processes whereby property rights are created and transferred: it is less concerned with the substantive patterns of property rights which result from those processes of creation and exchange. Although social democratic liberals have begun to develop 'patterned' theories of social justice which do attend to the substantive distribution of property (see, for example, Rawls 1972; Dworkin 1981) even those who come closest to defending some substantive conception of distributive justice or equality are committed to the market. The correction of inequalities and injustices emerging from market processes is thus a persistent preoccupation for liberals and social democrats who espouse a commitment both to the market economy and to social justice.

There is a link between these debates about substantive versus procedural conceptions of justice in property and the ideology of the rule of law considered in Chapter 3.a.i. The notion of formal equality in the capacity to hold property rights is mirrored in the discourse of legal rights and in the conception of equality of subjects, abstracted from their social circumstances, before the law. This ideology contrasts with critical approaches, which search beneath the rhetoric of liberal equality to scrutinise the actual operation and distribution of legal rights. One particularly influential critical analysis of the implications of distributions of property rights in different societies is that of classical Marxism. In capitalist society, according to Marxist analysis, private property, and in particular the ownership of the means of production, becomes the means whereby the ruling classes maintain their dominant position by exploiting the labour power of the proletariat. While Marxist theory has been extensively criticised, it nonetheless serves to illuminate the ways in which institutions of property shape some of the most fundamental dynamics of political, economic and social systems. Robert Merton's social structural 'anomie' theory suggested that crime increased when there was a disparity between 'culturally prescribed goals and structurally limited means to fulfil them' (Reiner 2007a, p. 349). Often misunderstood, Merton was not suggesting that inequality or deprivation led directly to crime but that in materialistic cultures they may do so (Reiner 2007a, p. 350). Nonetheless the evidence points clearly to a connection between crime

and deprivation (Reiner 2007b, p. 362) and more particularly between property crime and macro-economic factors. Home Office research demonstrates that in times of low or negative economic growth, property crime rises at a faster rate (Barclay (ed.) 1995, p. 5). In considering criminal law's regulation of property, therefore, one has to be alive to the significance of property not only as an individual entitlement which may be violated by property crime but also as an institution which is a defining feature of contemporary social order. As we shall see, the history of criminal law's development has accordingly been marked by concerns about the law's capacity to facilitate the efficient conduct of commerce. The justice of criminal law has been questioned in the light of the radically unequal distribution of property and by the difficulty of drawing in a capitalist culture a clear moral line between legitimate and illegitimate dealings with property. These tensions surface in a particularly obvious way in criminal law's difficulty in delineating the concept of dishonesty, as well as in its uncertainty about the proper scope of defences such as necessity.

The preoccupation with private property is a particular feature of modern Western political thought and social structure rather than a universal phenomenon: the organisation of other cultures reminds us that private property does not have to be central to social life. Different forms of property holdings have characterised the social organisation of other cultures. The Mohegan Indians, for example, held fast to their system of collective property even when their expropriation by the white immigrants to America made it almost impossible to survive without resorting to the dominant conception of proprietorship as the 'cultivation' of individual parcels of land (Thompson 1989). It is in the nature of particular conceptions of property that they marginalise alternative conceptions and, with them, ways of life. Laws – both criminal and civil – are centrally involved in this process of marginalisation, as is well illustrated by the history of the expropriation of indigenous peoples and debates about its rectification in countries such as Australia (*Mabo No. 2* (1992): see Ivison et al. 2000). Liberal theory has come to acknowledge the existence of certain forms of collective ownership and contracting, but it does so by analogy with individual ownership and by creating complex legal entities such as 'companies' which are themselves often referred to as 'fictions'. The dominant position of private property and of market economies, as well as globalisation and the internationalisation of markets, since the late twentieth century is such that it has become difficult for any society to maintain a totally different system – as witnessed by the 'capitalisation' of China, one of the few remaining state socialist societies.

Within the dominant idea of private property, different conceptions of proprietary interest abound, and these, too, pose a number of challenges for the legal framework. It has been argued, for example, that the development of the 'welfare state' in liberal capitalist democracies has issued in a conception of 'new property', consisting in entitlements to welfare and other social benefits provided by the state (Reich 1964). The position of this last form of property in terms of legal recognition as a property-type right is tenuous, and seems

currently to be undergoing redefinition not so much as an entitlement but as a privilege reminiscent of older conceptions of charity. The flexibility and importance of law in setting up different kinds of property is well illustrated in a vast range of private law provisions having to do with, for example, 'chooses in action'; 'trusts' splitting 'legal' and 'equitable' interests in property; freeholds, leases and licences; life interests; bailments; covenants and easements. Our idea of property and criminal law's regulation of it must also go beyond the common-sense image of property as tangible goods and resources to include a wide range of intangible interests with indistinct boundaries. The incorporation into law of 'intellectual properties' such as copyrights and patents has gradually been established; but should laws of criminal libel be seen as a form of property law, protecting a group's right to 'cultural capital' in its reputation? And what of the all too tangible Elgin marbles, a good example of 'cultural property' to which we would now accord protection if they had remained in Greece. That of course does not answer the difficult question of whether the British Museum should now return them. Laws prohibiting unauthorised telephone tapping could be seen as protecting a property right in the private and uninterfered with use of a telephone line, and laws regulating pollution or even road traffic as protecting collective property rights in a clean or safe environment. As we shall see in Section V, even sexual offences have sometimes been interpreted as protecting a proprietary interest in controlling sexual access to the body. The variety and breadth of legal and social regulations which can be interpreted as recognising property-type rights is therefore vast. Much the same is true of non-legal systems of norms: one has only to think of some of the most basic elements of children's socialisation and education, or of the domestic rules of clubs, schools and societies, to see how many of those regulations relate to property. Central notions of conventional morality such as honesty and enterprise relate intimately to the social value attached to respect for property. The role of law in constructing property relations and thereby facilitating and legitimising certain uses of resources and powers, and impeding and delegitimising others, is therefore of the first social importance.

A review of social histories of crime through the ages bears witness both to the pervasiveness and variety of property offences, and to the public anxiety and soul-searching to which offending against property gives rise.

J. Bellamy 1973 *Crime and Public Order in England in the Later Middle Ages* (Routledge and Kegan Paul), pp. 6-8

... The chronicler Henry Knighton, under the year 1364, described a wave of theft, pointing out how many churches were entered and robbed... In the fifteenth century the first evidence that law and order were in serious jeopardy came not at the time of the rebellions of 1403 or 1405-8 but in Henry IV's last three or four years as king, when recurrent sickness had sapped his physical vitality. In Norfolk, secret societies were reported to be extorting



money by threats, particularly from abbots and priors, and there were widespread riots and feuding in the north midlands and Yorkshire. In Staffordshire, at least, the years were noteworthy for the giving of livery to retainers illegally...

When the child king Henry VI had ascended the throne, complaint started again. In October 1426 the government admitted there were open and notorious robberies and misdeeds being committed in divers parts of the realm, and made special provision for the proclamation in public places of those statutes which concerned the safeguarding of the peace most vitally. Three years later the king, or rather his ministers, claimed to have reliable information from many sources that in every county a great number of robberies had lately been committed by thieves in criminal bands, 'more than used to be in times past'. He was especially unhappy, he said, because ordinary citizens were doing little to capture the miscreants... A petition in parliament in 1429 referred to the daily occurrence of forcible entries into other men's property and claimed that the land so acquired was often being granted away to the locally powerful in order to have their maintenance.

This passage suggests one persistent theme in official preoccupations with property offences. This is that they are potentially undermining to political authority in that those who have little or no property may perceive the enforcement of property laws as a form of social injustice: in an unequally propertied society, the consensus underpinning property laws is likely to be vulnerable and will often be perceived by propertied classes to be so.

The following extract confirms the pervasiveness of social preoccupations about property crime and shows that it was seen as linked with socio-economic factors as long ago as the sixteenth century:

J. S. Lockhart (1917) *The Nature and Incidence of Crime in England 1330-1425: A Preliminary Survey*, in Lockhart *Early Crime and Society in England 1550-1600* (Oxford), pp. 60-1

Almost all contemporary complaints that crime was increasing focused upon offences against property. To some extent this merely reflected the obvious fact that trials for theft traditionally dominated criminal court proceedings. Throughout this period the vast majority of indictments laid at assizes were for theft of some sort: of 7544 persons indicted in the three counties under review, 5493 (almost 73 per cent) were accused of larceny, burglary or robbery. For those wishing to moralize or to urge more severe penalties for offences against property, the consistently high proportion of thieves appearing on gaol calendars constituted an undeniably powerful argument.

In seeking to explain this feature, most contemporaries embraced the view that theft was a socio-economic phenomenon. Pamphleteers occasionally noticed that the lower classes did not enjoy a monopoly of theft and violent crime. But rarely did they go on to draw the direct connection between crime and childhood training advanced by the pediatrician John Jones in 1579. Crime in the 1570s was due, he claimed, to 'nothing so much... as to the manner of bring up in liberty, void of the fear of God's justice, terror of the Prince's laws, knowledge



of themselves, and exercise in youth how to attain lawfully their living and maintenance in age . . .'. Privy Councillors, MPs and grand jurymen alike regarded thieves, vagrant soldiers, rogues, paupers and the idle as associated, or even indistinguishable categories. Poverty and roguery were cut from the same quarry; ale – and gaming-houses were both resorts for the idle and 'nurseries of naughtiness'; 'the cause of great misdemeanours and outrages'; 'the very stock and stay of our false thieves and vagabonds'. An anonymous pamphleteer in 1595 summed up popular thinking: 'such is the reward of riot; where no regard is had of spending above the course of lawful getting necessity must needs follow; games, wantonness and ease are not continued without excessive cost'. In noting the connection between scarcity and crime and the more permanent dislocating effects of urban life, contemporary writers commonly associated offences against property with those sectors of society thought to have been most affected by the economic and social dislocation of the late sixteenth and early seventeenth centuries – rural labourers driven from the land, unemployed craftsmen, discharged and deserted soldiers. Nor did the more general point that crime may be seen as an indicator of social tensions and instability entirely escape them. 'England had never so much work for a chronicle', mused a commentator on the shooting of a Chancery master in 1616, 'never such turnings, tossings and mutabilities in the lives of men and women and the streams of their fortunes'.

Much of the indictment evidence tends to support those generalizations which sought to explain property crime in socio-economic terms. However, the social classification of criminals in this period poses serious problems. Traditional legal definitions – 'labourer', 'husbandman', 'yeoman' – reflected by this time only the broadest social grouping; court clerks used the terms loosely, and it is not uncommon to find the same man described as a 'labourer' in one indictment and as a craftsman of some sort in another. It is therefore impossible to give statistical definition to contemporary generalizations attributing theft to particular social groups.

On the other hand, individual indictments occasionally confirm the connection between crime and economic misfortune. 'Weavers' occupation is a dead science nowadays', declared a Colchester weaver in 1566. 'We can get no work', said another, 'nor we have no money; and if we should steal we should be hanged, and if we should ask no man would give us; but we will have a remedy one of these days or else we will lose all'.

Cockburn concludes from a study of the available evidence, including the relationship between prices and property crime, that 'in the early seventeenth century theft was to a perceptible degree motivated by economic necessity' (1977, p. 70).

As we might expect given the relationship between property crime and fears of public disorder, further historical evidence suggests that property crime was often associated with 'moral panics' (see Chapter 4.b.). Beattie, for example (1977, p. 155 ff.), tells of the arousal of high public anxiety about robbery in the eighteenth century. Nor were robbery and theft the only property crimes which preoccupied our ancestors: counterfeiting and the more subtle property offences now associated with fraud also have a long history (see, for example, MacFarlane

1981, p. 186 ff.). The diversity of kinds of and motivations underlying even standard property offences such as theft continues to puzzle criminologists who seek to explain property offending – whether as an act of political protest stemming from social injustice or as an instrumental and calculated action which participates in the values of the very capitalist system whose norms it violates.

Hay's research on the enforcement of property offences in the eighteenth century calls into question any simple assumptions about the law's instrumental functions, and reveals the varying attitudes to criminal law evinced by those with different stakes in the system of property:

D. Hay 1975 'Property, Authority and the Criminal Law' in D. Hay, P. Minchagub and E. P. Thompson, *Albion's Fatal Tree* (Penguin), p. 174 pp. 39–60

... Romilly and the rest of the reformers were undoubtedly right that convictions in the courts were uncertain, and that the occasional terror of the gallows would always be less effective than sure detection of crime and moderate punishments. Yet the argument had little weight with the gentry and aristocracy. In the first place they had large numbers of personal servants to guard their plate and their wives. Their problem was not attack from without but disloyalty within their houses. No code of laws or police force would protect them there. Their own judgment of character and the fair treatment of servants within the family were the only real guarantees they could have. Nor did the technicalities of the law bother country gentlemen when they did come to try pilferers of their woods and gardens. For as MPs they passed a mass of legislation that allowed them, as JPs, to convict offenders without the trouble of legalistic indictments or tender-minded juries. In cases involving grain, wood, trees, garden produce, fruit, turnips, dogs, cattle, horses, the hedges of parks and game, summary proceedings usually yielded a speedy and simple conviction. The other crime from which the gentry commonly suffered was sabotage: arson, cattle-maiming, the destruction of trees. Although all these offences were punished by death, few offenders were ever caught. Here too gentlemen knew that a reform of the capital statutes would not increase the certainty of the conviction. Moreover, sabotage was primarily an attack on their authority rather than their property. Their greatest protection against such assaults was acquiescence in their right to rule: the belief in their neighbourhoods that they were kind and just landlords and magistrates. In one area alone were they exposed to the danger of great financial loss from theft. Their largest possession was land. The only way it could be taken from them illegally was by forgery – and it is significant that forgery was punished with unmitigated severity throughout the century, by death.

Lower down the social scale, the property of men in trade and manufacturing and farming was much less secure. In the eighteenth century very few of the offences from which such men suffered were punishable on summary conviction. Instead, to recover embezzled banknotes or shoplifted calico or stolen sheep, it was necessary to go to the expense and trouble of a full criminal trial. Its outcome was always uncertain: the technicalities of

indictment or the misplaced sympathies of juries allowed many thieves to escape. After the trial came the misplaced sympathies of petitioners for pardons. Martin Madan, anxious to see property secured by a more rigorous execution of the laws, argued that 'the outside influences of great supporters' had too great effect on the prerogative of mercy. The result was that the great indulged their humanity at the expense of lesser men's property.

There was, therefore, a division of interest among propertied Englishmen about the purpose of the criminal law. The reformers' campaign spoke to humanitarians of all classes, men revolted by the public agonies of the condemned at the gallows. But their argument that capital punishment should be replaced by a more certain protection of property appealed mostly to that great body of 'middling men', almost half the nation, who earned from £25 to £150 a year at mid-century, and created more than half of England's wealth. Although they could use the discretionary elements of the law to a limited degree, their property was the prey of thieves undeterred by terror. Their complaints did not impress a tiny but powerful ruling class, whose immense personal property in land was secure, who could afford to protect their other goods without public support, and who in any case were most concerned with the law as an instrument of authority.

Hay's research also illustrates the way in which the discretionary application of criminal law may serve to maintain a delicate balance between the efficacy and legitimacy of criminal law: the capital penalties which he discusses were frequently commuted, and the exercise of the prerogative of mercy acted, paradoxically, as a means whereby the legitimacy of state authority could be strengthened (cf. Thompson 1975, discussed in Chapter 3.a.i.).

In the early nineteenth century, anxieties about poaching and about riots and criminal damage in protest at land enclosure once again illustrate the continuity between property and public order issues and the way in which changes in the form of property holdings, imposed by those with political power, radically affect the conditions of life of ordinary people and hence on occasion generate protest-related crime (see Rudé 1985, pp. 21, 30–1, 81 ff.). In this era, too, larceny was the dominant form of property crime, although forgery of banknotes and bills of exchange was also prevalent. The conclusions of another historian underline the difficulty of constructing any overarching explanation of property offending:

G. Rudé 1985 *Criminal and Victim: Crime and Society in Early Nineteenth-Century England* (Clarendon Press), pp. 117–19

But does this tendency of criminal and victims to belong to different, if not opposing classes in this confrontation mean that, through crime and the combating of crime, they were engaged in a form of class war? To some commentators and to some historians of crime this has appeared as a reasonable proposition; for does not the criminal, as an evident reject from society, attempt, through crimes committed against those most socially favoured, to restore the balance or to climb his way back into his own? It seems a logical and an



apparently attractive theory; but . . . the premiss is a false one. Most conspicuously so in the case of those I have called the 'acquisitive' type of criminal, who, far from turning his back on the norms of the society he lives in, is the one (in my view) who exploits these norms, including the competition for property and profit, in order to enrich himself and become more securely entrenched in a form of society that he patently admires and wishes to belong to. Nor does the proposition hold in the case of those to whom I have attached the label 'survival', those who have generally confessed to or been found guilty of stealing clothing, foodstuffs, fowls, bed-linen, or small amounts of money and who, as so many prisoners appearing at the Old Bailey in certain years have testified, have been 'impelled to steal, rob, and burgle by economic "distress" . . . such crimes tend to respond directly to short-term economic factors such as a rise in prices or a fall in wages whereas the more serious and more violent crimes, or those more susceptible to capital punishment, were not so responsive to economic motivation . . . [C]rimes committed for survival, whoever the victim, do not betoken a class war. In fact, from the records we have examined, the only suggestion of a class war was that engaged in by certain participants in unlawful protest . . .

The inclination to regard property crime as a symptom of class conflict and a threat to social order is itself relative to the stability and self-confidence of that order. As Wiener argues, changing attitudes to crime are associated not only with changing patterns of offending but also with shifting understandings of criminal responsibility. Wiener's analysis shows how the early Victorian conception of the rational and self-governing individual who is responsible for crime was gradually displaced by a more deterministic approach which had very different implications for criminal policy:

*Martin Wiener 1996* *Reconstructing the Criminal* (Cambridge University Press), p. 12

Although fears of both social and personal disorder were steadily allayed by the success of Victorian efforts at control, this very success, taking place while both scientific and social thinking were profoundly altering, nurtured [a] new anxiety. As technology and economic advances kept extending the scale and complexity of life, and as the natural sciences put forth new deterministic models of understanding the human world, the Victorian image of the individual weakened. Reflective persons were coming to feel dwarfed by their natural and social environment . . .

. . . At the same time that upper-middle-class individuals began to feel less autonomous and less vital, they began to perceive criminal offenders as less threatening and less responsible for their behaviour and instead saw them as social wreckage and stepchildren of nature, rather than willful enemies of society. As self-realization began to replace self-discipline as the organizing theme of middle-class lives, the prison and its impersonal disciplinary regime appeared ever less a satisfactory answer to crime. Criminals appeared now to require direct therapeutic intervention rather than deterrence or discipline. Consequently, the link between



liability to criminal sanctions and moral blame was loosened, while these sanctions were made less punitive and more welfarist...

[pp. 279–81] In the diminishing insistence upon personal responsibility, the treatment of theft [in the late nineteenth century] paralleled that for most forms of homicide. As with the latter, the statistics showed that the amount of traditional theft was in decline; the proportion of trials to population began to fall in the mid-1860s and continued to do so down to World War I. With a relaxation of fear of crime and the spread in the 1880s of social conscience, the responsibility of society was increasingly stressed. The argument was made by criminals as well as by social reformers.

... Street criminals were rarely now being described as dangerous beasts or self-willed villains, but rather as almost pathetic incompetents. In this context, current sentencing practices seemed misdirected and, for the first time since the abolition of capital sanctions for property crime, official interest reappeared in realigning penalties for offenses against the person and offenses against property. From 1880 on, the Liberal MP D.H. Macfarlane kept before the public eye the lack of seriousness with which the courts treated assaults against women and children as compared to offenses against property; he called for both greater judicial protection of the helpless and more lenient sentencing of petty property offenders...

Underneath this divergence in concern about these two categories of objectionable offenses lay several broad developments: the increasingly successful control of street crime, which relaxed fears; the spread of material prosperity (and the appearance of insurance against theft), which lessened the economic importance of the offenses; a growth of democratic sensitivities, which raised concern for the weaker members of society, disproportionately the victims of violence more than of theft (as Macfarlane pointed out, all had a person but only a minority had significant property); and, not unconnected with democratization, a weakening belief in the chosen, willed character of deviant behaviour.

Wiener's account of the 'reconstruction of the criminal' in the late nineteenth century is directly relevant to our analysis of contemporary property crime. For, as we shall see, debates about social versus individual responsibility continue to flourish, bringing with them implications for both the structure of criminal liability and the nature of punishment.

In considering contemporary concerns with criminal threats to property, we could focus on a wide variety of conduct. Vandalism; burglary; illicit reproduction of copyright materials; insider dealing; pollution; tax evasion; theft associated with vehicles (which, despite a steady decline, still constituted 14 per cent of the offences recorded by the police in 2008/9: Home Office 2009). These constitute just a few of the diverse phenomena which are daily reported in newspapers and by other news media. In setting the context for our discussion of the history and contemporary framework of criminal offences against property, we have selected some particular areas for detailed study. They have been selected because they illustrate both the flexibility of legal categories and, conversely, the extent to which conventional images of property offences, reflected in legal definitions, focus on particular kinds of behaviour which do not necessarily

represent either the most prevalent or the most serious threats to established property interests. Hence, like Wiener, we shall try to identify the nature of the images of the property offender which practices of criminalisation produce. We shall also examine the toleration of forms of property offending such as tax evasion and other forms of 'white collar crime' which are technically within legal definitions but which are not seen as particularly threatening to the legal and social order.

#### IV.11.b. Shoplifting

Among the many forms of property offence, theft probably occupies the central position in popular conceptions of property crime. Excluding vehicle-related theft it constitutes a third of property offences. Shoplifting is of particular interest because of the vivid way in which it relates to changing cultures of consumption in capitalist economies. The British Crime Survey does not cover shoplifting, but it seems likely that this kind of theft very often goes unreported, either because of lack of detection or because informal measures such as warnings are judged to be appropriate. Official figures are influenced by the extent to which members of the public are likely to interpret a particular incident as criminal and hence to report it; the importance of social attitudes in shaping such perceptions is vividly illustrated by the case of shoplifting. There were 320,000 recorded instances of shoplifting in 2008/9, an increase of 10 per cent on the previous year (Home Office 2009) and according to the British Retail Consortium customer theft is by far the largest 'crime cost' amounting to £746 million in 2000, closely followed by staff theft at £426 million and fraud at £54 million. Several studies point to the early age at which young people can become involved in shop theft.

Shoplifting is often thought of as a typically female crime. A self-report study of offending by 12–30-year-olds in 1998/9 found that, with criminal damage, shoplifting was the commonest offence admitted by girls under 15. Shop theft accounted for 18 per cent of all offences admitted to by women in the Youth Lifestyles Survey, compared to 6 per cent of men's crimes (Home Office 2000). While it is true that theft and handling as a whole constitute a far higher proportion of female (60 per cent) as opposed to male (36 per cent) indictable cautions or convictions, the total number of men convicted or cautioned for theft or handling (137,800) is over double that of women (52,700) (figures taken from Home Office 2000c, pp. 4, 8). Thus, even though the specific instance of shoplifting does indeed represent one of the few areas where women's offending approaches the level of men's (at least as judged by the official statistics), the figures do not bear out the stereotype of shoplifting as a female-dominated crime. There is also a self-fulfilling aspect of this stereotype. Women may be over-represented in the recorded offences of shoplifting because the stereotypes of 'menopausal' or 'kleptomaniac' women lead store detectives to observe women more carefully. Preconceived notions that women are prolific shoppers may also lead to an over-emphasis on their shoplifting tendencies. This

perception has shifted from one based on a clear division of labour – only a third of women were in employment in the 1930s – to one based on shopping for pleasure now that over two-thirds of women have paid jobs.

Another important feature of shoplifting is a popular ambivalence about its causes: the social perception of shoplifting as wrongful is tempered by a recognition of the temptations inherent in a society organised to ever-greater degrees around the logic of consumption. This recognition introduces a determinism at odds with the usual notions of individual responsibility in terms of which crime is constructed. The very label 'shoplifting', as opposed to the more moralistic 'theft', is significant in this respect. Nonetheless, severe legal sanctions remain available for cases which the public and the courts do interpret as 'mainstream' theft, and stereotypes are doubtless influential. Sensational reporting of large-scale shoplifting in London by women from overseas contrasts, for example, with press reaction to the conviction in the US of actress Winona Ryder: while the latter explained Ryder's offence in terms of psychological problems, the former has all the marks of a moral panic raised against those who can be classified as 'outsiders'. Murphy reminds us that legal responses to shoplifting have on occasion been draconian:

*D. J. I. Murphy 1986 Customers and Thieves. An Ethnography of Shoplifting (Gower), pp. 85-6*

Despite the recent concern about shoplifting, it is not a new world of activity. Reference to 'The Lifting Law' was made in 1597, and the modern usage of the term, specifying theft from shops, dates from the seventeenth century when shoplifting became an established feature of everyday life...

The offence was officially recognised in the preamble to the 1698 Act 10 of Parliament, William III, c. 12: 'The Crime of stealing goods privately out of Shops and Warehouses commonly called shoplifting...'. Under the Act, shoplifting was a capital offence, and it was not until 1820 that Sir James Mackintosh succeeded in abolishing the death penalty for the offence of 'stealing five shillings from a shop'. Edwards... records that 'In the Summer of the year 1726, shoplifters became so common and so detrimental to the shopkeepers, that they made application to the Government for assistance in apprehending the offenders; and in order thereto, offered a reward and a pardon for any who would discover their associates in such a practice.'

This amnesty to informers led to the downfall of the notorious Jonathan Wild who had built up an empire of 'fencing', partly on the proceeds of shoplifters...

Until his death, Wild operated an ingenious system by which he controlled much of London's underworld; acting as an agent through whom victims of crime could recover their stolen property, which Wild had bought from the thieves, at a price. For example, if a gold watch were stolen from a prosperous gentleman, Wild would let it be known, either directly to the victim or through advertising, that the watch could be recovered for a fee, and the arrangement was duly completed.



Jonathan Wild's career, brilliantly satirised in Henry Fielding's eponymous novel (1743) raises not only the continuing spectre of 'professional' or 'organised' crime in the context of shoplifting, but also the way in which the fine line between enterprise and crime is mediated in capitalist culture by moral and legal notions of property and honesty. Shoplifting also provides a good example of the way in which forms of offending develop in response to changing social conditions:

C. P. Walsh, 1979 *Shoplifting: controlling a Major Crime (Astonbury)*, p. 3

The process of translation, whereby fairs became markets with stalls, which became covered markets or permanent shops, took time, and it was never complete. There are still covered markets and for that matter fairs, as well as thousands of open market stalls. Judging by contemporary legislation, it seems highly likely that before and during this transition shop theft was rife. The harsh lessons learnt in the market-place were not forgotten when it came to constructing and using permanent shop-houses. For example, the same conventions relating to the 'counter' or boundary between customer and shopkeeper were still observed, unlike shops in other cultures where buyer and seller sit and talk in comfort in the back of the shop before bargaining with each other . . . The shop was organised around its stock and the protection of it . . .

In medieval times the businessmen who were most alert to theft were of course those who had most to lose, that is the jewellers, the goldsmiths and the silversmiths, who always kept their most valuable wares concealed from the view of the ordinary shopper to make it harder for the impromptu thief . . . Such (justified) apprehension about theft has always meant that jewellers and the like have been quick to take advantage of any new security devices which have become available, from early iron bars on shop windows and heavy iron-studded oak doors to modern photo-electric alarm systems and radar sentries . . . The earliest shops and stalls of course had no glass windows, and this made it very easy for people to steal by just reaching in and grabbing articles . . .

[p. 6] . . . The nineteenth century shop had reached a pinnacle of development and perfection with regard both to selling and to controlling shop theft.

Very little substantive change in the shape, structure and selling techniques adopted by shops occurred from then on to the end of the Second World War. Such change as did occur was chiefly in the variety and appearance of the goods, and how they were prepared for sale . . . The most significant changes in shop organisation were the introduction of voluntary wholesale chains and retail buying groups, and new merchandising techniques, especially important being self-service and self-selection. Self-service was first developed in America as a sales technique and its proposed introduction into England was initially regarded with horror by established, experienced, shop managers. Their view was that at the cost of a great deal of time, effort and ingenuity, they had finally reduced the theft problem to manageable proportions, and now the suggestion was that after all the customers should be allowed to help themselves! This would set at nought all the practical lessons of selling which had been so hardly won . . . In 1950 there were less than 500 self-service grocery



shops in England, ten years later there were 6,500. Despite all the adverse criticism and the comments that the idea of self-service had attracted, there were compelling reasons for accepting it ultimately in many retail areas. Customers liked it for a start, but the main pressure to change to self-service was the growing cost of shop labour...

[pp. 16-17] In large department stores and supermarkets shoplifting can occur for hundreds of separate reasons, and can be seen as illustrating selfishness, human greed, or virtually anything else along similar lines, but to shop managers the most important aspect of this is not shoplifting alone, but the final rate of 'shrinkage'. Shrinkage as a term represents total stock-loss, and it includes stock lost through damage or decay, as well as through theft, by delivery-men, shop staff and shoplifting by customers... It is indeed interesting to consider how such shop managers are able to combine their initial moral indifference to the problem of shoplifting with the moral indignation which they display when it starts to present itself in a fashion which cannot be ignored, and how they manage to resolve this psychologically.

Walsh relates the modern increases in levels of (recorded) shoplifting (a fourfold increase from 1939 to 1964, and a further twofold increase between then and 1972, rising by nearly another 50 per cent by 1976: p. 29) to the development of increased opportunities provided by the self-service system. More recent trends show at most a very gradual increase and across the last eight years more like steady state. In 2002 when new counting and recording rules were introduced there were 306,500 recorded instances rising to 320,800 in 2008 (Home Office 2009). Walsh also recognises the diversity of motivations for and types of shoplifting, ranging from the casual and opportunistic to (less frequent) organised offences.

This discussion of shoplifting exposes competing ideologies informing our interpretation of property offences – ideologies which reflect, respectively, a commitment to the individualistic and social conceptions of criminal responsibility identified by Wiener. These competing ideologies are reflected in the ways in which property crime is talked about: the language of dishonesty and culpability can quickly replace acknowledgement of temptation accompanied by tolerance and indifference. The criteria for the shift are not legal but cultural and political. The significance of those criteria are further illustrated by our next example.

#### IV.11.c. Occupational and 'white collar' crime and conceptions of fraud

As we shall see in Section VI, the crimes of corporate offenders tend to be marginalised by criminal regulation despite the fact that corporations frequently conduct themselves in ways which can be seen as harmful and even violent. Corporate offenders also engage in conduct which causes economic and material loss. Research has drawn together some of the actual examples of corporate crime which have caused serious material, psychological and financial harm

(Box 1983, pp. 25 ff.; Gobert and Punch 2003). Examples of corporate crime by fraud, price-fixing and insider dealing are in sharp contrast to the popular image of property offenders – the young ‘mugger’, the masked burglar, the menopausal or ‘foreign’ shoplifter, the working-class ‘fence’. Yet the serious impact of corporate crime cannot be doubted. In this section, we consider both corporate crime and individual offending in the corporate and employment contexts – what has been called ‘white collar crime’ and ‘occupational crime’ such as ‘pilfering’ and ‘fiddling’.

The classic conceptualisation of white collar crime is to be found in the pioneering work of American criminologist Edwin Sutherland:

E. Sutherland, *1939 White Collar Crime*, 1939 (Yale University Press), pp. 7–8

Persons who violate laws regarding restraint of trade, advertising, pure food and drugs and similar business practices are not arrested by uniformed policemen, are not tried in criminal courts, and are not committed to prisons: their illegal behaviour receives the attention of administrative commissions and of courts operating under civil or equity jurisdiction. For this reason such violations of law are not included in the criminal statistics nor are individual cases brought to the attention of the scholars who write the theories of criminal behaviour. The sample of criminal behaviour on which the theories are founded is biased as to socio-economic status, since it excludes these business and professional men...

The thesis of this book, stated positively, is that persons of the upper socio-economic class engage in much criminal behaviour; that this criminal behaviour differs from the criminal behaviour of the lower socio-economic class principally in the administrative procedures which are used in dealing with the offenders; and that variations in administrative procedures are not significant from the point of view of causation of crime...

These violations of law by persons in the upper socio-economic class are, for convenience, called ‘white collar crimes’. This concept is not intended to be definitive, but merely to call attention to crimes which are not ordinarily included within the scope of criminology. White collar crime may be defined approximately as a crime committed by a person of respectability and high social status in the course of his occupation...

Although Sutherland’s arguments about white collar crime were innovative and were for some time not accepted by other criminologists, the phenomenon itself was hardly new:

W. G. Coyne, 1900, ‘White-collar crime and the institutionalisation of Ambiguity: the case of the Laidlaw Factory Act’, in G. Giv and E. Stollard (eds.), *White-collar Crime* (Sage Publications), p. 117

The factory crime of...[the mid-nineteenth century] was calculated and, as occasion demanded, pervasive. As Leonard Horner, one of the first and arguably the most important Inspector in this period, ruefully reflected after more than fifteen years’ experience, ‘We

unfortunately know too well that all mill-owners are not to be trusted: that many of them have a very loose kind of morality in regard to evasions of the factory law'. Despite open admissions of the grounds on which they might violate, however, employers were frequently none too willing to assume personal responsibility for the law having been broken. More often than not, juvenile labour was hired directly by the skilled adult operatives themselves, the industry's employment structure again intruding, this time to lend superficial credibility to claims that the master was not the really culpable party. Moreover, as the law was framed at the point when Inspectors were first appointed and some measure of real control became a possibility for the first time, it was legally permissible to shift responsibility from the mill-occupier to the employee, where the magistrates were satisfied that the offence had been committed without personal consent, concurrence or knowledge of the master . . .

Displacement of responsibility onto others was not, however, the only strategy used by employers in this period to deny any real criminal guilt on their own part, while continuing to profit from factory crime. Some, of course, deemed it sufficient to follow the letter of the law even though its spirit was grossly abused – Ashworth, for example, maintained that even if a child was actually and patently under the permitted age, once an employer had paid sixpence for a certificate of age, however false, he had a licence to work the child. Others contended that although they might indeed be in breach of the law, their delinquencies were merely formal or even technical offences involving no substance of moral responsibility commensurate with conviction on a criminal charge.

This passage illustrates the fluidity of conceptions of property crime: the use of child labour to maximise profit might not normally be seen as property crime, but can certainly be represented as such. We shall return below to the strategies used to 'neutralise' guilt and responsibility by white collar offenders. Levi's study of the regulation of fraud in Britain confirms the significance of this kind of crime, whilst reminding us that its social functions and official attitudes towards it are more complex than Marxian critics assume. Levi's arguments are of special interest in the context of public concern over city fraud in general and 'insider dealing' in particular. In financial terms losses from fraud dwarf all other types of property crime. Levi and Burrows estimate the extent of fraud:

Overall, however, available sources suggest that: excluding the cost of doing something about them, the direct losses from frauds of all types were at least £12.98 billion (mostly) in 2005 . . . In addition, the known and separately identified private and public costs of acting against fraud – both before the event and in response to it – total £0.937 billion; this is certainly a significant underestimate; together, the known costs of fraud and of dealing with fraud were at least £13.9 billion in 2005. (2008, p. 310)

Levi also observed in his earlier study that non-financial losses are important too:

Another important dimension of fraud is more difficult to quantify: its impact upon social values and sense of well-being. Certainly, this has economic ramifications. All commerce, and even the acceptability of a national currency,



depends upon some degree of trust and confidence. An early example of the consequences of such a collapse of confidence was the Wall Street Crash of 1929 . . . In the case of fraud affecting financial institutions, or the diversion of funds from governmental or non-governmental aid agencies, the effects are measurable, but may well extend far beyond the money stolen, to the death of thousands from malnutrition, for example . . . (1987, p. 46)

This last point is brought home with particular intensity by the 2001 Enron scandal, in which the sudden collapse of America's seventh largest company revealed that the apparent success of this giant energy corporation had been manufactured by systematic lies about its profits and debts, the latter concealed so that they did not show in its accounts. It further emerged that Arthur Andersen, Enron's auditors, had destroyed evidence of its relationship with the company. Enron employees lost billions of dollars because their pensions scheme was heavily invested in Enron's own stock. As the Securities and Exchange Commission, the FBI, Congress and the Justice Department proceeded with investigations, with a view to prosecution of a number of executives for fraud, conspiracy and false accounting offences, other companies needed to reconsider the use of so-called 'aggressive accounting practices' which are vulnerable to definition as criminal yet which have apparently been accepted as normal practice in vast areas of commerce. Furthermore, questions are being asked about the influence of business on national energy policy and the role of business funds in US political campaigning: Enron was a substantial contributor to the Republican presidential campaign.

Levi and Burrows identify a broad range of types of fraud:

Marion Levi and John Burrows, 'Measuring the Impact of Fraud in the UK: A conceptual and empirical journey' (2008) in *British Journal of Criminology* 22.3-34, at 299.

**Benefit fraud:** Frauds of various kinds upon the social security system, ranging from widespread 'working and drawing' by employees in casual agriculture and fisheries sectors (with employer/subcontracting 'gangmaster' collusion) via housing benefit frauds (sometimes involving landlord collusion) to the more common (by volume) failure to notify benefit officials of changes in circumstances that disentitle claimants to benefits.

**Charity fraud:** Frauds in which donations are stripped from entirely fictitious or unregistered charities, or are embezzled from registered charities . . . **Cheque fraud:** Most frauds on individuals' cheques are covered by guarantees up to a particular limit, depending on the card type (£50-£200) if presented at the time; beyond that, losses accrue to the firm that accepted them, unless bank negligence can be demonstrated.

**Consumer frauds:** A broad category including lottery/prize scams; rogue dialling and other communications-based frauds; 'dishonest' mis-descriptions of products and services (such as some 'alternative health care products' or sex aids); gaming frauds (e.g. 'fixed' races and matches upon which bets (including spread betting) have been made); purchases of



goods and services that are not sent by the supplier. Frauds involving the sale of cars – for example the handover of a vehicle before full payment is received (e.g. after receipt of a false banker's draft, or cheques that are then not honoured) – are also included.

Counterfeit intellectual property and products: A broad set, including medicines, vehicle parts, art and antiques sold as genuine and believed by consumers to be genuine. Thus, few people buy Viagra or antibiotics or genuine Microsoft software expecting them to not to work...

Counterfeit money: A direct loss to the individuals/business people given counterfeit money. Data-compromise fraud: Frauds on companies and on individuals (sometimes called 'phishing' and 'pharming') arising from website manipulations; these frauds include the manipulation of corporate websites to make the target believe that the firm they are dealing with (and possibly are supplying credit to) is the genuine business...

Embezzlement: Frauds against all businesses, government departments and professional firms by staff, ranging from junior clerical staff to directors and officers... of the company or partners of the unincorporated firm. This normally either involves accounts manipulation or the construction of false invoices.

Gaming frauds: This refers to 'fixed' races and other forms of sport upon which spread betting and other gaming wagers have been made...

Insider dealing/market abuse: This category of offences is particularly difficult to classify, as it affects the general integrity of the market but may not have any directly attributable victims or – in any given individual case – even affect people's confidence in the market. In this sense, they [sic] insider dealing/market abuse might be classified as frauds against individuals/the public rather than against financial services firms...

Investment frauds: There are essentially three sub-types: (a) frauds in which investors do not believe that investments are FSA-authorised, e.g. advance fee/some high-yield investment frauds involving 'secret inside information' or 'whisky/champagne' (i.e. boiler room scams); (b) frauds in which investors wrongly believe that the investments are FSA/other regulated; and (c) frauds in which investors correctly believe that investments are FSA/other authorised. Only in the third case will any compensation normally be paid...

Lending fraud: This category includes a variety of frauds involving lending funds... and lending credit for goods and services Payment card fraud: Frauds on issuers and merchant acquirers of debit, credit and charge cards...

Pension-type frauds... Procurement fraud: Frauds and corruption in the purchasing process, including pricefixing rings, abuse of inside information in the construction of tenders

Tax fraud involves failure to pay direct, indirect and excise taxes.

As compared with theft, official statistics suggest that serious fraud is relatively infrequent. Despite a slight increase in fraud and a decrease in theft in the last year, for every fraud or forgery recorded in the 2008/9 statistics there are about seven thefts; the BCS shows an increased risk of being a victim of plastic card fraud from 4.7 per cent to 6.4 per cent (Home Office 2009). But Levi's estimate of the value of serious frauds reminds us that, even leaving aside the question

of under-recording, the social impact of fraud cannot be properly estimated merely in terms of its frequency.

An important feature of corporate fraud and white collar crime is their relationship with developing technology and in particular with the use of computers and the internet, which have generated means of conducting frauds and thefts which are very hard to detect. These new technologies have increased the scope for behaviour threatening 'intellectual', intangible property such as information and software. They have also facilitated the commission of a wide range of property offences including theft, fraud, forgery and breaches of trust, and have given rise to new offences such as those under the Computer Misuse Act 1990. New technologies increase the ability to cause high losses and reduce chances of detection, though they also provide the criminal justice system with new tools of detection and surveillance.

Some important ambiguities in the definition of white collar crime are already emerging from this discussion (see also Nelken 2007). On the one hand, Sutherland's focus is primarily on the status of the offender. Pearce, too, attaches importance to this, but also develops a macro-economic and political approach to the marginalisation of certain kinds of crime. A different and in some ways complementary perspective concentrates rather on the kinds of actions in question – forms of corruption, cheating and straightforward norm-infraction (such as the evasion of factory legislation) which have an important impact on proprietary interests but which do not conform to stereotyped images of 'real' property crime. The offenders in question are not necessarily those on whom Sutherland focussed, but their position is analogous in that the conduct in question, whilst clearly illegal, becomes legitimised within a particular subculture. These areas may therefore usefully be examined in the context of 'white collar crime'. One example is the practice of work-related, 'part-time' crime (Ditton 1977). Once again, this is a practice which has a history far longer than that acknowledged by criminology:

(Clive Finkel 1999 *Crime and Society in England, 1760-1830*, 2nd edn., Longman, New York) pp. 122-3

Workplace crime or 'fiddles' come under a variety of alternative headings, most of which are not neutral words but are those employed by employers or, more commonly, agents of the law concerned with repression. Perquisites or 'perks' can be tolerated by an employer; they can also be the objects of periodic clamp-downs. Generally a 'perk' is regarded by the workforce as an entitlement, though it can sometimes be abused to the extent that few employees could, or would seek to, justify. It is a hazy line that separates perks from pilferage or small-scale theft from the workplace. Pilferage can be practised by virtually an entire workforce at a particular workplace or in a particular job; in a few instances it might shade into more organised and more large-scale theft. A third kind of workplace crime can

come under the heading of fraud... Examples of all of these crimes, or 'fiddles', abound throughout the eighteenth and nineteenth centuries.

The largest single employment sector in Britain during the eighteenth, and for much of the nineteenth century, was agriculture. Various labourers and agricultural communities claimed a whole series of allowances or perks which were gradually whittled down or subjected to greater control and supervision. Gleaning was the best known allowance whereby, after the harvest had been gathered, women and children entered the fields and collected the scattered grain which the harvesters had missed. Corn or beans collected in this way could form a significant percentage of the poor rural family's diet or wage. The custom had biblical authority, though it was clearly practised differently from place to place. During the eighteenth century it was known for individuals to object violently to anyone from outside the community seeking to glean in local fields, and farmers who tried to prevent gleaning, or who turned hogs or cattle out to graze on stubble and thus denied access to the poor, were the objects of popular odium and even assault...

In 1788 the Court of Common Pleas gave judgment in the case of *Steel v. Houghton and Uxor*; the judges declared that there was no specific right in common law permitting anyone to glean without the authority of the farmer who owned the land. 'Though [the farmer's] conscience may direct him to leave something for the poor', added one judge, 'the law does not oblige him to leave anything'... Here was a vigorous defence of property against what many considered as a custom: such a defence was typical of the eighteenth century. Yet it was not necessarily acted upon in such a way in the courts. In Essex a group of farmers set out to put a stop to gleaning on the basis of this ruling; the magistrates refused to convict at summary level, and the one case indicted at the quarter sessions was thrown out by the grand jury...

... Farmers did not use the 1788 judgment as the opportunity for a blanket assault on gleaning; the gleaners' case continued to be underpinned by humanitarian and scriptural arguments, and such prosecutions as there were seem to have depended rather more on local farming practice than on a new determination to preserve property rights...

As the nineteenth century wore on communities regulated gleaning themselves with the use of gleaning bells which rang to start and finish daily operations... Gleaning gradually disappeared partly as a result of technological change in the shape of mechanical binders and reapers which were introduced towards the end of the nineteenth century and which transformed harvesting, but probably rather more because a rise in real wages reduced the incentives.

Long after the 1788 ruling by the Court of Common Pleas gleaning continued to be justified in terms of customary rights; the taking of other produce from the land was not open to such justification, though some may have considered that their labour in the fields entitled them to some such 'perks'. Some farmers probably tolerated such behaviour, providing it was only occasional and limited; and, of course, such 'perks' or pilferage were difficult to prove unless a man was caught in the act, or with the produce on him... It would, of course, be folly to suppose that every incidence of the appropriation of growing produce was prompted by a labourer's need to feed a starving family or by a belief that his sweat and effort justified a 'perk'. Growing crops could only be taken at certain times of the year;



there was a peak of summary indictments in the late summer and autumn when such crops were plentiful but also when there was a peak of agricultural employment. Furthermore, on occasion growing crops were taken by organised gangs. In 1822 eight bushels of apples were stolen from farmer John Burr's land on the outskirts of Bedford. Five men armed with bludgeons cowed his night watchmen and took the apples away in a cart.

In this passage, Emsley illustrates the relationship between crime and socio-economic change, the blurred boundaries between lawful and unlawful property-related conduct, and the interaction between legal and informal regulation of property relations which we shall see reproduced in many parts of this chapter. Work-related crime has attracted some measure of public attention over the last three decades, particularly in the context of concern about a 'hidden economy' whose implications for the 'open economy' become salient in times of recession:

... *James 1988 The Hidden Economy* (Martin Robinson), pp. 6-7

In spite of the considerable attention it has been given in the last two years, the hidden economy is not new. Its history can be traced back to the thirteenth century, when it appears to have been much the same as it is today. According to Jerome Hall (Hall 1952) fiddles of 'office' are probably the oldest property crimes in history. Aristotle spoke of the embezzlement of funds by road commissioners and other officials, and in thirteenth-century England, the Articles of Edward I provided for the investigation of 'overseers of works' who, by adjusting the accounts, acquired 'stone or timber which should have gone into public construction' (Hall 1952, p. 36) ... These offences can be seen as direct forerunners of tax dodging, evasion or avoidance ...

The activity of fiddling accounts 'by the highest officials' was considerable in the fourteenth century ... By 1589, Queen Elizabeth I had a statute directed against 'persons who embezzled munitions of war which had been entrusted to them' (Act 31 Eliz c.4) and a statute of James I's made it criminal for any person in the wool industry to 'imbezil any Wool or Yarn delivered to him to be wrought' (Act 7 Jac 1.7) ... Pilfering by people in honest jobs was also prevalent and was known as 'Larceny by Servant'. Hall says that this was recognised as a problem as early as 1339, but was disregarded in the 1344-5 Statutes of Edward III (Hall p. 7). However, in 1529 Henry VIII had made it a felony for a servant to take his master's goods (Act 21 Hen. VIII c.7) ...

[p. 10] By the nineteenth century, instances of pilfering, fiddling and dealing were reported to have occurred in almost every occupation and, importantly within legitimate jobs. John Tobias has said, for example, that among young people in Birmingham, 'the most prevalent crime was larceny from their masters or from ships, committed by youngsters who had an honest job' ... One of the important aspects of this on-the-side trading was that, having taken the opportunity, the employee could rely on an understanding of what he was doing on the part of other tradesmen whom he could trust not to betray him ...



[pp. 12-13] The matter of explaining the hidden economy is... complicated by the historical treatment of this kind of illegal activity. Until the last few years, no one had been prepared to see hidden-economy activities as phenomena in their own right. The belief was widely held that people were either completely honest or completely dishonest and anyone who persistently, even if only occasionally, committed an illegal offence, was dishonest. As a consequence of this assumption, no attempt was made to conduct a detailed examination of part-time property crime and its wider implications. It was preferred, instead, to concentrate upon the professional criminal and his stereotypical world. But the stereotype of the property criminal is an ill-fitting explanation for hidden-economy crime. Assuming, as it does, that property crimes are committed for the pursuit of economic gain, the dishonest criminal theory cannot account for the 'part-timeness' of hidden-economy crime. Thus, while almost all the activities comprising the hidden economy involve an illegal transfer of money, goods and services... they are not the province of 'criminals', but an everyday feature of ordinary people's lives. The artificial distinction between 'honest' and 'dishonest' masks the fact that the hidden economy is the on-the-side, illegal activity of 'honest' people who have conventional jobs and who would never admit to being dishonest. More importantly, the distinction fails to accommodate the finding... that although money may be involved in the hidden economy, a multiplicity of other factors are often more significant, not least of these being the nature of the social relationship between all those taking part in hidden-economy crime...

A graphic example of the widespread existence and 'normalisation' of workplace crime was reported in *Le Monde* (10 September 1988) in an article describing disciplinary proceedings against police officers in a region of Paris who admitted to having systematically removed items such as radios from stolen cars before returning the cars to their owners. The defendants confounded the tribunal by not only freely admitting the practice but defending themselves vigorously on the basis that this constituted an 'institution', utterly accepted by the whole brigade (and apparently well known by the local community). The analysis of the cultural ambivalence which characterises attitudes to occupational crime is taken further by Mars, who opens his own study in the following way:

G. Mars 1982 *Cheats at Work: An Anthropology of Workplace Crime* (Unwin Paperbacks), pp. 1-2, 3

This is a book about crime at work. It is not, however, about crime in the normal sense. First, most of the 'criminals' do not regard what they are doing as remotely blameworthy and secondly, they appear in all respects to be no different from other people. And nor are they - since self-report studies show that between 75 and 92 per cent of us regularly add to our incomes in ways that are technically against the law.

More recent studies have argued that occupational crime is characteristic of a whole range of occupations, while intensive studies of particular occupations have confirmed the

findings of earlier self-reports . . . [T]he extent and variety of these activities are astonishing. The range of description alone indicates their extent. In England one speaks of 'pilfering' and 'the fiddle', in the USA it is called 'skimming' or 'gypping', in France 'le travail noir' and in the Soviet Union it is known as 'rabotat nalyevo', which means 'on the left'. These terms are not exact synonyms. Indeed, the complexity of these activities is such that no one word or phrase can convey the scope and ingenuity they involve. In English there are also words such as 'moon-lighting', 'tax evasion' and 'perks'. Although almost everyone is aware of them, and although the majority of us fiddle in one way or another, fiddling is still considered a trivial activity without serious implication. This view needs to be challenged . . .

Mars goes on to develop a typology of 'fiddling' which is related to the structure of particular jobs, which provide specific roles and opportunities which relate directly to the kinds of fiddling which go on. He argues:

The fiddled benefits obtained (unlisted in audits and unmentioned in official statistics on incomes), far from being the exceptional activity of the minority, are an integral aspect of all the occupations they include. They are indeed the shadow side of conventional economic transactions.

...[S]ome occupations are so fiddle-prone, for instance, that the workings of whole sectors of the economy cannot be understood unless these aspects of reward are taken into account. It is impossible to explain industrial relations in much of the personal services sector, for example, or to understand the real reasons behind some strikes, or why technical changes are blocked, or why some trade unions make no headway, when orthodox theories of strike-proneness or of trade union growth are all we have to depend on.

These examples not only extend our conception of the scope of 'white collar crime', but also force us to re-examine our understanding of the ways in which white collar or occupational offenders (i.e. most of us) adopt points of view which allow us to interpret our own actions as not 'really criminal' whilst upholding our general attitudes of support for criminal law. Building on Sutherland's early insights, a wide range of neutralisation strategies has been identified by students of occupational crime:

S. Henry 1978 *The Hidden Economy* (Martin P. J. Jackson), pp. 76-7

Three fundamental distinctions are made by members of the hidden economy by which they contrast their own 'insignificant' behaviour with the 'really villainous' activity of the professional criminal. It is argued, for example, that whereas 'criminals' behave in a predatory way, ordinary people, in contrast, need only accept things that 'come their way'. A number of the people I interviewed made a sharp distinction between 'going out and doing something' and accepting 'good fortune' that might come their way . . .

A further distinction made between hidden economy and full-time crime in the minds of ordinary people is the scale of operation. In the course of conducting interviews... I was continually told that the activity of the person I was interviewing was only 'small-time stuff' and not a fraction of what some people were doing. More than once I was told to 'go to where it's really at'... However, the most significant contrast made between the public stereotype of full-time crime and the hidden economy, is the fact that real crime provides the basic source of income for those involved. It is this, rather than any other aspect of the criminal stereotype, that renders a person morally free to commit part-time crime.

The relationship between the 'neutralisation' of occupational crime and institutional culture was suggested by Cressey in his early study of violations of trust in America:

D. R. Cressey 1953 *Other People's Money: A Study in the Social Psychology of Embezzlement* (Hatterston Smith 1973 reprint), pp. 136-7

The rationalisations which are used by trust violators are necessary and essential to criminal violation of trust. They are not merely ex post facto justifications for conduct which already has been enacted, but are pertinent and real 'reasons' which the person has for acting... Each trusted person does not invent a new rationalisation for his violation of trust, but instead he applies to his own situation a verbalisation which has been made available to him by virtue of his having come into contact with a culture in which such verbalisations are present. Cultural ideologies which sanction trust violation are in basic contradiction to ideologies which hold nonviolation as the norm, and in trust violation the trusted person applies a general rule to his specific case... A large majority of the independent businessmen and trusted employees who take funds over a period of time apply... the rationalisation that they are merely borrowing the funds... Frequently it is necessary for an individual to abandon the rationalisations which he has been using, and when this occurs he looks upon himself as a criminal...

[pp. 140-2] Among the violators interviewed, the accountants, bankers, business executives and independent businessmen all reported that the possibility of stealing or robbing to obtain the needed funds never occurred to them, although many objective opportunities for such crimes were present. Even a man who had been convicted of fraud or embezzlement as many as three times stated that crime of any other kind is repulsive...

Also, trust violators usually consider the conditions under which they violated their own positions of trust as the only 'justifiable' conditions, just as they consider their own trust violation to be more justified than a crime such as robbery or burglary. The individual who embezzles by 'borrowing because I needed the money', looks with some contempt upon an embezzler whom he thinks embezzled 'in order to try to make a killing'... just as he looks with some contempt upon burglars.

The ambiguities in individuals' views of the moral status of their actions find a counterpart in society's attitudes to crime:



*S. MARK FIDDLER: Fiddles at Work: An Anthropology of Workplace Crime* (Unwin Paperbacks), pp. 163–5

[S]ociety has an ambiguous attitude towards the actions of its 'big men'. In a perverse way, the corrupt means such men employ to achieve success and power is seen as part of their achieving-style: to have succeeded, the individual must have 'fixed' things for himself. On the other hand, society's view of the actions of 'little men' is unambiguous. The supermarket cashier who rings short is seen as nothing more or less than dishonest.

It is tempting to explain this distinction purely in terms of class... The class argument is based upon the view that opinions are moulded and social agencies activated by the most powerful elements in society in their own interest. There is a lot in this argument, and yet... individuals, as far as their fiddling goes, are not so much simply the victims of a class system as the victims of its mediation through occupational structures which determine the nature, type and scale of fiddles that are practised...

The basis of the different views society takes of different offences can be seen in the different words it uses to describe them. Throughout this book I have tended to use the word 'fiddle' rather than pilferage or theft. The word is not used lightly, but it is a 'light' word: morally it is relatively neutral... It allows us to look at part-time crime not so much with complaisance as with empathy. Using the word 'fiddle', we can more readily appreciate the world-view or cosmology of the fiddler... If, on the other hand, we use the word 'theft', we stand outside the fiddler's view of his own actions.

[pp. 166–7] [I]f we accept that there are different methods of transaction, even within the relatively 'straight' operation of market exchange, we can see that fiddling is not necessarily the 'wrong' way of doing something but rather that it is another way of doing something. And we can now appreciate that the use of 'heavy' words like 'theft' and 'crime' by people who are outside the operating quadrant excludes (because it has to if these terms are to have meaning) the possibility of there being such alternative methods of transaction. It effectively prejudices because it recategorises the acts that are being discussed. Therefore when I use the word 'fiddle' I do so not to condone theft, but to allow for the possibility of other systems of dealing which 'theft' does not adequately describe.

It is because people are in a sense 'trapped' in their own cosmologies that they do not have the ability to split up the image of what they see. Their view of fiddles is determined by where they stand, since a specific cosmology not only orders the world, it also precludes alternative orderings. The use of words to describe what is seen suggests that different viewpoints need different words to describe the same view... When a 'perk' is classed as fraud, perhaps because it oversteps acceptable limits and becomes the subject of prosecution, it is prosecuted as a fraud and the charge has to be answered in these terms. Generally there is no answer... The transaction has broken the rules of 'normal' dealing and it is for this that punishment is appropriate and recategorisation becomes a necessity.

Moreover, the existence of alternative systems of exchange, cosmologies and categories produces problems for the fiddler, as Mars also explains:



[p. 170] This squaring of the working self with the fiddling self is often achieved, as we have seen, through group support. When Ditton's (Ditton 1977) bread salesman was shown the ropes by an experienced salesman or supervisor, he was also shown certain truths about the job. He was shown how to balance his books and then shown, in the course of learning, that the books would never balance; that he would always be down at the end of the day. He was gradually led to realise that only through fiddling could he stay on top of the job. He then adopted the cosmology of the group of bread salesmen, in which fiddling is intrinsic not extrinsic to the job. In the same way the docker's world-view is also pressed home by the group – that because managements are perceived as inherently untrustworthy, the group itself is the only secure defender of members' interest. It is the group worker's acceptance and absorption of group assumptions that allows him to square his straight self with his sinful self. The two are insulated at one level but coalesce at another and thus ambiguity is resolved. Without group support, however, ambiguity remains unresolved. In jobs where the worker is isolated, there is an individual but not a group view. Hence the personal 'sinning' self threatens to overwhelm the working self.

These group norms, argues Mars, generate controls on the extent and type of fiddling, and these contribute to its status not so much as an anarchic, individualistic activity but as 'one of the factors that contribute to equilibrium in normal economic activity' (p. 171). The fiddler thinks (perhaps not at a conscious level) that he or she will have society's support for his or her actions because of the continuity between their underlying ideology and that of capitalism – an assumption which turns out to be radically misplaced once Mars's 'heavy' criminal definitions are applied to recategorise fiddling as theft.

Another question which underlies many discussions of 'white collar' and occupational property crime is the extent to which it is 'organised' or 'professional'. As we have seen, the part-time nature of much occupational crime has supported its marginalisation as criminal – but criminal violations of property which are systematic and justify the definition 'organised' may be marginalised in their turn. Naturally, 'organised' crime does not have its impact only on property interests: as the activities of groups such as the Mafia show, it can have serious implications in terms of public order and often involves violence. Our image of organised crime is dominated by the Mafia, 'gangs' and similar organisations of a 'criminal underworld' which operate unambiguously outside the law, and tends to disregard the many areas in which legitimate and illegitimate activities are closely intertwined. Yet it would be perfectly appropriate to expand our perspective so as to apply the label 'organised' or 'professional' crime to the apparently 'respectable' activities of corporations and individuals who systematically violate environmental laws, take calculated risks in terms of the safety of their products in order to increase their profits, or systematically under-report their earnings on their tax returns. For the line between legitimate and illegitimate profit-oriented activity turns out to be exceedingly fine. The

suggestion that we should conceptualise much white collar crime as organised crime was made by Sutherland:

E. Sutherland 1949 *White Collar Crime* (Yale University Press, 1983), pp. 256-7

Evidence has been presented . . . that crimes of businesses are organized crimes. This evidence includes references not only to gentlemen's agreements, pools, trade associations, patent agreements, cartels, conferences and other informal understandings, but also to the tentacles which business throws out into the government and the public for the control of those portions of the society. The definition of specified acts as illegal is a prerequisite to white collar crime, and to that extent the political society is necessarily organized against white collar crime. The statutes, however, have little importance in the control of business behavior unless they are supported by an administration which is intent on stopping the illegal behavior. In turn the political administration has little force in stopping such behavior unless it is supported by a public which is intent on the enforcement of the law. This calls for a clear-cut opposition between the public and the government, on the one side, and the businessmen who violate the law, on the other. This clear-cut opposition does not exist and the absence of this opposition is evidence of the lack of organization against white collar crime. What is, in theory, a war loses much of its conflict because of the fraternization between the two forces. White collar crimes continue because of this lack of organization on the part of the public.

Far from public institutions organising against such crime, Chambliss's undercover study of networks of crime and corruption in public and corporate life the United States suggests that the fabric of capitalist society actually supports it:

W. J. Chambliss 1974 *On the Take: From Petty Crooks to Presidents* (Indiana University Press), pp. 178-83

Kickbacks, bribes, collusion, and corruption are as much a part of corporate business as they are a part of crime networks everywhere. So too are public lies and disclaimers of business men and politicians caught in the act. In 1967 and 1968 the top executives and accountants of Lockheed Aircraft, with the complicity of high-ranking officers of the Air Force, falsified public reports of the cost of overruns on the C-5A airplane. Complicity of the Pentagon was purchased by the favors Lockheed does for the high-ranking officers, including, perhaps most significantly, the prospect of high-paying jobs in the aircraft industry upon retirement from the service . . . Investigative agencies such as the FBI and IRS are co-opted in similar if not identical ways. Retired FBI agents become 'special investigators' or are employed by banks, corporations, or state governments at high-paying jobs . . .

We could of course go on indefinitely with such examples but the point would be the same: there is an inherent tendency of business, law enforcement, and politics to engage

systematically in criminal behavior. This is so not because there are too many laws but rather because criminal behavior is good business, it makes sense, it is by far the best, most efficient, most profitable way to organize the activities and operations of political offices, businesses, law-enforcement agencies and trade unions in a capitalist democracy...

By now it should be clear that the logic of capitalism is a logic within which the emergence of crime networks is inevitable. Capitalism is based on the private ownership of property. Property is acquired by selling products, providing services, or selling one's labor. By law most of the products and services which can be exchanged for money at a profit are legal... At one time in American history most of the products and services which support the crime industry were legal... In time some commodities and services came to be defined as illegal. But the demand for these things did not disappear with their transference from legality to illegality. Indeed, in some cases the profits increased as a consequence of their newly established illegality... Through it all the crime network becomes an institutionalized, fixed and permanent link in the chain of a nation's political economy...

A global survey of 5,500 firms disclosed that nearly one in two had experienced economic crime. Despite the fact that in half the instances the perpetrator was an insider, companies rarely pursued criminal charges (Bussmann and Werle 2006). These studies of white collar and occupational crime provide us with a complex picture of the variety of property-violating behaviour in which a range of systems of property relations and exchanges co-exist with competing definitions of what is and is not honest or legitimate. This complexity relates both to the motivations and self-understandings of property offenders and to society's attitudes to particular forms of conduct and the application of criminal definitions thereto. The idea of organised crime is open to reconstruction in the light of evidence about existing forms of criminal behaviour in just the same way as work on 'white collar crime' has challenged perceptions of 'real' property crime in general. It is instructive to consider how the individualistic and moralistic definitions of legal offences such as theft (see below Chapter 12) would apply to the systematic and normalised behaviour discussed by Sutherland and Chambliss.

#### IV.11.d. Burglary

For our final example, we return to the well-charted waters of 'real' crime, to consider the crime of burglary – an offence which is central both to popular images of property crime and to popular anxieties about crime in general. Burglary also serves to illustrate the blurred boundaries between property and other crime: the sense of invasion of privacy and fear of violence are clearly important factors in determining the high level of social anxiety about this form of crime. It is this feature of burglary, as well as concern about its prevalence, that underpinned the decision to introduce a mandatory minimum three-year term



for third offence domestic burglary (Powers of Criminal Courts (Sentencing) Act 2000, s. 111).

In 2008/9, residential and non-residential burglary represented 12 per cent of recorded crime and 7 per cent of British Crime Survey (BCS) crime (Home Office 2009). Since 1995 there has been a 59 per cent decrease in the number of burglaries reported to the BCS, with a total of 729,000 incidents. It is estimated that 64 per cent of burglaries are reported, rising to 83 per cent of those involving loss (Home Office 2009). Relatively few burglaries involve either violence or very high losses and only 3 per cent of burglaries involved a violent or threatening confrontation between offender and victim. The first BCS revealed fears about burglary among a wide range of people, many of whom were concerned about violation of their territory and sense of order rather than with material loss (Hough and Mayhew 1983, pp. 24–7): in the 2001/2 BCS, 81 per cent of interviewees reported that they had been emotionally affected by being burgled, with the most common emotions being anger, shock, fear, feelings of vulnerability and difficulty with sleeping (Home Office 2002g, p. 34).

The BCS also suggests that burglary is predominantly a feature of urban life, burglaries in inner-city areas being about twice as frequent as those in rural areas (Home Office 2009). The major risk factors are young (occupants between 16 and 24) households and those without security measures such as deadlocks and window locks. Crime Surveys also show that there is a marked variation in reporting rates for different kinds of burglaries: this variation relates to the extent of loss, the existence of insurance, perceptions of ‘real’ and ‘unreal’ burglaries and to victims blaming themselves (for example, for failing to lock their home adequately).

There exists a wide variety of opinion about the motivation for the ‘typical’ burglary among commentators who persist in the belief that such a thing exists. One approach is that adopted by economic analysts of the Chicago school:

‘... ECONOMICALLY FROM THE POINT OF VIEW’ IN R. ANDERSON AND  
J. HOPKINS (eds.) *The Economics of Crime* (John Wiley and Sons,  
1967) p. 111–3

Burglary is a risky activity, since the individual’s return depends upon whether or not he is apprehended and convicted. Accordingly, the monetary return is an expected value and can be expressed as

$$R = (1 - p) S + p (S - D)$$

where  $p$  is the probability that the individual is caught and penalized;  $S$  is the monetary component of the income from the act – or simply the amount stolen – and  $D$  is the dollar equivalent of the penalty imposed on those apprehended. . . In 1967 the average market value of stolen property yielded by a burglary in Pennsylvania was \$288. However, the gain to the burglar generally falls short of this amount since he is unable to dispose of



his non-monetary ill-gotten gains at their market value . . . To compute the probability of conviction, the number of adult convictions for burglary in Pennsylvania is divided by twice the number of reported adult burglaries . . . This method of computation yields a probability of conviction of .058.

Calculation of the dollar value of the penalty will include only those direct costs resulting from incarceration and the confiscation of stolen property . . . The measure of the value of the burglar's time while incarcerated will be his net foregone earnings, less the value of his consumption and earnings, if any, while in prison. The personal discomfort associated with prison life is a subjective element which will be negative for most, if not all, inmates. No attempt will be made to measure this factor . . . The measure of foregone earning will be the present value of the average after-tax earning of individuals with characteristics similar to those of burglars . . . [On this calculation], while the burglar forgoes \$4,321 per year while in prison, he is provided with consumption goods and may be paid for work he performs . . . The expected yearly value of consumption, then, to a burglar sentenced to prison is \$567.

The net result of this complex calculation is that the expected cost of imprisonment to the burglar is approximately \$316. This approach, with its strong assumptions about the rationally calculated nature of criminal behaviour, has informed some significant developments in crime control – notably the situational approach to crime prevention (see below 13.a.i.). It contrasts sharply with research methods which aspire to shed light on the actual social phenomenon of burglary:

**M. Maguire and T. Bennett 1982 *Burglary in a Dwelling* (Heinemann), pp. 164-70**

Burglary of private houses conjures up many frightening and disturbing images – of violent strangers in the night, ransacked rooms, fouling of property and sexual assault . . . We have confirmed that about one-quarter of those who actually become victims are, temporarily at least, badly shaken by the experience. Moreover, a small minority, mainly women, suffer long-lasting effects including fear, sleeplessness and a deep distrust of others.

Analysis of the actual circumstances of the offence has revealed that, although it is an all-too-common crime, burglary is rarely as objectively serious as people imagine. Confrontations between victim and offender are unusual, and physical contact or violence result in only a tiny proportion of cases. Research leaves us in no doubt that, generally speaking, people who engage in burglary are 'sneak' thieves who will do what they can to avoid coming into contact with residents and, if disturbed, their first reaction is to run away . . .

Deliberate violence to property, apart from force used to effect entry, is also less common than widely believed. Only five of the 322 victims we interviewed reported any gratuitous acts of vandalism and only one had the experience of finding a pile of faeces. Untidy searches were more common . . . but in the majority of cases very little had been moved.

In assessing the importance of burglary, Maguire and Bennett emphasise its impact on the psychological rather than the pecuniary interests of victims. Their study demonstrates that it is difficult to generalise about any aspect of 'property crime', let alone property crime in general.

The examples selected in this chapter have demonstrated the diversity of behaviour which threatens established interests in property as defined by criminal law. They have also thrown light on the social construction of 'real crime': the way in which both public perception and enforcement practice, themselves influenced by the media and other social institutions, distinguish between types of behaviour equally subject in principle to criminal law. More generally, in relation to activities which have an adverse impact on property interests, the boundaries between those which are and which are not regarded as legitimate are blurred. Commercial and governmental policies (not to mention market operations) which are legal and widely perceived as legitimate may raise prices, devalue certain commodities or cut welfare benefits in ways which affect interests in property far more radically than does property crime. Not all interests in property which are or could be recognised socially come within the scope of legal protection.

Within the area of illegal property-affecting behaviour, we saw how common practices are tolerated, acquiesced in or rationalised by the operation of a variety of strategies which 'neutralise' criminality and illegitimacy. From social, official and offenders' points of view, competing definitions and interpretations of behaviour affecting property interests are constructed. The intervention of the criminal process into this area is relatively infrequent. However, criminal law affirms certain conceptions of property as legitimate and deserving of protection and as such makes a symbolic as well as an instrumental contribution to the social definition of property, theft and related concepts. In the next two chapters, therefore, we turn to the substantive law and its implementation.

#### FURTHER READING

- Jason Ditton *Part Time Crime: An Ethnology of Fiddling and Pilfering* (Macmillan 1977).  
 G. Geis and R. F. Meier *White-Collar Crime* (Free Press 1977).  
 Michael Levi 'Organized Crime and Terrorism' in Maguire *et al.* (eds.) *The Oxford Handbook of Criminology* (Oxford University Press 2007), p. 771.  
 C. B. MacPherson *Property: Mainstream and Critical Positions* (University of Toronto Press 1978).

## Constructing Property in Criminal Law

We now move to the legal context to consider how property interests and threats to property are constructed by criminal laws. Just as many 'offences against the person' have public order or property-affecting aspects, so many 'property offences' have public order or person-affecting repercussions. The relative seriousness of the offences enacted in the Theft Acts 1968 and 1978 and the Fraud Act 2006 – theft, handling stolen goods, burglary and aggravated burglary, robbery, taking a conveyance without authority, abstracting electricity, going equipped for stealing, blackmail, making off without payment and fraud – relate not only to the extent to which they threaten property rights but also to violations of trust and the threats to social order, authority and the person which they pose. Robbery and aggravated burglary attract maximum sentences of life imprisonment largely on the latter ground, and the fact that there is a higher maximum for handling than for theft is perhaps to be explained not just by the argument that thieves could not survive without handlers and thus that handling is an important focus for punishment and prevention (after all, the converse is equally true) but in terms of the idea that handling systematically supports the institution of theft in a way which potentially undermines the system of property entitlements more thoroughly than does theft.

In considering criminal law's construction of property offences, we should not, however, confine our view to the Theft Acts. We need to bear in mind the laws relating to criminal damage, computer misuse, conspiracy to defraud, offences relating to forgery and counterfeiting, criminal nuisances or trespasses and indeed offences relating to terrorism and hijacking, which may have considerable implications for property holdings. Many 'regulatory' offences such as those relating to pollution and safety precautions are also relevant, as are laws relating to 'intellectual property' and the protection of copyrights, computer software and data and performing rights. These may not always have come squarely within conventional social and legal conceptions of property, but they have called for accommodation in law as social conceptions have developed. The protection of these forms of property interest, along with regulatory arrangements to do with revenue, licensing and the like, lie at the muddy junction between criminal and civil regulation: between a system geared to prevention, blame and punishment and a system geared to promoting security of

expectations and providing compensation. They are not seen as being a core part of criminal law, yet they have similar functions and some criminal law aspects.

We cannot deal with more than a small selection of property offences, and we have chosen a sample to illustrate some of the most interesting points which arise in this area. Our focus will be on theft, burglary, fraud and criminal damage. We also continue to explore the contours of inchoate liability in considering conspiracy to defraud. Finally, we shall examine the defences of duress and necessity, which raise important questions about the location of responsibility for property crime.

## IV.12.a. Theft

### IV.12.a.i. The history of theft

William Blackstone's *Commentaries*, written in the middle of the eighteenth century, represent one of the first systematic expositions of the common law. His volume on criminal offences included a substantial section on 'offences against private property':

William Blackstone 1971: *Commentaries on the laws of England* 1765, Vol IV (University of Chicago Press), p. 230

Simple larceny then is the 'felonious taking, and carrying away, of the personal goods of another'. This offence certainly commenced then, whenever it was, that the bounds of property, or laws of meum and tuum, were established. How far such an offence can exist in a state of nature, where all things are held to be common, is a question that may be solved with very little difficulty. The disturbance of any individual, in the occupation of what he has seized to his present use, seems to be the only offence of this kind incident to such a state. But, unquestionably, in social communities, when property is established, the necessity whereof we have formerly seen, any violation of that property is subject to be punished by the laws of society: though how far that punishment should extend, is matter of considerable doubt.

In the next few pages, we shall examine the development of conceptions of theft since Blackstone's time, so as to provide a historical context in which to consider the contemporary law of theft. The history of theft produces a striking illustration of the way in which distinctive logics of legal argumentation may persist notwithstanding legal and social change, whilst also exemplifying a significant shift in the very basis of attributing criminal responsibility. Yet, despite the extensive legislative codification of property offences, many of the problems thrown up by the history of larceny reproduce themselves in a curious way in the modern law of theft. These traces serve to cast doubt on the extent to which older forms of viewing crime have been entirely displaced by modern conceptions of responsibility and wrongdoing.



Laws against theft (or 'larceny') count among the most historically and geographically pervasive forms of criminal law, yet the form of the offence is bound to be culturally specific: it reflects prevailing ideas of property (Fletcher 2000, pp. 1–122). Blackstone's comment neatly captures not only the interaction between prevailing social formations and the form of criminal offences against property, but also the persistent controversy about the shape of those forms within any particular polity. From the seventeenth century on, there was in England a growing body of statutory law which specified many different instances of larceny, grading them as grand or petit, and distributing penalties accordingly. For example, horse theft, sheep and cattle theft, theft from bleaching grounds, theft from houses and ships, shoplifting and picking pockets were all categories singled out as grand larcenies, reflecting socioeconomic structures, the demands of local economies, and (closely related) popular perceptions of the relative seriousness of different kinds of theft (Beattie 1986). Among these distinctions, places or locations, and specific objects, are of particular importance, suggesting a conception of larceny as essentially about the transgression of commonly recognised boundaries. But as the integrity of these boundaries gradually dissolved in more mobile and fragmented modern societies, criminal law increasingly struggled to articulate a determinate conception of theft.

In his extensive analysis of the development of the modern law of theft, Fletcher (2000) distinguishes between three basic kinds of property crime: larceny, embezzlement and false pretences. Larceny, as defined by Blackstone, consists in a felonious taking and carrying away of the personal goods of another: it must be felonious in the sense of being done with an '*animus furandi*' – theftuous spirit or intent (though, as we shall see, this is not really equivalent to contemporary '*mens rea*'/intent); and it is essentially a crime against possession – hence physical taking – which entails that those in possession could not be guilty of larceny. Embezzlement, by contrast, consists in appropriating goods entrusted to the defendant's possession to her or his own use; and false pretences, deception or fraud in getting possession of goods by means of some pretence or cheating. If you snatch my wallet and run off with it, you commit theft; if you falsely tell me you are starving so as to persuade me to give it to you, you commit false pretences; if I put my wallet in your hands for safekeeping, but you then decide to abscond with it, you commit embezzlement. Embezzlement and false pretences tend to develop in modern systems as statutory innovations coming much later than larceny. As Fletcher explains, the difference between these three kinds of offence has centrally to do with the nature of the victim's participation: in larceny, the victim in no way voluntarily participates; in embezzlement the victim agrees to the initial taking but not to the later appropriation; in false pretences, the victim agrees to the transfer, but only because he or she is the victim of a deception. This illustrates the variety of interests or wrongs which criminal laws on property can express; whilst larceny is fundamentally concerned with possession, embezzlement is concerned rather with trust.

Fletcher's argument is that in the development towards contemporary law, the distinction between these three forms of separate property violation became blurred, and that this blurring not only produced the modern concept of theft, but also expressed a deeper change in the underlying conception of criminality – a change from 'manifest' to 'subjective' patterns of liability. Whilst the accounts provided by writers such as Quinney and Hall (see below) represent these changes as driven by social and economic factors, Fletcher's explanation is rooted in the logic of legal forms themselves. Fletcher rejects both the idea that the development of theft is a question of historical accident and the idea that it is a matter of historical determinism – primarily a product of social and economic conditions. These factors certainly have a place in his story, but his account shows how those broader influences are filtered through a set of legal forms which have their own internal logic. To explore these competing legal and social explanations, and their implications for modern criminal law, it is worth examining the law of larceny in a little more detail.

In Blackstone's time, as we have seen, the essence of larceny was a taking. In other words, the consent of the owner had to be wanting; and there had to be a taking from possession – someone legally in possession could thus not be a thief. This meant that uncertainties in the law of possession, and in particular about the line between possession and mere use or custody, were of central importance in the law of larceny. For example, was a domestic servant in possession of cutlery or linen, or did she only have 'care and oversight'? If the latter, she could be guilty of larceny if she took the goods away; if the former, she could not – it was merely a private or civil matter. Further difficult doctrinal issues had to do with what constituted a carrying away. Blackstone cites the case of a guest stealing goods from an inn, and being caught on his way out: this was thought to be a sufficient taking away.

Of particular interest to modern eyes is the summary way in which Blackstone deals with 'animus furandi' – what looks to us like the 'mens rea' of larceny. He simply observes that, apart from its role in 'excusing those who labour under incapacities of mind or will', it 'indemnifies also mere trespassers and other petty offenders'. He explains that the paradigm example of 'animus furandi' is that of the person found taking 'clandestinely' – though he goes on to say, not entirely helpfully, that 'this is by no means the only criterion of criminality: for in cases that may amount to larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those, which may evidence a felonious intent, or animus furandi; wherefore they must be left to the due and attentive consideration of the court and jury' (Blackstone 1979, p. 232). As we shall see, the contrast between the eighteenth-century conception of 'animus furandi' and contemporary conceptions of 'mens rea' plays a central role in grounding Fletcher's argument that the early common law's conception of larceny was based on a very different pattern of criminality from the modern law of theft.

Fletcher points out that the basic idea of larceny as a felonious taking from possession created a number of problem cases which arose regularly but which were outside the definition: examples include the person who comes into possession with a felonious purpose unknown to the owner; the person who finds goods which he later appropriates; the person to whom goods are mistakenly delivered, and who then appropriates them; and the person to whom goods are delivered by a third party and who appropriates them rather than passing them on to the owner. Each of these cases posed a problem for common law larceny, because each encountered the barrier of possessorial immunity: i.e. in each case the putative thief has got possession, and hence cannot become a thief by his or her later appropriation. As Quinney observes in the following passage, these problems began to be resolved in the *Carrier's Case* (Star Chamber 1473):

R. Quinney 1970 *The Social Reality of Crime* (Little, Brown & Company), pp. 70-3

The creation of a particular criminal law must have its conception in some concrete setting of time and place. The development of the law of theft demonstrates that necessity. For prior to the fifteenth century there was no legal conception of theft as we know it today. It was during the fifteenth century in England that the modern law of theft was officially formulated into criminal law. The law of theft was shaped by changing social conditions, and especially by pressing social interests of the time. The definition of theft as a crime was a solution to a legal problem that arose within a particular social framework.

The decision that resulted in the legal concept of theft occurred in England in 1473, in what is known as the *Carrier's Case*. The case has been documented and interpreted by Jerome Hall in his book *Theft, Law and Society* (Hall 1952). The facts of the case are these: the defendant was hired to carry bales to Southampton. Instead of fulfilling his obligation, he carried the goods to another place, broke open the bales, and took the contents. The man was apprehended and charged with felony.

The most illustrious judges of the time discussed the case at length. While the defendant was finally held guilty by a majority of the judges, a legal problem of considerable portent developed during the proceedings. Before the case arose, the common law recognized no criminality in a person who came legally into possession and converted it to his own use. The reasoning of the common law had been that the owner of transported goods was responsible for protecting himself by employing trustworthy persons...

Until the *Carrier's Case* it had been agreed that while trespass (the taking of property from one who is in possession of it) was an essential element of larceny, a person in possession of property could not commit a trespass upon that property. Therefore, since a bailee (an employee who is trusted with property) had possession, larceny could not technically be committed by such an employee. The judges, however, departed from precedent by introducing a new concept which could neither be found among the existing legal rules nor logically derived from them. For the judges held that 'breaking bulk' terminated the bailment, that such property at once reverted to the possession of the bailor, and that the



removal of it from the bales supplied the trespass. Hall thus observes: 'By this refinement the door was opened to admit into the law of larceny a whole series of acts which had up to that time been purely civil wrongs.' (Hall 1952, p. 10) . . .

An important question arises as to the forces that were active in the creation of a new legal concept. In his analysis of the case, Hall outlines the changes that were occurring in fifteenth century England. These changes coupled with the social conditions and institutions of the period made convenient a change in the law of theft. To begin with, in the political realm, the courts were subservient to the wishes of Edward IV. This meant that the special interests of the Crown were protected by the courts. Among the interests of the king that received the favour of the courts were the royal commercial activities, including trade with merchants on the Continent. Edward himself was a merchant who carried on many private ventures.

The economic conditions of the period were especially important for the decision reached in the *Carrier's Case*. During this phase of the Renaissance a commercial revolution was taking place in England and Europe. The old feudal structure resting on an agricultural economy was giving way to a new order based on industry and trade . . . Hall . . . argues that the complainant was a foreign merchant . . . whose trade was desired by the Crown. Such foreign merchants were subject to special risks: there was naturally hostility by local merchants toward foreign trade. Moreover, foreign merchants were handicapped in the transport of goods because of the uncertainty of finding trustworthy carriers who would not abscond with the goods. The king attempted to relieve the situation somewhat, issuing covenants of safe conduct through the country . . . The merchandise taken by the bailee of the *Carrier's Case* was probably wool or cloth, or both. Such goods were usually transported in bales . . . All these deductions mean that 'the interests of the most important industry in England were involved in the case.' (Hall 1952, p. 31)

The *Carrier's Case* of 1473 vividly demonstrates the way in which changing social conditions and emerging social interests may bring about the formulation of a criminal law. The decision of the *Carrier's Case* provided the framework for the further development of the law of theft. Eventually, with the growth in banking and the use of paper currency, the law was expanded to include the act of embezzlement by clerks, officers and the like. A Whig Parliament in the eighteenth century passed an embezzlement statute in order to protect mercantile interests. The legal protection of property has always been to the interest of the propertied segments of society.

Through the ingenious means of Lord Chokke's argument that the carrier's 'breaking bulk' constituted a trespass, and that there was therefore a felony, the *Carrier's Case* therefore overcame the barrier presented by the doctrine of possessorial immunity. This idea of breaking bulk remained the major exception to that doctrine until the mid-nineteenth century. By this time, fraud and embezzlement had encompassed such behaviour, and the common law had developed an array of other techniques for avoiding the doctrine's effect – for example by arguing that certain kinds of bailees did not get possession in the first place.



What explains the decision in the *Carrier's Case*? On the face of it, the rule about possessorial immunity may seem an obscure technicality, and the argument about breaking bulk a clever judicial fiction designed to get around it. But this explanation of the case begs the question of why the judges would have wanted to get round it from the late fifteenth century on. As Quinney notes, Jerome Hall argued that the decision was driven by the imperatives of commerce and the desire in particular to protect foreign merchants so as to encourage trade. Fletcher points out, however, that this is not a convincing argument, because the contrary decision on the point would have protected the merchant just as well: the merchant's difficulty in recovering the goods actually derived from the fact they were argued to have reverted to the King, through the law of waif, as being the products of a felony. Thus the Star Chamber's decision that the bulk-breaking did indeed constitute a felony necessitated the further innovation, to protect merchants, that the ordinary law of waif would not apply to goods of foreign merchants. But even if Hall's explanation were convincing, it begs a further question: what was the rationale for the original rule, and why did this apparently rather technical modification of it – along with the other ways the common law found around problem cases – survive for so long?

Fletcher's argument is that the original form of larceny reflected a framework of 'manifest' criminality – the idea that criminal liability should be based on actions manifestly dangerous to the community – and that the subsequent modifications were designed (though with increasing dilution) to retain the law of larceny within that framework:

**George Fletcher 1978 *Rethinking Criminal Law* (2000 reprint, Oxford University Press), pp. 115–20**

The metamorphosis of larceny permits us to abstract two general patterns of criminality that find expression in a variety of crimes in addition to larceny. The common law of larceny up to the time of Blackstone reflected what we may call the pattern of manifest criminality; the modern law of larceny, emerging in the late eighteenth century, stands for a pattern of subjective criminality... The tension between the pattern of manifest criminality and the pattern of subjective criminality is one that pervades a wide field of the criminal law...

The critical feature of [the manifest] pattern of liability is that the commission of the crime be objectively discernible at the time that it occurs. The assumption is that a neutral third-party observer could recognize the activity as criminal even if he had no special knowledge about the offender's intention...

Two important features of crimes follow from this distinguishing mark of manifest criminality. First there is a sense in which the crime itself crystallizes as the product of community experience, rather than being imposed on the community by an act of legislative will. The contours of what we perceive to be larceny spring from a shared experience with thieves. It is incorporated in our language as well as our legal judgments... There is no doubt that this way of looking at crime and criminals is foreign to the modern view that the criminal law is imposed on the community by the courts or the legislature...

The second feature born of the principle of manifest criminality is the subsidiary position of intent in the analysis of liability. The issue of non-intent arises primarily as a challenge to the authenticity of appearances, rather than as a basis for inculpating the actor. It is only after the manifestly criminal quality of the act is established that intent can conceivably become an issue. In this way of thinking the required intent is linked conceptually to the commission of certain acts. It is not thought of as some mysterious inner dimension of experience that exists independently from acting in the external world.

The pattern of manifest criminality may be understood as a theory about the appropriate jurisdiction of the criminal courts. The premise is that the courts should stay their hand until the actor manifests discernible danger to the community. Thus the criteria for judicial intervention resemble the ground for the private execution of thieves in ancient legal systems...

The contrasting [subjective] pattern of liability begins with the radically different assumption that the core of criminal conduct is the intention to violate a legally protected interest. A crime in this pattern may presuppose the occurrence of a particular event, such as the 'taking from possession' required by larceny. But this result is often not incriminating, as indicated by the cases of finders and those who receive a chattel by mistaken delivery. The function of the criminal act is to demonstrate the firmness rather than the content of the actor's intent...

This pattern of liability presupposes a notion of intending that treats intent as a dimension of experience totally distinct from external behaviour. Intending is conceived as an event of consciousness, known to the person with the intent but not to others. Thus the relationship of intending to action is dualistic rather than monistic. The intent exists in the realm of the mind, the act in the realm of the body.

This dualistic way of thinking about intent has undergone philosophical criticism in recent years; yet it retains a powerful grip on the way lawyers think about the criminal law. Its power derives in part from its dovetailing with an appealing theory of criminality. The criminal law should begin, this theory holds, by identifying interests that are worthy of protection. The next step should be preventing conduct that threatens those interests. The reasons that humans sometimes threaten those interests is either that they intend to do so or that they take risks that subject the protected interests to danger. Therefore the purpose of the criminal law should be to prevent people from embarking on courses of behaviour that threaten these worthy interests... The only reason we require that offenders act on their intention is to make sure that the intention is firm and not merely fantasy...

... These two patterns of liability - the manifest and the subjective - interweave in contemporary thinking about criminal law. Yet they remain camouflaged by a common stock of legal maxims that create an image of unity in criminal theory. It is generally said that criminal liability presupposes (1) an act, (2) an intent, (3) a union of act and intent. In addition, it might be asserted that (4) danger to the community, and (5) an intrusion upon the public sphere are general features of criminal conduct. Though the requirement of these elements is nominally common to both patterns of criminality, the concepts of act, intention, union, danger and public sphere acquire different meanings and significance, as they are interpreted in one pattern of liability or the other.

Fletcher's account denies that the common law of larceny was merely chaotic and beset by procedural technicalities. His argument allows us to perceive criteria of order and coherence which related to the specific social conditions of the time. Essentially, Fletcher diagnoses in the early common law of larceny a throwback to early conceptions of *furtum manifestum* from Roman law, under which manifest theft – catching a thief red-handed, as it were – entailed the immediate right of justified killing on the part of the discoverer. This contrasted sharply with non-manifest theft, which was treated as a matter pertaining to compensation. Fletcher suggests that the doctrine of possessorial immunity in common law was doing much the same thing: it was identifying the line between those relationships which were properly within the ambit of the criminal as opposed to the civil courts. Domestic servants' appropriations were not criminal, unless manifest, even after the *Carrier's Case*, because they took place within the ambit of ongoing relationships which provided a framework of social control in relation to property: it was up to a master to see that his servants did not misappropriate his property. Commercial relationships between strangers, by contrast, were gradually moved into the public sphere and regulated by criminal as well as civil law.

What Fletcher identifies here is therefore a particular conception of the nature of the private and of the proper line to be drawn between criminal and civil law. The assumption of the pattern of manifest criminality is that criminal law should not intervene until there is an unequivocal manifestation of danger to the community. This gradually gave way to a subjective pattern, in which the essence of crime was individual intent or responsibility. Fletcher does not elaborate any general explanation of the shift from the manifest pattern to a subjective pattern, but it seems plausible that this had to do with changing conceptions of the nature of human agency, and of the relationship between the individual and the state. In the relatively static social order of the early common law, the idea of crime as something immediately identifiable as threatening to community interests made sense. But as society became more fragmented, the criminal law more extensive, and criminal law's functions more diverse, the emerging conception of individual, subjective responsibility began to replace the increasingly untenable conception of crime as manifest, generally identifiable wrongdoing (cf Farmer 1996, quoted in Chapter 1).

Within the framework of manifest criminality, '*animus furandi*' does not operate to underpin the need for social protection or to justify the ascription of culpability, as intent or '*mens rea*' within a subjective framework would. Rather, in so far as '*states of mind*' are relevant to manifest criminality, they function merely as evidence, bolstering the interpretation of an equivocally criminal act as indeed criminal (see Lacey 2001b). Unlike the modern, dualistic analysis, the pattern of manifest criminality engaged in an integrated reading of an action as one which could be recognised by any observer as a crime. Hence '*animus furandi*' spoke to the perceived limits of criminal law and the nature of crime. By contrast, in the emerging subjective pattern, the intent of the offender to



violate a legally established and socially recognised interest is the foundation for the attribution of liability, and this brings with it a focus on the conceptual distinction between 'mens rea' and 'actus reus', an elaboration of excuses, and a movement towards inchoate offences such as attempt. In the specific area of property law, it entails the gradual blurring of the boundaries between the later offences of embezzlement and false pretences and the original conception of larceny – a blurring which was already evident in the Larceny Act 1916, and which, as we shall see, reaches its zenith in the Theft Act 1968. We shall now move on to consider the modern law of theft and to examine the ways in which it replays the technical problems identified by Fletcher and, in doing so, echoes conceptions of criminality often regarded as having been transcended by modern, subjectivist criminal law doctrine.

#### IV.12.a.ii. Contemporary conceptions of theft: ordinary language through the looking glass...

Although the common law of theft was subjected to a significant degree of rationalisation in 1916, the Larceny Act of that year still encompassed a wide range of different offences. Following a consideration of the area by the Criminal Law Revision Committee, the passage of the Theft Act 1968 represented an attempt to engage in a systematic codification of theft. This project of codification was informed by rule of law values such as clarity, comprehensiveness, coherence and consistency, and in particular by the idea that the criminal law should be accessible to the citizen and that its technicality should be reduced. In pursuit of these goals, the drafters of the Theft Act 1968 aspired to frame it in 'ordinary language'. This aspiration had two aspects: that the definition of theft should capture common-sense conceptions of stealing and that the Theft Act should be comprehensible to citizens without legal training.

Theft therefore provides an occasion to consider both the practice of statutory interpretation and the extent to which ideals of codification are capable of being realised. It is interesting in particular to assess the extent to which the law of theft reflects ordinary conceptions of stealing and remains relatively 'untechnical' after 35 years of judicial interpretation.

#### Theft Act 1968

##### Section 1

1. A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and 'thief' and 'steal' shall be construed accordingly.
2. It is immaterial whether the appropriation is made with a view to gain, or is made for the thief's own benefit.



This one basic definition is to be applied to the whole gamut of stealing, from one-off and opportunistic shoplifting through pocket-picking and small-scale workplace theft to systematic, 'professional' or organised thefts of large values of goods or money. The important task of distinguishing between the relative seriousness of thefts is deferred to magistrates' and judges' sentencing function, in which they have a broad discretion. Theft is triable either way, and the maximum penalty on trial on indictment is seven years' imprisonment.

Despite its grounding in the philosophy of 'ordinary language' whose meaning should be accessible to the layperson, the Act further defines the terms of the basic definition, and does so in ways which often stretch the meanings of the original words far beyond what any layperson could be expected to anticipate. Several features of this extended definition and of the courts' interpretations of it call for special comment. The statutory definition reflects very clearly the 'actus reus/mens rea' dualism typical of the subjective pattern of liability. We may therefore begin by considering the 'mens rea' requirement – a dishonest intention permanently to deprive.

### Theft Act 1968

#### Section 2 Dishonesty

- (1) A person's appropriation of property belonging to another is not to be regarded as dishonest—
  - (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or
  - (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or
  - (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.
- (2) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.

The framing of theft in the moralistic terms of 'dishonesty' is interesting, particularly given the absence of such 'loaded' terms from legislation dealing with what might be thought to be more serious crimes (e.g. aggravated criminal damage under s. 1(2) of the Criminal Damage Act 1971: see 12.e. below). Dishonesty is an idea about which there is incomplete social consensus. Yet section 2 of the Act offers only a partial definition. After some prevarication, the higher courts have now effectively delegated the task of further interpretation and application to the fact-finding bodies, that is to magistrates and juries:

***R v. Ghosh* [1982] 2 All ER 689, CA**

[The appellant had been charged with several offences of attempting to obtain and obtaining money by deception by falsely representing that he had carried out abortion operations which had in fact been carried out by someone else or under NHS provisions. His defence was to deny dishonesty and deception on the basis that the sums paid were legitimately payable under the regulations. Lord Lane, delivering the judgment of the court, engaged in a lengthy analysis of the case law on dishonesty from a variety of fields and concluded:]

In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest.

In this passage, Lord Lane simultaneously affirms the central doctrinal value of 'subjectivity' in 'mens rea' whilst appealing to an assumed social consensus about dishonesty. He also underlines with an example a particular view of behaviour which should not be accounted honest, because it is asserted that it is not morally justifiable. Both the concept of dishonesty and the institution of jury are being asked to do considerable work here. The founding of dishonesty in what 'ordinary people' think may well facilitate the differential treatment of certain classes of defendant, such as the white collar defendant whose actions are seen as only 'marginally' dishonest, or the defendant whose conduct has coincided with a 'moral panic' about a particular form of property crime (these two categories occasionally overlap, as illustrated by the extract from Halpin below). Furthermore, the approach assumes that it is appropriate for magistrates and juries to make 'at large' moral judgments under the guise of applying determinate legal standards. But it is easy to think of examples which many 'ordinary people' might not see as lending themselves to assessment in terms of honesty or dishonesty. The anti-vivisectionists seem a good example here, as does the neighbour who refuses to allow the retrieval of a ball which has landed in her garden. Do these situations really fall squarely within some unproblematic social conception of honesty versus dishonesty which a jury may

easily apply? While it might be possible to agree that the conduct of the animal activists is anti-authoritarian, or the response of the neighbour uncharitable, it seems odd to ask whether they are dishonest. These problems, as well as the way in which the judiciary is nonetheless able to shape the construction of dishonesty by means of its directions to the jury and through appellate cases, are identified by Halpin in relation to cases of city fraud:

Andrew Halpin, 'The Test for Dishonesty' (1996) *Criminal Law Review* pp. 386-41

The appeal of the *Ghosh* test is precisely that it appears to strike an effective compromise. Upon further examination, however, we find within it not a stable compromise but a continuing tension between the subjective and objective approaches, concealed by the great assumption of the *Ghosh* test that there exists a set of ordinary standards of dishonesty...

Although the *Ghosh* test firmly places the issue of dishonesty in the hands of the jury, juries have to be directed, and judges' directions come to be scrutinised by appellate courts. The course that the test has taken in appeal cases provides some insight into its practice. It also demonstrates that the test has undergone significant modification.

... Notwithstanding the technical authority of *Ghosh*, the courts have taken a hard line by holding particular circumstances to amount to absolute dishonesty, thus permitting 'objective' standards to be imposed by the courts... The implications are twofold. First, the subjective element, which could operate in the *Ghosh* test at least partially to resolve the uncertainties over dishonesty in the defendant's favour, can be excluded in a case of obvious dishonesty. Secondly, the clash of different standards of dishonesty may reappear in determining what is a case of obvious dishonesty.

Ernest Saunders allowed several million pounds of the assets of Guinness to be used for an illegal share support scheme without standing to gain a penny for himself. Thomas Ward accepted several million pounds of the assets of Guinness for himself in contravention of the company's articles of association. Why was Saunders convicted of theft and Ward acquitted? In both cases the guilt of the defendant turned on dishonesty.

The £5.2 million success fee paid on the takeover of Distillers to Ward, an American corporate lawyer, had been agreed by a committee of Guinness directors (one of them Ward himself) rather than by the full board as the company articles required. On this basis summary judgment for the return of the money to Guinness was upheld by the House of Lords, where Lord Templeman criticised Ward's conduct in allowing personal interests to conflict with his duties as a director.

In these circumstances, it might have been anticipated that dishonesty would be established at the criminal trial, but Ward was acquitted. It is impossible to know what influenced the jurors, but one part of the evidence may have proved crucial. In describing the negotiation and size of his success fee, Ward informed the court that it was agreed in the manner in which he was used to operating in America. It is quite possible that this convinced the jury of Ward's honesty - honest by the standards of ordinary American corporate lawyers...



Saunders was convicted of theft of the money used for the illegal share support scheme. Comments made by the trial judge, subsequently approved by Neill LJ, in the first failed appeal to the Court of Appeal, indicate that Saunders had made no personal gain, and had behaved properly and honestly until he had 'got sucked into dishonesty by the ethos of the bitterly fought contested takeover'.

The clear implication is that the dishonesty of Saunders consisted solely in the fact that he was involved in breaching section 15 of the Companies Act 1985, even though perhaps not dishonest by the standards of ordinary company directors. The convicted Guinness defendants were widely reported in the media at the time as expressing astonishment that their practices should be regarded as dishonest. And one of the grounds of the second appeal was that evidence of similar practices in the City, which had been withheld by the prosecution, substantiated this viewpoint.

The Court of Appeal accepted that the material should have been disclosed but nevertheless upheld the convictions, since there was 'ample evidence of a dishonest scheme'. Although the Court elaborated on the 'scheme' as involving not merely a breach of section 151 but also indemnities, false invoices and huge success fees, the impact of the two failed Guinness appeals is to establish the possibility of constructive liability [i.e. liability which is assumed, as a matter of law, on the basis of certain facts] for theft whereby the infringement of company (or other) regulations may lead to a holding of 'obvious dishonesty'.

The idea of obvious dishonesty can relate to the *Ghosh* test in two ways. In the first case the full rigour of the test is not required because there exists a moral consensus in society over the conduct in question, such that even the rogue is aware that he is acting dishonestly. This does not operate as a qualification on the *Ghosh* test itself, but rather on the procedure for applying the test: there is no need to apply the second limb in asking whether the defendant was aware that his conduct would be regarded as dishonest, since it is a foregone conclusion that he was.

In the second case, the test is modified. It is assumed as a matter of law that there exists a consensus. So, for example we assume that all reasonable honest people would consider Robin Hood's conduct as being dishonest (and that all unreasonable dishonest people would realise this). The crucial distinction consists in the fact that we have moved to a purely objective test. The defendant is now precluded from asserting that he himself thought that his behaviour would be regarded as honest even where he did.

Halpin argues that these tensions can be resolved only by reverting to a subjective approach or by enacting a statutory definition of dishonesty. His analysis illustrates a final feature of the test enunciated in *Ghosh*. Particularly when interpreted in the 'constructive' way exemplified by Saunders' case, it does not in substance fit the 'actus reus/mens rea' dualism, for it is as easily seen as inviting the jury to consider the quality of the defendant's action as the state of her mind. Finch and Fafinski's research carried out through video case studies on a website seem to confirm wide variations in evaluations of 'dishonesty' ([www.invenio-research.co.uk/archives/45](http://www.invenio-research.co.uk/archives/45)). As we shall see below, the preservation of a clear line between questions of 'dishonesty' and of 'appropriation'



has in practice caused considerable difficulty in the interpretation of the Theft Act.

### Theft Act 1968

#### Section 6 Intention permanently to deprive

- (1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights: and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.
- (2) Without prejudice to the generality of subsection (1) above, where a person, having possession or control (lawfully or not) of property belonging to another, parts with property under a condition as to its return which he may not be able to perform, this (if done for purposes of his own and without the other's authority) amounts to treating the property as his own to dispose of regardless of the other's rights.

This extended definition of 'intention permanently to deprive' is a vivid illustration of the double-think underlying 'ordinary language legislation'. Under the terms of section 6, 'intention permanently to deprive' appears to encompass both recklessness and certain forms of temporary deprivation. Subsection (1) provides that someone who does not mean the other permanently to lose the thing itself has nevertheless such an intention if she intends 'to treat the thing as [her] own to dispose of regardless of the other's rights'. A specific example is given: that of borrowing or lending in circumstances in which this is 'equivalent to an outright taking or disposal'. This might seem obvious and reasonable in the case of property such as a ticket which loses its value after a certain time, but marginal cases can easily be imagined. How are we to categorise the person who hides someone else's property believing there is a less than 50 per cent chance she will find it? Would it make a difference if she assessed the chances as 70 per cent? This extended definition of 'mens rea' is in part an attempt to side-step the difficult issue of just what 'property' is being appropriated in such cases. For example, the courts have decided that there is no intention permanently to deprive under section 6 where someone 'borrows', say, a season ticket and returns it before the end of the season; where some value remains there has been no 'equivalence to an outright taking or disposal' (Lloyd, 1985; Arnold, 1997). If the ticket is returned after the end of the season, however, this may constitute a theft. In such a case, what, precisely, is stolen? What the defendant intends to deprive the other of is not the ticket but its value; yet it is not at all apparent either that this can naturally said to be what is 'appropriated' or that the 'value' or 'rights of an owner' which are appropriated come within the definition of 'property' given by section 4. Another example is where the property is taken in order that it can then be offered back to its rightful owner.

In *Raphael* (2008) the defendants had first driven off with V's car, then offered to sell it back to him in a worse condition than when it was taken. The President of the Queen's Bench Division explained the background to section 6 thus:

43. Although the problem to which this argument gives rise is identified in the current edition of Smith and Hogan, Criminal Law 11th edition, as a 'conditional intention to deprive', the essential principles are long established. The common law is exemplified by *Hall* [1848] 1 Den 381. Hall took fat from a candle maker, and then offered to sell it back to the original owner. His conviction for larceny was upheld.

44. The decision in these appeals is governed by section 6(1) of the Theft Act 1968. This provides:

'A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights: . . .'

45. Despite the 'obscurities' with which J. R. Spencer suggested that section 6 of the Theft Act 'sprouted' [1977] CLR 653, the section itself demonstrates that the necessary intention may sometimes be established when the person appropriating property belonging to another does not in fact intend that its true owner should be deprived of it permanently. It is properly described as a deeming provision. As Lord Lane CJ observed in *Lloyd* [1985] 1 QB 829

'... It must mean, if nothing else, that there are circumstances in which a defendant may be deemed to have the intention permanently to deprive, even though he may intend the owner eventually to get back the object which has been taken.'

46. Initially section 6(1) was narrowly construed. In effect the principles which existed before the 1968 Act came into force continued to apply. (*Warner* [1970] 55 CAR 93 followed in *Lloyd*). We ourselves doubt whether the statutory framework created by the Theft Act 1968 should always be restrictively interpreted by reference to the law as it stood before it was enacted. Authorities such as *Duru* [1971] 1 WLR 2, *Bagshaw* [1988] Crim LR 321 and *Fernandez* [1996] 1 CAR 175 suggest the contrary. However the facts of this particular case fall within the most restrictive possible interpretation. As Lord Lane explained in *Lloyd* at p 836

'... The first part of section 6(1) seems to us to be aimed at the sort of case where a defendant takes things and then offers them back to the owner for the owner to buy if he wishes. If the taker intends to return them to the owner only upon such payment, then, on the wording of section 6(1) that is deemed to amount to the necessary intention permanently to deprive . . .'

He continued that there were other cases of 'similar intent': for instance, 'I have taken your valuable painting. You can have it back on payment to me of £X000. If you are not prepared to make that payment, then you are not going to get your painting back.'

47. The express language of section 6 specifies that the subjective element necessary to establish the mens rea for theft includes an intention on the part of the taker 'to treat the thing as his own to dispose of regardless of the other's rights'. In our judgment it is hard to find a better example of such an intention than an offer, not to return Adeosun's car to him in exactly the same condition it was when it was removed from his possession and control, but to sell his own property back to him, and to make its return subject to a condition or conditions inconsistent with his right to possession of his own property.

48. This is not a case in which the vehicle was taken for what is sometimes inaccurately described as a 'joy ride'. Section 12 of the Theft Act has no application to it. It was only 'abandoned' after the purpose of the robbery had been frustrated and its possible usefulness to the robbers dissipated. Equally the appropriation of the car was not conditional in the sense described in *Easom* [1971] 55 CAR 410 where it was held that theft was not established if the intention of the appropriator of the property was 'merely to deprive the owner of such of his property as, on examination, proves worth taking and then, on finding that the booty is to him valueless, leaves it ready at hand to be re-possessioned by the owner'.

Further issues arise in relation to section 6(2). This subsection includes within the definition of 'intention permanently to deprive' the attitude of someone who parts with property under a condition with which she may not be able to comply wherever this amounts to 'treating the property as [her] own to dispose of regardless of the other's rights'. This provision appears to allow for theft by recklessness – for example where one pawns something knowing that there is a chance that one will not be able to redeem it. Yet the provision simultaneously allows the surface of the law to proclaim the need for 'specific intent', and thus to reflect what is perceived as the 'ordinary' person's conception of theft. The strategy also suppresses the question of whether such recklessness should be interpreted 'subjectively' or 'objectively'. While the definition of theft in terms of 'intent' suggests a 'subjective' test, the framing of section 6(2) moves in a significantly 'objective' direction. Indeed, it does so to the extent of imposing 'constructive' liability similar to that identified by Halpin in relation to dishonesty. In other words, it states that parting with property in the given circumstances 'shall be regarded' as an intention permanently to deprive. This approach of taking 'mens rea' as proven by the existence of an external situation is fundamentally at odds with the ideology of modern criminal law doctrine, and is one of the practices which the modern law claims generally to avoid. The 'mens rea' requirement for theft therefore constitutes a good example of criminal law proclaiming strict safeguards for the defendant whilst in fact introducing broad, uncertain and potentially objective standards.

Similar points can be made about the elaborated definition of the 'actus reus' of theft.



## Theft Act 1968

### Section 3 Appropriation

- (1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.
- (2) Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by him of rights which he believed himself to be acquiring shall, by reason of any defect in the transferor's title, amount to theft of the property.

The use of the concept of 'appropriation' was intended to broaden the notion of 'taking' so as to be able to encompass a wider range of situations and objects. But the statutory definition in terms of 'any assumption... of the rights of an owner', including later assumptions of rights after an initially non-theftuous acquisition (although excluding the purchaser in good faith), threatens to take on such a wide meaning as effectively to undermine its status as a genuine requirement of or restriction on the definition of theft. Given that an assumption of any of the rights of the owner suffices (*Morris*, 1983), a broad reading could support the view that any dealing with goods accompanied by the requisite 'mens rea' already constitutes theft. On this view, the dishonest shopper who has placed some food in her supermarket trolley intending to hide it at the checkout to avoid paying has already stolen – a view which raises the question of what could possibly constitute attempted theft. On a narrower reading, by contrast, an assumption of the owner's rights would only count as an appropriation where it was inherently adverse to those rights; this would exclude the action of placing food in a supermarket trolley. The competition between these two, broader and narrower, approaches to appropriation is of particular interest because it evokes some of the difficulties arising within the common law about the relationship between larceny, embezzlement and false pretences. On the narrow view, the modern notion of theft as appropriation seeks to preserve a notion of stealing as distinct from deception, embezzlement or false pretences.

The appellate courts have see-sawed between the broad and narrow approaches. The broad approach first appeared in the case of *Lawrence v. Cmr of Police for the Metropolis* (1971). The facts as set out in the speech of Viscount Dilhorne, were these:

...the appellant was convicted on 2nd December 1969 of theft contrary to s.1(l) of the Theft Act 1968. On 1st September 1969 a Mr. Occhi, an Italian who spoke little English, arrived at Victoria Station on his first visit to this country. He went up to a taxi driver, the appellant, and showed him a piece of paper on which an address in Ladbroke Grove was written. The appellant said that it was very far and very expensive. Mr. Occhi got into the



taxi, took £1 out of his wallet and gave it to the appellant who then, the wallet being still open, took a further £6 out of it. He then drove Mr. Occhi to Ladbroke Grove. The correct lawful fare for the journey was in the region of 10s.6d. The appellant was charged and convicted of the theft of the £6.

The conviction was upheld by the Court of Appeal, Criminal Division, and again by the House of Lords which had certified the following questions as involving a point of law of general public importance:

- (1) Whether Section 1(1) of the Theft Act, 1968, is to be construed as though it contained the words 'without the consent of the owner' or words to that effect.
- (2) Whether the provisions of Section 15(1) and Section 1(1) of the Theft Act 1968 are mutually exclusive in the sense that if the facts proved would justify a conviction under Section 15(1) there cannot lawfully be a conviction under Section 1(1) on those facts.

Viscount Dilhorne, whose speech was concurred in by Lord Donovan, Lord Pearson, Lord Diplock and Lord Cross of Chelsea, expressed some doubts as to what Mr Occhi had meant when he said that he 'permitted' the taxi driver to take the £6, and then continued:

The main contention of the appellant... was that Mr. Occhi had consented to the taking of the £6 and that, consequently, his conviction could not stand. In my opinion, the facts of this case to which I have referred fall far short of establishing that Mr. Occhi had so consented. Prior to the passage of the Theft Act 1968... it was necessary to prove that the property alleged to have been stolen was taken 'without the consent of the owner' (Larceny Act 1916 s1(l)). These words are not included in s. 1(1) of the Theft Act 1968, but the appellant contended that the subsection should be construed as if they... appeared after the word 'appropriates'... I see no ground for concluding that the omission of the words 'without the consent of the owner' was inadvertent and not deliberate, and to read the subsection as it they were included is, in my opinion, wholly unwarranted. Parliament by the omission of these words has relieved the prosecution of the burden of establishing that the taking was without the owner's consent. That is no longer an ingredient of the offence... Belief or the absence of belief that the owner had with [full knowledge of the circumstances] consented to the appropriation is relevant to the issue of dishonesty, not to the question of whether or not there has been an appropriation...

But the narrow view was asserted a decade later.

*R v. Morris, Anderton v. Burnside* [1983] 3 All ER 288

[The defendants in this case had dishonestly switched the price tags of goods and put the goods bearing the lower price into a supermarket trolley. These circumstances raised neatly

the issue of just when an appropriation had taken place, especially given that Burnside, unlike Morris, had been arrested before he had paid the lower price. Lord Roskill adopted a narrowed conception of appropriation which sought to avoid the absurdities of a literal reading of the Act:]

My Lords, counsel for the prosecution sought to argue that any removal from the shelves of the supermarket, even if unaccompanied by label-switching, was without more an appropriation. In one passage in his judgment in Morris's case, Lord Lane CJ appears to have accepted the submission, for he said:

'... It seems to us that in taking the article from the shelf the customer is indeed assuming one of the rights of the owner, the right to move the article from its position on the shelf to carry it to the check-out ...'

With the utmost respect, I cannot accept this statement as correct. If one postulates an honest customer taking goods from a shelf to put in his or her trolley to take to the check-point there to pay the proper price, I am unable to see that any of these actions involves any assumption by the shopper of the rights of the supermarket. In the context of s. 3(1), the concept of appropriation in my view involves not an act expressly or impliedly authorised by the owner but an act by way of adverse interference with or usurpation of those rights. When the honest shopper acts as I have just described, he or she is acting with the implied authority of the owner of the supermarket to take the goods from the shelf, put them in the trolley, take them to the check-point and there to pay the correct price, at which moment the property in the goods will pass to the shopper for the first time. It is with the consent of the owners of the supermarket, be that consent express or implied, that the shopper does these acts and thus obtained at least control if not actual possession of the goods preparatory, at a later stage, to obtaining property in them on payment of the proper amount at the check-point. I do not think that s. 3(1) envisages any such act as an 'appropriation', whatever may be the meaning of that word in other fields such as contract or sale of goods law.

However, in 1993, the House of Lords reverted to the broad view of appropriation taken in *Lawrence v. MPC* (1971):

### ***R v. Gomez* [1993] 1 All ER at 1**

The respondent, who was employed as the assistant manager of an electrical goods shop, was approached by B, who asked to be supplied with quantities of electrical goods from the shop in exchange for two stolen building society cheques which were worthless. The respondent agreed and asked the shop manager to authorise the supply of the goods against the cheques. The manager told him to find out from the bank whether the cheques were acceptable and the respondent later pretended to have done so and told him that the cheques were 'as good as cash'. The cheques were then used for the purchase of goods to the value of over £16,000 and were later dishonoured on presentation. The respondent

was jointly charged with B and another with theft. At his trial, it was submitted that there was no case to answer, on the ground that the electrical goods were sold to B pursuant to a contract of sale between B and the shop (the owner of the goods) and although it was conceded that the contract had been induced by the fraudulent misrepresentation of the respondent and that the manager would not have agreed to the removal of the goods had he known the truth, the manager had expressly authorised the goods to be removed and therefore there had been no 'appropriation' within s. 1(1) of the Theft Act 1968. The judge rejected that submission and the respondent then pleaded guilty. He appealed on the grounds that the judge's ruling was wrong. The Court of Appeal held that there had been no appropriation and accordingly it allowed the respondent's appeal and quashed his conviction. The Crown appealed to the House of Lords.

The House of Lords (Lord Lowry dissenting) held that an appropriation could exist:

if the owner of the goods was induced by fraud, deception or a false representation to consent to or authorise the taking of the goods, since it was the actual taking of the goods, whether with or without the consent of the owner, in circumstances where it was intended to assume the rights of the owner that amounted to the 'appropriation' and the fraud, deception or false representation practised on the owner made the appropriation dishonest. It was irrelevant that the taking of goods in such circumstances could also constitute the offence of obtaining property by deception under s. 15(1) of the 1968 Act.

The respondent's conviction was accordingly restored.

#### Lord Keith, p. 4

The court [of Appeal] granted a certificate under s. 33(2) of the Criminal Appeal Act 1968 that a point of law of general public importance was involved in the decision, namely:

'When theft is alleged and that which is alleged to be stolen passes to the defendant with the consent of the owner, but that consent has been obtained by a false representation, has (a) an appropriation within the meaning of s. 1(1) of the Theft Act 1968 taken place, or, (b) must such a passing of property necessarily involve an element of adverse "interference" with or usurpation of some right of the owner?' ...

[pp. 5-6] In the civil case of *Dobson v General Accident Fire and Life Insurance Corp plc* (1989) ... [the Court of Appeal] considered the apparent conflict between Lawrence's case and *R v Morris* and applied the former decision. The facts were that the plaintiff had insured property with the defendant company against, inter alia, 'loss or damage caused by theft'. He advertised for sale a watch and ring at the total price of £5,950. A rogue telephoned expressing an interest in buying the articles and the plaintiff provisionally agreed with him that the payment would be by a building society cheque in the plaintiff's favour. The rogue called on the plaintiff the next day and the watch and ring were handed over to him in

exchange for a building society cheque for the agreed amount. The plaintiff paid the cheque into his bank, which informed him that it was stolen and worthless. The defendant company denied liability under its policy of insurance on the ground that the loss of the watch and ring was not caused by theft within the meaning of the 1968 Act. . . . One of the arguments for the defendants was that there had been no theft because the plaintiff had agreed to the transaction with the rogue and reliance was placed on Lord Roskill's statement in *R v. Morris* that appropriation 'involves not an act expressly or impliedly authorised by the owner but an act by way of adverse interference with or usurpation of those rights'.

[Having noted Parker LJ's rejection of Lord Roskill's assertion that the House of Lords in *Lawrence* had not considered the precise meaning of 'appropriation', Lord Keith went on to quote further aspects of his critique of *Morris* from the judgment in *Dobson*:]

What then is it which would make label-switching alone something which adversely affects or usurps the right of the owner? [I]t appears to be envisaged that it will depend on the question whether the label-switching was dishonest and coupled with the other elements of the offence of theft or was due to a perverted sense of humour. This, however appears to run together the elements of dishonesty and appropriation when it is clear from *Lawrence's* case that they are separate. That the two elements were indeed, at any rate to some extent, run together is plain from the fact that the answer to the certified question begins with the words 'there is a dishonest appropriation'. Moreover, on general principles, it would in my judgement be plain interference with or usurpation of an owner's rights by the customer if he were to remove a label which the owner had placed on goods or put another label on. It would be a trespass to goods and it would be usurping the owner's rights, for only he would have any right to do such an act and no one could contend that there was any implied consent or authority to a customer to do any such thing. There would thus be an appropriation. In the case of the customer with a perverted sense of humour there would however be no theft for there would probably be no dishonesty and certainly no intent permanently to deprive the owner of the goods themselves. The case of the customer who simply removes goods from the shelves is of course different because the basis on which a supermarket is run is that customers certainly have the consent of the owner to take goods from the shelves and take them to the checkout point, there to pay the proper price for them. Suppose, however, that there were no such consent in, for example, a shop where goods on display were to be taken from the shelves only by the attendant. In such a case a customer who took from the shelves would clearly be usurping the right of the owner. Indeed he would be doing so if he did no more than move an item from one place on a shelf to another. The only difference appears to be that in the one case there is consent and in the other there is not. Since, however, it was held in *Lawrence's* case that consent is not relevant to appropriation there must, one would have supposed, be no difference between the two cases on that aspect of the offence. There are further matters in *R v Morris* in which I find difficulty. I mention only two. The first is the observation made on *R v McPherson* (1973). That was a case in which the defendant took two bottles of whisky from the shelves and put them in her shopping bag. The sole question in issue was whether there had been an appropriation. It was held in the Court of Appeal that there had been. As to this Lord



Roskill said (p. 294): 'That was not, of course, a label-switching case, but it is a plain case of appropriation effected by the combination of the acts of removing the goods from the shelf and of concealing them in the shopping bag...' Reference to the transcript of the judgment in that case however reveals that the decision did not turn on concealment in the shopping bag but was expressly on the ground that the goods were appropriated when they were taken from the shelves... After anxious consideration I have reached the conclusion that whatever *R v. Morris* did decide it cannot be regarded as having overruled the very plain decision in *Lawrence's* case that appropriation can occur even if the owner consents and that *R v. Morris* itself makes it plain that it is no defence to say that the property passed under a voidable contract.

On this ground Parker LJ dismissed the appeal...

It was argued for the respondent in the present appeal that *Dobson's* case was wrongly decided. I disagree, and on the contrary find myself in full agreement with those parts of the judgment of Parker LJ to which I have referred... The actual decision in *R v. Morris* was correct, but it was erroneous, in addition to being unnecessary for the decision to indicate that an act expressly or impliedly authorised by the owner could never amount to an appropriation. There is no material distinction between the facts in *Dobson's* case and those in the present case. In each case the owner of the goods was induced by fraud to part with them to the rogue. *Lawrence's* case makes it clear that consent to or authorisation by the owner of the taking by the rogue is irrelevant. The taking amounted to an appropriation within the meaning of s. 1(1) of the 1968 Act. *Lawrence's* case also makes it clear that it is no less irrelevant that what happened may also have constituted the offence of obtaining property by deception under s. 15(1) of the 1968 Act...

My Lords, for the reasons which I have given I would answer branch (a) of the certified question in the affirmative and branch (b) in the negative, and allow the appeal.

*Gomez* therefore firmly endorsed the broad view of appropriation (see also *Atakpu* (1993)). Yet the decision left several important issues unresolved. In the first place, the line between 'appropriation' and 'dishonesty' remained blurred. Though Lord Keith's analysis envisaged that an appropriation might take place even in the absence of any fraud which casts doubt on the reality of the owner's consent – arguing that such fraud relates to dishonesty rather than appropriation – the certified question was framed narrowly. Hence the decision in the case might be read strictly, as covering only cases in which some form of fraud is involved. In view of these factors, and of Lord Lowry's strongly argued dissent, it was therefore not surprising that the issue of appropriation found its way to the House of Lords once again relatively quickly, and this time in a form which forced the judges to confront the ambiguities left in place by *Gomez*.

In *Hinks*, the defendant had received property and large transfers of money from a vulnerable low-IQ man who was more or less in her care. She had been convicted of theft and her appeal to the Court of Appeal was dismissed. On appeal to the House of Lords, the certified question was whether an appropriation could take place notwithstanding the fact that a valid gift had taken place

and that, hence, Hinks had acquired an 'indefeasible title to the property'. The House of Lords decided by a majority of 3 to 2 that on the basis of *Lawrence* and *Gomez* appropriation could indeed take place under such circumstances. The question of whether the gift was void or voidable due to undue influence or coercion was irrelevant to appropriation under the Theft Act: these factors were, as the trial judge had directed, merely questions relevant to dishonesty. While recognising the criticism that this interpretation stretches the offence of theft considerably, Lord Steyn, with whom Lords Slynn and Jauncey concurred, argued that prosecution discretion and the contours of dishonesty under section 2 would be adequate to keep the law of theft in reasonable bounds:

***R v. Hinks* [2000] 4 All ER 833 at 841, 843-4**

**Lord Steyn:** [After quoting from Lord Browne-Wilkinson's speech in *Gomez*] [I]t is immaterial whether the act was done with the owner's consent or authority. It is true of course that the certified question in *R v. Gomez* referred to the situation where consent had been obtained by fraud. But the majority judgments do not differentiate between cases of consent induced by fraud and consent given in any other circumstances. The ratio involves a proposition of general application. *R v. Gomez* therefore gives effect to s. 3(1) of the 1968 Act by treating 'appropriation' as a neutral word comprehending 'any assumption by a person of the rights of an owner'. If the law is as held in *R v. Gomez*, it destroys the argument advanced on the present appeal, namely that an indefeasible gift of property cannot amount to an appropriation.

Counsel for the appellant . . . pointed out that the law as stated in *Lawrence's* case and in *R v. Gomez* creates a tension between the civil and the criminal law. In other words, conduct which is not wrongful in a civil law sense may constitute the crime of theft. Undoubtedly, this is so . . . The question whether the civil claim to a title by a convicted thief, who committed no civil wrong, may be defeated by the principle that nobody may benefit from his own civil or criminal wrong does not arise for decision. Nevertheless there is a more general point, namely that the interaction between criminal law and civil law can cause problems: compare Beatson and Simester (1999) . . . The purposes of the civil law and the criminal law are somewhat different. In theory the two systems should be in perfect harmony. In a practical world there will sometimes be some disharmony between the two systems. In any event, it would be wrong to assume on a priori grounds that the criminal law rather than the civil law is defective. Given the jury's conclusions, one is entitled to observe that the appellant's conduct should constitute theft, the only available charge. The tension between the civil and the criminal law is therefore not in my view a factor which justifies a departure from the law as stated in *Lawrence's* case and *R v. Gomez*. Moreover these decisions of the House have a marked beneficial consequence. While in some contexts of the law of theft a judge cannot avoid explaining civil law concepts to a jury . . . , the decisions of the House of Lords eliminate the need for such explanations in respect of appropriation. That is a great advantage in an overly complex corner of the law. My Lords, if it had been demonstrated that in practice *Lawrence's* case and *R v. Gomez* were calculated to produce injustice that

would have been a compelling reason to revisit the merits of the holdings in those decisions. That is however not the case. In practice the mental requirements of theft are an adequate protection against injustice. In these circumstances I would not be willing to depart from the clear decisions of the House in *Lawrence's* case and *R v. Gomez*. This brings me back to counsel's principal submission, namely that a person does not appropriate property unless the other (the owner) retains, beyond the instant of the alleged theft, some proprietary interest or the right to resume or recover some proprietary interest. This submission is directly contrary to the holdings in *Lawrence's* case and in *R v. Gomez*. It must be rejected. The alternative submission is that the word 'appropriates' should be interpreted as if the word 'unlawfully' preceded it so that only an act which is unlawful under the general law can be an appropriation. This submission is an invitation to interpolate a word in the carefully crafted language of the 1968 Act. It runs counter to the decisions in *Lawrence's* case and in *R v. Gomez* and must also be rejected. It follows that the certified question must be answered in the affirmative.

Does this broad conception of appropriation leave that concept any distinct role in defining and hence limiting the scope of theft? Or does it collapse theft back onto dishonesty, hence conflating 'actus reus' and 'mens rea' and implying that more or less any dishonest behaviour around property will satisfy the appropriation condition? Commentators have differed both on these questions and in their attitude to the fact that, on the broad view of appropriation, criminal law conceptions of property rights do not track civil law conceptions (see Beatson and Simester 1999; Shute 2002).<sup>1</sup> By allowing a valid civil law transfer to count as an appropriation, the law now relies on dishonesty to do virtually all the work in drawing the line between theft and lawful behaviour. This, in effect, allows the line between crime and non-crime to depend on the jury's view of the moral status of the offender's behaviour. Quite apart from generating an over-extensive concept of theft, we could ask whether, given areas of social disagreement about the concept of dishonesty, this meets the standards of certainty and predictability which a commitment to human rights would dictate. On the other side of the debate, the actual wording of the Theft Act and the differing social functions of civil and criminal law – securing expectations and providing compensation as opposed to setting standards and imposing punishment – have been cited in support of the *Gomez/Hinks* approach. The difference of opinion is not confined to academic commentaries. In *Morris*, Lord Roskill, like Lord Steyn in *Hinks* and Lord Keith in *Gomez* argued strongly against aligning criminal and civil law questions: 'I respectfully suggest that it is on any view wrong to introduce into this branch of the criminal law questions whether particular contracts are void or voidable on the ground of mistake or fraud or whether any mistake is sufficiently fundamental to vitiate a contract. These difficult questions should so far as possible be confined to those fields of law to which they are immediately relevant, and I do not regard them as relevant questions under the 1968 Act.' But in a passionately argued dissent



in *Hinks*, Lord Hobhouse argued for a narrow reading of *Gomez* and a closer articulation of the civil and criminal law of property – a position also implicit in Lord Hutton's dissenting view that 'it appears contrary to common sense that a person who receives money or property as a gift could be said to act dishonestly no matter how much ordinary and decent people would think it morally reprehensible for that person to accept the gift'.

***R v. Hinks* [2000] 4 All ER 833 at 852-3**

**Lord Hobhouse:** Another aspect of the Court of Appeal's reasoning which also has to be examined is the relationship of that proposition [that a gift may be evidence of appropriation] to the concept of dishonesty. It is explicit in the Court of Appeal judgment that the relevant definition of the crime of theft is to be found in the element of dishonesty and *R v. Ghosh*... and that this is to receive no greater definition than consciously falling below the standards of an ordinary and decent persona and may include anything which such a person would think was morally reprehensible. It may be no more than a moral judgment.

The reasoning of the Court of Appeal therefore depends upon the disturbing acceptance that a criminal conviction and the imposition of custodial sanctions may be based upon conduct which involved no inherent illegality and may only be capable of being criticised on grounds of lack of morality. This approach itself raises fundamental questions. An essential function of the criminal law is to define the boundary between what conduct is criminal and what merely immoral. Both are the subject of the disapprobation of ordinary right-thinking citizens and the distinction is liable to be arbitrary or at least strongly influenced by considerations subjective to the individual members of the tribunal. To treat otherwise lawful conduct as criminal merely because it is open to such disapprobation would be contrary to principle and open to the objection that it fails to achieve the objective and transparent certainty required of the criminal law by the principles basic to human rights.

Three further points arise on the interpretation of appropriation under the Theft Act. First, the continuing difficulty of establishing the line between appropriation and dishonesty undermines the doctrinal assumption, clearly reflected in the structure of the Theft Act, that it is possible completely to define an offence in terms of a number of discrete 'actus reus' and 'mens rea' requirements, and suggests once again that criteria legally proclaimed to be analytically distinct run together in the practical interpretation of cases. In many theft cases, it is the concept of 'dishonesty', delineated by the magistrates or jury, which is the crucial factor in determining liability. Though the centrality of intent to the modern definition of theft places it firmly within Fletcher's subjective pattern, the definition of dishonesty in terms of popular standards echoes the pattern of 'manifest criminality' in which crime is conceived in terms of actions recognised as wrongful by the community.

Second, there is an indeterminacy both in *Morris* and in *Gomez/Hinks* as to just what is being appropriated. For example, on facts such as those in *Morris*,



is it the whole of the property whose label has been switched (as reflected in the framing of actual charges of theft), or the difference in price, or the supermarket's right to fix the price? If it is the last of these, is this property within the definition in section 4, with its reference to 'things in action and other intangible property'?

Third, the cases on appropriation leave the relationship between theft and fraud in a peculiar position. The broad *Gomez/Hinks* view entails that every case of fraud involving the obtaining of property by deception will also be a case of theft. In this context, one wonders about the rationale for having two separate offences. The extent of the overlap also illustrates the degree to which, as Fletcher argues, the modern conception of theft has come to swallow up the distinct ideas of embezzlement and false pretences.

## Theft Act 1968

### Section 4 Property

(1) 'Property' includes money and all other property, real or personal, including things in action and other intangible property.

(2) A person cannot steal land, or things forming part of land and severed from it by him or by his directions, except in the following cases, that it to say –

(a) when he is a trustee or personal representative, or is authorised by power of attorney, or as liquidator of a company or otherwise, to sell or dispose of land belonging to another and he appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in him; or

(b) when he is not in possession of the land and appropriates anything forming part of the land by severing it or causing it to be severed, or after it has been severed; or

(c) when, being in possession of the land under a tenancy, he appropriates the whole or part of any fixture or structure let to be used with the land.

For purposes of this subsection 'land' does not include incorporeal hereditaments; 'tenancy' means a tenancy for years or any less period and includes an agreement for such a tenancy, but a person who after the end of a tenancy remains in possession as statutory tenant or otherwise is to be treated as having possession under the tenancy, and 'let' shall be construed accordingly.

(3) A person who picks mushrooms growing wild on any land, or who picks flowers, fruit or foliage from a plant growing wild on any land, does not (although not in possession of the land) steal what he picks, unless he does it for reward or for sale or other commercial purpose. For purposes of this subsection 'mushroom' includes any fungus, and 'plant' includes any shrub or tree.

(4) Wild creatures, tamed or untamed, shall be regarded as property; but a person cannot steal a wild creature not tamed nor ordinarily kept in captivity, or the carcass of any such creature unless either it has been reduced into possession by or on behalf of another person and possession of it has not since been lost or abandoned, or another person is in course of reducing it into possession.

We have already noted legal uncertainty about just what 'property' is concerned in cases in which the extended definitions of appropriation or intention permanently to deprive are in play. The definition of 'property' under section 4 is itself very wide. Given this breadth, it is perhaps odd to find the continued exclusion, subject to some exceptions, of land from the definition of property, for there is no doubt that some kinds of interference with interests in land could without difficulty be brought within the extended definition of appropriation. This suggests the perceived importance of preserving a popular image of theft as the dishonest taking of goods – a conception which resonates with the old idea of 'taking and carrying away'. Indeed, the genius of the 1968 definition lies in the fact that the basic definition resoundingly echoes a 'common-sense' conception of theft, thus serving to legitimise the law, whilst the extended definitions allow its application to a vast range of situations. Notwithstanding the breadth of section 4, however, it appears to exclude certain forms of intangible phenomena which occupy an important place in contemporary conceptions of property (Firth 1995).

We have seen how the extended definitions of 'intent' and 'appropriation' in the Theft Act 1968 have sought to overcome some of these difficulties. The Computer Misuse Act 1990 (CMA) enacted three offences of unlawfully entering another's computer system with dishonest intent (Wasik 1991) and the Police and Justice Act 2006 added a further offence of making, supplying or obtaining of articles for use in offences contrary to sections 1 or 3 (CMA, s. 3A). The Act was passed following the House of Lords' refusal to extend the law of forgery to cover cases of 'hacking' (*Gold and Schifreen*, 1988). English law has stopped short of recognising confidential information as intangible property within the meaning of the Theft Acts (*Oxford v. Moss* (1979)). The potential complexities which arise from intangible phenomena such as information would be matched by an even larger area of potential uncertainty were it ever to be argued that aspects of what has been called the 'New Property' – welfare rights against the state – should be incorporated as potential subjects for criminal regulation through laws of theft or deception.

## Theft Act 1968

### Section 5 Belonging to another

- (1) Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).
- (2) Where property is subject to a trust, the persons to whom it belongs shall be regarded as including any person having a right to enforce the trust, and an intention to defeat the trust shall be regarded accordingly as an intention to deprive of the property any person having that right.

- (3) Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with the property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.
- (4) Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds.
- (5) Property of a corporation sole shall be regarded as belonging to the corporation notwithstanding a vacancy in the corporation.

The extended definitions reach what is perhaps their furthest point of departure from popular images of theft in section 5's conception of 'belonging to another', which encompasses not only possession, control or practically any other non-equitable proprietary right or interest but also a range of other situations. The section has generated copious case law concerning issues such as whether the obligations envisaged by section 5(3) and (4) to deal in a particular way with or to restore property must be legal or need only be social; exactly when such obligations exist (see, for example *R v. Hall* (1972), *R v. Meech* (1973), *R v. Arnold* (1997)); and the effects of various kinds of mistakes. In allowing for the conviction of someone who takes advantage of another's mistake (as in the case, for example, of overpayment of salary: *A-G's Reference (No. 1 of 1983)* (1983)), section 5(4) in effect creates an offence of theft by omission – again, subtly stretching doctrinal margins. The breadth of the section is illustrated by the fact that it enables the conviction of someone for theft of their own property (where another has possession and control, as in the case of a defendant who takes his car from the garage without having paid for the repairs – *R v. Turner* (No. 2) (1971)). Thus theft law operates with a relative rather than an absolute conception of property (property 'as against him'), and one which, notwithstanding deployment of concepts drawn from company law, contract, trusts and the law of restitution, departs substantially from civil law conceptions. As we have seen, the criminal courts have been reluctant to engage in civil law analysis, and both the Law Commission and the legislature have supported this posture by engaging in piecemeal reform where difficulties have arisen as a result of this separated approach.

Legal regulation of theft, then, illustrates the flexibility of legal definitions even in the context of a modern statute explicitly drafted on the basis of 'ordinary language' philosophy. What is more, the openness of the legal definition of theft, and in particular the scope for magistrates' and juries' interpretations of dishonesty, illustrate once again the potential relevance of competing perspectives, definitions and points of view in the construction of criminal liability.



The existence of competing conceptions of what 'ordinary people' regard as dishonest gives rise to the possibility of applications of the law which discriminate along particular lines – for example in favour of 'white collar' offenders as compared with shoplifters. Similarly, the plausibility of defences such as belief in consent or claim of right will depend to a large extent on technically legally irrelevant criteria affecting the defendant's credibility as a witness and on jury views about the nature of 'real crime'. The combination of a basic definition which reflects popular images of 'real crime' and technical extended definitions which go well beyond it renders the law of theft a flexible and effective tool of social control, and one which is, not surprisingly, widely and selectively used in our society. This combination marks the persisting relevance of both manifest and subjective patterns of liability in modern criminal law. It is worth returning, therefore, to reconsider Fletcher's analysis in the light of our discussion of the contemporary law of theft.

Does the modern law of theft exemplify a consistent expression of the subjective pattern of liability, and what, precisely, explains modern law's development towards the subjective pattern? The problematic cases of larceny which Fletcher discusses – mistaken delivery, appropriation by a possessor – are explicitly covered by the modern law of theft: the doctrine of appropriation requires no taking from possession, and the decisions in *Gomez* and *Hinks* effectively elide false pretences with theft. Thus section 1 of the Theft Act 1968, in Fletcher's terms, covers larceny, embezzlement and false pretences. But have the problematic cases really gone away? Does the ongoing disagreement about the meaning of appropriation in fact echo the older concern with manifest criminality? Is this what underlies Lord Roskill's idea that appropriation requires 'usurpation' of the owner's rights? This view is rejected in *Gomez* and *Hinks*, but it is fascinating to perceive such echoes even in contemporary law. The modern law is comfortable neither with the view that crime consists in manifestly wrongful acts, with malice or intent playing a merely evidentiary role, nor with the view that crime inheres in subjective responsibility, with conduct playing a merely evidentiary role. The idea that current law is exclusively based on a subjective pattern is also rendered problematic by the way in which section 6 encompasses a form of constructive intent, objectifying that which is purportedly subjective so as to convert temporary taking into permanent deprivation. There are traces here of Fletcher's third pattern of criminality, distilled from the law of homicide: a pattern based on harm or risk, which complements and even displaces the subjective focus on intent. While the subjective pattern which locates liability within mental states such as intent may resonate strongly with modern conceptions of individual agency and of the relationship between citizen and polity, it is far from clear that it completely dominates other patterns, either in positive law or as a basis for critique of that law. As Fletcher observes, rather than there being a unitary set of 'general principles', a variety of approaches to criminal liability co-exist in modern criminal law.



Nor are these traces of non-subjective patterns of criminal liability confined to the offence of theft. As we shall see in the following sections, similar questions arise in relation to several other offences both within and beyond the Theft Act. For example, one might speculate that a concern with manifest criminality – overtly wrongful or dangerous acts as the core of criminality – underlies objections to the idea that offences of deception can be committed by silence. Like the broad view of appropriation, the idea of deception by silence seems to minimise the conduct requirement of the offence to an extent which expresses a very pure form of subjective criminality. Critique of these cases might be thought to be grounded in a continuing sense of the importance of ‘manifest’ criminality. The uncertainty in the modern law of burglary about whether the trespassory quality of an entry is exclusively a subjective question might also be argued to echo a concern with both ‘manifest’ and ‘harm-based’ criminality. And as we saw in Chapter 10, the debate about ‘impossible attempts’, too, turns to an important extent upon the question of whether or not a ‘manifest’ criminal wrong is properly required for conviction. The idea of manifest criminality depends on a notion which seems inapposite to the modern, pluralistic age: that all members of a community can recognise criminality. But is this not, in effect, what the modern law assumes in leaving the determination of dishonesty to magistrates or juries? Against this, one could ask whether the problems of operationalising a conception of manifest theftuous criminality have become overwhelming in a capitalist culture in which the underlying values informing ‘theft’ and ‘enterprise’ are not necessarily easy to distinguish, and in which the more fluid notions of risk or harm are more apposite. Yet the delegation of the core element of theft – dishonesty – to the finder of fact sustains an image of manifest criminality by creating the aura of social consensus – an aura which is sustained by the fact that jury deliberations are secret and not supported by reasons.

#### IV.12.b. Fraud

We have already seen that fraud comes in many shapes and forms (Levi and Burrows 2008). The Theft Acts 1968–1996 contained eight offences of deception. These included obtaining property, obtaining a pecuniary advantage, obtaining services, obtaining a money transfer and so on. But it was often difficult for prosecution authorities to work out which offence applied, and they frequently overlapped. Mapping the boundaries between them led to lengthy and complex trials. Loopholes were forever emerging. For 20 years the Law Commission wavered between two options. The first would entail the detailed reform of criminal law to provide a range of new substantive offences covering areas such as deceiving machines, fraudulent trading, temporary deprivation, taking land, commercial and gambling swindles, dishonest failure to pay where there is no intent to make permanent default, commercial counterfeiting, fraudulent acquisition of confidential information and some non-economic frauds. The

second – eventually favoured – option was to create a general fraud offence. On either of these approaches, the general law of statutory conspiracy could be applied in the usual way. In 2002, when the Commission finally settled on the second option, it recommended not only the abolition of the eight deception offences but also of the common law offence of conspiracy to defraud. In the following passage, the background to the Commission’s thinking is set out, and the continuing power of the philosophy of ordinary language legislation revealed:

*Law Commission 2002 Fraud (Ghosh) (No. 276), pp. 57–9*

We now believe that what is needed is a fresh approach, involving a middle course between... two extremes [i.e. a general offence criminalising all dishonest conduct and piecemeal reform specifying particular instances of criminal dishonesty]. We think it is possible to devise a general fraud offence which, without relying too heavily on the concept of dishonesty, would nevertheless be sufficiently broad and flexible to catch nearly every case that would today be likely to be charged as a conspiracy to defraud. Conspiracy to defraud would then be virtually redundant (in practice if not in theory), and could safely be abolished.

In our view, the key to defining such an offence ought to be the ordinary (non-legal) usage of the word ‘fraud’. At present, the criminality or otherwise of a fraudulent act depends whether it falls within one of a multitude of offences of varying degrees of specificity. The fact that it is fraudulent will not necessarily mean that it is an offence. Most non-lawyers would think this an extraordinary state of affairs...

The difficulty that we have encountered in seeking to formulate a satisfactory fraud offence, we believe, results largely from the fact that the concept of fraud developed by the criminal courts has in some respects parted company from the word’s ordinary meaning... This divergence between the ordinary and legal meanings of fraud has laid a trap for law reformers... To render conspiracy to defraud dispensable, a new fraud offence needs only to catch those kinds of dishonest conduct that an ordinary person would call fraud. The question is: what are the hallmarks of such conduct...

In framing its proposals, the Law Commission was particularly exercised by the question of whether there should be a general offence of dishonesty, and by the implications of the use of the broad Theft Act (*Ghosh*) conception of dishonesty to characterise criminal behaviour (see Law Commission 2002, Pt. V, pp. 39–49). Reflecting some of the human rights and other concerns expressed by the dissenting judges in *Gomez* and *Hinks*, discussed above, the Commission stopped short of recommending a general dishonesty offence. However, it regarded the possibility of undue variance in jury interpretations of dishonesty as merely a ‘theoretical risk’ and, in the light of the widespread use of the *Ghosh* test in the criminal law and the consequently wide implications of rejecting it, decided to retain *Ghosh* dishonesty as a necessary though not a sufficient condition the new offence of fraud. This means that the scope for

the boundaries of criminal law to be determined by juries' moral evaluations remain wide, even though the specification of the four broad kinds of fraudulent conduct makes some contribution to certainty and precise labelling of the relevant wrong. While the Commission's rejection of the Crown Prosecution Service's call for a general offence of dishonesty is to be applauded, and while the new offence dispenses with the arcane technicalities of the 1978 Theft Act, we may nonetheless ask whether the thinking behind the Fraud Act remains unduly ready to assume that the expense and inconvenience of civil enforcement militate towards a wide reach for criminal law. Criminal enforcement is, after all, likely to be equally expensive and just as unreliable from the point of view of the victim's chances of recovery. It is also significant that debates about possible decriminalisation and greater use of civil regulation have tended to be in areas of 'white-collar' crime such as business and tax fraud and unfair trading (see Levi 1987, pp. 105–9).

#### *The Fraud Act 2006*

The Act repeals the following offences in the Theft Acts:

- Theft Act 1968 – Section 15 (obtaining property by deception);
- Section 15A (obtaining a money transfer by deception);
- Section 16 (obtaining a pecuniary advantage by deception);
- Section 20(2) (procuring the execution of a valuable security by deception);
- Theft Act 1978 – Section 1 (obtaining services by deception);
- Section 2 (evasion of liability by deception).

They are replaced by a single fraud offence (s. 1) and an offence of obtaining services dishonestly (s. 11). The new offences came into force on 15 January 2007 but do not of course apply retrospectively. The old offences apply with respect to any offences committed before 2007.

Section 1 creates a general offence of fraud, punishable with a maximum of 10 years' imprisonment. This is longer than the maximum for theft which reflects both the breach of trust that fraud involves as well as the potential for enormous sums of money. As we saw in Chapter 11, the financial costs of fraud were estimated at £12.98 billion in 2005. Fraud can be committed in one of three ways as set out in sections 2, 3 and 4 of the Fraud Act. There is no need to prove deception as such, nor that any gain or loss need to have taken place. The essence of the offence lies in dishonesty and in intention.

David Ormerod and David Huw Williams 'The Fraud Act 2006' (2007)  
*Archbold News* 7–8

#### The three forms of the fraud offence

##### (1) Fraud by False Representation (s. 2)

Under s. 2, D commits an offence by dishonestly making a false representation, intending thereby either (i) to make a gain for himself or another, or (ii) to cause loss to another or to



expose another to a risk of loss. A great deal (arguably too much) will turn on the question of dishonesty.

This is the broadest of the three forms of fraud and is likely to be the most frequently used. The section will cover common-place wrongdoing such as making false mortgage applications or insurance claims and will catch the 'high yield investment' fraudster and cases of 'advance fee fraud'. It is also designed to criminalise phishing on the internet.

Under the old law, it was necessary to prove that D's conduct deceived V. Now there is no need to prove a result of any kind or that any person believed or acted on any representation. Indeed, there need not be any identifiable victim. It follows that s. 2 is even broader in scope than a conspiracy to defraud, given that an individual may be liable even where there has been no prejudice caused to the economic interests of another. This shift from a result to a conduct based offence means that the crime is complete much earlier in time – as soon as the representation is made – and there will be less need to rely on attempts...

The *actus reus* requires that D made a representation and that it was false. As to the representation, it may be made expressly or impliedly (subs. (4)). The representation may be as to fact or law, including a representation as to the state of mind of D or another. Representations made by words or conduct will suffice and it may be the case that an omission to speak or act will be sufficient. Representations made to machines (e.g. Chip and Pin) are specifically caught by the extended definition of representation in subs.(5)). As to falsity, subs.(2) provides that a statement is false if it is untrue or misleading, and D knows that it is, or might be, untrue or misleading. It is enough that D's statement is in fact misleading (which the Home Office suggests is something 'less than wholly true and capable of an interpretation to the detriment of the victim' (Explanatory Notes, para.19) and D knows that it might be misleading. Problem cases debated in Parliament include D selling a painting which he attributes to Renoir knowing that given the incidence of forgery it might not be by that artist. His liability would turn on the concept of dishonesty. There is no explicit defence that the false representation was made with lawful excuse; that must be subsumed within the dishonesty question. Whether a representation is false usually depends on the meaning understood by the parties and will be a jury question except, e.g. where it is a pure question of law such as the legal effect of a document.

The *mens rea* requires proof that (i) D knew the representation was or knew that it might be false, (ii) D was dishonest within the Ghosh... test and (iii) that D acted with intent to gain or cause loss.... So far as 'an intention to gain' and an 'intention to cause loss' are concerned, in most cases they will go hand in hand. However, this is not always the case – for example D might intend to cause a loss to V without any intent to gain. Section 5 defines 'gain' and 'loss' as in s. 34(2)(a) of the 1968 Act, being limited to gain and loss in money or other property. As under s. 4(1) of the 1968 Act, property covers all forms of property, including intellectual property.... No gain or loss need actually occur, but there must be a causal link between the false representation that D made and the gain or loss that he intended should result.



### (2) Fraud by Failing to Disclose Information (s. 3)

This form of fraud is committed where D dishonestly fails to disclose information to another which D is under a legal duty to disclose, and he intends, thereby to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss. The section is narrower than s. 2, but there is considerable overlap. This form of fraud shares the concepts of dishonesty and an intention to gain or cause loss with the s. 2 form of fraud. Arguably, if an omission is to be seen as a representation, all cases of legal duty might fall within s. 2. Nevertheless, where the allegation centres on a failure to fulfil a legal duty, charges under s. 3 will more accurately describe the wrong done.

The central element of this section is the concept of a legal duty, which is undefined in the Act. It was proposed by the Law Commission (Fraud 2002) to extend to duties arising: under statute (e.g. obligations of accuracy in company prospectuses); in transactions of the utmost good faith (e.g. insurance); from general contractual terms or from the custom of a particular trade or market; and from the existence of a fiduciary relationship between the parties...

### (3) Fraud by Abuse of Position (s. 4)

This is the most controversial of the three forms of fraud, criticised in Parliament as a 'catch all provision that will be a nightmare of judicial interpretation'. It is committed where D 'occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person' and he dishonestly abuses that position, intending thereby to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss. D might be in a relevant financial position towards A, e.g. his employer, and abuse that position to cause loss to B. The section clearly catches the secret profiteer such as the wine waiter selling his own bottles passing them off as belonging to the restaurant (*Doukas* [1978] 1 All ER 1071). There is, however, no need for the conduct to be 'secret' (cf. the original proposal in the Law Commission Report, Fraud). The government also emphasised the potential for s. 4 to combat legacy fraud with an expectation that charities will benefit by £2-3m p.a.

An early example of the use of section 4 is that of *Gayle* (2008). The defendant who was employed by a shipping company was based at an international airport. He had accepted £100 as a bribe from a stranger who asked him to move cargo through the airport in a hurry. He used his position to send a large crate to New York certifying it as 'known cargo' even though he did not know what it contained and that it would as a result of his actions not be screened. The crate contained 500 kilos of khat, an illegal substance in the US. His appeal against sentence of eight months' imprisonment was rejected. In the first two years since the Act's implementation there have been 672 (2007/8) and 917 (2008/9) recorded instances of section 4 crimes, compared with 265 and 305 of section 3 (failing to disclose information). Frauds by misrepresentation numbered 122,569 in 2008/9, a small increase on the previous year (Home Office 2009).

#### IV.12.c. Conspiracy to defraud

As we have seen (Chapter 10), those who attempt or conspire to commit crimes are themselves criminally liable. While conspiracy in general was put on a statutory footing in 1977, the property crime of conspiracy to defraud survives as a common law offence. The Criminal Justice Act 1987, section 12 provided that conspiracy to defraud and statutory conspiracy should not be regarded as mutually exclusive, allowing the prosecution a free choice between the two charges where a conspiracy to defraud may also constitute a statutory conspiracy.

The Law Commission assumed that conspiracy to defraud would be abolished – because it would be redundant – when the generic fraud offence was enacted. It lives on, however. Conspiracy to defraud is broadly defined as an agreement between two or more persons dishonestly to deprive another person of something to which he or she is or may be entitled, or to injure some proprietary right of that person, with intent to cause economic loss. If the person conspired against is a public official, the prohibited agreement may also be one by dishonesty to cause the official to act contrary to his or her public duty (*Scott v. Metropolitan Police Commr* (1975)). The House of Lords recently approved the formulation given by Lord Goff in the Privy Council in *Wai Yu-Tsang v. The Queen* (1992) ‘that the conspirators have dishonestly agreed to bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act, that he will suffer economic loss or his economic interests will be put at risk’ (*R v. GG plc* (2008)).

*R v. GG plc* [2008] UKHL 17

[The Judicial Committee gave a single opinion.]

2. The issue in the appeal before the House is whether a prosecution will lie against the appellants for conspiracy to defraud the Secretary of State for Health and others by fixing and maintaining the price, and manipulating the supply, of certain drugs to suppliers of the drugs, if the steps taken in pursuance of the alleged conspiracy were dishonest and deceptive. The appellants raised the issue at a hearing of matters on which preliminary rulings were sought from Pitchford J and at which they asked him to quash the indictment on the ground that it did not disclose an offence against the criminal law. The judge... ruled that the prosecution should go ahead. The Court of Appeal... dismissed the appellants’ appeal [2007] EWCA Crim 2659.

3. The defendants in the prosecution consist of five companies; together with nine individuals who were at the material times employees or directors of these companies. The companies were concerned in the manufacture, sale and/or distribution to wholesalers and pharmacists of drugs, mainly generic drugs, which pharmacists then supplied to members of the public on NHS prescriptions. The case being made against them is that in their respective capacities the defendants dishonestly fixed and maintained the price of the drugs.

5. Generic drugs are normally produced by a number of different manufacturers once the patent on a branded drug has expired. Suppliers provide list prices to the Prescription Pricing Authority, which calculates a drug tariff in reliance upon the lists of certain suppliers. The Department of Health does not regulate the prices of generic drugs, but states that it relies on the competition between suppliers in an open market to provide prices which represent value for money. Pharmacists purchase these drugs from the suppliers of their choice at their list prices and are reimbursed by the Department at the prices contained in the drug tariff for the cost of the drugs when they are dispensed on NHS prescriptions. The Department claims that the reimbursement system, to the knowledge of the suppliers, is predicated upon the existence of a genuine open competitive market and contends that it is important that the list prices published by suppliers and furnished by them to the Department should be a true reflection of the prices which should be charged in such a competitive market, otherwise they would pay the pharmacists' inflated prices in accordance with the drug tariff. It is alleged that the appellants have engaged in dishonest price fixing, so distorting the market and obtaining artificially inflated profits from the provision of generic drugs. The Department of Health made a civil claim for damages against the appellant companies and settlements have been reached of each of these claims, involving the payment of substantial sums of money. The question of criminal liability, however, remains outstanding and the present prosecution has been brought under the aegis of the Serious Fraud Office.

13. ... In rejecting [the appellants' arguments Pitchford J] encapsulated the case against them at para 63:

'The prosecution case is that the corporate defendants well knew the basis upon which the Department of Health funded the provision of pharmaceutical drugs under the NHS. Its method of reaching a fair price was formulated upon the continued existence of open competition between manufacturers and suppliers. Taking advantage of that knowledge the defendants acted as though they were engaged in open competition when in fact they were not. They had secretly agreed to undermine open competition in order to fix prices and by that means to extract from the Department of Health vast sums of money from which they knew it would not otherwise have parted.' ...

18. The voluminous material in the Prosecution Case Statement contains within it quite sufficient notice of aggravating elements, consisting of allegations of lies and positive deception. The appellants could not possibly maintain that they were left without notice of the acts of this nature on which the prosecution could rely in putting forward a case of conspiracy to defraud on the basis of agreement to commit such acts. The difficulty which faces the prosecution is that although they could very well charge the appellants with conspiracy to defraud so based, they have not done so as the indictment stands. It is necessary that the particulars should make clear to the defence the case which it must meet ... It is readily apparent from the terms of the indictment and the summaries in the Prosecution Case Statement which we have quoted that the thrust of the case, as so charged, is that of price fixing. It goes on the incorrect assumption that price fixing, when carried out in circumstances of secretive and deceptive behaviour, is dishonest in itself and a sufficient



basis for conspiracy to defraud. It does not isolate and charge any specific aggravating elements which would elevate price fixing into an indictable conspiracy to defraud. For that reason we must regard the indictment as defective as it stands.

19. It was submitted briefly by Mr Pannick that it was too late to amend the indictment and that it should be quashed, leaving it to the prosecution to start again with a fresh indictment, if so advised. Mr Lissack QC for the respondent, while submitting that the indictment as drawn was sufficient, indicated that the prosecution would prefer to seek leave to amend the indictment rather than have it quashed. We cannot regard the present indictment and case statement as satisfactory as they stand and they require review if the prosecution is to proceed. We consider that they are in principle capable of amendment in suitable terms, in order to accord with the views which we have expressed in this appeal and in Norris' case. Any application to amend must be made to Pitchford J, who will hear any argument and give any necessary rulings.

20. We shall accordingly allow the appeal and remit the matter to the judge.

Pitchford J rejected the revised indictment and refused leave to appeal, a ruling against which the Serious Fraud Office (SFO) unsuccessfully appealed to the Court of Appeal. The net result was a failed prosecution costing the SFO in the region of £30 million. Could this price fixing agreement now come under the Fraud Act 2006?

In the light of the decision to retain conspiracy to defraud in addition to the broadened single fraud offence the Attorney General issued guidance on its use in 2007. It would be appropriate to use conspiracy to defraud in 'cases where the interests of justice can only be served by presenting to a court an overall picture which cannot be achieved by charging a series of substantive offences or statutory conspiracies. Typically, such cases will involve some, but not necessarily all of the following: evidence of several significant but different kinds of criminality; several jurisdictions; different types of crimes, e.g. individuals, banks, websites administrators, credit card companies; organised crime networks (para. 12). The Guidance then gives examples of conduct that can only be prosecuted as conspiracy to defraud (in other words, agreements that do not amount to conduct that would be an offence): agreements to obtain dishonestly land or other property that cannot be stolen (such as intellectual property and other confidential information); agreements dishonestly infringing another's right (such as dishonest exploitation of another's patent) and cases where the accused cannot be proved to have had the necessary degree of knowledge of the substantive offence to be perpetrated (para. 15).

This Guidance clearly underlines the perceived usefulness to the state of an offence which acts as a safety net to catch conduct that is dishonest but does not otherwise fit within the definition of a specific offence. This is hard to justify. The outcome of the protracted litigation against GG plc and others may give an indication of an increasing reluctance on the part of the courts to tolerate



prosecutions based on the semi-detached common law offence of conspiracy to defraud.

#### IV.12.d. Burglary

The distinctive wrong of transgressing the boundaries of buildings is recognised in section 9 of the Theft Act 1968, which creates two offences of burglary. Section 9(1)(a) enacts what we might call 'pure' burglary: this offence is committed where someone enters any building or part of a building as a trespasser and with intent to steal within the building or to inflict grievous bodily harm on or rape anyone within it or to commit unlawful damage to the building. One might regard this as an inchoate offence or as an aggravated trespass. Section 9(1)(b), by contrast, enacts what we might call 'completed' burglary: it is committed where someone, having entered as a trespasser, goes on to commit theft or to inflict grievous bodily harm or attempts to commit either of those offences within the building.

Since 1991 (Criminal Justice Act, s. 26(2)), burglary of a dwelling has been further differentiated as a more serious offence, with a 14-year, as opposed to a 10-year, maximum penalty; since the implementation of the Crime (Sentences) Act 1997, third-time burglars receive a mandatory minimum three-year sentence unless it would be unjust in all the circumstances (consolidated in Powers of Criminal Courts (Sentencing) Act 2000, s. 111). Guidelines issued by the Chief Justice in 2003 suggest that the three-year minimum will not be imposed if two of the offences committed many years earlier, or if the offender has made real efforts to conquer drug or alcohol addiction but a personal tragedy triggers the third offence, or if the first two were committed when the offender was under 16 (*McInerney and Keating* (2003)). It seems however that less than half of third-time domestic burglars received the minimum sentence in 2007. Of those convicted by magistrates only 27 per cent serve a custodial sentence, the average of which is 3.7 months. Two-thirds of those convicted at Crown Court are sentenced to immediate custody with an average length of 24.2 months (Sentencing Advisory Panel 2009).

The elements of burglary serve once again to illustrate some discontinuities between civil and criminal law, as well as tensions between different approaches to attributing criminal responsibility. Each of these can be demonstrated in relation to the issue of trespass, canvassed in the unforgettable case of *Collins*:

#### *R v. Collins* [1973] QB 100

**Edmund-Davies LJ:** ... Let me relate the facts. Were they put into a novel or portrayed on the stage, they would be regarded as being so improbable as to be unworthy of serious consideration and as verging at times on farce. At about 2 o'clock in the early morning of Saturday, July 24, 1971, a young lady of 18 went to bed at her mother's home in Colchester.

She had spent the evening with her boyfriend. She had taken a certain amount of drink, and it may be that this fact affords some explanation of her inability to answer satisfactorily certain crucial questions put to her at the trial.

She has the habit of sleeping without wearing night apparel in a bed which is very near the lattice-type window of her room... At about 3.30 or 4 o'clock she awoke and she then saw in the moonlight a vague form crouched in the open window. She was unable to remember, and this is important, whether the form was on the outside of the window sill or on that part of the sill which was inside the room, and for reasons which will later become clear, that seemingly narrow point is of crucial importance.

The young lady then realised several things: first of all that the form in the window was that of a male; secondly that he was a naked male; and thirdly that he was a naked male with an erect penis. She also saw in the moonlight that his hair was blond. She thereupon leapt to the conclusion that her boyfriend, with whom for some time she had been on terms of regular and frequent sexual intimacy, was paying her an ardent nocturnal visit. She promptly sat up in bed, and the man descended from the sill and joined her in bed and they had full sexual intercourse. But there was something about him which made her think that things were not as they usually were between her and her boyfriend. The length of his hair, his voice as they had exchanged what was described as 'love talk', and other features led her to the conclusion that somehow there was something different. So she turned on the bed-side light, saw that her companion was not her boyfriend, and slapped the face of the intruder, who was none other than the defendant...

The complainant said that she would not have agreed to intercourse if she had known that the person entering her room was not her boyfriend. But there was no suggestion of any force having been used upon her, and the intercourse which took place was undoubtedly effected with no resistance on her part.

The defendant was seen by the police... the next morning... He was very lustful the previous night. He had taken a lot of drink... On this occasion, desiring sexual intercourse – and according to the police evidence, he added that he was determined to have a girl, by force if necessary, although that part of the police evidence he challenged – he went on to say that he walked around the house, saw a light in an upstairs bedroom, and he knew that this was the girl's bedroom. He found a step ladder, leaned it against the wall and climbed up and looked into the bedroom. He could see through the wide-open window a girl who was naked and asleep. So he descended the ladder and stripped off all his clothes, with the exception of his socks, because apparently he took the view that if the girl's mother entered the bedroom it would be easier to effect a rapid escape if he had his socks on than if he was in his bare feet. That is a matter about which we are not called upon to express any view, and would in any event find ourselves unable to express one.

Having undressed, he then climbed the ladder and pulled himself up on to the window sill. His version of the matter is that he was pulling himself in when she awoke. She then got up and knelt on the bed, she put her arms around his neck and body, and she seemed to pull him into the bed...

Now, one feature of the case which remained at the conclusion of the evidence in great obscurity is where exactly Collins was at the moment when, according to him, the girl

manifested that she was welcoming him. Was he kneeling on the sill outside the window or was he already inside the room, having climbed through the window frame, and kneeling upon the inner sill? . . .

The second ingredient of the offence [of burglary under s. 9(1)(a)] – entry as a trespasser – is one which has not, to the best of our knowledge, been previously canvassed in the courts.

The matter has been dealt with by Professor Griew, who in paragraph 4-05 of his work *The Theft Act 1968* has this passage: 'What if D wrongly believes that he is not trespassing? His belief may rest on facts which, if true, would mean that he was not trespassing: for instance, he may enter a building by mistake, thinking that it is the one he has been invited to enter. Or his belief may be based on a false view of the legal effect of the known facts: for instance, he may misunderstand the effect of a contract granting him a right of passage through a building. Neither kind of mistake will protect him from tort liability for trespass. In either case, then, D satisfies the literal terms of section 9(1): he "enters as a trespasser". But for the purposes of criminal liability a man should be judged on the basis of the facts as he believed them to be, and this should include making allowance for a mistake as to rights under the civil law. This is another way of saying that a serious offence like burglary should be held to require 'mens rea' in the fullest sense of the phrase: D should be liable for burglary only if he knowingly trespasses or is reckless as to whether he trespasses or not.'

[Edmund Davies LJ endorses this approach to trespass, and continues:]

Having so held, the pivotal point of this appeal is whether the Crown established that this defendant at the moment that he entered the bedroom knew perfectly well that he was not welcome there or, being reckless as to whether he was welcome or not, was nevertheless determined to enter. That in turn involves consideration as to where he was at the time that the complainant indicated that she was welcoming him into her bedroom . . . Unless the jury were entirely satisfied that the defendant made an effective and substantial entry into the bedroom without the complainant doing or saying anything to cause him to believe that she was consenting to his entering it, he ought not to be convicted of the offence charged . . . We have to say that his appeal must be allowed on the basis that the jury were never invited to consider [this] vital question . . .

Collins's liability therefore turned on whether he was already inside the house when the woman beckoned him in: if so, he was a trespasser; if not, her invitation negated trespass and hence burglary. This approach to liability is, however, in marked contrast to the approach taken in the later case of *Jones and Smith* (1976). The case involved two young men who had stolen a television set from the house of the father of one of them. Notwithstanding the fact that the father gave evidence that his son 'would never be a trespasser in my house', the court held that the intent to steal itself established the trespass. In this decision, trespass as a distinct requirement of burglary shrinks to almost nothing, being simply inferred from the 'mens rea' for the further offence contemplated at the time of entry. On this approach, Collins should have been convicted whatever side of the window he was on, on the basis that he intended (if necessary) to rape.



#### IV.12.e. Criminal damage

Even a selective review of criminal laws relating to property would be lacking without some reference to the area of criminal damage. Here we are no longer in the sphere of dishonesty but rather at the margins of maintenance of public order and protection of the person. Criminal damage contributes nearly a third of recorded property offences. There were 2,769,000 offences of vandalism against domestic property as measured by the British Crime Survey (BCS) interviews in 2008/9. Of these, 1,843,000 were against vehicles and 926,000 against other domestic property, such as a dwelling or surrounding property. Recorded crime figures, which include non-domestic property and vehicles, showed a decline of 10 per cent in the number of criminal damage offences between 2007/8 and 2008/9. Of the 936,729 criminal damage offences recorded in 2008/9, 42 per cent were to a vehicle, 25 per cent to a dwelling and 12 per cent to a building other than a dwelling, such as commercial premises and bus shelters. Arson offences account for 4 per cent of all police recorded criminal damage offences and the number of arson offences fell by 11 per cent from 39,319 offences in 2007/8 to 34,841 offences in 2008/9. The 2008/9 BCS estimated that only a third of incidents of vandalism were reported to the police (33 per cent). The BCS suggests that over 7 per cent of households experienced some form of vandalism in the previous 12 months, with a high risk of repeat victimisation. Those living in terraced housing, in areas with high unemployment and/or physical disorder were more vulnerable to this kind of offence (Home Office 2009).

The basic offence of criminal damage, defined as the intentional or reckless destruction or damaging of another's property without lawful excuse (Criminal Damage Act 1971, s. 1(1)), is punishable by up to 10 years' imprisonment. (In addition there is now the racially or religiously aggravated version of criminal damage with a maximum penalty for simple criminal damage to 14 years, see generally Chapter 6.d above.) This leads to consideration of mode of trial. Where the property damaged is assessed at less than £5,000, basic criminal damage (though not arson) has to be tried summarily and the maximum penalty available is three months' imprisonment or a level 5 fine (Magistrates' Courts Act 1980, s. 22 and Sch. 22). If the value is more than £5,000 but the defendant opts for summary trial the maximum rises to six months or level 4 fine. Numerous other sentences are used to deal with criminal damage offenders the majority of whom are under 21, cause minor damage, act on the spur of the moment reportedly out of boredom or for the 'buzz' or because they are intoxicated: these include fixed penalty notices, supervision orders, curfew orders, anti-social behaviour orders and acceptable behaviour contracts. The most common disposal for basic criminal damage is a conditional discharge.

Simple criminal damage most obviously relates to the social phenomenon of 'vandalism', but the Act also creates two aggravated forms of the offence. Where property has been intentionally or recklessly damaged or destroyed with intent



or recklessness as to endangering life (s. 1(2)), or where the means used is fire (s. 1(3)), the offence carries a maximum penalty of life imprisonment.

The definition of criminal damage in the 1971 Act makes it unsuitable for dealing with many 'white collar' offenders. This is because the Act does not follow the relatively broad definition of property adopted in the Theft Act, extending only to 'property of a tangible nature' (although going further than the Theft Act in including land) (CDA 1971, s. 10). The image of criminal damage which the Act reproduces is the image of the destruction of tangible goods – the smashed bus shelter, the indelible inner city graffiti, the vandalised car, the trampled field. As we have seen, 'hacking' and other such interference with computers is now covered by the Computer Misuse Act 1990, which created three offences of dishonestly and unlawfully entering another's computer system (Wasik 1991).

The meaning to be given to recklessness in the Criminal Damage Act is now found in the decision of the House of Lords in *R v. G and R* (2003). The defendant is reckless if she was aware of a risk that property would be destroyed or damaged and that in the circumstances which were known to her it was unreasonable for her to take that risk. This replaces the objective version of recklessness that applied for 20 years after the controversial case of *Caldwell* (1982). In most cases the objective and subjective tests will achieve the same result. As magistrates and juries cannot know what a defendant foresaw at the time of an alleged offence they must generally make inferences from the evidence, or from common sense. Where the defendant for one reason or another lacks that common sense, the objective test had the potential to be unjust. It was however often forgotten that the definition of 'damage' is itself extremely broad. Often what is not foreseen by the defendant herself is the extent or type of damage leading from their actions. Thus in a case based on setting light to newspaper which then leads to a major fire, it should not be difficult to prove that the defendant realised that the paper at least would be damaged.

It should be noted that the relatively narrow conception of property is not mirrored by the other definitional elements of criminal damage. For example, the idea of 'belonging to another' is construed broadly, as under the Theft Act, to include custody, control and a variety of other proprietary rights short of ownership. Furthermore, the scope of the aggravated form of criminal damage endangering life is enormously extended by the fact that there is no requirement that the property damaged belong to another. It is hence possible for the owner of property or someone who damages property with the owner's authorisation to be convicted of this very serious offence even if the risk is created for a short period and the defendant takes immediate steps to eliminate it (*Merrick* (1995)). This, like several other features of the law relating to criminal damage, suggests the increasing influence of a risk-based pattern of criminality in contemporary criminal law.

The Act provides a defence of lawful excuse to the basic offence. Under section 5, a person is to be treated as having lawful excuse if he destroyed or

damaged the property 'in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts . . . he believed –

- (i) that the property, right or interest was in immediate need of protection and
- (ii) that the means of protection adopted . . . were . . . reasonable having regard to all the circumstances.'

The section states that it is immaterial whether a belief is justified or not if it is **honestly held**.

This is interesting as, in its reliance on the defendant's belief rather than in an objective assessment of the reasonableness of her action, it is considerably broader than the general defences of prevention of crime (Criminal Law Act 1967, s. 3). This subjective element has been effectively exploited by those involved in civil disobedience protests. Thus eight protestors who scaled the Kingsnorth power station chimney and painted 'Gordon' on the side of it were acquitted in September 2008 on charges of criminal damage. (They had planned to daub the words 'Gordon, bin it' on the stack in a reference to Prime Minister Gordon Brown, but were threatened with a High Court injunction and arrested.) Similarly, two of the Iraq war protestors were acquitted of conspiracy to cause criminal damage when their case was eventually returned to trial after a lengthy and complex series of cases that culminated in the House of Lords rulings in *Jones* (2006). The case which also dealt with other protests ranged over the defence of prevention of crime and issues in relation to the incorporation in domestic law of the international crime of aggression and provides a useful bridge to our discussion of the defences of duress and necessity. We return to it below.

As to the 'Fairford five' there were six trials in total most of which resulted with hung juries; in the end there were two acquittals and two convictions. The five carried out disruptive activities at the Royal Air Force (RAF) base at Fairford, which is a NATO stand-by base and home for the visiting US forces. On 13 March 2003, two of them (Jones and Milling) entered the base and damaged fuel tankers and bomb trailers. Five days later, Olditch and Pritchard were caught in possession of articles that they intended to use to damage the runway of the base and aircraft belonging to the US Air Force. On the same day, Richards tried to set fire to a US aircraft. They were charged with conspiracy to cause criminal damage (Jones, Milling, Olditch and Pritchard), with having articles with intent to damage or destroy property (Olditch, Pritchard and Richards) and with criminal damage and attempted arson (Richards). At the resumed trials in July 2007, Olditch and Pritchard were acquitted, Richards was dismissed after the jury failed to agree and Jones and Milling were convicted of causing £10,000 worth of damage to tankers and trailers. Their defence was that their actions were an attempt to prevent the 'murder of innocent civilians'. They were sentenced to a curfew order and a conditional discharge respectively.

#### IV.12.f. Duress, necessity and property

The specific defence of lawful excuse under the Criminal Damage Act overlaps with some defences of more general application including prevention of crime, duress and necessity. We turn now to consider those defences in relation not only to property but also to other offences. One of the themes explored in Chapter 11 was the instability of criminal law's individualisation of responsibility for property crime given the connection between property offending and social patterns such as the unequal distribution of wealth or employment. From the perspective of criminal law doctrine, this means that individuals may be under economic or other forms of pressure when they commit property offences, and raises the question whether such pressure can ever excuse or even justify an offence. So although duress and necessity are more often pleaded in relation to offences against the person, the field of property crime is an interesting one in which to consider the contours of these defences.

First we take a more detailed look at *R v. Jones* (2006) which illustrates the difference between the application of the section 5 lawful excuse defence and the more objectively based defences we are concerned with here. We then move to discuss duress, duress of circumstances and necessity.

Cristino Villarino Villa 'The Crime of Aggression Before the House of Lords: Chronicle of a Death Foretold' (2006) *Journal of International Criminal Justice* 866

The 20 appellants before the House (the Fairford appellants, the Marchwood appellants and Valerie Swain) had been either charged or convicted in different proceedings for causing criminal damage and/or committing aggravated trespass in UK military bases in the course of protests against the at-the-time imminent military attack of Iraq by the Coalition forces.

The Fairford appellants carried out disruptive activities at the Royal Air Force (RAF) base at Fairford, which is a NATO stand-by base and home for the visiting US forces. On 13 March 2003, two of them (Jones and Milling) entered the base and damaged fuel tankers and bomb trailers. Five days later, Olditch and Pritchard were caught in possession of articles that they intended to use to damage the runway of the base and aircraft belonging to the US Air Force. On the same day, Richards tried to set fire to a US aircraft.

They were charged with conspiracy to cause criminal damage (Jones, Milling, Olditch and Pritchard), with having articles with intent to damage or destroy property (Olditch, Pritchard and Richards) and with criminal damage and attempted arson (Richards).

In their defence, appellants adduced they had used reasonable force to prevent the commission of a crime – the crime of aggression – and therefore, their actions were justified under section 3 of the Criminal Law Act 1967. The thrust of their argument was that, if carried out, the imminent attack on Iraq would amount to an unlawful war of aggression and hence they were entitled to take measures aiming at preventing it.



*R v. Jones* [2006] UKHL 16

## LORD BINGHAM OF CORNHILL

1. The immense, perhaps unprecedented, suffering of many people in many countries during the twentieth century had at least one positive result: that it prompted a strong international determination to prevent and prohibit the waging of aggressive war. This determination found expression in the international legal order, and understandably so, since it is states which wage such wars and states that must suppress them. At issue in these appeals is the extent to which, if at all, this international determination is transposed into the domestic legal order of England and Wales.

2. There are 20 appellants before the House. All of them committed acts in February or March 2003 which were, or are alleged to have been, criminal offences, unless there was legal justification for what they did or are said to have done. The issue in each appeal concerns this legal justification, which (depending on the charge in question) differs somewhat from case to case. But the common feature of all the appeals, and the feature which makes the cases important, is that they all raise the question whether the crime of aggression, if established in customary international law, is a crime recognised by or forming part of the domestic criminal law of England and Wales. The appellants acted as they did because they wished to impede, obstruct or disrupt the commission of that crime, or what they believed would be the commission of that crime, by Her Majesty's Government or the Government of the United States against Iraq in the weeks and days before (as we now know) hostilities began. They accordingly contend, or have contended, that they were legally justified in acting as they did. The House is not asked to rule whether, in preparing to make war against Iraq, the United Kingdom or the United States committed the international law crime of aggression, but it must rule whether, if they may have done, that would justify the appellants' otherwise criminal conduct.

**The Fairford appellants**

3. On the night of 13 March 2003 the appellants Margaret Jones and Paul Milling broke into the Royal Air Force base at Fairford in Gloucestershire and caused damage to fuel tankers and bomb trailers. They had conspired together to do so. A little later, the appellants Toby Olditch and Philip Pritchard conspired together to cause criminal damage at the base. On 18 March 2003 they had in their possession articles which they intended to use to destroy or damage the runway at the base and aircraft belonging to the United States Air Force. On the same date, 18 March 2003, the appellant Josh Richards attempted to set fire to an aircraft at the base belonging to the United States Air Force. He had with him on that date articles which he intended to use to destroy or damage such aircraft. Also on that date, he caused damage to a perimeter fence at the base. It is convenient to refer to these appellants collectively as 'the Fairford appellants'. In indictments preferred against them they were (after the withdrawal of one count) charged with counts of conspiracy to cause criminal damage contrary to section 1(1) of the Criminal Law Act 1977 (Jones, Milling, Olditch, Pritchard), having articles with intent to destroy or damage property contrary to section 3(b) of the Criminal Damage Act 1971 (Olditch, Pritchard, Richards) and criminal



damage contrary to section 1(1) of the 1971 Act and attempted arson contrary to section 1(1) of the Criminal Attempts Act 1981 (Richards). The Fairford appellants have not yet been tried [see above for the outcome of their trials in 2007]. Thus the factual basis of these counts has not been proved. But the facts recounted above are not understood to be contested...

### **The Marchwood appellants**

5. It is convenient to refer to the appellant Benjamin Ayliffe and his 13 co-appellants as 'the Marchwood appellants'. On 4 February 2003, some weeks before hostilities began against Iraq, they trespassed on the land of the Sea Mounting Centre, Marchwood Military Port, at Hythe in Hampshire. Some of them entered the port by boat. Others cut a hole in the perimeter wire and entered the port through it. Some of them chained themselves to tanks or reconnaissance vehicles. The work of the port, which involved the loading of vessels bound for the Middle East, was brought to a halt, as they intended. They were all charged with the offence of aggravated trespass contrary to section 68(1) of the Criminal Justice and Public Order Act 1994, the charge being that they trespassed on land in the open air and, in relation to a lawful activity, namely port operations, which persons were engaged in on that land, did an act intended to have the effect of obstructing that activity. There was also a charge of criminal damage contrary to section 1 of the 1971 Act.

6. ... At trial, all the appellants were convicted of aggravated trespass, and some were convicted of criminal damage. They were conditionally discharged or fined, and some compensation orders were made. The judge stated a case for the opinion of the High Court on the correctness of his rulings.

... [Lord Bingham then discussed at length the argument about the status in domestic law of the international crime of aggression]

23. I would accordingly accept that a crime recognised in customary international law may be assimilated into the domestic criminal law of this country. The appellants, however, go further and contend that that result follows automatically. The authorities, as I read them, do not support that proposition.

24. Section 3 of the Criminal Law Act 1967 provides: '(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

(2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.'...

25. I have some doubt whether section 3 was ever intended to apply to conduct like the appellants' which, although causing damage to property in some cases, was entirely peaceable and involved no violence of any kind to any person. It was, however, common ground before Grigson J that what the Fairford appellants did or intended to do involved a use of force; ... question of interpretation was not the subject of appeal; and it has not been fully investigated. I shall therefore treat the section as applicable to acts such as the appellants did.

26... The focus of the Act is entirely domestic, and it would seem to me very highly unlikely that Parliament understood 'crime' in section 3 as covering crimes recognised in customary international law but not assimilated into our domestic law by any statute or judicial decision. In construing a domestic statute the ordinary practice is to treat 'offence', in the absence of an express provision to the contrary, as referring to an offence committed here against a common law or statutory rule: ... The same approach must apply to 'crime'. Nothing in the Act or in the Report on which it was based suggests a contrary intention in this case. I cannot, therefore, accept the appellants' submission on this issue...

27. I approach this proposition [that 'crime' in section 3 means a crime in the domestic law of England and Wales, and the crime of aggression is such] assuming the correctness of the conclusions already reached, that 'crime' in section 3 means a crime in the domestic law of England and Wales and that a crime recognised as such in customary international law (such as the crime of aggression) may, but need not, become part of the domestic law of England and Wales without the need for any domestic statute or judicial decision.

28. The lack of any statutory incorporation is not, however, a neutral factor, for two main reasons. The first is that there now exists no power in the courts to create new criminal offences, as decided by a unanimous House in *Kneller (Publishing, Printing and Promotions) Ltd v. Director of Public Prosecutions* [1973] AC 435. While old common law offences survive until abolished or superseded by statute, new ones are not created. Statute is now the sole source of new criminal offences. The second reason is that when it is sought to give domestic effect to crimes established in customary international law, the practice is to legislate...

29. These reasons, taken together, are very strong grounds for rejecting the appellants' contention, since they reflect what has become an important democratic principle in this country: that it is for those representing the people of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties. One would need very compelling reasons for departing from that principle...

36. For these reasons, which are much the same as those given by the Court of Appeal and followed by the Administrative Court, I would answer the certified questions in paragraphs 4 and 9 above together, as follows: the crime against peace (or crime of aggression) is not capable of being a 'crime' within the meaning of section 3 of the Criminal Law Act 1967 or an 'offence' within the meaning of section 68(2) of the Criminal Justice and Public Order Act 1994. I would accordingly dismiss all the appeals.

#### **Lord Hoffmann...**

43. In essence, all the demonstrators said that their actions were justified, not only morally but also legally, because they were aimed at preventing a greater evil, namely the war in Iraq and its probable consequences. Translating these generalities into the terms of the various statutes, they said that their acts of disruption were not aggravated trespass because the activities of the Crown at Marchwood and Fairford were not lawful within the meaning of section 68. They involved the commission of criminal offences associated with

the prosecution of the war. Likewise, the intention to prevent the commission of a crime was a 'lawful excuse' for causing damage to property within the meaning of section 1 of the 1971 Act. And, in respect of any of the offences charged, they were entitled to rely upon section 3 of the Criminal Law Act 1967:

'(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.'

44. All these defences thus depend upon the proposition that the war in Iraq was a crime as well as a mistake. What was that crime? Various offences were suggested but all except one have either fallen by the wayside or been left for further consideration at a later stage. The one which remains is the crime of aggression, the unlawful use of war as an instrument of national policy. There is no doubt that this is a recognized crime in international law. Twelve of the major German war criminals were convicted of aggression in one form or another by the International Military Tribunal at Nuremberg and eight of them were executed. This decision has since received general international approbation. Article 5 of the Rome Statute of the International Criminal Court lists 'the crime of aggression' together with genocide, crimes against humanity and war crimes as the crimes over which the Court is to have jurisdiction, these being 'the most serious crimes of concern to the international community as a whole'. But the Statute postpones the exercise of jurisdiction over the crime of aggression until the adoption of a provision which defines the crime and sets out the conditions under which the jurisdiction is to be exercised. [Lord Hoffmann concluded that the defences did not apply international law offences that had not been incorporated in domestic law]...

### **The limits of self-help**

70. Put shortly, Mr Perry's submission was that even if aggression was a crime in domestic law and the defendants honestly believed that the United Kingdom was about to commit it, section 3 of the 1967 Act would not justify the action which they took. The section says that a person may use 'such force as is reasonable' and it was not reasonable in all the circumstances for the defendants to have taken it into their own hands to use any force at all.

71. My Lords, I pass over the question of whether damaging property counts as the use of force within the meaning of section 3 of the 1967 Act. There is much to be said for the view that offences against property have their own provisions for justification, such as 'reasonable excuse' as defined in section 5 of the 1971 Act and that 'force' in section 3 means force against persons committing crimes or escaping arrest. But I am willing to assume for the sake of argument that chaining oneself to railings or putting sugar into the petrol tanks of lorries involves the use of force for the purposes of section 3 of the 1967 Act.

72. In *R v. Baker and Wilkins* [1997] *Crim LR* 497 the Court of Appeal decided that in considering whether a defendant was entitled to rely upon section 3, it must be assumed that the events which the defendant apprehended were actually going to happen. Provided

that his belief was honest, it did not matter that it was unreasonable. If those events would in law constitute a crime, he was entitled to use such force as was reasonable to prevent it.

73. My Lords, I have no difficulty with these propositions. I am willing to assume that, in judging whether the defendant acted reasonably, it must be assumed that the facts were as he honestly believed them to be. But the question remains as to whether in such circumstances his use of force would be reasonable. And that is an objective question. The position may be different under section 5 of the 1971 Act but section 3 of the 1967 Act does not excuse a defendant if he uses such force as he himself thinks to be reasonable. It must actually have been reasonable.

74. The crucial question, in my opinion, is whether one judges the reasonableness of the defendant's actions as if he was the sheriff in a Western, the only law man in town, or whether it should be judged in its actual social setting, in a democratic society with its own appointed agents for the enforcement of the law. I take, by way of example only, the statement by Margaret Jones and Paul Milling appended to their printed case, which states their beliefs when they entered RAF Fairford: 'By disrupting the loading of bombs onto aeroplanes and by interfering with the ability of the base to refuel the aircraft they were acting lawfully, reasonably and proportionately in order to (i) prevent armed aircraft from operating from RAF Fairford and (ii) in order to prevent domestic and international criminal offences from being committed.'

That the action they took was reasonable to protect persons and property in Iraq from injury and damage caused by criminal acts. That their action would at least in part prevent the commission of the crime of aggression. Their action would at least in part prevent invasion by armed forces of the aggressor or would at least in part prevent the attack by the airpower of the aggressor.'

75. That is a fair picture of what an observer from the United Kingdom would have thought of a somewhat ineffectual attempt by a Second World War *résistante* to sabotage a German airfield in occupied France. It assumes the defendant to be a lonely individual resisting the acts of a hostile and alien state to which she owes no loyalty. But the state in this case was the defendant's own state, the state which protected and sustained her and to which she owed allegiance. And the legal system which had to judge the reasonableness of her actions was that of the United Kingdom itself.

76. It is a fundamental characteristic of the state as a social structure that, in the classic formulation of Max Weber (*Politics as a Vocation* (*Politik als Beruf*), 1918), it 'claims the monopoly of the legitimate use of physical force within a given territory . . . [T]he right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it.'

77. That formulation does not of course answer the questions which arise in these appeals, because the appellants say that the state, by its legislation, did indeed permit them to use physical force in the circumstances which existed, or which they honestly thought to exist.

But when Parliament speaks of a person being entitled to use such force as is reasonable in the circumstances, the court must, in judging what is reasonable, take into account the



reason why the state claims the monopoly of the legitimate use of physical force. A tight control of the use of force is necessary to prevent society from sliding into anarchy, what Hobbes (*Leviathan*, Chapter 13) called the state of nature in which 'men live without other security, than what their own strength, and their own invention shall furnish them withal. In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and what is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.'

78. In principle, therefore, the state entrusts the power to use force only to the armed forces, the police and other similarly trained and disciplined law enforcement officers. Ordinary citizens who apprehend breaches of the law, whether affecting themselves, third parties or the community as a whole, are normally expected to call in the police and not to take the law into their own hands. In *Southwark London Borough Council v. Williams* [1971] Ch 734, 745 Edmund Davies LJ said: 'the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances.'

79. There are exceptions when the threat of serious unlawful injury is imminent and it is not practical to call for help. The most obvious example is the right of self-defence. As Hobbes said (*Leviathan*, Chapter 27): 'No man is supposed at the making of a Common-wealth, to have abandoned the defence of his life, or limbes, where the Law cannot arrive time enough for his assistance.' But, he went on to say: 'To kill a man, because from his actions, or his threatnings, I may argue he will kill me when he can (seeing I have time, and means to demand protection, from the Sovereign Power) is a Crime.'

80. In the same spirit as Hobbes, Lord Upjohn said in *Burmah Oil Co Ltd v. Lord Advocate* [1965] AC 75, 164-165: 'No doubt in earlier times the individual had some . . . rights of self-help or destruction in immediate emergency, whether caused by enemy action or by fire, and the legal answer was that he could not in such circumstances be sued for trespass on or destruction of his neighbour's property. Those rights of the individual are now at least obsolescent. No man now, without risking some action against him in the courts, could pull down his neighbour's house to prevent the fire spreading to his own; he would be told that he ought to have dialled 999 and summoned the local fire brigade.'

81. What is true of the use of self-help to protect one's own interests is a fortiori true of the use of self-help to protect the interests of third parties or the community at large. In a moment of emergency, when individual action is necessary to prevent some imminent crime or to apprehend an escaping criminal, it may be legitimate, praiseworthy even, for the citizen to use force on his own initiative. But when law enforcement officers, if called upon, would be in a position to do whatever is necessary, the citizen must leave the use of force to them.

82. What if the sovereign power, when called, will not come? Sometimes this is for operational reasons, as when the police lack the resources to provide protection (see, for

example, *R v. Chief Constable of Sussex, Ex p International Trader's Ferry Ltd* [1999] 2 AC 418)...

91. In *Hutchinson v. Newbury Magistrates' Court* (2000) 122 ILR 499, where a protester sought to justify causing damage to a fence at Aldermaston on the ground that she was trying to halt the production of nuclear warheads, Buxton LJ said: 'There was no immediate and instant need to act as Mrs Hutchinson acted, either [at] the time when she acted or at all: taking into account that there are other means available to her of pursuing the end sought, by drawing attention to the unlawfulness of the activities and if needs be taking legal action in respect of them. In those circumstances, self-help, particularly criminal self-help of the sort indulged in by Mrs Hutchinson, cannot be reasonable.'

92. I respectfully agree. The judge then went on to deal with Mrs Hutchinson's real motive, which ('on express instructions') her counsel had frankly avowed. It was to 'bring the issue of the lawfulness of the government's policy before a court, preferably a Crown Court'. Buxton LJ said: 'In terms of the reasonableness of Mrs Hutchinson's acts, this assertion on her part is further fatal to her cause. I simply do not see how it can be reasonable to commit a crime in order to be able to pursue in the subsequent prosecution, arguments about the lawfulness or otherwise of the activities of the victim of that crime.'

93. My Lords, I do not think that it would be inconsistent with our traditional respect for conscientious civil disobedience for your Lordships to say that there will seldom if ever be any arguable legal basis upon which these forensic tactics can be deployed.

94. The practical implications of what I have been saying for the conduct of the trials of direct action protesters are clear. If there is an issue as to whether the defendants were justified in doing acts which would otherwise be criminal, the burden is upon the prosecution to negative that defence. But the issue must first be raised by facts proved or admitted, either by the prosecution or the defence, on which a jury could find that the acts were justified. In a case in which the defence requires that the acts of the defendant should in all the circumstances have been reasonable, his acts must be considered in the context of a functioning state in which legal disputes can be peacefully submitted to the courts and disputes over what should be law or government policy can be submitted to the arbitrament of the democratic process. In such circumstances, the apprehension, however honest or reasonable, of acts which are thought to be unlawful or contrary to the public interest, cannot justify the commission of criminal acts and the issue of justification should be withdrawn from the jury. Evidence to support the opinions of the protesters as to the legality of the acts in question is irrelevant and inadmissible, disclosure going to this issue should not be ordered and the services of international lawyers are not required.

95. I would dismiss these appeals.

*R v. Jones* is clearly a significant decision on the central question of incorporation of international customary law into domestic law. But for our purposes the interest lies in the analysis of the general defence of prevention of crime, the contrast with the statutory defence of reasonable excuse in the Criminal

Damage Act 1971 to which we have already referred, and the discussion of self-help. The general defence of prevention of crime did not apply because the House of Lords did not accept that the international crime of aggression was part of our domestic law. But even if it had been, the tenor of Lord Hoffmann's speech in particular suggests that this would not be enough to found a defence where protestors substitute their judgement of the lawfulness of state action. Section 5 in contrast is based not on prevention of crime but on the defendant's belief that her action is reasonable.

Moving to the general defences of duress by threat, duress of circumstance and necessity (the last two are often but not always co-terminous) we can see similar kinds of arguments being used. In what circumstances can a defendant argue that what she did, despite apparently fulfilling all the requirements of the offence, should be excused because she acted under irresistible pressure? Duress by threats is recognised as a defence to all offences other than murder and attempted murder. Only threats of death or serious personal injury to the defendant or her immediate family will suffice. So although a person who offends in the course of protecting their own property may well have a defence under section 3 of the Criminal Law Act 1967 on the basis that they were acting with reasonable force in the prevention of crime, and despite the high value attached to property rights in our society, *threats to property* interests alone do not ground the duress defence. (Interestingly, the House of Lords in *R v. Jones* cast doubt on this view of s. 3 but most textbooks and commentators have assumed that 'force' in s. 3 does encompass more than physical violence. We can recall too that under the Public Order Act 1986 'violence' includes threats to property so it might be odd – and perhaps verging on the disingenuous – to allow a broad view of 'violence' in an *offence* definition while a narrow interpretation applied to 'force' in a *defence*.) Either way, it is clear that the threat must be one that seriously threatens a person's physical integrity to count for duress. The defence can of course be used in relation to a charge of theft, or other property crime. The potential application of duress in the field of property offences helps to illustrate ambiguities in the rationale of duress and the related defence of necessity.

Some of the philosophical and political issues at stake are canvassed in the following extract:

L Vandervort, 'Social Justice in the Modern Regulatory State; Duress, Necessity and the Consensual Model in Law' (1987) 6 *Law and Philosophy* 265 at 217–19

... [I]t has been argued that within the consensual model [the model of criminal liability based on free choice and responsibility] findings of voluntariness or involuntariness and reasonableness or unreasonableness are policy based determinations and only superficially findings of legal fact. In case after case, policy masquerades as fact. The concepts of choice,



waiver, consent, etc., the key operative concepts in the consensual model, are highly subject to conscious and unconscious manipulation, explicit or overt, to achieve the results deemed desirable by a particular decision maker on policy grounds. Decision-makers, including judges, often must 'make' law in order to dispose of a particular case, and their decisions invariably contain a normative component where the consensual model is relied on. Where the manipulation of the operative legal concepts is perceived to be apt or appropriate, the result will be regarded as just. The community and the defendant or applicant will regard the determination of legal guilt or acquittal, liability or non-liability, entitlement or non-entitlement, as a reflection of the moral 'desert' of the individual.

... [T]he consensual model, through the use of the concept of 'free choice' to determine moral 'desert', can operate as an effective subterfuge to conceal the policy aspects of formal decisions that apply positive law to individual cases... There is no question but that the legal system makes routine use of such subterfuges to allocate liability and entitlement, and, in effect, choose victors and victims, and at the same time conceal or deny societal responsibility for structuring key social determinants of the outcome for which the individual alone is held liable - all in the name of impartial justice under a system of formal positive law.

General recognition that legal criteria for legal responsibility and 'desert' are shaped by policy considerations would not only eliminate the duplicity now often entailed in the use of the consensual model by judges and other decision-makers, but at the same time would direct increased attention and criticism towards the formation of public policy in the political forum. Overtly political first order determinations - involving fundamental issues of social justice and affecting great numbers of persons - would receive greater scrutiny. Judicial decisions about individual legal responsibility would more frequently be seen to be concerned not with individual choice alone, but rather with the consequences of social policy mediated by individual choice.

[pp. 220-3] Once it is agreed that the conditions of life... of persons in the contemporary state are significantly shaped by political decisions, and that those conditions constitute the context within which individuals make choices, it follows that the traditional legal concepts of necessity (choice dictated by life-threatening circumstances [in American law]) and duress (choice dictated by an agent) must be re-interpreted. Re-interpretation of these concepts is required to adapt the consensual model to accommodate contemporary social realities. It must be recognized that choices made by individuals are often influenced and sometimes 'dictated' by socioeconomic factors that are themselves the product of collective societal decisions. For the individual who must make a choice, factors comprising the context in which the choice is made are not less 'real' simply because some of the conditions that constitute the immediate threat to life and well-being and generate the pressure or impetus to act have an 'institutional' source and cannot be uniquely attributed to any specific human agent or to fortuitous natural causes.

Decisions about the allocation of resources (distribution) can be distinguished from decisions to impose sanctions (retribution). But the most difficult and politically significant decisions of both types are those that are concerned with scarce but essential commodities and direct or indirect threats to life and well-being. In retributive judgments social



vindictiveness would be deflected where societal conditions for which there is a collective responsibility, even if only as a consequence of non-feasance, were seen to have had significant influence as determinants of individual choice. Reference to social factors in mitigation is familiar from sentencing law. Sentencing law is relevant, however, only if a conviction has been entered. At issue here instead is the prior question of whether socio-economic duress and necessity, arising from socio-economic causes for which there is collective responsibility, may not sometime 'excuse' or 'justify' acts that would be 'criminal' but for the excuse or justification. Such arguments have been rejected in the past to protect 'social order'. But the query raised here is: is such a negative response consistent with the exceptions to the principles of legal responsibility recognized within the traditional consensual model? Is it not instead the case that the source of the threat to life and well-being that provides the justification or excuse is irrelevant to the determination of individual legal responsibility? If so, we must acquit where the other prerequisites of excuse or justification are present. And if the concern with social order and the values it is said to protect is more than rhetoric, presumably the underlying and collectively created conditions that justify or excuse order threatening behavior must be changed. This requires re-examination of distributive practices and principles.

Vandervort shows that what appear to be relatively limited doctrinal issues about the definition and scope of a particular set of defences in fact raise wide-ranging questions about the legitimacy of criminal law and, in particular, about its capacity effectively to individualise and depoliticise the attribution of responsibility. These issues have been played out in cases dealing with the conditions under which the defences may be pleaded and, notably, in judicial reluctance to acknowledge the defence of duress of circumstances and of its close cousin necessity.

The test for the availability of the defence of duress, as stated in *R v. Graham* (1982, p. 806), contains both 'subjective' and 'objective' elements, asking:

Was [the accused], or may he have been, impelled to act as he did because, as a result of what he reasonably believed [X] had said or done, he had good cause to fear that if he did not so act [X] would kill him or . . . cause him serious physical injury? If so, have the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of [the accused], would not have responded to whatever he reasonably believed [X] said or did by taking part in the killing?

The fragile balance between objective and subjective aspects of the test is well-illustrated by the case of *Bowen* (1996). In this case, the defendant pleaded duress in his defence against the allegation of obtaining services by deception. His case was that two men had threatened to petrol-bomb him and his family if he did not obtain goods for them and told him that if he went to the police his family would be attacked. Despite the fact that witnesses testified that Bowen was a 'simple man who had difficulty reading and writing' and that a psychologist testified that he was abnormally suggestible, vulnerable and with a very low

IQ, the judge simply directed the jury to consider whether the words and conduct alleged would have driven a person of reasonable firmness of the same sex and age and in the same circumstances as the accused to have committed the offences. Bowen appealed against conviction on the grounds that his low intelligence was a relevant characteristic which should have been put to the jury. His appeal was dismissed by the Court of Appeal on the basis that a low IQ short of mental impairment could not be said to be a characteristic which made those who had it less courageous and less able to withstand threats and pressure than an ordinary person. Quite how this squares with the psychologist's evidence is unclear from the report.

The House of Lords has recently considered the defence of duress in a case which highlights the differing contexts in which these issues may arise. In her speech Baroness Hale considers the implications of a strict approach to duress for those trapped in violent families.

*P v. H* [2002] 1 AC 1469

[The defendant who worked as a driver and minder of a woman who ran an escort agency was charged with aggravated burglary. His defence was that her boyfriend threatened him, giving him the impression he had already killed two drug dealers, demanding that he break into the house of a client of the agency to raid a safe that was known to be there.]

**Lord Bingham:** 14. [On the issue of duress] the judge put four questions to the jury:

'Question 1: Was the defendant driven or forced to act as he did by threats which, rightly or wrongly, he genuinely believed that if he did not burgle [the] house, his family would be seriously harmed or killed? If you are sure that he was not forced by threats to act as he did, the defence fails and he is guilty. But if you are not sure go on to question 2. Would a reasonable person of the defendant's age and background have been driven or forced to act as the defendant did? If you are sure that a reasonable person would not have been forced to act as the defendant did, then the defence fails and he is guilty. If you are not sure, then go on to question 3. Could the defendant have avoided acting as he did without harm coming to his family? If you are sure he could, the defence fails and he is guilty. If you are not sure go on to question 4. Did the defendant voluntarily put himself in the position in which he knew he was likely to be subjected to threats? If you are sure he did, the defence fails and he is guilty. If you are not sure, he is not guilty. Those four questions are really tests.'

The first of these questions repeated in substance a question the judge had already framed for the consideration of the jury. In his earlier direction he had explained the second question somewhat more fully:

'The second question is: Would a reasonable person, of the defendant's age and background, have been forced and driven to act as the defendant did? That question is necessary because everybody has to be judged by the same standards. The reactions

of a reasonable person may or may not be the same as the reactions of any particular defendant. You represent society and you set the standards of what is reasonable. In judging what a reasonable person would do, you are not expected to imagine a saint and that is why I say a reasonable person of the defendant's age and background. What, in your judgment, as judges of the facts, would such a person have done in the circumstances? Would he have felt compelled to act as he did? If you are sure that a reasonable person would not have been forced to act as the defendant did, again, the defence fails and the defendant would be guilty. But if you are not sure if a reasonable person might have been forced to act as the defendant did, then you go on to the third question.'

He had earlier directed the jury on the third question as follows:

'The third question is: Could the defendant have avoided acting as he did without harm coming to his family? In fact, as we know, having broken in, he left empty handed. No harm apparently has resulted. I will remind you of the evidence in due course but Mr Sullivan, according to the defendant, accepted that position.

If he had left as soon as the alarm went off and as soon as [the victim] started telephoning the police, would it have been any different? Could he have pretended that he could not find the house? You will remember some of the questions that he was asked on this topic by [prosecuting counsel]. Could he have pretended to the minder - if there was a minder - that there was no answer when he rang?

All those are matters for you to consider. If you are sure that he could have avoided acting as he did without harm coming to his family, again the defence fails and he is guilty. But if you are not sure that he could have avoided acting as he did without harm coming to his family, then there is one final question.'

Then the judge had turned to the fourth question:

'Question 4: Did the defendant voluntarily put himself in the position, in which he knew he was likely to be subjected to threats? You look to judge that in all the circumstances. If he had stopped associating with Frank Sullivan after the August 1999 incident, would he have ever found himself in this predicament?

It is for you to decide. It is right to say he says he did stop associating but Sullivan kept finding him. It may not be wholly straightforward. It is for you to consider and it is a relevant consideration because if someone voluntarily associates with the sort of people who he knows are likely to put pressure on him, then he cannot really complain, if he finds himself under pressure. If you are sure that he did voluntarily put himself in such a position, the defence fails and he was guilty. If you are not sure and you have not been sure about all of the other questions, then you would find him not guilty.'

15. On his appeal to the Court of Appeal the defendant criticised the judge's directions on the third and fourth questions. With regard to the third question Rix LJ, giving the judgment of the court, said (in para 49 of the judgment): 'We think that the direction on this third question was a misdirection. There never was any suggestion that the appellant could have



avoided the effect of the threat against him, assuming one had ever been made, by going to the police or simply refusing to carry out the robbery. On analysis the issues raised under this third question collapse into the issues raised under questions one and two. We therefore think that there is a danger that the jury may have been confused by being asked an additional question on matters already covered by the first two questions.'

Having considered a number of authorities, the Court of Appeal also concluded (paras. 72-77) that there was a misdirection in the judge's formulation of question 4 'and that he should have directed the jury to consider whether the [defendant] knew that he was likely to be subjected to threats to commit a crime of the type [with] which he was charged.'

16. Having . . . found two misdirections on the duress issue, the court considered the defendant's conviction on the second count to be unsafe and quashed it. In this appeal to the House, the Crown seek to establish that the judge's directions on the third and fourth questions involved no misdirection, and they suggest that his direction on the first question was favourable to the defendant. It is necessary to consider the law on duress in a little detail.

### **Duress**

17. The common sense starting point of the common law is that adults of sound mind are ordinarily to be held responsible for the crimes which they commit. To this general principle there has, since the 14<sup>th</sup> century, been a recognised but limited exception in favour of those who commit crimes because they are forced or compelled to do so against their will by the threats of another. Such persons are said, in the language of the criminal law, to act as they do because they are subject to duress.

18. Where duress is established, it does not ordinarily operate to negative any legal ingredient of the crime which the defendant has committed. Nor is it now regarded as justifying the conduct of the defendant, as has in the past been suggested . . . Duress is now properly to be regarded as a defence which, if established, excuses what would otherwise be criminal conduct . . .

19. Duress affords a defence which, if raised and not disproved, exonerates the defendant altogether. It does not, like the defence of provocation to a charge of murder, serve merely to reduce the seriousness of the crime which the defendant has committed. And the victim of a crime committed under duress is not, like a person against whom a defendant uses force to defend himself, a person who has threatened the defendant or been perceived by the defendant as doing so. The victim of a crime committed under duress may be assumed to be morally innocent, having shown no hostility or aggression towards the defendant. The only criminal defences which have any close affinity with duress are necessity, where the force or compulsion is exerted not by human threats but by extraneous circumstances, and, perhaps, marital coercion under section 47 of the Criminal Justice Act 1925.

20. Where the evidence in the proceedings is sufficient to raise an issue of duress, the burden is on the prosecution to establish to the criminal standard that the defendant did not commit the crime with which he is charged under duress . . .



21. Having regard to these features of duress, I find it unsurprising that the law in this and other jurisdictions should have been developed so as to confine the defence of duress within narrowly defined limits. Most of these are not in issue in this appeal, but it seems to me important that the issues the House is asked to resolve should be approached with understanding of how the defence has developed, and to that end I shall briefly identify the most important limitations:

- (1) Duress does not afford a defence to charges of murder (*R v. Howe* [1987] AC 417), attempted murder (*R v. Gotts* [1992] 2 AC 412) and, perhaps, some forms of treason (Smith & Hogan, *Criminal Law*, 10th ed., 2002, p 254). The Law Commission has in the past (e.g. in *Criminal Law. Report on Defences of General Application* (Law Com No 83, Cm 556, 1977, paras 2.44-2.46)) recommended that the defence should be available as a defence to all offences, including murder, and the logic of this argument is irresistible. But their recommendation has not been adopted, no doubt because it is felt that in the case of the gravest crimes no threat to the defendant, however extreme, should excuse commission of the crime...
- (2) To found a plea of duress the threat relied on must be to cause death or serious injury...
- (3) The threat must be directed against the defendant or his immediate family or someone close to him... In the light of recent Court of Appeal decisions such as *R v. Conway* [1989] QB 290 and *R v. Wright* [2000] *Crim LR* 510, the current (April 2003) specimen direction of the Judicial Studies Board suggests that the threat must be directed, if not to the defendant or a member of his immediate family, to a person for whose safety the defendant would reasonably regard himself as responsible. The correctness of such a direction was not, and on the facts could not be, in issue on this appeal, but it appears to me, if strictly applied, to be consistent with the rationale of the duress exception.
- (4) The relevant tests pertaining to duress have been largely stated objectively, with reference to the reasonableness of the defendant's perceptions and conduct and not, as is usual in many other areas of the criminal law, with primary reference to his subjective perceptions. It is necessary to return to this aspect, but in passing one may note the general observation of Lord Morris of Borth-y-Gest in *R v. Lynch*, above at p. 670: '... it is proper that any rational system of law should take fully into account the standards of honest and reasonable men. By those standards it is fair that actions and reactions may be tested.'
- (5) The defence of duress is available only where the criminal conduct which it is sought to excuse has been directly caused by the threats which are relied upon.
- (6) The defendant may excuse his criminal conduct on grounds of duress only if, placed as he was, there was no evasive action he could reasonably have been expected to take. It is necessary to return to this aspect also, but this is an important limitation of the duress defence and in recent years it has, as I shall suggest, been unduly weakened.
- (7) The defendant may not rely on duress to which he has voluntarily laid himself open. The scope of this limitation raises the most significant issue on this part of this appeal, and I must return to it.

22. For many years it was possible to regard the defence of duress as something of an antiquarian curiosity, with little practical application . . . As already acknowledged, the House is not invited in this appeal to recast the law on duress. It can only address, piecemeal, the issues which fall for decision. That duress is now regularly relied on as a complete defence to serious criminal charges does not alter the essential task which the House must undertake, but does give it additional practical importance. I must acknowledge that the features of duress to which I have referred in paras 18 to 20 above incline me, where policy choices are to be made, towards tightening rather than relaxing the conditions to be met before duress may be successfully relied on. In doing so, I bear in mind in particular two observations of Lord Simon of Glaisdale in *R v. Lynch* above (dissenting on the main ruling, which was reversed in *R v. Howe*, above):

‘ . . . your Lordships should hesitate long lest you may be inscribing a charter for terrorists, gang-leaders and kidnappers.’ (p. 688). ‘A sane system of criminal justice does not permit a subject to set up a countervailing system of sanctions or by terrorism to confer criminal immunity on his gang.’ (p. 696) . . .

23. The appellant did not challenge the judge’s direction to the jury on questions 1 and 2. Save in one respect those directions substantially followed the formulation propounded by the Court of Appeal (Criminal Division) (Lord Lane CJ, Taylor and McCullough JJ) in *R v. Graham* [1982] 1 WLR 294, 300, approved by the House of Lords in *R v. Howe* above, at pp. 436, 438, 446, 458–459. It is evident that the judge, very properly, based himself on the JSB’s specimen direction as promulgated in August 2000. That specimen direction included the words, adopted by the judge, ‘he genuinely believed’. But the words used in *R v. Graham* and approved in *R v. Howe* were ‘he reasonably believed’. It is of course essential that the defendant should genuinely, i.e. actually, believe in the efficacy of the threat by which he claims to have been compelled. But there is no warrant for relaxing the requirement that the belief must be reasonable as well as genuine. There can of course be no complaint of this departure from authority, which was favourable to the defendant.

### **The judge’s direction to the jury on question 3**

24. As recorded in para 15 above, the Court of Appeal held that the judge had misdirected the jury on question 3 because, it was held, there was no suggestion that the defendant could have taken evasive action. This may, or may not, on the facts, be so, and this suggested misdirection does not feature in the question on duress certified for the opinion of the House. It is true, as the Court of Appeal recognised in its judgment, that there may be an area of overlap between questions 2 and 3: a reasonable person of a defendant’s age and background would not have been forced and driven to act as the defendant did if there was any evasive action reasonably open to him to take in order to avoid committing the crime. But the third question put by the judge, and regularly put in such cases, whether or not correctly put on the facts of this case, in my opinion focuses attention on a cardinal feature of the defence of duress, and I would wish to warn against any general notion that question 3 ‘collapses’ into or is subsumed under questions 1 and 2 . . .

26. The recent English authorities have tended to lay stress on the requirement that a defendant should not have been able, without reasonably fearing execution of the threat, to avoid compliance. Thus Lord Morris of Borth-y-Gest in *R v. Lynch*, above, at p. 670, emphasized that duress 'must never be allowed to be the easy answer of those who can devise no other explanation of their conduct nor of those who readily could have avoided the dominance of threats nor of those who allow themselves to be at the disposal and under the sway of some gangster-tyrant.'

Lord Simon of Glaisdale gave as his first example of a situation in which a defence of duress should be available (p. 687): 'A person, honestly and reasonably believing that a loaded pistol is at his back which will in all probability be used if he disobeys...'

In the view of Lord Edmund-Davies (p. 708) there had been 'for some years an unquestionable tendency towards progressive latitude in relation to the plea of duress.'

27. In making that observation Lord Edmund-Davies did not directly criticise the reasoning of the Court of Appeal in its then recent judgment in *R v. Hudson and Taylor* [1971] 2 QB 202, but that was described by Professor Glanville Williams as 'an indulgent decision' (*Textbook of Criminal Law*, 2nd ed, 1983, p. 636), and it has in my opinion had the unfortunate effect of weakening the requirement that execution of a threat must be reasonably believed to be imminent and immediate if it is to support a plea of duress. The appellants were two teenage girls who had committed perjury at an earlier trial by failing to identify the defendant. When prosecuted for perjury they set up a plea of duress, on the basis that they had been warned by a group, including a man with a reputation for violence, that if they identified the defendant in court the group would get the girls and cut them up. They resolved to tell lies, and were strengthened in their resolve when they arrived at court and saw the author of the threat in the public gallery. The trial judge ruled that the threats were not sufficiently present and immediate to support the defence of duress but was held by the Court of Appeal to have erred, since although the threats could not be executed in the courtroom they could be carried out in the streets of Salford that same night. It was argued for the Crown that the appellants should have neutralised the threat by seeking police protection, but this argument was criticised as failing to distinguish between cases in which the police would be able to provide effective protection and those when they would not...

28. The judge's direction on question 3 was modelled on the JSB specimen direction current at the time, and is not in my opinion open to criticism. It should however be made clear to juries that if the retribution threatened against the defendant or his family or a person for whom he reasonably feels responsible is not such as he reasonably expects to follow immediately or almost immediately on his failure to comply with the threat, there may be little if any room for doubt that he could have taken evasive action, whether by going to the police or in some other way, to avoid committing the crime with which he is charged.

#### **The judge's direction to the jury on question 4**

29. The judge's direction to the jury on question 4 is quoted in para 14 above and, as recorded in para 15, the Court of Appeal ruled that this was a misdirection because the



judge had not directed the jury to consider whether the defendant knew that he was likely to be subjected to threats to commit a crime of the type of which he was charged. It is this ruling which gives rise to the certified question on this part of the case, which is: 'Whether the defence of duress is excluded when as a result of the accused's voluntary association with others: (i) he foresaw (or possibly should have foreseen) the risk of being subjected to any compulsion by threats of violence, or (ii) only when he foresaw (or should have foreseen) the risk of being subjected to compulsion to commit criminal offences, and, if the latter, (iii) only if the offences foreseen (or which should have been foreseen) were of the same type (or possibly of the same type and gravity) as that ultimately committed.' The Crown contend for answer (i) in its objective form. The defendant commends the third answer, omitting the first parenthesis . . .

34. In its Working Paper No 55 of 1974, the Law Commission in para 26 favoured 'a limitation upon the defence [of duress] which would exclude its availability where the defendant had joined an association or conspiracy which was of such a character that he was aware that he might be compelled to participate in offences of the type with which he is charged.' This reference to 'offences of the type with which he is charged' was, in substance, repeated in the Law Commission's . . . 'Criminal Code Bill' (Law Com No 177) published in 1989. But there was no warrant for this gloss in any reported British authority until the Court of Appeal (Roch LJ, Richards J and Judge Colston QC) gave judgment in *R v. Baker and Ward* [1999] 2 Cr App R. 335. The . . . appellants claimed that they had been specifically instructed to rob the particular store which they were convicted of robbing. The trial judge had directed the jury (p. 341): 'A person cannot rely on the defence of duress if he has voluntarily and with full knowledge of its nature joined a criminal group which he was aware might bring pressure on him of a violent kind or require him if necessary to commit offences to obtain money where he himself had defaulted to the criminal group in payment to the criminal group.'

This was held to be a misdirection (p. 344): 'What a defendant has to be aware of is the risk that the group might try to coerce him into committing criminal offences of the type for which he is being tried by the use of violence or threats of violence.' . . .

35. Counsel for the defendant in the present case contends (as the Court of Appeal accepted) that this ruling was correct and that the trial judge in the present case misdirected the jury because he did not insist on the need for the defendant to foresee pressure to commit the offence of robbery of which he was convicted . . .

37. The principal issue between the Crown on one side and the appellant and the Court of Appeal on the other is whether *R v. Baker and Ward* correctly stated the law. To resolve that issue one must remind oneself of the considerations outlined in paras 18-22 above. The defendant is seeking to be wholly exonerated from the consequences of a crime deliberately committed. The prosecution must negative his defence of duress, if raised by the evidence, beyond reasonable doubt. The defendant is, *ex hypothesi*, a person who has voluntarily surrendered his will to the domination of another. Nothing should turn on foresight of the manner in which, in the event, the dominant party chooses to exploit the defendant's subservience. There need not be foresight of coercion to commit crimes, although it is



not easy to envisage circumstances in which a party might be coerced to act lawfully. In holding that there must be foresight of coercion to commit crimes of the kind with which the defendant is charged, *R v. Baker and Ward* misstated the law.

38. There remains the question, which the Court of Appeal left open in para 75 of their judgment, whether the defendant's foresight must be judged by a subjective or an objective test: i.e. does the defendant lose the benefit of a defence based on duress only if he actually foresaw the risk of coercion or does he lose it if he ought reasonably to have foreseen the risk of coercion, whether he actually foresaw the risk or not? I do not think any decided case has addressed this question, and I am conscious that application of an objective reasonableness test to other ingredients of duress has attracted criticism: see, for example, Elliott, 'Necessity, Duress and Self-Defence' [1989] *Crim LR* 611, 614-615, and the commentary by Professor Ashworth on *R v. Safi* [2003] *Crim LR* 721, 723. The practical importance of the distinction in this context may not be very great, since if a jury concluded that a person voluntarily associating with known criminals ought reasonably to have foreseen the risk of future coercion they would not, I think, be very likely to accept that he did not in fact do so. But since there is a choice to be made, policy in my view points towards an objective test of what the defendant, placed as he was and knowing what he did, ought reasonably to have foreseen. I am not persuaded otherwise by analogies based on self-defence or provocation for reasons I have already given. The policy of the law must be to discourage association with known criminals, and it should be slow to excuse the criminal conduct of those who do so. If a person voluntarily becomes or remains associated with others engaged in criminal activity in a situation where he knows or ought reasonably to know that he may be the subject of compulsion by them or their associates, he cannot rely on the defence of duress to excuse any act which he is thereafter compelled to do by them. It is not necessary in this case to decide whether or to what extent that principle applies if an undercover agent penetrates a criminal gang for bona fide law enforcement purposes and is compelled by the gang to commit criminal acts.

39. I would answer this certified question by saying that the defence of duress is excluded when as a result of the accused's voluntary association with others engaged in criminal activity he foresaw or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence . . .

### Conclusion

40. The judge's direction to the jury on question 4 involved no misdirection. It was based on the JSB specimen direction current at the time, save that it omitted the qualification made to reflect the erroneous ruling in *R v. Baker and Ward*. The ruling was, on the law as I have stated it, too favourable to the defendant, but he cannot complain of that . . . I would accordingly answer the certified question as indicated, allow the Crown's appeal, set aside the Court of Appeal's order, restore the defendant's conviction and remit this matter to the Court of Appeal so that the defendant may surrender to his bail.

Lord Bingham's speech is clearly a significant re-statement of the defence of duress. He accepted that the defence is grounded in excuse rather than justification but was keen to draw tight limits round its application to those who consort with known criminals. Baroness Hale was more circumspect on this point, wondering whether it would work fairly on those caught in family situations from which escape would be difficult:

68. [Referring to the Law Commission's proposals]: The overall result was a proposed defence which had 'as its guiding principle the reasonable reaction of the defendant in the circumstances as he or she believed them to be' (Law Com No 218, para 29.7). Thus (i) there had been almost no support on consultation for the approach in *Graham* that the defendant's belief that a threat had been made had to be reasonable; consistently with the defence of self-defence, therefore, the defendant should be judged on the facts as she honestly believed them to be (paras 29.8 to 29.10); (ii) the substantial balance of opinion on consultation had been that the defence should be available to a defendant who honestly believed that official protection would be ineffective (paras 29.3 to 29.7); and (iii) there remained strong support for the view that the defence should apply where the particular defendant in question could not reasonably have been expected to resist the threat (paras 29.11 to 29.14). The draft Bill reflected this consistently subjective approach to the defence...

71. The Commission was, of course, thoroughly aware of the practical difficulties caused by the fact that duress is most likely to arise in terrorist, gang or other organised crime offences and that, particularly in such circumstances, 'the defence of duress is so easy to raise and may be so difficult for the prosecution to disprove beyond reasonable doubt, the facts of necessity being as a rule known only to the defendant himself' (Law Com No 218, para 30.15, quoting Lord Lane CJ in *R v. Howe* [1986] QB 626, 641, to which Lords Bridge and Griffiths attached particular weight in the House of Lords [1987] AC 417, 438 and 444).

72. The Commission's solution, strongly supported by the judiciary and most practitioners, was to place the persuasive burden of proving duress, on the balance of probabilities, on the defence (paras 30.16, 33.1 to 33.16). Duress, in their view, was different from other defences, in that the facts on which it is founded are not part and parcel of the incident during which the offence was committed. They will characteristically have happened well before, and quite separately from, the actual commission of the offence that the prosecution must know about and must prove. The difficulty of the prosecution disproving the unilateral claims of the defendant made it 'hardly surprising that judges and others should express lack of enthusiasm about the defence of duress as a whole.'

73. This solution, coupled with the Commission's 'sell-out to subjectivism', has been strongly criticised: see Jeremy Horder, 'Occupying the moral high ground? The Law Commission on duress' [1994] *Crim LR* 334... I accept that even the person with a knife at her back has a choice whether or not to do as the knifeman says. The question is whether she should

have resisted the threat. But, perhaps because I am a reasonable but comparatively weak and fearful grandmother, I do not understand why the defendant's beliefs and personal characteristics are not morally relevant to whether she could reasonably have been expected to resist... I remain attracted by the Law Commission's proposals...

74. If we are not to have legislation to alter the burden of proof, and I agree that it is not open to us to do it ourselves, then I understand your lordships' desire to maintain the objective standards set by Lord Lane in *Graham*. But it seems to me that the best counter to Lord Lane's concerns is the *Fitzpatrick* doctrine which is the issue in this case. Logically, if it applies, it comes before all the other questions raised by the defence: irrespective of whether there was a threat which he could not reasonably be expected to resist, had the defendant so exposed himself to the risk of such threats that he cannot now rely on them as an excuse? If even on his own story he had done so, then the defence can be withdrawn from the jury without more ado; if that issue has to be left to the jury, but they resolve it against him, there is no need for them to consider the other questions.

75. But how far does this principle go?...

76... [Having agreed that *Baker and Ward* was the incorrect approach, Baroness Hale continued] There are, however, two other questions.

77. The first is that the cases tend to talk about exposing oneself to the risk of 'unlawful violence'. That, it seems to me, is not enough. The foreseeable risk should be one of duress: that is, of threats of such severity, plausibility and immediacy that one might be compelled to do that which one would otherwise have chosen not to do. The battered wife knows that she is exposing herself to a risk of unlawful violence if she stays, but she may have no reason to believe that her husband will eventually use her broken will to force her to commit crimes. For the same reason, I would say that it must be foreseeable that duress will be used to compel the person to commit crimes of some sort. I have no difficulty envisaging circumstances in which a person may be coerced to act lawfully. The battered wife knows very well that she may be compelled to cook the dinner, wash the dishes, iron the shirts and submit to sexual intercourse. That should not deprive her of the defence of duress if she is obliged by the same threats to herself or her children to commit perjury or shoplift for food.

78. But this brings me to a concern which I have had throughout this case. It is one thing to deny the defence to people who choose to become members of illegal organisations, join criminal gangs, or engage with others in drug-related criminality. It is another thing to deny it to someone who has a quite different reason for becoming associated with the duressor and then finds it difficult to escape. I do not believe that this limitation on the defence is aimed at battered wives at all, or at others in close personal or family relationships with their duressors and their associates, such as their mothers, brothers or children. The Law Commission's Bills all refer to a person who exposes himself to the risk 'without reasonable excuse'. The words were there to cater for the police infiltrator (see Law Com No 83, para 2.37) but they are also applicable to the sort of association I have in mind. The other

elements of the defence, narrowly construed in accordance with existing authority, are more than adequate to keep it within bounds in such cases.

79. ... As will be apparent, I would have chosen option (ii) [in the certified question, that the defence would be excluded where as a result of voluntary association the accused only when he foresaw (or should have foreseen) the risk of being subjected to compulsion to commit criminal offences], together with the further explanation of the concept of 'voluntary association with others' given in paragraph 78 above.

Many of the ambiguities in the duress defence are perhaps best revealed by judicial debate about its applicability to murder. The House of Lords, contrary to its earlier decision in *DPP for Northern Ireland v. Lynch* (1975), decided in *R v. Howe* (1987) that the defence of duress is not available to any party, principal or secondary, to a completed murder and the House of Lords has also ruled out the duress defence in cases of attempted murder (see *R v. Gotts* (1992)). Two competing arguments about the basis for the duress defence are very clearly illustrated by the reasoning in *Howe*. The first, which sees duress in terms of excuse, interprets the coercive threat as rendering it unfair or inappropriate to attribute responsibility to the defendant. The second, which regards duress rather in terms of justification, bases the defence on the accused's decision to take the lesser of two evil courses, implying that duress takes the 'actus reus' itself outside the scope of wrongs criminal law seeks to prevent and deter. Clear evidence of both approaches, and lack of awareness of any tension between them, is to be found in the judgment of Lord Hailsham in *Howe* (1987). Lord Hailsham begins by construing the defence as a species of excuse:

*R v. Howe* (1987) 1 ALL ER 771, 773

... [T]he definition of duress, whether applicable to murder or not, was correctly stated by both trial judges to contain an objective element on the lines of their respective directions and thus must involve a threat of such a degree of violence that 'a person of reasonable firmness' with the characteristics and in the situation of the defendant could not have been expected to resist. No doubt there are subjective elements as well...

In similar vein, Lord Hailsham quoted approvingly from Lord Kilbrandon's judgment in *Lynch*:

... 'the decision of the threatened man [sic] whose constancy is overborne so that he yields to the threat, is a calculated decision to do what he knows to be wrong, and is therefore that of a man with, perhaps to some exceptionally limited extent, a "guilty mind". But he is at the same time a man whose mind is less guilty than is his who acts as he does but under no such constraint' [777].



Lord Hailsham proceeded to assert that he did:

... not at all accept in relation to the defence of duress that it is either good morals, good policy or good law to suggest, as did the majority in *Lynch's case* and the minority in *Abbot v R* (1977) that the ordinary man of reasonable fortitude is not to be supposed to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own [779-780].

He went on to admit that:

Consistency and logic, though inherently desirable, are not always prime characteristics of a penal code based like the common law on custom and precedent [780].

He then (unconsciously) illustrated this point by gradually shifting into the discourse of justification in denying the appropriateness of allowing duress as a defence to murder:

In such a case [one of assault] the 'concession to human frailty' is no more than to say that in such circumstances a reasonable man of average courage is entitled to embrace as a matter of choice the alternative which a reasonable man could regard as the lesser of two evils. Other considerations necessarily arise where the choice is between the threat of death or a fortiori of serious injury and deliberately taking an innocent life. In such a case a reasonable man might reflect that one innocent human life is at least as valuable as his own or that of his loved one. In such a case a man cannot claim that he is choosing the lesser of two evils. Instead, he is embracing the cognate but morally disreputable principle that the end justifies the means.

This interweaving of arguments of excuse and justification continues through the rest of Lord Hailsham's judgment, which appears at once to claim that duress operates to excuse the actor's 'human frailty', and that it is inapplicable in murder cases because choosing one's own life above another's is never a justifiable action. Note also the gender-specific images of the normal subject: the duress defence is designed to excuse people invested with characteristics which are strongly marked as masculine in our society on the basis of assumptions to which Baroness Hale's speech in *Hasan* (above) is a welcome corrective.

Given the difficulties which the rationale for duress poses for criminal law doctrine, it is hardly surprising that in this area judges have often been willing to opt for pragmatic solutions legitimised by appeals to 'common sense'. One such strategy has been for judges to comfort themselves that potential injustice wreaked by the denial of the duress defence in murder cases can be mitigated despite the mandatory life sentence by the exercise of executive discretion to release the person convicted on licence at an early stage – a good example of the interplay between issues of substantive law, sentence and post-trial

discretion. However, as the following extract suggests, the 'common sense' mode of argument presents its own problems:

P. Alldridge and C. BeKey, 'Murder under Duress: Terrorism and the Criminal Law' (1989) *International Journal for the Sociology of Law* 223 at 234-5

It was Lord Wilberforce who pointed to the legal crisis precipitated by Lynch's story [Lynch was threatened with a gun into driving some IRA members to a garage where they shot a person dead], when he said, 'A law, which requires innocent victims . . . to be tried . . . and convicted . . . is an unjust law'. This oxymoron, an injustice in the system of criminal justice, a blindness in the authorities which constituted the guarantee of their own legal authority, was the problem which exercised all five of the Law Lords in *Lynch*. Though their verdicts differ, their judgments have this in common, that the law must be made to make sense again. The sliding signifiers, put into process by the case of an action which is simultaneously voluntary and involuntary, are to be arrested in their headlong course. The law must be 'restated', either by the judges or by Parliament, in order to reconstitute the legitimacy of an institution which derives its sovereignty from the conviction that it administers justice.

The inconsistency resides in the legal code itself: the signifying slippage is in the (authorising) texts, the authorities. The Lords therefore invoke a supplement, something from outside the criminal code itself which will make the law work again. Lord Morris enlists normal standards of rationality. His decision is based on what 'any rational system of law should take into account' . . . 'The law must, I think, take a common sense view'. If it does, it cannot find Lynch guilty. It is not right that the law should demand more than can 'reasonably' be expected. 'The law would be censorious and inhumane which did not recognise the appalling plight of a person who perhaps suddenly finds his life in jeopardy unless he submits and obeys.' To demand that law should understand how ordinary people behave when they are threatened 'is not to make the law weak but to make it just'.

In psychoanalytic theory negation represents unconscious affirmation. The unprompted insistence that a specific event is not important or that a state of affairs is not the case unconsciously provides the analyst with an indication of what matters most. Is there, perhaps, a hint of unconscious anxiety in Lord Morris's final assertion? To bring the law into line with common sense is not to make it weak, he insists. What is the statement that is being made here on behalf of the legal institution? That it would be a mistake to suppose that to exonerate Lynch would weaken the law? Probably. But also, perhaps, at another level of meaning, that the invocation of supplementary standards of what is reasonable threatens to reveal a weakness in the institution of the law, by acknowledging its inadequacy in the present case. Because if common sense could determine what ought to be done, what need would there be of courts and judges, of the House of Lords as the court of final appeal, or indeed of the entire institution which endows Lord Morris himself with the authority to participate in the process of determining the fate of Lynch and so many others?

The duress defence illustrates a tension in criminal law doctrine between a world-view based on assumptions about defendants' freedom of will and one which assumes rather that human actions are, wholly or largely, causally determined. This tension is of particular relevance to property crime, where 'situational' pressures to offend are widely acknowledged (not least in the field of crime prevention: see Chapter 13 below). In the following passage, Kelman identifies the slippage between intentionalist and determinist interpretive frames in legal discourse, touching on themes already raised by Vandervort and by Alldridge and Belsey:

*M. Kelman 'Interpretive Constitution in the Substantive Criminal Law' (1981) *Stanford Law Review* 591, 642-4*

Anglo-American courts and commentators assert that our criminal justice system is based on the supposition of 'free will' or intentionalistic conduct. Of course, though, in a number of areas we allow determinist excusing conceptions of the defendant to be considered. This residual determinism negates the simplest claims justifying the generally asserted intentionalism, i.e. that a determinist discourse is somehow technically infeasible or methodologically inapplicable to legal contexts. The standard methodological objections to a more general determinism are twofold: first, a simple skepticism about the necessity of any effect following from any cause, and second, a distrust of our capacity to account for the roots of particular decisions that explain the precise conduct that the actor ultimately engaged in. Yet, these objections apply as well to the uses of determinism that we do tolerate . . .

Ordinarily, we judge criminal liability at the moment the crime occurs. A defendant is guilty if he performs a harmful act in a blameworthy fashion. The origin of a decision to act criminally is ordinarily of no concern.

At times, though, we open the time frame to look at earlier events in the defendant's experience and construct deterministic accounts of the intentional wrongdoing. For instance, a defendant may perjure himself after being threatened. At the moment the defendant is perjuring himself, he is intentionally telling a lie. But the decision to lie under duress may seem normal, expectable, and therefore blameless.

. . . The duress defence represents a severe threat to ordinary criminal law discourse and is strictly confined, in terms of both time and the pressures that may influence the reasonable defendant. For the most part, we accept only discrete incidents as forming the basis of a duress plea, and we demand that these incidents occur close in time to the arguably criminal incident. Furthermore, the pressures must be attributable to a single human agent or group of agents that focuses his or their efforts on inducing the defendant to commit the crime. This second restriction maintains the illusion of an intentionalist discourse, but the relevant will is now that of the source of the duress, not that of the defendant. Of course, though, from the vantage point of the defendant on trial, we have shifted to a determinist mode. What is odd is that the 'substitution of wills' metaphor implies that the defendant is acting involuntarily, or at least without exercising normal rational facilities, when he commits the crime. In fact his conduct may be as voluntary and sensible as any behaviour



we can imagine, given the background conditions. The defendant is not rendered will-less; it is simply that the content of the expressions of his will, in the typically relevant broader time perspective we are suddenly using, is deemed to be determined.

The co-existence of responsibility-oriented and deterministic arguments in relation to duress is clear. What is also significant is that on either of these approaches, a thorough pursuit of the appropriate rationale for the defence would dictate a considerable extension of its scope and of that of other related defences. If we are to regard duress as an excusing condition within a voluntarist or subjective framework, why should restrictions based on the 'reasonableness' of the defendant's response be introduced? A person who is particularly anxious or fearful is so through no fault of their own, yet the operation of the 'objective' test renders them liable even when their will may have been thoroughly 'overborne'. Similarly, such a person may be 'unreasonably' timorous in taking advantage of possible avenues of escape, hence excluding the application of the defence. If, conversely, we were to take a more deterministic approach, the framing of the defence would be concerned with motivating and justifying the taking of the lesser of evil courses, and a far wider scope would be appropriate. For example, if the basis of the duress defence is the justified taking of the least harmful course, why not allow the defence in the case of threats to property to which the accused has submitted by committing a property offence less harmful than the conduct threatened? The argument from justification seems to apply: **the accused does no wrong in taking the lesser of two evil courses.**

In pointing out these ambiguities in legal approaches to duress, we hope to show the importance of recognising the choices being made and the underlying issues which are involved. The results of failure to do so are well illustrated by the chaotic development of law on the application of duress to murder cases in *Lynch* (1975), *Abbott* (1977) and *Howe* (1987). Arguments from voluntariness and responsibility have constantly competed with arguments from lesser evil and social policy in motivating acceptable behaviour: the outcome of these arguments in particular cases has been spectacularly unpredictable. Yet criminal law's continued insistence on (purportedly principled) limitations to the duress defence provides important clues not just to competing world-views underlying doctrine but also to a pragmatic concern with preserving the authority of law and the perceived reality of its threats. It is perhaps this fundamental concern which dictates that criminal law resist the full force of the arguments which follow from any of the suggested rationales for the duress defence.

For example, on a view of duress or necessity as excuses, the voluntariness and 'subjective' responsibility of especially anxious or impetuous defendants may be radically affected by threats to their property or remote threats to their person. But criminal law sees a danger that its authority will be undermined by consistent adherence to a 'subjective' approach through recognition of the defence, and demands instead a baseline of 'reasonableness' beyond which its inquiries



into 'subjectivity' will not go. Similarly, the recognition that an individual's situation – extreme poverty, for instance – might attenuate the basis for holding her fully responsible for an offence is threatening to the abstract method of legal doctrine. Conversely, although trivial property offences might be regarded as justifiable – the lesser evil – if done in response to much more serious threats to property, a consistent acceptance of the argument opens up the worrying possibility of its generalisation beyond the area of threats and its use by any defendant who claims that their offence was committed to avoid a greater evil (see also the discussion of self-defence in Section VI). This argument is threatening to the very core of criminal law's method, which is to denominate certain forms of behaviour absolutely unacceptable subject only to limited excusing arguments – a method of asserting authority which would also be undermined by recognition, for example, of a general defence of superior orders. The idea of defence from lesser evil opens up the possibility of endless debates in court about the relative merits of particular courses of action, thus sacrificing criminal law's promised certainty and the efficacy of its threats, as well as undermining law's supposed autonomy by introducing moral and political argument, explicitly, within the legal arena.

These arguments explain the courts' ambivalence about duress of circumstance and the defence of necessity. Courts have become noticeably more receptive to these defences in recent years, perhaps itself reflecting the increased use of duress as a defence noted by Lord Bingham in *Hasan* above. Of course, the increased receptiveness will also encourage more use of the defences too. Duress of circumstance is distinguished from duress by threat by the absence of threat, and therefore the absence of a wrongdoer 'standing behind' the defendant. An example of duress of circumstance would be where a person had to drive in excess of the speed limit in order to avoid being caught by a bush fire. *Conway* is one of the first cases of this type of defence. We can note that although the Court of Appeal equated duress of circumstance with necessity, necessity can be seen as a rather different species of defence, one which justifies a considered action for example to separate conjoined twins where only one can survive, as in *Re A (Conjoined Twins)* (2000). We will return to this further below.

***R v. Conway* (1988) 3 All ER 1025, 1029**

[Conway had been charged with reckless driving; his defence based on the need to escape a supposed attack on his passenger had been rejected by the court of first instance but was accepted on appeal.]

**Woolf LJ:** We conclude that necessity can only be a defence to a charge of reckless driving where the facts establish 'duress of circumstances', as in *R v. Willer*, i.e. where the defendant was constrained by circumstances to drive as he did to avoid death or serious bodily harm to himself or some other person.

As the learned editors point out in Smith and Hogan *Criminal Law* (6th edn, 1988) p. 225, to admit a defence of 'duress of circumstances' is a logical consequence of the existence of the defence of duress as that term is ordinarily understood, i.e. 'do this or else'. This approach does no more than recognise that duress is an example of necessity. Whether 'duress of circumstances' is called 'duress' or 'necessity' does not matter. What is important is that, whatever it is called, it is subject to the same limitations as the 'do this or else' species of duress. As Lord Hailsham LC said in his speech in *R v. Howe* (1987, p. 777):

'There is, of course, an obvious distinction between duress and necessity as potential defences: duress arises from the wrongful threats of violence of another human being and necessity arises from any other objective dangers threatening the accused. This, however, is, in my view, a distinction without a relevant difference, since on this view duress is only that species of the genus of necessity which is caused by wrongful threats. I cannot see that there is any way in which a person of ordinary fortitude can be excused from the one type of pressure on his will rather than the other.'

No wider defence to reckless driving is recognised.

Lord Justice Woolf's denial of the significance of whether the defence is called duress or necessity calls to mind Alldridge and Belsey's argument about negation. In *R v. Martin* (1989), the Court of Appeal followed *Conway* in accepting the applicability of a plea of necessity to a charge of driving whilst disqualified. The defendant had done so after his wife had threatened to commit suicide if he did not drive her son to work. Simon Brown J, whilst acknowledging a general defence of 'necessity in extreme circumstances', was quick to insist that the defence 'most commonly... arises as duress' (p. 653). And in what was, before *Re A*, the most serious case in which the defence was invoked – a case in which the defendants were charged with hijacking a plane, their defence being that they were acting under the extreme pressure created by the fact that their families had been tortured and killed and that they faced a similar threat – the courts once again conceptualised this as a potential defence of duress of circumstances (*R v. Abdul-Hussain* (1999)).

As well as adding the new variant of duress of circumstances to duress by threats, the courts have taken a further, tentative step towards recognising a defence of necessity. To appreciate the significance of this new development it is instructive first to consider the history of judicial resistance to a necessity defence. The most famous judicial discussion is to be found in the case of *R v. Dudley & Stephens* (1884), in which the defence was denied to two shipwrecked sailors who had killed and eaten a cabin boy in order to survive. The fact that the case concerned murder and that no lots had been drawn before the killing of the weakest party narrows the general applicability of the decision, and it can be questioned whether it stands for the general denial of a necessity defence which it has been taken by later cases to establish (*Buckoke v. GLC* (1971)). However, it is worth quoting Lord Coleridge's splendid rhetoric, which combines an

exaggerated equation of duty and supererogation with expression of fears about either defendant or judge being put in the position of having to choose which should be regarded as the lesser of evils:

***R v. Dudley and Stephens (1884)***

**Lord Coleridge:** To preserve one's life is generally speaking, a duty, but it may be the plainest and highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die . . . It is not correct, therefore, to say that there is any absolute and unqualified necessity to preserve one's life . . . It is enough in a Christian country to remind ourselves of the Great Example which we profess to follow.

It is not needful to point out the awful danger of admitting the principle which had been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. Was it more necessary to kill him than one of the grown men? The answer be, No . . .

Where, it might be asked, would the authority of criminal law be if defendants could come to court and plead not just illicit pressure or threats, or even exceptional circumstances such as shipwreck, flood or famine, but also crushing poverty and overwhelming need as defences to crime? Would this not threaten the entire basis of the property system? Just such a fear was later expressed by Lord Denning:

. . . if hunger were once allowed to be an excuse for stealing, it would open a door through which all kinds of lawlessness and disorder would pass . . . If homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door which no man could shut [*Southwark London Borough v. Williams (1971)*, 179].

Similar preoccupations led Edmund Davies LJ to make the following assertion in the same case:

. . . the law regards with the deepest suspicion any remedies of self-help, and permits these remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear – necessity can very easily become simply a mask for anarchy [p. 181].

We have already seen the powerful pull of concerns about those who take the law into their own hands in the Iraq war protest case, *Jones (2006)*, in relation to the use of force in the prevention of crime, and in the duress context in *Hasan (2008)*. These defences challenge the basic doctrinal precept of criminal liability as based on individual responsibility. They introduce arguments of social context which may well lead to a reading of crime as proceeding not just



from individual decision and action but from action situated in an influential environment for which the individual herself is largely not responsible. As Vandervort envisages, it raises the possibility of laying, in whole or in part, the 'responsibility' for crime at the door of government, state or social structure. This is particularly true of the defence of necessity in which there is no possibility of simply shifting law's focus onto the actions of another individual – a strategy which, as Kelman rightly observes, is crucial to the limitation of the duress defence.

Nicola Padfield, 'Duress, Necessity and the Law Commission' (1977),  
*Criminal Law Review* 778 at 786–9

Why separate duress by threats from duress of circumstances? ... The importance of separating excusing defences from justificatory ones appears to be much better understood in the American literature than it is in England. However, it is increasingly recognised in this country that there are important reasons for recognising the differences.

A model which the Law Commission should re-examine is the American Model [Penal] Code, drafted by the American Law Institute between 1952 and 1962. Approximately one-half of the States have recognised the choice-of-evil defence in the Model Code:

Section 3.02 Justification Generally-Choice of Evils

- (1) Conduct which the actor believes to be necessary to avoid harm or evil to himself or to another is justifiable, provided that:
  - (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offence charged; and
  - (b) neither the Code or other law defining the offence provides exceptions or defences dealing with the specific situation involved; and
  - (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
- (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offence for which recklessness or negligence, as the case may be, suffices to establish culpability.

This version has the merit of making explicit the difference between this defence and that of duress. It is a 'residual justification' defence: that is, it legitimises technically wrongful conduct that common sense, fairness, or utilitarian concerns convince us is justified, but which does not fall within any other recognised justification defence ... Without the defence a system of criminal laws is neither rational nor just (Dressler 1987: 249) ...

Sir James Stephens echoed this sentiment in his description of necessity:

An act which would otherwise be a crime may in some cases be excused if the person accused can show that it was done only in order to avoid consequences which could not



otherwise be avoided, and which, if they had followed, would have inflicted upon him or others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided. (*Digest of the Criminal Law* (1887))

The judgment of Robert Walker LJ in *Re A* comes close to taking such an approach. In this case (also discussed in Section VI), a hospital applied to the courts for a ruling on the legality of an operation to separate conjoined twins. One of the twins was judged to be capable of survival if separated from her weaker twin sister, but the separation operation would be certain to kill the latter. In his analysis of the issues, Robert Walker LJ described duress of circumstances, along with duress by threats and private defence, as 'a residual category of necessity' (p. 1064) which might apply in such circumstances (though he rejected the idea that there was any significance in a distinction between excuses and justification). The full implications of the case are difficult to judge, not only because of its very particular facts but also because it reached only the Court of Appeal, where the judges, though agreeing that the operation would not amount to murder of the weaker twin, took rather different routes to this conclusion. The judges were at pains to emphasise the special facts of the case, 'In truth there is no helpful analogy or parallel to the situation which the court has to consider in this case' (per Robert Walker LJ at p. 1066), which involved a conflict not merely between moral but between legal duties. Nonetheless, the case offered an opportunity for an extensive review of the authorities on the necessity defence, drawing in particular on Wilson J's judgment in the Canadian case of *Perka v. R* (1984), which argued for a necessity defence as 'the justification of a wrongful act . . . premised on the need to fulfil a legal duty which was in conflict with the duty which the accused was charged with having breached' (per Brooke LJ at p. 1048). In the course of this review, *Re A* also provided a significant reassessment of the decision in *Dudley and Stephens*:

*Re A* [2000] 4 All ER 961 at 1051

**Brooke LJ:** I have considered very carefully the policy reasons for the decision in *R v. Dudley and Stephens*, supported as it was by the House of Lords in *R v. Howe*. These are, in short, that there were two insuperable objections to the proposition that necessity might be available as a defence for the . . . sailors . . . [W]ho is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? The second objection was that to permit such a defence would mark an absolute divorce of law from morality. In my judgement, neither of these objections are dispositive of the present case.

Implicit in this reassessment is the acknowledgment that the necessity defence is likely to continue to develop: '[I]n the absence of Parliamentary intervention

the law as to the defence of necessity is going to have to develop on a case by case basis' (per Robert Walker LJ at p. 1067, following Rose LJ in *Abdul-Hussain*). The special facts of *Re A* render it of limited relevance in the property area or elsewhere. But the courts may yet be confronted with a case which forces upon their attention the fact that the logic which dictated an extension of existing defences to cover duress of circumstances also militates towards a general focus on social conditions in attributing criminal responsibility. We can therefore look forward to displays of judicial ingenuity in preserving the fragile barriers which protect the doctrinal integrity of criminal law and the appearance of the legitimacy of offences against property in the context of a radically unequally propertied society.

#### IV.12.g. Respect for property?

In its delineation of offences against property and the application of general 'principles' of liability and excuse, criminal law helps to construct a particular social conception of legitimate interests in property and a particular image of illegitimate threats to those interests. Thus criminal law's focus on a relatively 'conventional' conception of property excludes many forms of 'intangible property' and fails to accommodate the interests in welfare and social security provision which have been dubbed the 'new property'. Images of property offending which are thought of as 'real crime' remain salient, despite the existence of hundreds of statutory offences relating to property in fields such as taxation and company law. Criminal law constructs property offending as an issue of individual responsibility which abstracts the defendant from her social context and thus from potentially embarrassing contextual conditions such as poverty, discrimination and radical inequalities of wealth. In this way, the legal institution is enabled not only to protect property rights but to express and reinforce the legitimacy of the property system. This process is supported by the construction of many property offences in the moralistic terms of dishonesty, which is applied dispositively, so as to represent the subjects of the legal process as either dishonest or honest, either guilty or innocent. Moreover, the delegation of the definition of dishonesty to the magistrates or the jury serves to paper over cracks in social consensus about the legitimacy of a variety of dealings in property.

However, as we discovered in our consideration of some instances of property offending, the dispositive, either/or approach suppresses deep ambiguities in societal attitudes to respect for property. For whilst our public discourse supports the simple moral judgments expressed in criminal law, our private practice is replete with examples of deviations from those standards – deviations which we rationalise in a complex combination of world-views. With the help of institutional and group support, we seek to neutralise our guilt by speaking from different perspectives and distinguishing our actions – whether 'part-time', 'white collar' or other crime – from the 'real' crime of other people. The

occasional 'moral panic' about particular activities generally marginalised as crime, such as the current preoccupation with business fraud, can be argued merely to reinforce the power of these distinctions by focussing attention on those who have overstepped the informal, institutional limits and whose actions have taken them beyond the scope of the relevant institutional support. Their conviction serves to affirm the majestic impartiality of 'the law'. These distinctions and vocabularies are not to be found in law or in most scholarly discussions of it, but they are essential to our understanding of the social meaning, functions and operation of criminal law.

#### FURTHER READING

- Jack Beatson and Andrew Simester 'Stealing One's Own Property' (1999) 115 *Law Quarterly Review* 115.
- W. Chan and A. Simester 'Duress, Necessity: How Many Defences' (2005) 16 *Kings Law Journal* 121.
- R. A. Duff *Criminal Attempts* (Clarendon Press 1996).
- Alison Firth 'The Criminalisation of Offences against Intellectual Property', in Loveland, I. (ed.) *Frontiers of Criminality* (Sweet & Maxwell 1995), p. 149.
- Jerome Hall *Theft, Law and Society* (2nd edn, Bobbs-Merrill 1952).
- Stephen Shute 'Appropriation and the Law of Theft' (2002) *Criminal Law Review* 445.
- Keith Smith 'Must Heroes Behave Heroically?' (1989) *Criminal Law Review* 622.
- Martin Wasik *Crime and the Computer* (Oxford University Press 1991).

## Property Rights and Criminal Enforcement

In the area of offences against property, as in other contexts, we cannot achieve real insight into the nature of criminal law without examining how it is enforced. As we shall see in this section, the relative frequency of property crime has bred a diversification of enforcement practices, ranging from the formal to the informal, the publicly scrutinised to the privately controlled, the civil to the criminal. This diversity reflects the complexity of our responses to threats to property: it also raises a number of important political issues concerning accountability in and selectivity of enforcement. In particular, the eminently movable boundaries between formal and informal and between civil and criminal enforcement render discretion and discrimination important issues in the area of protection of interests in property.

Both historical and contemporary evidence reveal an important interaction between enforcement practice and the meaning of the criminal law. Blackstone berated the common law for its unjust severity in relation to grand larceny and notes the 'pious perjury' on the part of juries which this engendered: juries would find the value of the goods to be a shilling or less in order to avoid the death penalty. Similarly, Beattie's evidence suggests that grand larcenies were rather rarely prosecuted, particularly from the late eighteenth century when popular confidence in the jury system was waning and distaste for the draconian punishments was growing. Presumably victims initiating prosecutions, too, would manipulate the value of the goods, and Beattie's evidence from the late eighteenth century suggests that among grand larcenies, only horse theft was still tried with any regularity; the vast majority of property crime was petty larceny, with the most prevalent serious offences being burglary and robbery. There is a further link here with Hay's account of the way in which draconian penalties provided for by eighteenth-century law were often commuted by the authorities – a practice which fostered a sense of their munificent clemency (Hay 1975, see Chapter 11.a. above). This was ideologically more useful than a reputation for even-handed enforcement – something which becomes a much more insistent demand from the late eighteenth century on.

Because of the way in which crimes against property still dominate the officially recorded statistics of crime, much of the time and resources of the various agencies of the criminal process are devoted to 'tackling' crimes against



property, and much public debate focusses on ways in which property crime should be addressed and, if possible, reduced. In this part of the chapter, we focus on four issues of criminal enforcement which have arisen out of this debate. Our discussion adds to the emerging picture of the social and political nature of criminal enforcement and suggests that some incipient developments are peculiarly related to social concerns about property crime.

### IV.13.a. *Crime prevention*

#### IV.13.a.i. *Situational prevention*

In recent years, public fears about increases in crimes such as burglary, 'mugging' and 'vandalism' have generated a shift in focus from the offender towards a debate about how we might change the environment in which such offences occur so as to prevent or inhibit their commission (Crawford 2007, Zedner 2009). This 'situational' approach may be contrasted with 'social crime prevention', which attempts more directly to address the conditions which generate offending behaviour. The contrast between situational and social approaches therefore raises once again the question of where responsibility for property crime is assumed to lie.

R. V. G. Clarke and P. Mayhew 1980 *Designing Out Crime* (Home Office Research Unit), pp. 5-12

In defining the 'situational' approach, opportunity is . . . a key concept . . . The term criminal opportunity has several shades of meaning. First it can refer simply to the material conditions in which a potential offender is competent or able to commit a crime. And, of course, for those crimes which are the result of impulse or temptation, the opportunity for crime consists simultaneously in the material conditions and the inducement: a car with a key in the ignition provides both conditions and inducement. But it has a still broader meaning which includes the element of chance – criminal opportunities exist not only where the material conditions are present but where benefits can be gained at low risk . . .

Situational measures are exemplified below under eight headings. The first three groups comprise measures which reduce opportunity by making crime physically harder to commit. The remainder involve the manipulation of the costs and benefits, as well as the material conditions, of offending in ways which are considerably more complex.

#### **Target hardening**

The most obvious way of reducing criminal opportunities is to obstruct or 'target harden' – to increase the physical security of targets of theft through the use of locks, reinforced materials and immobilising devices, to protect against vandalism by installing unbreakable and paint-resistant materials, and by placing vulnerable objects behind grills or meshes . . . In this country, the Post Office have succeeded in virtually eliminating theft

from telephone kiosks by the wholesale replacement of vulnerable aluminium coin boxes with stronger steel ones.

### **Target removal**

A second group of measures consists in the removal of targets of crime from the environment. Thus the opportunities for wage-snatches are reduced if employers are encouraged to pay their staff by cheque rather than cash... A further variant of target removal is to be found in measures which disguise the opportunities for crime or make temptations less blatant, even if in these cases the target is only removed from the subjective world of potential offenders. For example, the rapid repair of vandalism damage may prevent further attacks.

### **Removing the means to crime**

Some sorts of crime have been dramatically reduced by removing the means to commit them. For example the incidence of aircraft 'skyjacking' has been reduced from an annual average of about 70 in the early seventies to the present rate of about 15 a year by screening passengers and baggage to detect weapons and bombs... [C]hildren can be denied the opportunities for some sorts of vandalism if, for example, they are not allowed to buy aerosol paint sprays...

### **Reducing the pay-off**

Some preventive measures are designed to reduce the incentives to crime, or the pay-off accruing to successful offenders. Most of these are applicable only to property crime and rest on making stolen goods less valuable to people who acquire them illegitimately. One example is to be found in the 'Operation Identification' schemes now popular in North America whereby households are encouraged to mark valuable possessions with indelible codes which render the goods uniquely identifiable and thus of less value to the thief...

### **Formal surveillance**

Formal surveillance refers to the activities of those whose sole or primary function is to provide a threat of apprehension sufficient to deter potential offenders. The police, of course, are the main agency to provide formal surveillance, but... there seem to be few realistic policies open to them which would achieve any further substantial impact on crime. Under certain circumstances, however, it may be worthwhile for public authorities or private organisations to provide themselves with formal surveillance for high risk targets. Some local authorities have set up special patrols to protect their parks, for example, and the private sector is making increasing use of private security services...

### **Natural surveillance**

The 'natural' surveillance afforded by people going about their everyday affairs can afford a source of (free) protection against crime, the potential of which can be exploited by intelligent design. 'Planning' solutions of this kind are associated most with Jane Jacobs, who argued that increased population densities and 'mixed' land use (shared between housing, schools, recreational facilities and so on) would lead to a stronger sense of community and higher levels of street activity - conditions which she thought would provide considerable informal surveillance...

The 'architectural' solutions of Oscar Newman have centred on the design of housing estates to give residents a better view of vulnerable areas and an increased sense of responsibility for the areas surrounding their homes. These have had particular appeal in combining solutions to the problem of crime with the promise of more attractive and less alienating environments. Both here and abroad 'action' projects to build or modify housing complexes along defensible space lines have been initiated as well as a number of empirical studies relating levels of crime and vandalism to defensible space features... Other 'natural' surveillance measures aim to increase the visibility of crime by upgrading the quality of street lighting and designing out features such as pedestrian tunnels, which are susceptible to very little surveillance. Evidence as to the effectiveness of these measures is mixed...

### **Surveillance by employees**

If formal surveillance encounters problems of cost and natural surveillance is of limited effectiveness, there is rather more promise in exploiting the surveillance role of certain sorts of employee such as caretakers in schools and on housing estates, doormen, shop assistants, bus conductors and so on. Research in North America has shown that apartment blocks with doormen are less vulnerable to burglary...

### **Environmental management**

A final group of situational measures can be loosely identified under the heading of environmental management. These measures have some but not all the characteristics of the situational approach, and some are opportunity-reducing only in an extended sense. Insofar as a distinction can be drawn between the social and physical environment, this group tends to involve manipulation of the former. Perhaps the best example is to be found in the organisation of events such as football matches. Good liaison between the police, two football clubs and supporters' clubs can reduce the opportunities and temptations for vandalism and violence; arrival and departure of supporters can be better managed so as to avoid long periods of delay; within the grounds routes of access to stands and occupation of stands can be co-ordinated so as to minimise contact between rival supporters; sale of alcohol can be controlled within, and possibly around, the grounds... Housing allocation policies can be pursued which avoid high concentrations of children on certain sorts of estate...

The objection most often raised to opportunity-reducing measures is that they are subject to 'displacement' – either in causing offenders to choose their time carefully; shift their attention to other places where there are unprotected targets; employ a different method of committing crime; or turn instead to some completely different form of illegal activity. To the extent that displacement occurs, then, situational measure might be effective only in protecting individual targets, leaving overall crime levels intact. There are reasons for thinking, however, that the problem of displacement has been overestimated. The dispositional bias in theory has tended to reinforce popular beliefs in the inevitability of displacement ('bad will out'). People find it hard to accept that actions with often momentous consequences for both victim and offender can turn on apparently trivial situational contingencies. But shifts in opportunities do affect levels of behaviour such as suicide, which not unlike many forms of crime is usually thought to be the result of deep-seated motivation...

It is also clear... that there is an enormous number of people whose engagement in crime is marginal and who would be seen by very few people as 'real' criminals; these people, as almost all of us know from personal experience, commit offences which are defined by themselves as relatively trivial, are easy to commit and have a low probability of detection. There are very few people, according to self-report studies, who have not at some time or other committed offences such as shoplifting, theft from their employers or vandalism. A sizeable proportion of the population regularly evades income tax, drives whilst drunk, or commits drugs offences. It is unlikely that reducing the opportunities for these sorts of offences will displace energies to other illegal activities... A certain amount of displacement does not vitiate a preventive measure; so long as the benefits accruing from a reduction in crime exceed the social cost of a measure, it can be regarded as a success not only by the individuals receiving the protection but also by those who have a responsibility for crime control.

This last paragraph illustrates the extent to which cost-benefit analysis pervades policy discussions in criminal justice – particularly in relation to property crime. We should also note the assumptions about the links between environment and behaviour which underlie some of the strategies: can these assumptions of 'architectural determinism' be justified? The authors go on to explain that the realisation of situational strategies is not without its difficulties:

[p. 17] Problems of implementation include cost, difficulties in persuading people to take and co-ordinate action, and resistance arising out of a general distaste for what can be seen as mechanistic and illiberal solutions to complex social problems. These objections are neither specific to the situational approach nor sufficient to invalidate it. Like any form of social control, the situational approach is open to both use and abuse. Assessed in context – in the light of the costliness, unwieldiness and doubtful effectiveness of our existing criminal justice system – it is clear that it merits a great deal more support.

The book from which this passage is taken reports a variety of studies concerning attempts to control crime situationally, including surveillance on buses and the London Underground and car security campaigns. These studies and subsequent research give mixed messages about the effectiveness of situational measures (Gilling 1997, though see Clarke (ed.) 1997), in particular about the potential for situational measures to displace crime from one area to another rather than to prevent it altogether. Several implications of any serious attempt to espouse a generally situational approach do, however, emerge. In the first place, since it is people and their property who are the 'targets' of crime, the implication of situational prevention is that they should change their behaviour, for example by staying off the streets at night or not going out alone. Such implications are not necessarily reconcilable with people's sense of the importance of their choices about their own behaviour and the quality of their lives. Moreover, the situational approach can become associated with a tendency to 'blame' the



victims of crime for their victimisation: if we all have a social responsibility to act so as to reduce the chances of our being victimised by crime, the natural result may be the judge's censure of the rape victim who took a lift – or indeed of the burglary victim who left her window unbolted (cf. Maguire and Bennett's research cited in Chapter 11.d. above) – or again of the person who has no elaborate security locks or alarms, perhaps because she could not afford them. Moreover, the situational approach raises important issues not only about where responsibility for crime lies but also about the implications of crime prevention strategies for social justice and political culture:

R. A. Duif and S. E. Marshall 2000 'Benefits, Burdens and Responsibilities: Some Ethical Dimensions of Situational Crime Prevention' p. 17 in von Hirsch et al. (eds.), *Ethical and Social Perspectives on Situational Crime Prevention* (Hart Publishing), pp. 21–2

Discussions of 'the ethics of SCP' [situational crime prevention] often (rightly) focus on the impacts of such measures: the benefits they bring by reducing crime; the burdens they impose in material costs, in limiting freedom or in infringing privacy. We should also attend, however, to their meanings, to the attitudes, the conceptions of citizens and their mutual relationships, that they manifest. Two examples will illustrate this point.

The first concerns trust. It is commonplace that civil society depends on our ability to trust each other not to attack or harm us in various ways . . . SCP measures typically manifest a lack or loss of trust: they are (seen as) necessary because we do not trust people not to commit the crimes that they aim to prevent . . . Suppose that I take to locking my wallet away when I leave my office with colleagues or students in it, to make sure that they don't steal from me. Apart from questions about whether such a measure is cost-effective, we might question the attitude it displays: we might say that I insult my colleagues and students by taking such mistrustful precautions . . .

The second example concerns inclusion and exclusion, in relation to fellow-citizenship. Consider . . . a policy of excluding certain groups from a shopping mall; or a housing estate whose streets used to be a public space open to all, which is turned into a private estate that admits only residents and 'legitimate' visitors. 'Public' space is space to which all citizens have access, in which they can coexist and interact: to exclude some groups from such space (as from a mall) is to refuse to treat them as fellow citizens . . .

[pp. 28–30] The impact of simple target-hardening measures like locking one's house is focused only on actual or would-be offenders . . . Other kinds of SCP measures, however, are focused on potential rather than actual or would-be offenders, and have a larger impact than this.

Suppose that the owners of a shopping mall aim to reduce thefts in the mall by excluding those who can be identified as potential thieves. Such a measure does not just make it hard or impossible for would-be thieves, who have already formed and are acting on the intention to steal . . . it deprives potential thieves, who have as yet formed no such

intention, of opportunities to form or act on such intentions; and it also deprives them of other opportunities and goods by excluding them from the benefits of the mall...

The possible criteria of potential criminality are of two kinds. The first kind concerns the person's own prior and relevant criminal conduct... The second kind concerns the possession of other characteristics, whether behavioural or non-behavioural, which are supposedly correlated with the commission of the relevant kind of crime: that this person... is a young, unemployed male, that he is dressed like a tramp or a gypsy – and that there is a correlation between the possession of these characteristics and the commission of the relevant kinds of crime... No such criteria, we suggest, can provide legitimate grounds for exclusion: for exclusions based on such criteria fail to treat, or to trust, those excluded as responsible fellow citizens... What... of the first kind of criterion for exclusion, based on the person's own relevant criminal conduct? This seems a more appropriate kind of criterion, since we can now say that those excluded have defined themselves as untrustworthy by their own criminal conduct... Even here, however, there are serious questions to be asked: questions about proof... and questions about the length of exclusion that could be justified... The requirement that such exclusions be justified by reference to the person's own past criminal conduct subjects them to demands of due process and proportionality which will radically constrain their use.

The emphasis on situational crime prevention may be connected with governmental attempts to diffuse responsibility for crime control in response to the perceived crisis of the state criminal justice system (see Garland 1990, quoted in Chapter 1.a.): in the context of these sorts of political and economic imperatives, ethical issues such as those raised by Duff and Marshall are all too easily forgotten.

It is also interesting to note the resonance of the situational approach with a utilitarian view of criminal behaviour. Situational approaches assume a theory of deterrence which has tenuous empirical support (von Hirsch *et al.* 1999): they also assume the centrality of an economic, cost-benefit analysis of crime which arguably ignores some of the most important social and political issues raised by criminality. In doing so, situational crime prevention encounters all the general 'pros' and 'cons' of utilitarian analysis. Utilitarian approaches to crime, whatever their real plausibility, promise some accommodation of social factors in determining crime, rather than seeing it as purely the result of individual transgression and wickedness. This is an important feature of the environmental approach – as reflected in the headline 'When design is the real criminal' (*The Guardian*, 9 March 1988, p. 23). But the situational approach, when wholeheartedly pursued, is potentially equally continuous with an explanation of crime in terms of the individual dispositions of offenders. For example, we might interpret the imprisonment of those who have committed serious offences against the person or property as a situational approach to crime prevention: it changes the environment by removing those who are likely to commit crimes. As such, it resonates with the 'new penology' canvassed by

Feeley and Simon (1994, see Chapter 2.c.). The situational approach runs the risk of legitimising both the blaming of victims and the selection of some kinds of offenders as 'real' criminals who must be removed from the environment. Particularly in the context of 'zero tolerance' policing policies, questions about the displacement of crime problems and the zoning of 'dangerous populations' into the poorest areas cannot be ignored.

The situational approach, however, with its potential for suggesting a redistribution of responsibility for crime and its prevention, has clear attractions for governments which are unable to match their tough rhetoric on law and order with substantial reductions in crime. It is therefore not surprising that a persistent theme in contemporary criminal justice policy is an emphasis on police-community liaison and arrangements such as neighbourhood watch schemes, property marking schemes and the latest wardenship schemes under the Police Reform Act 2002. The implications of such schemes in terms of increased and unaccountable surveillance and their potential social divisiveness given limited trust of the police in many urban areas raise, however, serious ethical questions. Some sociologists have pointed out that movements such as 'situational' crime prevention and 'community corrections' for offenders (such as community penalties, widely used for property offenders) have the adverse side-effect of generating ever-higher levels of surveillance in the community (see Cohen 1985; Garland and Young 1983; see also Welsh and Farrington's systematic review of the inconclusive-preventive effects of closed circuit TV, 2002). The impact of situational strategies needs to be assessed not only in narrow, cost-benefit terms but also in terms of their broader social implications. We increasingly take for granted the existence of video equipment in shops and other public places such as sports stadia, stations and roads. Should we be worried about the extent to which our society is intent on equipping itself with the paraphernalia of 1984-type surveillance (see Chapter 2.a.)? These developments, furthermore, have importance in terms of the trial process: the poor quality of much video evidence (for example of the identity of those accused of shop robbery or theft) render its use controversial. If it is the case that current standards of evidence would rule out reliance on many security videos in court, will it be the use of the videos or the standards of evidence which will be adapted?

A final question about situational crime prevention relates to its commercial aspects. One has only to read and watch the media to witness the extent of advertising of crime prevention devices such as burglar alarms. Their production is now a large-scale and highly profitable business, one which plays cleverly on popular anxieties about crime. The fact that many insurance companies now make household cover dependent on the use of alarms and elaborate locks broadens the implication of this development. The differential availability of such preventive hardware to the more and less propertied members of society raises issues of social justice and illustrates the inequitable consequences of holding potential victims at least partially responsible for avoiding victimisation.



Moreover, some commentators suggest that preventive controls can actually be counter-productive:

*S. Wemy 1978 The Hidden Economy (Martin Robertson), pp. 145-2*

At a conference on major property crime held at Edinburgh University in 1975, the question was raised of whether the cost of crime was high enough to justify the expenditure of so much money and effort on crime prevention. More precisely, it was argued that there is little or no evidence to show that security is really cost-effective...

Clearly, a crucial dilemma for the economic or cost-effective analysis of controlling hidden-economy activity is what is taken to be 'loss'. If all activities which detracted from profits were taken as 'loss', then employees would be expected to work for nothing. Fortunately, this is not how wage-earning is seen by most companies. Wages and salaries are taken into account as part of the economic 'costs' of production. The problem occurs with activities such as pilfering, fiddling and trading. These are considered by some employers as part of the costs of production. But employers are increasingly being urged to see these costs as unnecessary losses and that further costs (of security and crime prevention) are necessary in order to cut these losses. Thus, in retail business, for example, the Group 4 Total Security Company claim that a retailer who spends £1 on their services should save at least £2 on his losses in staff theft and customer shoplifting. As a rule of thumb, the company says, shopkeepers should be prepared to devote 0.1 per cent to 0.5 per cent of their turnover to security. In London's Oxford Street shops are spending around £5m per year on security to combat an estimated £10m worth of losses. This is without the additional cost of £20 for each case that is brought to court...

Of course, it will always be argued, especially by private security companies, that without controls the situation would be much worse... However, I contend that in the case of hidden-economy controls, expenditure on security actually represents an economic loss. The assumption made, notably by security companies, is that pilfering, fiddling and dealing start suddenly at the instigation of either the odd, morally defective individual who is unable to resist temptation, or of the criminally dishonest person who has planned to steal. It is argued that these 'bad apples' will affect the rest of the work force if they are not stopped in their prime. Furthermore, it is felt that by not taking security precautions, managements encourage employee theft... I take a contrasting view to this. I have tried to show... that hidden-economy activity is not something that suddenly grows. Rather it is, and always has been, a part of the costs of production. Like wages, it provides another set of satisfactions, in this case to do with the personalised nature of work and the relationship between labour and property ownership... In other words, hidden-economy activity is... a natural, ever-present feature of human work. The implications of this for controlling the hidden economy are considerable. By paying for security, employers are creating an additional, unnecessary loss which, in turn, may be multiplied by lost production through strikes. But there is an even more ironic consequence of the employment of external security of policing agencies. This concerns the natural control that already exists within the hidden economy... By removing the responsibility for self-control from the hidden economy, the introduction of



external control policies may actually exacerbate the activity . . . Employers' private justice is arbitrary, unfair and wide open to abuse, and private security is politically and economically dubious.

The rapid development of situational approaches to the prevention of property and other crime over the last two decades therefore raises important issues. These include the relevance of cost-benefit analysis and utilitarian models of crime and punishment and their relation to criminal law's doctrinal insistence on individual responsibility for crime; the allocation of responsibility for crime and its prevention; and the extension of surveillance and control in the community. These themes are often insufficiently explored by proponents of the approach. The attractions of situational crime prevention are, however, manifest: for the alternative 'social' approach is liable to raise the intractable issues about social rather than individual responsibility for crime. These issues threaten the individualist basis of criminal law and, as we have seen, the judiciary has been assiduous in framing areas such as the necessity defence in terms which keep them firmly out of the courtroom.

#### IV.13.a.ii. Diversifying and privatising control

Linked to moves towards situational crime control is the issue of the range and nature of the institutions and agencies involved in the criminal process. Situational approaches, particularly to property crime, are implemented by a greater and greater diversity of agencies at the margins of, or clearly beyond, the bounds of the formal criminal process. They are also generating a diversity of forms of sanction (such as adverse publicity in the contrasting cases of corporations and paedophiles) which draw on the offender's susceptibility to community or peer pressure. The prevalence of property crime, its costs and the gap between the resources of the police and the extent of the problem, have contributed to the generation of not only a wide range of private and state-sanctioned preventive initiatives but also new institutions which supplement formal criminal justice controls. Thus, for example, residents on housing estates are encouraged to cooperate with the police in implementing 'community crime prevention' schemes including neighbourhood watch; members of the public may be involved in mediation or 'restorative justice' schemes which divert offenders from the formal criminal process and require them to negotiate reparations with their victims and members of the local community (Braithwaite 1989; Zedner 1994; Roche 2003); shops, employers and places of public entertainment such as cinemas, theatres and malls increasingly pay for private detectives and security workers to engage in surveillance of customers and employees (Johnston 1992, Chs 4 and 5; Bayley and Shearing 1996; Zedner 2009, Chs 3 and 5). The Private Security Industry Act 2001 provides for the regulation through licensing of a number of security activities: wheel-clamping, manned guarding and door supervision. There was one prosecution for 'conduct prohibited without a licence' in 2006 ([www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080129/text/80129w0008.htm](http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080129/text/80129w0008.htm)).

Among these diverse phenomena, that of restorative justice deserves particular attention. This is not only because of its growing importance in policy terms but also because, as Braithwaite explains in the extract below, it illustrates the way in which forms of regulation developed in a particular field may be used as imaginative resources for the construction of more general policy development:

*John Braithwaite 2002 Restorative Justice and Responsive Regulation (Oxford University Press), pp. 10, 12, 16*

Restorative justice is most commonly defined by what it is an alternative to. Juvenile justice, for example, is seen as seesawing back and forth during the past century between a justice and a welfare model, between retribution and rehabilitation. Restorative justice is touted as a long-overdue third model...

The process idea of restorative justice as a method of bringing together all stake-holders in an undominated dialogue about the consequences of an injustice and what is to be done to put them right is important. But so is the idea of restorative justice as an alternative that has a very different values framing than punitive justice. A perfect restorative process in which all stakeholders have their say can result in an undominated democratic decision... to impose an extremely punitive outcome. An approach that is impoverished from the perspective of a process definition of restorative justice... might result in a richer result in terms of restorative values such as apology, repairing of harm, forgiveness, and reconciliation. In evaluating how restorative a program is, we need to analyze both the restorativeness of its processes and its values...

Most restorative justice advocates came to the approach through juvenile crime as a result of evidence of the failures of the welfare and justice models. The path that led me and a number of my colleagues who are experts in corporate crime to restorative justice is quite different and instructive. Many young criminologists began to study white-collar crime after Watergate to resurrect Edwin Sutherland's project [see Chapter II.c. above]. We wanted to document systematically how the crimes of the powerful were unpunished. What we found, in effect, was that the regulation of corporate crime in most countries was rather restorative. The reasons for this were far from ennobling, being about corporate capture combined with the high costs of complex corporate crime investigations that states were unwilling to pay. Nevertheless, some of us began to wonder whether we were wrong to see our mission as making corporate crime enforcement more like street crime enforcement through tougher sanctions. Instead we began to wonder whether street crime enforcement might be more effective if it were more like corporate criminal enforcement

In the area of fraud, HM Revenue and Customs, the Financial Services Authority and the Serious Fraud Office (see below) have investigative functions just as important as those of the police, and disciplinary proceedings by professional bodies such as Lloyd's and by self-regulatory organisations can lead to severe financial penalties (Johnston 1992, Ch. 6). In these regulatory contexts, warnings and other informal – sometimes 'restorative' – sanctions are very often used so as to divert offenders seen as trivial or deterrable from the formal criminal process (Weak 1995). While the framework of self-regulation

resonates to some degree with the situational emphasis on victim-responsibility, it raises important questions about the extent, openness and accountability of the power which regulatory institutions wield. This power is, at least in theory, circumscribed by law – for example, administrative law and laws on unfair dismissal – but it is unlikely that someone in the vulnerable position of having been accused of an offence will turn to the legal process to protect themselves against abuse of private power. Though the general move to privatisation, occasioned by both economic and ideological arguments, over the last 20 years has doubtless increased the involvement of non-state bodies in what amounts to law enforcement, the involvement of alternative institutions has a long history. Braithwaite has even claimed that, ‘Restorative justice has been the dominant model of criminal justice throughout most of human history for perhaps all the world’s peoples’ (Braithwaite 2002, p. 5; for critical discussion of this claim, see Daly 2002); and even within the framework of a criminal justice system dominated by a punitive ethos, a diversity of social institutions are involved in what might broadly be called criminal enforcement:

G. Rudé 1985 *Criminal and Victim* (Clarendon Press), pp. 93–3

. . . [T]here was no systematic method of detecting crime in London until the Whig reformers, following Peel, created the first professional detective force in 1842. In the meantime, detection was left to the plain-clothes police, directed from the Police Offices, who called to their aid the resources of a familiar but thoroughly unprofessional institution. This was the pawnbroker’s shop, later supplemented, or succeeded, by the marine-store shop, which dealt in second-hand goods. The pawnshop performed a useful, dual, function. On the one hand it provided the thief with a convenient means of exchange for his ill-gotten gains . . . On the other hand the pawnbroker’s shop, precisely because it offered such ready opportunities for thieves, was under close police surveillance, and the pawnbroker was expected to report all suspicious transactions and to attend at court in order to bring committed persons to justice. In fact, in the Proceedings for March 1830 we find the case of a pawnbrokers’ refusal to attend a police hearing inconvenient to themselves – much to the indignation of the prosecutor who charged that the pawnbrokers, by not attending at the proper time, ‘[had] done everything they could to prevent this prosecution’.

One area of contemporary property crime in which ‘informal’ control institutions are used is that of shoplifting. Here, despite the fact that their technical legal powers are no more than those of ordinary citizens, the initial enforcement stage lies in the hands of store detectives:

D. J. Murphy 1986 *Customers and Thieves, an Ethnography of Shoplifting* (Gower), pp. 237–8

Among other things, what emerged [from the empirical study of shops’ responses to shoplifting] was that most stores viewed store detectives as the best means of controlling



shoplifting and so their training was investigated. It was apparent that the intensity of training, both formal and on the shopfloor, varied enormously between retailers.

... Three models of store detective activity were outlined: the 'law-enforcer', the 'peace-keeper' and the 'moral entrepreneur'. It was argued that the law-enforcer model corresponded closely to the traditional conception of police activity. The first stage of this model was 'exclusion': potential troublemakers were not permitted entry – a policy which was only minimally pursued. The next step was 'screening' – the ways in which store detectives selected suspects for investigation. How store detectives apprehended suspects and the problems they had to overcome in doing so was the third stage of the model. Next came the interview with the suspect... Finally, came 'disposal', which usually entailed police referral unless the suspect fell into one of the categories where leniency was exercised.

The peace-keeping model followed the first two stages of the law-enforcement model ('exclusion' and 'screening'); the arrest stage, however, was eschewed in favour of 'manipulation' whereby the would-be thief was converted into a legitimate 'customer'. The peace-keeping role might be adopted by the law-enforcers where the apprehension of the suspect would be inappropriate or undesirable; and only a minority of retailers followed the peace-keeping model by preference, arresting suspects when all else had failed.

Store detectives also act as 'moral entrepreneurs', particularly when dealing with adolescents and gangs of children. More usually, this model was adopted in conjunction with the law-enforcer or peace-keeping model, and was especially used to reinforce the anxiety of apprehension when the police were not called. Critically, these three roles were not mutually exclusive; the store detective might adopt one in preference to another as the circumstances changed.

The activities of store detectives not only constitute a filter through which the impact of criminal law is mediated but also have implications for the role of the formal control agencies:

... Shoplifting is a significant offence for the police not least because it has a considerable positive effect on the 'clear-up' rate of offences detected, even though police involvement in detecting shoplifters is minimal, their role generally being that of 'processors'.

The diversification of enforcement processes has involved debate about the possibility of decriminalising shoplifting altogether or at least providing for private, civil enforcement as an alternative. There has also been discussion of the merits of police cautioning rather than prosecution: at one moment it is accepted that this is an appropriate standard procedure for first offenders; at others, this is seen as going 'soft on crime'. This debate raises an issue which is never far below the surface of the debate about property crime: the question of the appropriate line between civil and criminal enforcement and the coexistence of the two. The enforcement of criminal law relating to property raises criminological issues about how far it is accurate to envisage property offenders as rational calculators who may regard moderate criminal penalties



as modest price tags or taxes attaching to their activities (a recurring spectre in accounts of property crime). It also raises moral issues about how far offenders should effectively be able to buy the right to offend by paying fines, which are the predominant mode of sanction in this area. The latter concern has emerged clearly in debate about compensation for victims of crime, the recovery of the profits of crime, and the relationship between these practices and pecuniary criminal penalties in the form of fines.

The Hodgson Committee recommended the extended recognition within the criminal justice system of victims' interests and the greater accommodation of compensation and profit-stripping (1994). The report met with a positive institutional response in the Criminal Justice Act 1988, which provided for forfeiture and the confiscation of proceeds of offences (ss. 69–89), and made changes in the provision for compensation of victims by offenders (ss. 104–107), notably in extending the range of compensable injuries to include death and imposing a duty on courts to give reasons why they have not made an order in any case in which they have power to do so. (Confiscation in relation to offences committed after March 2003 is covered by the Proceeds of Crime Act 2002 which we discuss in further detail in 13.a.iii below). The 1988 Act also provided for the Criminal Injuries Compensation scheme to be placed on a statutory footing (ss. 108–117); however, this part of the Act was not brought into force, and it was not until the Criminal Injuries Compensation Act 1995 that a statutory basis was established – a long-delayed achievement given the rhetorical commitment to victims' rights' encapsulated in the Victims' Charter. Compensation paid directly to victims by offenders is, mandated by sections 130–134 of the Powers of Criminal Courts (Sentencing) Act 2000 (see Hoyle and Zedner 2007). In 2002 over half of offenders convicted at magistrates' courts of indictable offences of criminal damage were ordered to pay compensation but the vast majority of criminal damage cases will be summary. Overall, however, there is a downward trend – which may be connected with the rise in custodial sentences – with fewer compensation orders than 20 years ago (Ashworth 2005, p. 300).

#### IV.13.a.iii. Money laundering

It has long been recognised that behind the success of many acquisitive property offenders (including those involved in organised crime and/or drug dealers) lie those who help to dispose of the goods, and those who assist in retention of the assets. Money used to finance terrorism is another prime concern. Efforts to reduce opportunities to recycle 'dirty' money and render it useable have increased significantly in the last 30 years and the term 'money laundering' is now commonly recognised by anyone who has dealings with banks.

The main statute is the Proceeds of Crime Act 2002 together with regulations of which the most recent are the Money Laundering Regulations 2007 implementing the EC Third Money Laundering Directive in the UK. The provisions

are both complex and wide ranging. Under the Act (POCA) it is an offence for a person 'to enter into or become concerned in an arrangement which he knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person' (s. 328). POCA defines criminal property as property constituting or representing (in whole or in part, directly or indirectly) a person's benefit from criminal conduct (s. 340(3)). A person does not commit an offence under section 328 if they have made an authorised disclosure (to a constable, customs officer or nominated officer) under section 338 and obtained consent to commit the prohibited act. Consent is deemed to have been given if no notice of refusal is received within seven days. Persons working in the regulated sector (those in the business of deposit taking, insurance and investment activities, including independent legal professionals, accountants, tax advisers, auditors, insolvency practitioners, estate agents, and trust or company service providers) are obliged to disclose any knowledge or suspicion of money laundering. An offence will be committed if a person fails to make a disclosure in circumstances when they know or suspect *or have reasonable grounds for knowing or suspecting* (on the basis of information received in the course of business in the regulated sector) that another person is engaged in money laundering (s. 330). Note the objective test in the expression 'reasonable grounds for knowing or suspecting'. Failure to report can result in a five-year prison term. Part of the prevention strategy is seen in the requirement that businesses in the regulated sector must appoint a money laundering reporting officer (MLRO) whose role is to act as a filter and decide whether to disclose details of matters raised by employees to the Serious Organised Crime Agency (SOCA).

SOCA (set up by the Serious Organised Crime and Police Act (SOCPA) 2005) has replaced the Assets Recovery Agency as the body which manages the civil recovery orders under POCA. In 2008/9, £175 million worth of assets were obtained through a combination of cash seizure, cash forfeiture, civil recovery, restraint orders and confiscation orders and £88 million worth of assets were denied to criminals overseas (SOCA 2009).

As civil rules of evidence and procedure apply to orders to recover assets obtained by 'unlawful conduct' (crime), this means that money may be recovered even though there is insufficient evidence to bring a criminal prosecution.

#### IV.13.b. Enforcement patterns: 'real' crime and 'intangible' property

Three main agencies are involved in policing and enforcement in relation to major frauds: the Serious Organised Crime Agency (SOCA), the Serious Fraud Office (SFO), and the Financial Services Authority (FSA). We have already discussed SOCA's role in recovery of assets (proceeds of crime). SOCA aims to apportion its operational effort broadly as follows against the main threat sectors: drugs trafficking, primarily Class A – 40 per cent; organised immigration crime – 25 per cent; and individual and private sector fraud – 10 per cent.

There is clearly some overlap in their roles but while SOCA appears to work as a *policing, recovery and intelligence* agency, the SFO handles *prosecutions* of complex or serious frauds. The FSA on the other hand is effectively a specialised regulatory agency for financial services such as banks and insurance companies. It has powers to impose civil penalties for breach of its regulatory provisions some of which run into several millions of pounds (for example one company, A-on UK, was fined £5.25 million in 2009). The FSA levied £27.3 million in financial penalties in 2008/9 (FSA 2009) and the size of these fines calls into question the extent to which a *civil* fine can be distinguished from a *criminal* penalty. Financial crime thus involves an interplay between different enforcement and regulatory agencies with a range of different preventive and penalty options. In this part of the Chapter we first of all take a look at the SFO's work before considering the wider arguments about the social and political significance of commercial and organized fraud.

### The Serious Fraud Office

The following news items are taken from the Serious Fraud Office website [www.sfo.gov.uk/](http://www.sfo.gov.uk/) (accessed July 2009):

#### 30 June 2009

##### SFO restrains \$100M in Allen Stanford Case

Following developments in the US where Allen Stanford was taken into FBI custody in a criminal investigation, the SFO can now reveal that responding to a formal request from the US Department of Justice, it has obtained a restraining order over \$100 million of assets believed to be held at certain London financial institutions. The order is in connection with Robert Allen Stanford, Stanford International Bank and others.

#### 23 June 2009

##### Financial consultant defrauded British 'expats'

Expatriates in Indonesia were defrauded of over US\$800,000 by purported financial advisor Alan Gardner, a jury determined yesterday. Gardner created a fictitious foreign currency trading scheme, supposedly backed by the reputable Swiss bank UBS, offering 48 per cent returns per year. The scheme was a sham in which four British and a Canadian expatriate were defrauded in a classic case of a high-yield investment fraud. Gardner was sentenced by HHJ Hooper at Worcester Crown Court to six years imprisonment.

#### 19 June 2009

##### Four sentenced in a \$10 million 'Ponzi' fraud

Four men who operated high-yield investment schemes have been sentenced today to a total of over ten years after admitting their participation in defrauding investors worldwide of a total of US\$10 million. A fifth man was sentenced in September 2008. At the centre of the fraud, entailing one of the most complex investigations undertaken by the SFO and Cheshire Police, was a project to extract gold from spent ore, though not an ounce was produced, and no revenue generated.



The impetus for setting up the Serious Fraud Office in 1988, a unified organisation responsible for the detection, investigation and prosecution of serious fraud cases, was the Roskill Report on Fraud Trials (1986). It concluded:

While petty frauds, clumsily committed, are likely to be detected and punished, it is all too likely that the largest and most cleverly executed crimes escape unpunished. The Government has encouraged and continues to encourage ordinary families to invest their savings in the equity markets. If the Government cherishes the vision of an 'equity owning democracy', then it also faces an inescapable duty to ensure that financial markets are honestly managed, and that transgressors in these markets are swiftly and effectively discovered, convicted and punished.

The SFO states that the key criterion in deciding whether to accept a case is that the suspected fraud appears to be so serious or complex that its investigation should be carried out by those responsible for its prosecution. The factors considered are:

[www.sfo.gov.uk/about-us/our-policies-and-publications/does-the-fraud-fit-sfo-criteria.aspx](http://www.sfo.gov.uk/about-us/our-policies-and-publications/does-the-fraud-fit-sfo-criteria.aspx)

- Does the value of the alleged fraud exceed £1 million?
- Is there a significant international dimension?
- Is the case likely to be of widespread public concern?
- Does the case require highly specialised knowledge, e.g. of financial markets?
- Is there a need to use the SFO's special powers, such as Section 2 of the Criminal Justice Act?

Under section 2 of the Criminal Justice Act 1987, staff authorised by the Director have powers to require a person to answer questions, provide information or produce documents for the purposes of an investigation. Written notice is given. Section 2 notices are issued to banks, financial institutions, accountants and other professionals who may, in the ordinary course of their business, hold information or documents relevant to a suspected fraud. A section 2 notice obliges them lawfully to provide information and documents thus overriding the duties of confidence they otherwise owe to their clients. Section 2 powers may only be used for the purposes of an investigation of a suspected offence which appears on reasonable grounds to the Director to involve serious or complex fraud and where there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs of any person. A person may refuse to answer questions or provide information or documents if s/he has a reasonable excuse for not doing so and a person's answers to questions required under section 2 may not be used in evidence against them at their trial unless the trial is in relation to an offence of providing misleading information during the section 2 interview itself.



The SFO takes on high-value cases which tends to mean that its failures are publicised more than its successes. The House of Lords ruling in *GG plc* (2008) resulted in 24 acquittals and the failure of the long-running 'Operation Holbein' investigating pharmaceutical price fixing (see Chapter 12.c). It has become more proactive in the last few years and the most recent Annual Report shows that nearly all trials result in at least one conviction. The numbers of cases brought are still small, however, as the table below shows:

|                                        |                                      |
|----------------------------------------|--------------------------------------|
| Active cases at start of year          | 64 (sum at risk £2.38 billion)       |
| Referrals accepted (from 60 made)      | 16                                   |
| Re-opened                              | 1                                    |
| Cases worked on during year            | 81                                   |
| Investigations closed (not prosecuted) | 9                                    |
| Cases completed at court (see Fig. 2)  | 7                                    |
| Total cases concluded                  | 16                                   |
| <b>Cases on-going at year-end</b>      | <b>65 (sum at risk £4.8 billion)</b> |

### Perceptions of property crime

We move now from the institutional structure of fraud detection and enforcement to consider perceptions of what constitutes 'real' property crime. White collar crime has long been marginalized yet the crisis that has overtaken leading economies in the last 10 years, starting with the collapse of Enron and subsequent corporate scandals in 2001/2 and the widespread banking crisis in 2008 has shifted perceptions. It is too early to say how deep or how long-lasting these changes might be (McBarnet 2006). Law-makers have, on occasion, prescribed draconian penalties for certain forms of property offending which could be seen as forms of protest and thus as threatening to the social order (Thompson 1975). However, their execution has not always matched the original intention, as is illustrated by Hay's discussion of the use of the prerogative of mercy in the eighteenth century (Hay 1975, pp. 40–9). Hay argues that the existence of wide discretion to pardon acted to legitimate a system which is fundamentally loaded against the interests of the propertyless. Such examples reveal the significance of law's ideological functions, and the limits on its perceived legitimacy, reflected in middle-class juries' frequent refusals to convict as property laws became unduly brutal towards the end of the eighteenth century (see Rudé 1985, Ch. 7). Corporations and their wealthy executives are well placed to engage in 'creative compliance', in other words 'to use technical legal work to manage the legal packaging... the practice of using the letter of the law to defeat its spirit' (McBarnet 2006, p. 1091). The extraordinary degree of discretion in both prosecution and sentencing of criminal cases still enables enforcement agencies to treat with special severity property offences which sit squarely within the social

ideas of 'real crime' propagated by state and media (Cook 1989). In the following extract, Levi comments on the particular (often 'privatised' and deferential) modes of enforcement developed around white collar crime and the political implications of these developments:

*Levi 1987 Regulating Fraud (Tavistock), pp. 35-7*

Post-industrial society is characterized by a desperate search on the part of government to find responsible non-governmental bodies to carry out key regulatory functions. The inspection of factories in the nineteenth century was a comparatively easy task; hours of work, and health and safety provisions were visible, even if they were not vigorously enforced. But technological changes and increasing consumerism mean that it becomes harder and harder to tell whether or not a rule is being violated. How do we know if food sold to the public contains contaminated and/or banned substances? This, at least, is a problem that can be resolved by forensic analysis, if anyone reports it or if government or commercial compliance officers inspect it. But how can we tell if insurance or securities are being sold by an unauthorized person? Or if a director or professional is engaged in insider dealing? For tasks like this, social control must be dispersed and, at least in part, privatized. To borrow from Foucault (Foucault 1977), a new 'carcéral archipelago' – i.e. a new area of imprisonment – must be created within the metaphorical 'punitive city'. Thus, 'responsible corporations' – those with a comparatively good track record of violations – are permitted to police their own health and safety violations, leaving (reduced) resources to be focused upon the higher risk firms; S[elf] R[egulating] O[rganizations], set up alongside the established professional bodies, police their members who in turn have their own corporate compliance officers: upperworld community policing, with as few state police officers as possible to upset the delicate mechanisms of control.

For the remainder of society, however, this sort of strategy is labelled in advance as being doomed to failure. It is a common misunderstanding in some circles that large numbers of police and extensive police powers are positively desired to police the working-class city. This is foolish: self-policing is always preferable. But the family defects and the other pathologies of the poor give them (and us) inadequate protection against the forces of greed. Their crimes are highly visible; their police are already in place; there are all too few responsible bodies – schools, churches, youth clubs, football supporters' clubs (for the 'true' soccer-lovers) – to do the control work that is necessary. Fortunately, there are other regulatory factors – work prospects for some; social-security benefits for others; leisure activities (or, in the case of television and video, inactivities); narcotics; and even, perhaps, the 'black economy' – which serve to counteract the risk of revolt that is 'caused' by the ineffectiveness of family, school, and religion. We see now why we need the police: even in Japan, with its increasing geographical mobility and recently privatized families, social disorganization is rife. So Foucault's punitive city was designed to regulate the workers and the unemployed, because they were the dangerous classes from whom 'social problems' ... originated. Or so it was said.

But now we have a different set of disciplinary problems, created by people who live, not in the slums or even the suburbs of the punitive city, but in leafy Oxfordshire villages . . . from which their Porsches zoom forth at 5 am en route for the City . . . They work hard, sustained by adrenalin . . . as they play on the great financial casinos of the world with other people's money. What if they break the law? Well, with a bit of luck, nobody will notice, and 'everybody knows' that there are strong economic reasons why insider dealing is actually beneficial to the markets, though governments are forced to act tough because the public are ignorant and might misunderstand what was going on. But as for corporate embezzlement, computer fraud, commercial credit fraud, etc., there is general agreement that something must be done . . . Thus we see the intensification of surveillance within the commercial City . . .

This shape of regulatory things to come is naturally overdrawn: for to stop the embezzlers and the money-launderers completely would make life too uncomfortable for the money-makers, and in a fast-changing global market in which, once behind, we may never catch up, we all depend upon the money-makers . . . So although we may try to develop our upperworld equivalent of the punitive city, we cannot try too hard: for whether they are market-makers, first class chefs or Presidential advisers, those who are socially useful and create our wealth have to be allowed the occasional peccadillo. The ironic circle is complete: to fund the punitive city for those who are too young or too old or too ill-equipped to join the ever-shrinking ranks of the merchants, or the labouring poor, or the 'middling people', we must give the City the latitude to police itself, even if this means that the striving for prosperity triumphs over law. Persistent offenders who steal £1 go to prison; persistent insider dealers who steal £10 million pay back the money – perhaps in addition to a substantial fine – on the rare occasions that they are caught. *De maximis non curat lex*: for the greatest things, the law provides no remedy.

The specific issues of discrimination in favour of white collar crime in prosecution and sentencing are difficult to address, in that the data available are susceptible of many different interpretations. For example, do statistics which on the face of it suggest a fairly lenient treatment of 'white collar' fraudsters relative to the value of frauds as opposed, say, to thefts, reflect a special openness to some arguments from mitigation, the skill of the lawyers engaged by middle-class defendants, the shorter criminal records of fraud defendants (which may itself reflect differential patterns of enforcement) or other factors? Cook's research, however, reveals important contradictions in official responses to tax and social security fraud:

*D. Cook 1989 Risk Law, Poor Law: Different Responses to Tax and Supplementary Benefit Fraud (Open University Press), p. 160*

In 1983, 268 Social Security offenders were imprisoned compared to 32 tax law offenders, and this despite the Revenue's aim of seeking harsh deterrent punishments for its most



severe fraudsters. But it should also be stressed that over 8,000 benefit fraudsters also acquired criminal records in that year. Even though significant numbers of tax defaulters are dealt with through the imposition of compounded financial penalties, this does not involve the publicity and effective criminalization suffered by benefit fraudsters, who are far more likely to undergo court proceedings.

[pp. 165-8] There is a common assumption that the differential treatment of tax and benefit fraud derives from disparities in the offenders' relative 'ability to pay'... It is often asserted that this explains both the high rate of prosecution of poorer fraudsters by the DHSS and the comparably low rates of prosecution (coupled with emphasis of financial settlement) by the Inland Revenue where richer fraudsters are concerned. However, this argument ignores that fact that the poorest members of society do pay for their fiddles, both in reparation to the DHSS through deductions from benefit, and in reparation to society through the courts, where in 1983 62 per cent of benefit fraudsters were also ordered to pay fines...

... Until 1980 [DHSS] practice followed the rule that any deductions from benefit made in respect of overpayments should not reduce the claimant's income to below the basic supplementary benefit level, regarded as the 'poverty line'. But current regulations enable up to £6.80 to be deducted from the weekly benefit of... claimants admitting fraud... [I]t is difficult to see how benefit fraud is deterred by the use of recovery methods which can reduce a claimant's income to £6.80 below the poverty line and, if criminal proceedings ensue, possibly involve a fine imposed by the courts in addition: under such circumstances fiddling benefits or other crimes may ironically become the only means of financial survival.

Taxpayers are almost by definition better able to pay financial penalties than benefit claimants... [Yet] the taxpayers' ability to repay tax lost and to pay additional compounded penalties (if appropriate) is used as a justification for 'sparing the taxpayer's feelings' and for the adoption of an essentially non-prosecution policy... Officials were particularly aware of the relatively extensive publicity which 'scrounging' attracts in comparison to tax evasion. But publicity is inextricably linked to the reporting of criminal proceedings in the courts, and if tax fraud cases do not reach the courts, then public awareness of the extent and costs of the problem will be minimal... [The] rationale for the relatively 'quiet' treatment of the tax fraudster is closely linked to the mitigation offered in court... that social disgrace is in itself sufficient punishment for tax evaders. The notion that a fraudster has 'suffered enough' merely through the public exposure of his/her crimes is one which is not applied to supplementary benefit fraudsters. Indeed, the media treatment of them suggests just the opposite! It seems that in order to 'pay' for one's crimes through personal suffering and disgrace, one has to have some social standing to lose: hence these discourses are not available to justify lenience towards benefit fraudsters...

... [A]lthough the DHSS at present officially operates a policy designed to reduce numbers of prosecutions and seek 'benefit savings', effectively it still prosecutes over 8,000 supplementary benefit claimants per year; this is in stark contrast to the official 'selective' approach to Revenue prosecutions which effectively resulted in only 459 prosecutions in 1986-7... Moreover, the justificatory rationale behind both policies - deterrence - is not applied equally to tax and benefit fraudsters.



Judicial responses (and sentencing practice) towards tax and supplementary fraud are based on entirely different premises: the analysis of discourses used in court demonstrated crucial differences in the assumptions being made about claimant and taxpayer. In some cases it seemed that tax evaders were presumed to be victims – either of the ethos of the business and corporate world, or victims of the disgrace of their fellow citizens – as a result of Revenue prosecution. According to magistrates observed in this study, in cases of supplementary benefit fraud the victim is the taxpayer (who was seen to finance benefit payments), not the benefit fraudster. The tax fraudster is represented as at best folk-hero, at worst a victim of the taxman.

At the heart of the contradictions in policy and in practice ... is the ideological representation of the taxpayer as a 'giver' to the state and the supplementary benefit claimant as a 'taker' from the state (and thus, ultimately, from the compliant taxpayer).

There is little evidence to suggest that the balance of political concern as between these two forms of fraud has fundamentally changed in the last 20 years.

These are just some of the important issues which arise from a consideration of the practices of the criminal process in responding to threats to property interests. Just as the boundaries between property offences and other offences are blurred, the issues we have identified in this section also arise in other areas of enforcement. Nevertheless, the interwoven features of situational prevention, the diversification of institutions of control, the class and other divisions in enforcement practices and in political responses to the difficulties in addressing certain forms of property crime serve to raise issues of fundamental importance for the system as a whole. These have to do with the nature and site of responsibility for crime, the role of victims, the relation between civil and criminal law and the effect of socio-economic and cultural differences in the criminal process.

Our reflections on the protection of property again lead us away from a simple view of criminal law as even-handedly protecting a conception of valued interests underpinned by social consensus. Rather, our study suggests a broader and subtler set of functions for criminal law, encompassing the expression and underpinning of the perceived social legitimacy of a particular conception of the interests which it serves. Criminal law defends not property at large, but certain kinds of – highly unevenly distributed – property. It thereby defends not only property, but the power of certain interests and the authority of the social order.

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## **Section V**

# **Regulating Sexuality and Bodily Autonomy**

## **A Crisis of Trust and Intimacy?**

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### **14 The Social Construction of Sexuality and Bodily Autonomy**

- a. Attitudes to sexuality and autonomy
- b. Sexual freedom and sexual discipline

### **15 Sexual Violence**

- a. Sexual violence and the criminal process
  - i. A continuum of violence
  - ii. Investigating and prosecuting sexual violence
- b. The offence of rape
  - i. Penile penetration
  - ii. Rape and marriage
  - iii. Consent, belief and mistake – the background
  - iv. Consent, belief and mistake – the 2003 reforms
  - v. Evidence and the rape trial
  - vi. Punishing rape

### **16 Regulating Sexuality**

- a. Forbidden degrees
  - i. Ages of consent
  - ii. Homosexuality
  - iii. Child sexual abuse
  - iv. Incest
- b. Prostitution
- c. Pornography
  - i. Pornography, obscenity and freedom of speech
  - ii. Beyond the liberal approach?

### **17 Criminalising Healthcare Choices**

- a. Reproductive crimes?
  - i. Contraception and abortion
  - ii. Surrogacy arrangements
  - iii. Human fertilisation and cloning



- b. Euthanasia
  - i. Respect for life and death
  - ii. Consent and necessity
  - iii. Assisted suicide
  - iv. Avoiding reform

The categorisation of many of the issues dealt with in this section presents difficult decisions. Should rape, sexual assault and the sexual transmission of disease be thought of not as specifically sexual offences but as crimes of violence, and hence included in Section VI? Clearly, the latter offences may be regarded as involving violence, though they are equally clearly connected with cultural images of male and female sexuality and of bodily autonomy, which we begin to unpack in Chapter 14. The nonconsensual element of rape and many forms of sexual assault might be thought to separate them, in turn, from regulation of areas such as prostitution and pornography, which have symbolic and public order dimensions. We have located these issues side by side in Chapters 15 and 16 because each of them raises issues about bodily autonomy and, in particular, about consent and the conditions under which consent can be said to be 'valid'. Consent becomes a key concept when we look at the extent to which the state regulates our autonomy. Can we choose to exercise control over our bodies, even to the extent of choosing to die? In Chapter 17 we look at the criminalisation of healthcare choices, both at the beginning and end of life. The regulation of reproduction contributes to the construction of sexuality as well as limiting bodily autonomy more generally. Contraception and abortion are not the only relevant issues. Criminal laws are invoked to prohibit the commercialisation of surrogacy arrangements. Fear of an 'attack of the clones' has also led to the banning of reproductive cloning. There are interesting contrasts here between the perceived need to prevent the exploitation of surrogate mothers and the prevailing view that pornography and prostitution need be controlled only in so far as they offend the public gaze, or have public order implications. We then move to the broader aspect of bodily autonomy involved in the question of euthanasia. This connects closely with the issue of medical non-treatment (Chapter 20.b.), and illustrates how the issues raised by criminal regulation are not clear-cut: categorisation itself plays a significant role in the construction of crime. Whereas in Section VI non-treatment is used as a basis for considering criminal law's construction of violence, in this section our focus is on what it tells us about the law's (ambivalent) attitude to the role of human autonomy in circumscribing the limits of the criminal sanction.

The notion of autonomy is the theme that binds together the wide-ranging discussion contained in this Section. This is not, of course, to imply that the offences considered here are the only ones in which considerations of autonomy are important. Similar issues arise in relation to many other areas of criminal law, and notably that of drugs – tobacco and alcohol are not regulated to the

same degree as other, in some cases less harmful, drugs: see Chapter 9. The concept of autonomy running through this Section is a broad one which pulls in two directions. Bodily autonomy can demand protection in two senses: first, protection of one's own choices and, second, protection against interference by others. Protection of one's own choices can include freedom to engage in (possibly) 'self-harming' activities, such as prostitution, surrogacy and euthanasia. Protection against interference by others would mean prevention of rape, as well as sexual and other forms of assault. Although these two senses of protection are two sides of the same coin, it is useful to conceive of them as different tensions within debates about criminal regulation of bodily autonomy. If, for example, we are considering euthanasia, the initial protection we might seek is the freedom to make one's own decision about death. But in order to achieve that freedom, we would also be saying that a person is entitled not to be subject to medical or other interference which could prolong life. We are not here pre-judging the debate, but rather pointing to the different conceptions of autonomy which might be invoked.

Another important aspect of human autonomy consists in having the means to exercise a formally protected right or freedom. Contraception and abortion, for example, are dependent on the priorities of medical research and on the availability and accessibility of services. The capacity effectively to consent or to withhold consent may depend on information (as in medical contexts) or power (as in sexual contexts). Yet many debates canvassed in this chapter – particularly in legal literature – obscure vital questions about the positive conditions necessary for the effective exercise of autonomy.

Finally, the idea of autonomy raises questions about the extent to which consent or voluntariness do, or should, operate to delimit criminal regulation. Though in the law of rape, consent marks the limits of criminal law, this is not the case in many other areas considered in this chapter. The Surrogacy Arrangements Act 1985 is one example (see Chapter 17.a.ii. below); another is the courts' response to sado-masochistic practices (see Chapter 16.a.ii. below).

Autonomy is closely connected to the notion of trust. Given the centrality of trust to social interaction and our perceptions of individuals and institutions, it is surprising that it has escaped the same level of scrutiny that autonomy has attracted. Trust is a complex multi-dimensional concept, but may be broadly classified as two-fold: interpersonal and social. Interpersonal trust revolves around interaction between individuals, for example, the intimate and emotional ties of family and friends. Social trust, on the other hand, involves the ways and extent that we trust institutions such as the criminal justice system. Giddens and Beck have written about the increasing scepticism towards experts, expert knowledge and expert institutions in a 'risk society' (Giddens 1990; Beck 1992). Despite different theories, there is something of a consensus that there has been a shift in attitudes towards and perceptions of experts, the system they work within, and the institutions which regulate them. As Onora O'Neill reminds us, discussion of declining trust is something of a cliché of our times

(O'Neill 2002). Given that in one sense we have no choice but to trust, this phenomenon may more properly be described as a culture of suspicion.

It is perhaps unsurprising that suspicion sits comfortably in criminal justice systems, particularly those driven by crime control concerns. However, the sense of a breakdown of trust has gathered momentum in recent years. The sheer volume of criminal justice legislation is itself a commentary on this, and on one level, most of this book revolves around questions of trust. However, it seems particularly pertinent to think about trust in a chapter on bodily autonomy. Reforms in the Sexual Offences Act 2003 reflect increased suspicion at both individual and social levels. In terms of individuals, suspicion underlies the new offence of sexual grooming and explicitly so in relation to breach of trust offences for those in positions of authority. The reforms are also an attempt to restore broken trust in the system. Continued criticism of the low conviction rate for rape, as well as the negative experiences of rape victims, provides the background to the (belated) structured scheme of consent and the partial reversal of the burden of proof in the Sexual Offences Act 2003. Such controversial reforms are in one sense an admission of declining faith in the system, and reflect a (sometimes misplaced) form of paternalism.

Similarly, abortion and euthanasia may also be framed in terms of trust. Do we trust individuals to make decisions at the edges of life? In addition, reflex legislation such as the Human Organs Transplants Act 1989 and the Human Reproductive Cloning Act 2001 (now replaced by sections in the Human Tissue Act 2004 and the Human Fertilisation and Embryology Act 2008 respectively) are striking examples of suspicion of money and markets in body parts and of biomedical advances. Prostitution and pornography are generally viewed as issues of autonomy, but may equally be framed in terms of how far we trust certain types of behaviour.

Trust appears in another final sense: how far should we trust that reform will deliver? In relation to sexual offences, to what extent will they meet the liberal and radical feminist arguments set out in Chapter 14.b.? Will they increase the trust of such victims in the criminal justice system? Without pre-judging the debate, there is room for legitimate suspicion. For example, substantive reforms to the law of rape may be undermined by prejudicial attitudes held about rape that persist at a number of different layers in the system. Recent history of law reform, particularly surrounding sexual history evidence, permits such pessimism.

## The Social Construction of Sexuality and Bodily Autonomy

The state, through law, exercises a significant influence over bodily autonomy in general and the construction of sexuality in particular. Laws regulate, for example, the age of consent to sexual intercourse, and the nature of consent required for medical examinations, cosmetic and ritual procedures such as tattooing and circumcision, and for procedures in relation to childbirth and reproduction. Criminal laws embody norms of sexual practice and regulate the right of citizens to engage in sexual activity which is not consistent with those norms. Legal interventions in these areas inevitably confront the blurred social boundaries between 'legitimate' and 'illegitimate', 'normal' and 'abnormal' conduct, and raise in a particularly vivid way questions about the proper scope of criminal law.

*SLOVEN BOX-TREE FISHMAN, Crime and Mystification (Tavistock), p. 121*

Nearly one hundred years ago, Durkheim wrote that suicide is 'merely the exaggerated form of common practices' and that it 'appears quite another matter once its unbroken connection is recognised with acts, on the one hand of courage and devotion, on the other of imprudence and clear neglect'. This relatively simple, but radical idea – that there is considerable overlap between deviance and convention, rather than the former being distinctly different and opposite to the latter – inspired later generations of sociologists. . . [A] similar lesson can be obtained from considering how 'normal' sexual encounters merge imperceptibly into sexual assaults of which rape is the most serious, and how the former provide the ingredients out of which the latter can emerge.

It may seem easier to explain why societies develop ways of enforcing property rights, maintaining public order and controlling violence than it is to understand the development of systems controlling the forms of behaviour discussed in this section. However, it is often possible to detect in these areas of state-regulated conduct an underlying concern with property, public order or violence. The regulation of sexuality plays an important role in maintaining the institution of the family, which is of economic as well as social significance. Nonconformity is threatening and displays of culturally inappropriate behaviour are often controlled through the use of public order mechanisms,



such as the power to bind a person over to be of good behaviour, and anti-social behaviour orders (see Chapter 5) or through mental health procedures. Gender difference plays an important role in the maintenance of prevailing social and economic institutions; this is reflected in the law of rape and its enforcement. Laws do not always support women who do not consent to sexual intercourse. Through lifestyles such as prostitution – and, until recently, through marriage – they effectively lose that choice. Criminal law has often reflected an image of rape which arguably demonstrates a concern with maintaining the sexual status quo rather than with asserting the right of women to autonomy in sexual and other matters.

Similar tensions are played out in the areas of prostitution and pornography. The ideologies of a free-market economy and of free expression are allowed to obscure the exploitation inherent in these activities. Some of the most difficult moral questions arise here. They make us pause to think about the underlying justification for using criminal law as a coercive form. At the same time it is noticeable that much of the moral debate ignores the dimension of gender, obscuring the fact that these apparently consensual activities may be particularly damaging to women.

#### V.14.a. Attitudes to sexuality and autonomy

Before investigating these areas in more depth, it is useful to have an overview of contemporary social attitudes both to sexuality and regulation of the body. These attitudes are, of course, themselves socially constructed. Responses to all surveys are mediated by the setting in which the questions are asked, the type of questions, the presence of others during the questioning and so on. A classic example of this was the first British Crime Survey (Hough and Mayhew 1983), in which very little unreported sexual violence was disclosed to interviewers. Subsequent surveys have revealed far higher rates of such violence through the use of different interviewing techniques. As with all ‘facts and figures’, a cautionary note has to be entered. Within the framework of the caution, however, the social attitudes described below give us an insight into how bodily autonomy is constructed socially, as well as identifying some of the broad factors influencing attitudes to sexual and bodily autonomy over the last decade.

In the 1996 social attitudes survey (Jowell *et al.*, 11th Report, 1996), an attempt was made to relate patterns of permissive and censorious attitudes to demographic and other social factors. Perhaps not surprisingly, the factors with by far the strongest impact on attitudes to both homo- and heterosexuality are a person’s age and their underlying (authoritarian or libertarian) values and beliefs, with education, church attendance, gender and parental responsibility also significant (pp. 34–40). Subsequent surveys reveal a continuing tolerance of homosexual sex, perhaps as educational campaigns have gradually weakened the popular association of HIV with male homosexuality. In the 2002/3 report, 33 per cent of respondents saw ‘nothing wrong’ with homosexuality, compared

with 13 per cent in 1985 (19th Report, 2002, p. 218). This has risen markedly to 50 per cent in the 2008 report (see 24th report, 2008, Ch. 1). The social attitudes surveys demonstrate the fact that attitudes to sexual and bodily autonomy may shift significantly over relatively short periods of time. Although these attitudes do not tell us anything about whether particular legal regulations are justifiable, they do affect the context in which relevant legal frameworks operate. Although it would be naive to assume that attitudinal changes are directly or immediately influenced by legal changes, attitudes at variance with legal arrangements may on occasion make particular aspects of law difficult or even impossible to enforce. In the next extract Plummer notes the personal choices based around sexuality and bodily autonomy which have become accepted expressions of autonomy, and many of which we will consider in this section.

see Plummer 2003 *Intimate Citizenships: Private Decisions and Public Dialogues* (University of Washington Press) pp. 4, 7

[T]he twenty-first century is inviting us to consider a plethora of new ways to live our lives. This is a world in which troubles have obliged us to confront a growing array of 'choices' in our personal life - where for many both the troubles in and the options facing a life seem never to have been greater. 'Intimate troubles' can now bring with them seemingly major choices concerning families, gender, bodies, identities, and sexualities hitherto unknown in human history. The infertile can turn to assisted conception. Lesbians and gays can enter into registered partnerships and become parents. Younger people can be more experimental with their sexualities. Women have gained some measure of autonomy over their bodies and their lives. Older people are living longer - even into their centenarian years - and thus face decisions about whether and how to live alone. We are able to construct new sexual identities - from transgendered and queer to polyamorous and bisexual. Test-tube babies and 'designer children', elective plastic surgery, cybersex and safer sex, along with transgender and bisexual politics - all these have become part of an 'issues culture' of public debate that was largely unimaginable just fifty years ago...

Such issues threaten to overwhelm us as they lead more and more people to ask: *How do we live - and how should we live - our lives in an emerging late modern world?*... From a great many sources come signs that at least some personal lives are being transformed. We could view them, as many do, in despair - as instances of decline, decay or discipline. But we could also see these transformations as evidence of a desire for greater individualism and as an emerging pattern whereby we come to believe that we are gaining greater control over our lives. And, indeed, such gains are often real when compared with the limited choices of the past.

#### V.14.b. Sexual freedom and sexual discipline

Any debate about the regulation of forms of behaviour presupposes a common understanding of the relevant phenomenon. As Foucault argues (1976, p. 49),

it is a mistake to assume either that such social understanding is uncontested or that law is the only disciplinary mechanism in the production and control of sexuality:

We must . . . abandon the hypothesis that modern industrial societies ushered in an age of increased sexual repression. We have not only witnessed a visible explosion of unorthodox sexualities; but . . . a deployment quite different from the law . . . has ensured . . . the proliferation of specific pleasures and the multiplication of disparate sexualities.

In a society which thinks of itself as liberal, the legal regulation of sexuality poses a number of distinctive issues: how can law justifiably be invoked to sanction apparently 'harmless' activities, and how far, if at all, may law be used to enforce conventional moral standards? The following extracts present a liberal approach to these issues and they form the background to the feminist approaches which follow.

P. J. Fitzgerald 1962, *Criminal Law and Punishment* (Clarendon Press), pp. 78-81

With regard to other classes of crimes . . . it is not hard to find agreement as to the justification for their existence in law. Few could deny that a man has the right to defend himself against physical attack and to defend his property likewise against attack . . . Nuisance is perhaps less easy to justify as a crime, but here again most people would accept the proposition that a person is entitled to protect himself to some extent against offensive activities; he has a right to demand that others do not, by producing unpleasant fumes, noise, and so on, render his life intolerably unpleasant. Offences against public decency are in the same case. People have a right to demand that certain behaviour which disgusts or nauseates them should not take place in public. With regard to nuisance and indecency, however, the offence to the person affronted has to be weighed against the hardship involved in preventing the person committing the offence from continuing the activity in question. The justification of the existence of all these types of crimes is based on the right of the individual to protect himself against certain types of harm; his private right is supplemented and to some extent supplanted by state prevention of these activities.

The punishment by law of offences of immorality can sometimes be justified on similar grounds. Some of these offences, like rape, involve physical assaults, and here the justification is the same as for ordinary offences of violence. Others, while free from violence, involve a measure of corruption, where one of the parties is young, inexperienced, or economically dependent on the other. The justification for punishing corruption is that even if it were admitted that everyone should be free to choose his own way of life, nevertheless the young and inexperienced should be protected against their own immaturity until they are old enough to appreciate what is involved in this choice. Sometimes the punishment of these offences can be supported on the ground that they are committed in such circumstances as to offend against public decency. This still leaves the case of those offences



whose commission involves neither violence nor corruption nor indecency, viz. homosexual behaviour between consenting adults in private. [*This was written before the Sexual Offences Act 1967 partially legalised homosexual conduct; see Chapter 16.a.ii. below.*]

Such offences differ in one very important respect from ordinary crimes, in that it is only those who commit them that are obviously and directly affected. Such conduct is not other-regarding as is violence or dishonesty. No clear and direct attack is made on third parties by such behaviour. In order, therefore, to defend the imposition of penalties on those who behave in this way, it must either be shown that it is somehow good in itself to prevent people from so behaving or that their conduct does in reality affect other people, who consequently have a right to be protected against the harm caused by it. Not many champions are to be found in the first of these views. Enforced conformity to a moral code merely for the sake of such conformity would not generally be thought in these days to be in itself of any value. To force a person by fear and threat of punishment to act according to certain moral standards is not to make him act morally, though it could of course be argued that a man who was forced by law not to give way to certain sexual passions might end up resisting them purely for moral reasons. Today, however, the imposition by force of moral standards for their own sake is not generally accepted as defensible. Most people would agree with the Wolfenden Committee that the function of the law in this context is to preserve public order and decency, to protect the citizen against what is offensive and injurious, and to provide safeguards against corruption and exploitation. The committee concluded that private immorality should not be the concern of the law and recommended that homosexual behaviour between consenting adults in private should no longer be an offence.

Many people, however, while accepting the premise as to the proper function of the criminal law, would refuse to draw the same conclusion as the committee as to this particular problem. Such refusal is based on the view that such conduct, though not directly injurious to the citizen, is indirectly so. It has been argued that those who indulge in such practices with consenting adult partners may later extend their activities to corruption of the young. The Wolfenden Committee concluded here, however, that factual evidence did not support this proposition.

A different attempt to show that such behaviour is not self-regarding but is in fact injurious to others has been made by Lord Devlin, who denies the validity of the distinction between public and private morality. His main argument is that the established morality of a society is as necessary to its continued existence as are the institutions of government and that just as a society is justified in defending itself against subversive activities resulting in the overthrow of its government, so it is entitled to protect itself against the disintegration which would follow from the loosening of moral bonds resulting from failure to observe the rules of the established morality...

[T]his analogy between sexual immorality and treason has been challenged, notably by Professor H. L. A. Hart, who points out that the argument rests on several unproved assumptions. In the first place there seems little evidence that failure to enforce sexual morality in the past has led to the disintegration of societies. Secondly, it is by no means established that the failure by some members of a society to observe certain rules of a



moral code will lead to the abandonment of all the rules of the code by all the members of the society. Thirdly, mere failure to conform to a moral rule or standard is a quite different matter from a direct attack on an institution of the state; a closer parallel would be an attack on the moral standards made by a person advocating a change of attitude. This brings us to the next unproved assumption, viz. that a society is justified in resisting change, a view which would seem to entail that it is defensible to use the law to stifle criticism and reform and block the way of all peaceful change of the constitution and of all alteration of moral attitudes. Yet moral codes and political constitutions change without effecting the disintegration of society. Finally it is by no means clear that there in fact exists such unanimous moral agreement in our society on this matter as Devlin assumes; the established morality may well on closer inspection be found to be more like the Established Church, accepted in practice only by a minority of the citizen body.

**Gilbert Geis 1972 *Not the Law's Business* (National Institute of Mental Health, Washington), pp. 4, 252**

Some consensus is evident among the more preeminent thinkers who have concentrated upon issues such as homosexuality, gambling, prostitution, narcotics use, and abortion regarding the ground rules under which debate shall be conducted. Official action may legitimately be taken against a behaviour, they appear to agree, if some substantial harm can be demonstrated to result from it, either to a victim, seen as an involuntary party, or to the society and its legitimate interests. The classic statement of this position is that of John Stuart Mill:

The sole aim for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection . . . The only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a warrant.

Mill's statement, for all its clarion stress on individual liberty, is more tantalizing than definitive when the attempt is made to employ it as a guide to social policy. The terms 'self-protection' and 'to prevent harm to others' admit of numerous interpretations, so that honest persons may strongly disagree when confronted by the same facts . . .

A definition is offered by Packer of the kinds of behaviour that ought to be looked at very closely in terms of their proper place in the criminal law apparatus. These are 'offences which do not result in anyone's feeling that he has been injured so as to impel him to bring the offence to the attention of the authorities.' Three conditions ought to be assessed – the gravity, proximity, and probability of the harm – in regard to each offence, Packer notes, if it is alleged that the behaviour threatens social life and ought to be condemned by use of the criminal law. Packer further identifies six conditions that should be present before criminal sanctions are invoked against disapproved conduct . . .

1. The conduct must be regarded by most people as socially threatening and must not be condoned by any significant segment of society.
2. Subjecting the conduct to criminal penalties must not be inconsistent with the goals of punishment.
3. Suppressing it will not inhibit socially desirable conduct.
4. It can be dealt with through evenhanded and nondiscriminatory law enforcement.
5. Controlling it through the criminal process will not expose that process to severe qualitative or quantitative strains.
6. No reasonable alternatives to the criminal sanction exist for dealing with it. [Packer 1968]

The legal and philosophical liberalism represented in the previous extracts has been criticised for being blind to issues of gender and power. Feminist scholars have argued that, far from being a politically neutral framework, criminal laws and criminal processes 'consolidate and reproduce aspects of social relations at a formal institutional level'; they need to be 'understood in the context of a network of actions, structures and ideologies which reinforce and reveal the nature of patriarchal relations between men and women' (Fishwick 1988, p. 170).

Debate about two dichotomies is particularly noticeable in recent feminist writing. One is the distinction between public and private spheres, on which much liberal discourse has relied; the second is that between sexual violence as violence and sexual violence as sex.

The delineation of a 'private' realm is one way of looking at the liberal guarantee of autonomy: the liberal state leaves its citizens free from interference in spheres such as sexual morality which are, in Wolfenden's famous phrase, 'not the law's business'. Feminist writers have pointed out that, for example, placing the family in the private sphere has allowed certain forms of male domination to remain outwith public regulation (Zedner 1995). 'Domestic' violence and, until recently, rape within marriage serve as graphic examples. For some, the liberal legal account, often crude and blind to context, is the source of the problem.

*Resembling Hunter 2007 'Consent to Violent Relationships' in Sharon Cowan and Resembling Hunter (eds.) *Gender and Consent: feminist Engagements with Law and Subjectivity* (Oxford: Routledge) pp. 173-89*

The liberal paradigm of the autonomous, consenting legal subject puts women who have been targets of violence – and feminist legal scholars – in a double bind, however. On the one hand, it is arguable that the legal system ought to recognise that survivors of violence have a diminished capacity to consent in legal transactions with their abusers. On the other hand, such a recognition risks diminishing women's status as fully human

and fully functioning citizens – a return to the days when women were not seen as legal persons and were legally incapable of engaging in independent public activity or of giving or withholding consent to a range of transactions. In response to initiatives such as the construction of ‘battered women syndrome’ and ‘no drop’ policies in prosecuting violent men, for example, feminist legal scholars have been concerned to stress battered women’s agency rather than their helplessness, and to resist efforts by the legal system to take over decision making for them. How are we to avoid falling into what O’Donovan, drawing on Judith Butler, refers to as the ‘contradictory claims of powerlessness and self-determination’ for survivors of violence in the legal system?

This is a question that I argue cannot be answered in the abstract, and that I propose to address in the particularised, practical terms. There are two reasons for this. First, abstract reasoning about the meaning and nature of consent inevitably takes place within the parameters of the liberal legal paradigm, which is the very source of the problem. Liberal legal philosophy offers a bounded range of answers to questions about consent and consenting subjects. It provides little middle ground between the absolutes of the powerlessness and self-determination. Victims of violence either have sufficient agency to consent, or they do not and therefore cannot consent. Consent itself appears to be indivisible. Individuals are classified according to their capacity to consent, rather than instances of (apparent) consent being classified according to their surrounding circumstances. There is no room in the liberal account of consent to think about how occasions of consent might be structured so as to render them more or less valid, or meaningful to their subjects.

In this context, we might recall Ann Scales’ warning against adopting law’s vocabulary, epistemology and political theory (1986, p. 1376). Scales argues that feminists should pay attention to context rather than looking for the supposed ‘essence’ of a concept such as consent. We should focus on distinguishing between ‘occasions of respect’ and ‘occasions of repression’ in order to get to ‘the moral crux of the matter’, and in doing so, should consider the results of a particular activity or transaction rather than simply the process by which it occurred (1986, pp. 1387–88, 1402). In the case of violence against women, the results we might want to achieve are ones that acknowledge the existence of violence and seek to ensure the future safety of women and their children. In relation to consent processes, therefore, ‘occasions of respect’ are those in which agreements achieve these outcomes, while ‘occasions of oppression’ are those in which violence is ignored or sidelined and the agreement reached serves to perpetuate abuse.

The second reason for addressing the question of consent in violent relationships at a practical rather than theoretical level is that while removing the possibility of consent in these situations may be a theoretical option, pragmatically it is impossible to dispense with consent. Institutions do not simply promote consent because it is considered philosophically desirable. It is also an institutional imperative. No court has the capacity to try all of the cases that are brought before it, or even all cases involving violence...

Thus, to eschew consent in favour of judicial determination is not a realistic option most of the time. As a consequence, it is more useful to think about how consent processes can become ‘occasions of respect’, than to imagine doing away with them altogether.



The second dichotomy which structures feminist debate relates to the interpretation of sexual violence: is it best understood as a form of violence on a par with other assaults, or rather as an expression of the prevailing sexual order? These competing interpretations are discussed in the extracts by MacKinnon and Smart below:

Catharine MacKinnon (1987 *Feminism Unmodified* (Harvard), p. 100)

Calling rape and pornography violent, not sexual, the banner of much antirape and antipornography organizing, is an attempt to protest that women do not find rape pleasurable or pornography stimulating while avoiding this rejection as women's point of view. The concession to the objective stance, the attempt to achieve credibility by covering up the specificity of one's viewpoint, not only abstracts from our experience, it lies about it. Women and men know men find rape sexual and pornography erotic. It therefore is. We also know that sexuality is commonly violent without being any the less sexual. To deny this sets up the situation so that when women are aroused by sexual violation, meaning we experience it as our sexuality, the feminist analysis is seen to be contradicted. But it is not contradicted, it is proved. . . . To reject forced sex in the name of women's point of view requires an account of women's experience of being violated by the same acts both sexes have learned as natural and fulfilling and erotic, since no critique, no alternatives, and few transgressions have been permitted.

Smart suggests that the relationship between law, the state and the construction of sexuality is more complex than either the liberal or the radical feminist approach reveals:

Geoff Smart, *Sexuality and Law: Some Problems of Analysis and Theory* (1991) in *International Journal of Sociology of Law* 19, 117

There is no simple relationship between law and the economic structure of society. . . law has an autonomy from the state, and law itself is not a unified entity, indivisible in terms of structure and effects. Neither can legal changes be regarded as 'causing' economic or social change, although legislation may, in some instances, provide the means to achieve change.

The idea of the uneven development of law is an important one. It allows for an analysis of the law that recognises the distinctions between law-as-legislation and the effects of law, or law-in-practice. It rejects completely any concept of law as a unity which simply progresses, regresses or reappears as a cycle of history to repeat itself. . . Law both facilitates change and is an obstacle to change. . . Legislation in the areas of pornography and reproductive rights provides an illuminating example of this uneven development. The decade of the 1960s is commonly regarded as an era of permissive legislation in the UK. Hence legislation introducing legalised abortion for non-medical reasons, and legislation reducing censorship on theatrical displays (and ultimately books and magazines) are linked



together under the permissive banner. For some the legislation represents the triumph of liberalism over Victorian hypocrisy and repression. For others it symbolises the moral decline of the nation. Both schools of thought can be seen as treating legislation as indivisible, a unity that represents either progress or regress. From the position of a feminist analysis of law, neither position is correct. The lack of control over pornographic material is analysed as an instance of the exercise of power by others over women's bodies. The availability of abortion on the other hand, represents a limited extension of power over reproduction, and hence women's bodies, to women themselves. This is an oversimplification of the feminist position, but it serves to identify an instance of one dimension of what is meant by the uneven development of law.

Yet, notwithstanding the complex relationship between law and broader social forces, gender is a remarkably consistent influence on both legal practice and subjects' experiences of criminal law. In the following extract, Smart offers a framework within which questions about 'the sex of law' might be assessed:

Carol Smart 1990 'Law's Truth/Women's Experience' in R. Graycar (ed.) *Dissenting Opinions* (Allen and Unwin), pp. 7-9

[W]here women resort to law, their status is always already imbued with specific meaning arising out of their gender. They go to law as mothers, wives, sexual objects, pregnant women, deserted mothers, single mothers and so on... In going to law women carry with them cultural meanings about pregnancy, heterosexuality, sexual bodies... [L]aws that deal with the private sphere operate on fully gendered subjects...

Phallogocentrism is a neologism constructed from phallogocentric and logocentric... [F]eminism has begun to reveal the multifaceted nature of gender oppression. It reveals that gender difference (and hence oppression) exists in the language we use, it shows that the way knowledge is constructed is gendered, it suggests that sexual desire is not a matter of false consciousness but a deep psychic process which cannot be easily undone.

Logos means literally the father's spoken word. It is used to invoke a system of thought or ideas which cannot be said to be neutral, but rather constructed under conditions of patriarchy...

Phallogocentric is... deployed to refer to a culture which is structured to meet the needs of the masculine imperative. However, it is a term which is meant to imply more than the surface appearance of male dominance and to invoke the subconscious and questions of desire and sexuality. The term phallogocentric attempts to give some insight into how patriarchy is part of women's (as well as men's) subconscious, not merely a system imposed from outside and kept in place by threat and force...

Within this conceptual framework, we can begin to understand how it is that, while the sexual offence of rape formally penalises men, the enforcement of rape

law often reinforces male domination over women, to the extent that one empirical study of rape cases concludes that the criminal process in fact 'condones' rape (Lees 1996, p. 262). By focussing on rape as a crime committed by strangers who are deviant, the reality of 'intimate' rape is obscured (Estrich 1987). We can also start to subject to critical analysis the conception of valuable sexuality which the sexual offences purport to protect. For some, this appears to mean only economic value. Applied to rape this can lead to a chilling presentation of sexual favours as a scarce market commodity:

Richard Posner 1987, *The Economic Structure of Tort Law* (Harvard University Press), p. 157

If we tie the idea of value to the voluntary processes of the market, there is no increase in value in the rape case because it is not the kind of coercive act that improves the operation of the market, as the theft [of food] from [a deserted cabin] does. In any event, it is understandable why the legal system would not undertake to compare the hypothetical offer price of the rapist with the hypothetical demand price of his victim. The measurement problems are overwhelmingly difficult and hardly worth undertaking to identify the rare rape that may in some sense be thought to increase social wealth. Also, there are market substitutes for coercive sexual acts – substitutes presumptively more efficient than using the legal system to direct the allocation of resources to sex.

The reforms introduced by the Sexual Offences Act 2003 evidence an increased commitment to dealing with sexual crime. The government, preparing the ground for reform, recognised the disempowerment of women in the rape trial that lies at the heart of Smart's thesis.

Hon. Oliver, *Telling the Damned: reforming the Sexual Offences* (2003), pp. 3 and 4

Why did the law need reviewing? It is a patchwork quilt of provisions ancient and modern that works because people make it do so, not because there is a coherence and structure. Some is quite new – the definition of rape for example was last changed in 1994. But much is old, dating from nineteenth century laws that codified the common law of the time, and reflected the social attitudes and roles of men and women of the time. With the advent of a new century and the incorporation of the European Convention of Human Rights into our law, the time was right to take a fresh look at the law to see that it meets the need of the country today.

...

The law on sex offences is the part of the criminal law which deals with the most private and intimate part of life – sexual relationships – when they are non-consensual, inappropriate or wrong. As such it embodies society's view of what is right and wrong in sexual relations. Our guiding principle was that this judgement on what is right and wrong

should be based on an assessment of the harm done to the individual (and through the individual to society as a whole). In considering what was harmful we took account of the views of victims/survivors and of academic research. The victims of sexual violence and coercion are mainly women. They must be offered protection and redress and the law must ensure that male victims/survivors are protected too. The law must make special provision for those who are too young or otherwise not able to look after themselves, and offer greater protection to children and vulnerable people within the looser structures of modern families. In order to deliver effective protection to all, the law needs to be framed on the basis that offenders and victims can be of either sex. We have recommended offences that are gender neutral in their application, unless there was good reason to do otherwise.

We explore the criminalisation of sexual violence in detail in the next chapter.

#### FURTHER READING

- Sharon Cowan and Rosemary Hunter (eds.) *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Routledge-Cavendish, 2007).
- Michel Foucault, *The History of Sexuality: An Introduction* (Peregrine translation, 1976).
- Fatemeh Ebtehaj, Emily Jackson, Martin Richards and Shelley Day-Sclater (eds.) *Regulating Autonomy: Sex, Reproduction and the Family* (Hart, 2009).
- Ken Plummer, *Intimate Citizenship: Personal Decisions and Public Dialogues* (Washington University Press, 2003).
- Carol Smart, *Law, Crime and Sexuality* (Sage, 1995).

## Sexual Violence

### V.15.a. Sexual violence and the criminal process

*Home Office 2007 Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences (Criminal Justice Bill) (HMSO) p. 3*

The law on sex offences, as it stands, is archaic, incoherent and discriminatory. Much of it is contained in the Sexual Offences Act 1956, and most of that was simply a consolidation of nineteenth-century law. It does not reflect the changes in society and social attitudes that have taken place since the Act became law and it is widely considered to be inadequate and out of date.

While some piecemeal reform has taken place over the years, we have now undertaken a comprehensive review of the law so that it can meet the needs of today's society. The law on sex offences needs to set out what is unacceptable behaviour and must provide penalties that reflect the seriousness of the crimes committed. Some behaviour that should be covered by the criminal law is not at present. We know far more now about the insidious ways in which sexual abuse takes place and we have listened to the voices of victims about the profound and long-lasting effects of abuse. Our new framework of offences will plug existing gaps and seek to protect society from rape and sexual assault at one end of the spectrum and from voyeurism at the other. A special emphasis must be placed on the protection of children and the most vulnerable.

The conviction rate for rape is very low and has been falling in recent years. The number of persons found guilty of rape in comparison to the total number of offences reported has fallen from 25 per cent in 1985 to 7 per cent in 2000. Much of this is due to the change in the nature of the cases coming to trial, with many more instances of date or acquaintance rape being reported than before. These cases, which often rely on one person's word against that of another, make the decision of juries much harder than in cases of stranger rape. The recent HMIC / CPSI report on rape set out the issues that need to be addressed at all stages of the criminal justice system to reverse this trend, from the thoroughness of police investigations, through the preparation of cases for trial, to the role of the prosecutor and the cross-examination of victims in court. In



July 2002 we published an action plan of practical measures to implement the report's recommendations and make improvements across the whole of the criminal justice system. Through these improvements, we want to give victims of rape more confidence in the system and encourage them to report offences of rape. We also aim to send a strong message to perpetrators that this crime will not be tolerated and the law will be enforced.

We believe that there should be greater clarity in the law as it relates to consent. We intend to specify, in legislation, certain circumstances where, even if the victim had the capacity to consent, it is highly unlikely that consent would have been given; for example where the victim was abducted or subjected to force. Once the prosecution has proved beyond reasonable doubt that sexual activity has taken place in one of these limited circumstances, it will be for the defendant to establish on the balance of probabilities whether consent had in fact been given.

In addition, we plan to change the law on consent to help juries decide whether a defendant, who claims that he believed the other person consented, acted reasonably in the circumstances [discussed below, Chapter 15.b.iv.].

The government's commitment to re-thinking rape is reflected in the Sexual Offences Act 2003 (see below). It is perhaps too soon to assess the combined impact, if any, of the reforms in the 2003 Act and government Action Plans for addressing problems in sexual violence (Home Office 2002i and HM Government 2007). It may never be possible to chart these accurately because of general changes in crime recording practices introduced in 2002 (Maguire 2002, p. 346). Perhaps the only evidence of improvement is on the 'performance' of the CPS in terms of the marginally improved conviction rate of cases proceeding to court (see below).

#### V.15.a.i. A continuum of violence

**Ken Plummer 1995 *Telling Sexual Stories: Power, Change and Social Worlds* (Routledge), pp. 77-8**

The 'story of rape' that was given its voice by the women's movement in the early 1970s has now moved out beyond this into much wider communities, creating a rich mine of new, but linked, narratives. A crucial new language has been created through which lives are being lived and transformed. The story is now of a 'continuum of sexual violence' towards women which moves all the way from the 'lust murders' that receive prominent (maybe too prominent) coverage as sensational stories in the media through a myriad cluster of abusive acts newly named or reidentified: wife-beating, incest, child sexual abuse, daughter-rape, date rape, acquaintance rape, marital rape, indecent exposure, sexual harassment, on to a range of 'little rapes' wolf whistles, lookism and voyeurism, and through to a general climate

of sexual fear. A network of new sufferings, new stories and new groups ripples outwards: nursery crimes, child sex rings, Satanic abuse, fraternity gang rapes and children who molest children. Such stories become criss-crossed with race: black women speak out about incest, Latinos tell of wife-battering. And eventually it is not just a continuum of violence for women but for men too: male rape, male sexual harassment, abused boys, male-battering. And not just heterosexual victims but gays and lesbians too: lesbian and gay battered partners, same sex-sexual harassment, same sex-rape and hate crimes. Twenty years ago almost none of this had found its voice, and much of it is still silent. All these acts of coercion use sexuality as a means to abuse, pollute and desecrate: they generate enormous sexual suffering. Unsolicited and undesired, sexuality becomes the tool to defile and a source of danger.

The language of sexual danger defilement is now enormous. Shades of such language existed in the nineteenth-century women's evangelical movement, but it was then a much muter story (as all sexual stories were). Today, however, a multitude of dangers and defilements bring their own biographies, their own chat-show presentations, their own docudramas, their own research programmes. The story is told. And the stories are fed by social worlds and into social worlds to shift along the understanding and experience of sexual suffering as sexual danger.

However, as we will see, such emerging narratives have not readily translated into law reform, or at least into any meaningful change. The social practice of criminalisation assumes, by definition, the exceptional or 'abnormal' character of that which it proscribes. Just as Durkheim noted the continuity between suicide and 'normal' behaviour, some feminist writers have suggested that sexual violence is far from exceptional in our society. Indeed, its very 'normality' turns out to be one of the factors which give rise to difficulties of enforcing this area of criminal law.

*See Kelly 1998 Surviving Sexual Violence (Polity), pp. 80, 95*

As I transcribed and analysed the interviews [on which the research was based], it became clear that most women had experienced sexual violence in their lives. It was also clear that the range of men's behaviour that women defined as abusive was neither reflected in legal codes nor in the analytic categories used in previous research. In order to reflect this complexity I began to use the term 'continuum' to describe both the extent and range of sexual violence recorded in the interviews...

Feminist services for abused women as well as recent research have demonstrated that the incidence of sexual violence is far higher than recorded in the official statistics. Furthermore, many incidents which women experience as abusive are not defined legally as crimes. Official statistics and victimisation studies are, therefore, of limited use in measuring the prevalence of sexual violence.

Table 4.1 The Experience of Violence

| Form of Violence     | Number of Women | % of Sample |
|----------------------|-----------------|-------------|
| Threat of violence   | 60              | 100         |
| Sexual harassment    | 56              | 93          |
| Pressure to have sex | 50              | 83          |
| Sexual assault       | 42              | 70          |
| Obscene phone calls  | 25              | 68          |
| Coercive sex         | 38              | 63          |
| Domestic violence    | 32              | 53          |
| Sexual abuse         | 30              | 50          |
| Flashing             | 30              | 50          |
| Rape                 | 30              | 50          |
| Incest               | 13              | 22          |

... As this sample is self-selected and at least 50 per cent of women participated on the basis that they had had experience of rape, incest or domestic violence, it would be inappropriate to over-generalise on the basis of these findings. The figures do, however, show clearly that the vast majority of this sample experienced the more common forms of sexual violence; the threat of violence, sexual harassment, and pressure to have sex. These forms of sexual violence were extremely common in women's lives, both in the sense that they occurred to most women and that they occurred on multiple occasions.

Catharine Mackinnon has argued for the conceptualisation of rape as torture. However, as McGlynn points out below, any strategic benefits through the international law and political profile of torture are counterbalanced by the risk of forgetting the gendered nature of rape:

Clare McGlynn, 'Rape as "torture"? Catharine Mackinnon and questions of feminist strategy' (2008) 16 *Feminist Legal Studies* 71-85, at 72 ff.

Mackinnon's compelling, and rhetorically powerful, book *Are Women Human? And Other International Dialogues* (2006), in which the 1993 essay 'On Torture' is republished, advocates harnessing international human rights norms and applying them to violence against women with greater rigour and commitment than has hitherto been the case. One specific focus of her critique is the international prohibition on torture. In particular, she asks: 'why is torture on the basis of sex - for example, in the form of rape, battering, and pornography - not seen as a violation of human rights?' (Mackinnon 2006, p. 17) Her answer is deceptively simple. What fundamentally distinguishes torture, she argues, from domestic violence, rape and abuse, is that 'torture is done to men as well as to women' (Mackinnon 2006, p. 21). Mackinnon, therefore, urges us to reconceive many of the abuses which women face as torture. This would draw on the 'recognized profile' (Mackinnon 2006, p. 17) of torture internationally, garnering national and international recognition of the egregious nature of all

violence against women. Further, applying the sobriquet torture, the argument goes, would tap into effective legal sanctions and penalties that are accepted internationally, enforced nationally and which may, therefore, begin to act as a deterrent. The harms which MacKinnon seeks to reconceptualise as torture are many, including domestic violence, trafficking, pornography and rape...

In asking this question, MacKinnon challenges three aspects common to definitions of torture in international human rights instruments. The first relates to the required level of violence or harm for conduct such as rape to come within the scope of torture: defined as 'severe pain and suffering' in the UN Convention Against Torture. Here MacKinnon does an excellent job of highlighting the serious harm of domestic abuse and rape. Having set out the kinds of practices that are generally accorded the sobriquet 'torture', she then contrasts this with examples of systemic violence, abuse and rape of women at the hands of their partners, such domestic abuse equally involving the imprisonment, violence and degradation that constitutes torture. The parallels are strong. MacKinnon clearly draws attention to conduct which might hitherto have been considered 'private' or 'just' rape and has not been recognised as the serious harm that it is. She also notes the fact that '[w]hen women break under torture, we are said to have consented, or the torturer could have thought we did' (MacKinnon 2006, p. 24). 'Few say... Everybody breaks under torture' (MacKinnon 2006, p. 24). Rape and domestic violence are, therefore, sufficiently serious harms to pass the torture threshold...

Domestic abuse and rape are gender-based crimes. They are predominantly carried out against women and continue due to the unequal status of women in society. To term these harms and crimes 'torture', a gender-neutral term, may actually obscure this reality. The term rape, on the other hand, is widely accepted as describing harms against women by men. While it does, and should, encompass the rape of men, it must also not be forgotten that this is primarily a crime by men against women. Thus, while the word 'torture' has huge symbolic value, so does 'rape'. To classify an act as rape raises it in society's mind to an act which is especially grave and serious. It is sometimes argued that it is just this symbolic nature of the term which may be a factor in the high number of acquittals at court: the jury, so the argument goes, may perceive the acts of the defendant as wrong, as even criminal, but they may not wish to label him a 'rapist'. It is also why, when debating law reform of sexual offences, many reject the removal of the term rape and its replacement with, say, 'sexual assault' (Temkin 2002, pp. 177-178). In other words, rape is rape. While rape may also constitute torture in specific circumstances, as an additional harm and crime, each rape is also a rape and there may be advantages to retaining this gendering label...

While each rape is extremely serious and must be treated as such, rape is also mundane in its everyday nature, in the ordinariness of the men who commit it. This is a further argument for keeping rape as rape. Recent studies have suggested that in the UK alone there are anywhere between 47,000 and 61,000 rapes each year. Rape occurs all the time and everywhere. The men who commit rape are not demons, monsters and psychopaths, though undoubtedly some are. They are ordinary brothers, fathers, sons, friends, colleagues, teachers, doctors and the like. We should keep the term torture for what is generally understood as torture - extreme acts in exceptional circumstances. This is not to suggest



that torturers are not ordinary men (and women) because they are. Nor is it to suggest that torture is as rare as we would like to think or are led to believe it is. But it is to argue that torture is comparatively rare. Rape is not rare. Rape is commonplace. We need to establish this understanding in our society, and to label it as torture may in fact reinforce assumptions about what constitutes a 'real' rape, about the types of men who carry out rape and about penalties for rape.

Next we look in detail at the problems of investigating and prosecuting sexual violence.

### V.15.a.ii. Investigating and prosecuting sexual violence

Official crime statistics suggest that serious sexual violence is a relatively infrequent occurrence: between 2008 and 2009 40,787 serious sexual offences were recorded, representing less than 1 per cent of all recorded crime (Home Office 2009, p. 54). However, these statistics paint only a partial picture of the social phenomenon of sexual violence and the disparities tell us more about reporting and recording practices than about sexual violence per se. Sexual violence against women in general and rape in particular are among the least reported and most under-enforced crimes. Clearly, estimating the 'true' extent of sexual violence is very difficult, but the findings of crime surveys confirm that the reporting rate is far lower than that for burglary or non-sexual assaults. Research studies suggest that between 75 per cent and 95 per cent of rapes are not reported to the police (HMCPSI 2007, p. 34, para. 2.3). Whilst the different definitions and methodologies adopted in various research studies will inevitably produce different findings, there are consistencies to the context of rape:

Liz Kelly, Jo Lovett and Linda Regan 2005, *A Gap or Chasm? Attrition in Reported Rape Cases* Home Office Research Study 293 (Home Office), pp. 14–15

There has been no dedicated national random sample study of either the incidence or prevalence of rape in the UK, as distinct from wider surveys such as the national British Crime Survey (BCS), which focus on the broader issue of 'crime' but include a section on sexual assault. In fact, there has only been a single study designed solely to provide information on the extent of unreported rape (Painter, 1991). This survey involved 1,007 women in 11 cities and was primarily an attempt to quantify the extent of marital rape. The key findings include:

- one in four women had experienced rape or attempted rape in their lifetime;
- the most common perpetrators were current and ex-partners; and
- the vast majority (91%) told no one at the time.

The BCS is a large national victim-focused survey, which is used by the Home Office to provide estimates of the prevalence and incidence of crime in England and Wales. The 1998 and 2000 BCS both included a computerised self-completion module, which was designed to provide an accurate estimate of the extent and nature of sexual victimization (Myhill and Allen, 2002). In 2001 the BCS included another computerised self-completion module, which this time captured data on interpersonal violence, which was defined as domestic violence, sexual violence and stalking (Walby and Allen, 2004).

Rather unexpectedly, since the ability of the BCS to detect sexual violence has long been subject to criticism and internal reflection at the Home Office (Myhill and Allen, 2002), the findings from the 2001 specially designed interpersonal violence module are lower for sexual violence than in the earlier overview. The last-year prevalence rates calculated for 'sexual victimisation' – rape and sexual assault of women over 16 – are: 0.9 per cent (2002) and 0.5 per cent (2001) for sexual assault and 0.4 per cent (2002) and 0.3 per cent (2001) for rape. The much higher figure for sexual assault in the earlier data (Myhill and Allen, 2002) might be accounted for by the use of a narrower definition in the later study, linked to the revisions in the Sexual Offences Act (Walby and Allen, 2004). Myhill and Allen (2002) extrapolate that their figures would produce an annual incidence for rape of 61,000 in the year before the survey, whereas the figures for the more recent study means the annual incidence rate falls to 47,000 (Walby and Allen, 2004).

The earlier study (Myhill and Allen, 2002) recorded a 20 per cent reporting rate, with the more recent data showing a lower rate of 15 per cent (Walby and Allen, 2004) among those disclosing rape. Note, the focus in the former was whether the 'last' incident was reported, whereas in the latter it refers to the 'worst' incident. The BCS estimates cannot be simply mapped onto Home Office recorded crime statistics, firstly because not every crime reported is recorded as a crime at all, or as the same crime the victim perceives to have taken place. Secondly, to make the data comparable, disaggregation in terms of gender and age would need to be undertaken. The prevalence estimates from both studies are considerably lower than in Painter's study (1991): one in ten (9.7%) and one in six (16.6%) women respectively had been sexually assaulted; and one in 20 (4.9%) and one in 27 (3.7%) respectively had suffered at least one incident of rape since they were (Myhill and Allen, 2002; Walby and Allen, 2004). Whilst there is considerable disparity here between the actual numbers, there is convergence about the contexts in which rape takes place: women are most likely to be raped by men they know (intimates, 54%, other known individuals, 29%); and a considerable proportion involve repeat assaults by the same perpetrator (50% in the last 12 months) (Walby and Allen, 2004). The Myhill and Allen (2002) report also reflected findings from other jurisdictions (Bergen, 1995; Easta, 1998) that rapes by current and ex-partners were the most likely to result in injuries. This profile also accounted for the most common locations, which were the victim's home (55%) followed by offender's home (20%), public place (13%) and elsewhere (13%). Both sets of BCS data confirm an increasing willingness amongst women to tell someone, but even for those raped in the last five years less than half did so. They also echo findings from research on rape, domestic violence and child

sexual abuse, that the most likely person to be told is a friend or family member (Kelly, 2000), and that only a small minority access specialist support organisations like SARCs and rape crisis centres (Walby and Allen, 2004, p. 94; Myhill and Allen, 2002, p. 48).

Many factors contribute to the low reporting rate for sexual offences. Complainants often fear that they will be treated unsympathetically at police stations. In response to these fears, special procedures for handling rape victims have been introduced, including the Specially Trained Officer (STO) and Sexual Assault Referral Centres (SARCs) (HMCPSP 2007). Such improvements may partly explain increases in the total number of rapes reported to the police: from 1,842 in 1985 to 13,133 in 2008/9 (Home Office 2009, p. 54). Approximately 10 per cent of these involve male victims of rape. However, increased reporting has done nothing to arrest the declining conviction rate. The proportion of reported cases which ultimately result in a conviction has fallen from 24.4 per cent in 1985 to around 6 per cent in 2008. Data from the Home Office also reveals significant regional variation which do not appear to be linked to factors such as metropolitan versus rural areas. Strikingly, in Gloucestershire just 1 of 116 reports of rape led to conviction in 2005 (*The Economist* 7 October 2006).

Andy Myhill and Jonathan Allen 2002 *Rape and Sexual Assault on Women: the Extent and Nature of the Problem* Home Office Research Study 237 (Home Office)

Table E.1 Trends in reported rape statistics

| Year | Total number of offences recorded by the police as rape (N. %) |     | Total offenders cautioned or found guilty of rape (N. %) |    |
|------|----------------------------------------------------------------|-----|----------------------------------------------------------|----|
| 1985 | 1,842                                                          | 100 | 450                                                      | 24 |
| 1986 | 2,288                                                          | 100 | 415                                                      | 18 |
| 1987 | 2,471                                                          | 100 | 453                                                      | 18 |
| 1988 | 2,855                                                          | 100 | 540                                                      | 19 |
| 1989 | 3,305                                                          | 100 | 613                                                      | 19 |
| 1990 | 3,391                                                          | 100 | 561                                                      | 17 |
| 1991 | 4,045                                                          | 100 | 559                                                      | 14 |
| 1992 | 4,142                                                          | 100 | 529                                                      | 13 |
| 1993 | 4,589                                                          | 100 | 482                                                      | 10 |
| 1994 | 5,032                                                          | 100 | 460                                                      | 9  |
| 1995 | 4,986                                                          | 100 | 578                                                      | 12 |
| 1996 | 5,759                                                          | 100 | 573                                                      | 10 |
| 1997 | 6,281                                                          | 100 | 599                                                      | 9  |
| 1998 | 7,139                                                          | 100 | 656                                                      | 9  |
| 1999 | 7,809                                                          | 100 | 631                                                      | 8  |

An investigation of 752 crime reports from 2005 by the Crown Prosecution Service Inspectorate revealed that 23.8 per cent were 'no crimed'. Of the 75 cases in the CPS file sample which proceeded to trial 48 per cent resulted in acquittals based on the CPS offering no evidence (22.7 per cent) and acquittals after trial (25.6 per cent) (HMCPSI 2007, para. 16.4–16.9). The equivalent figure for 2002 was 70.4 per cent (HMCPSI 2002, para. 3.35). The increased conviction rate of cases proceeding to trial (52 per cent) is also reflected in CPS statistics for the two-year period ending in March 2008. 6,700 defendants were prosecuted and convictions increased modestly from 55 per cent in 2006/7 to 58 per cent in 2007/8. The last quarter of 2007/8 saw this rise to 61 per cent (CPS 2008, p. 31).

The array of statistics can be baffling. To some extent this reflects the multi-dimensional character of the criminal justice 'system'. Whether the measure is of recorded rapes, or of charges, cautions or convictions, the overall picture has not altered radically. What is interesting is the gradual official recognition of the attrition rate in rape cases and that this is a matter that should be addressed. Kelly *et al.* reveal six key attrition points at which cases may fall away: (1) reporting to the police; (2) no evidence of assault and false allegations; (3) insufficient evidence; (4) early withdrawal; (5) CPS decision making; and (6) the court and trial process. Each of these is affected by policies, procedures and practices in the criminal justice system:

Kelly, J., Burton and Linda Regan 2001 *Reason to Doubt? Attrition in Criminal Cases* (Home Office Research Study 271) (Home Office), pp. 1–11

Attrition is a process within which institutional rules, previous and predicted experience and gendered expectations of behaviour interact. Police, CPS, judges (and presumably juries) all work with 'gender schemes' which set the boundaries of what is considered appropriate and inappropriate behaviour for men and women. Jeffner's (2000) research with young people in Sweden, suggests that the same factors provide men with more of what she terms 'space for action', whilst simultaneously narrowing and restricting the space available for women. In relation to rape these factors include: alcohol; previous consensual sex; reputation; and mental health issues. Where these factors are present – whether for men or women – sex without consent is normalised, as being something other than 'rape'. She concludes that despite young people in Sweden defining rape on a general philosophical level as any sex that happens after a woman has said no, when invited to explore this in relation to specific contexts:

Only a sober young woman, who does not have a bad reputation, who has not behaved sexually provocatively and who has said no in the right way can be raped, and only by a young man who is sober and 'deviant' and with whom she is not in love. (Jeffner, 2000)

The malleability of rape, and the meaning of consent, were also evident in research with young people in the UK and Ireland (Burton *et al.*, 1998; Regan and Kelly, 2001), illustrating



that notions of 'real rape' not only reinforce the normative stereotype referred to earlier, but also designate conditions under which non-consensual sex is 'not really rape'. It is the awareness of these realities, and the fact that their credibility will be questioned in court (and, potentially, their sexual history raised), that was the most potent reason behind women's decisions to withdraw their complaint. Very early decisions to not complete the initial elements of an investigation are influenced by careless and insensitive treatment by police officers, as well as an existing perception of not being able to face any potential court process. Examples were uncovered of miscommunications, where police officers, in good faith, honestly conveyed the unlikelihood of a conviction and the difficulty of the court experience. These messages, whilst accurate, especially when given at a very early point (for example during or after taking an initial complaint or statement), are perceived by the victim as indicating disbelief at worst and as discouragement from engaging in the legal process at best.

There was little evidence of inter-agency links between police and CPS that sought to build cases; to find evidence that might go to the credit and believability of the complainant. Rather, all too often, the focus appeared to be on what was discrediting. There is evidence from other jurisdictions that a focus on building cases, especially when applied to those where consent is the likely defence, can increase the level of prosecutions and convictions.

For generations, sexual assault or rape was and continues to be defined in our minds as a violent and unprovoked attack by a stranger on defenceless, vulnerable, and unsuspecting victim. Our understanding of this crime . . . influences (even without conscious intent) our attempts to investigate and evaluate sexual assaults . . . We found officers were looking for serious injury, weapons and immediate cries for help to establish the elements of force or fear and to judge the 'believability' of the victim . . . and missing the opportunity to collect, describe, or emphasize the very necessary evidence that would support the lack of consent (Archambault and Lindsay, 2001).

In terms of understanding early withdrawal, there is no doubt that there has been a shift in policing to victim care/satisfaction and the impact is palpable in the more positive assessments from our questionnaire respondents, especially with respect to the earliest stages of intervention, compared to studies conducted in the late 1980s and early 1990s.

Far less attention has been given to improving investigation, and it is at this point in the process that considerably more dissatisfaction is expressed (see also Jordan, 2001 for similar findings with respect to New Zealand). The lack of knowledge transfer within the domestic violence field, especially with respect to enhanced evidence-gathering and supporting complainants to remain in the system, is also worth noting. This study confirmed that there are two major points of intense disappointment and loss of confidence that contribute to the decision of victims/survivors to withdraw their trust and co-operation: where the early investigative processes explicitly or implicitly suggest that women are not telling the truth and/or that the case is not worth pursuing; and later when a failure to keep them informed, to show that the CJS cares and/or ambivalence in the investigative officers leads to a loss of faith.

Perhaps the greatest challenge to the CJS is to re-think what rape is, and from this to then develop new understandings of how to approach, investigate and prosecute it.

Problems of proof in sexual offences (see Chapter 15 b.v. below) have undoubtedly helped to reinforce police and CPS views that only the most blatant cases can be successfully prosecuted. Evidential rules and official attitudes to complainants are symbiotically related and have at their base some very outdated ideas about women: their tendency to make false reports ('women are born liars'), and their complicity in the offence ('she asked for it'). Significantly, such prejudicial attitudes appear to creep into the practice of some medical and legal professionals who come into contact with rape victims. Temkin's research with defence barristers revealed the use of a range of strategies designed to discredit the victim in front of the jury, such as maligning the victim's clothes at the time of the alleged incident. As one of the barristers remarked:

This girl has gone into a bikers' pub wearing a mini-skirt and a see through shirt. That's part of the story. I don't think they (young girls) realise the effect of their appearance on men. Guys get turned on if they can see through the women's clothes. Dress is significant [Temkin 2000, p. 233].

More surprising is the discovery of similar sentiments amongst doctors carrying out the forensic medical examination:

[I]f people are dressed in an alluring way, they are inadvertently giving out overt messages. So if someone is wearing a black, slinky dress and red lipstick and has a lovely, curvaceous figure they are saying yes without saying yes. The man is receiving messages because he lacks the judgment to know what is and isn't a message [Temkin 1998, p. 842].

The risk that such assumptions from respected medical professionals will perpetuate existing police prejudices is obvious. Many of the legal arrangements considered below continue to disclose the stereotype that sexual violence is committed by strangers.

### V.15.b. The offence of rape

Criminal law includes a large number of different, and often overlapping, sexual offences. We deal here with the offence of rape. Child sexual abuse and other adult sexual activities are considered in Chapter 16 below.

The Sexual Offences Act 2003 repealed and replaced most of the Sexual Offences Act 1956. Section 1 extends the definition of rape beyond penile penetration of the vagina and anus to include the mouth. It applies for the first time to surgically reconstructed male and female genitalia. However, the real significance of the new definition lies in its approach to proving consent and in the mental element; in particular, the rejection of the 'defence' of honest belief in consent, and its replacement with a test referring to reasonableness.

### Sexual Offences Act 2003

#### Section 1 Rape

- (1) A person (A) commits an offence if –
  - (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
  - (b) B does not consent to the penetration, and
  - (c) A does not reasonably believe that B consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
- (3) Sections 75 and 76 apply to an offence under this section.
- (4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

The definition of rape is controversial in a number of ways. It concentrates on a specific form of sexual violation: penetration by a penis. Although rape has included anal intercourse since 1994, the new offence continues to exclude vaginal or anal penetration with other objects. However, it does now extend to forced oral sex. Whilst an insight into official attitudes to the latter was provided by a judge who crassly compared it with ‘a trip to the dentist’ (*The Guardian*, 14 November 1997), research has revealed its true prevalence:

#### Jennifer Temkin 2002 *Rape and the Legal Process* (Oxford University Press), p. 56

In their study of 115 rape victims, Holmstrom and Burgess found that vaginal penetration by the penis had been accompanied by forced fellatio in 22 per cent of cases, cunnilingus in 5 per cent, anal intercourse in 5 per cent, urination on the victim or her clothes in 4 per cent, and insertion into the vagina of an object in 1 per cent of cases respectively. Wright and West, in a study of all incidents recorded by the police as genuine rapes or attempted rapes in six English counties over a five-year period from 1972 to 1976, found that of a total of 297 cases, fellatio was attempted or demanded in 30 incidents, cunnilingus in 13, buggery in 12 and other sexual acts usually involving masturbation in 38. Forced fellatio was particularly common where the assailant had been drinking and was unable to sustain an erection or reach orgasm. Holmstrom and Burgess found that forced fellatio was twice as common in multiple assailant rape whereas cunnilingus only featured in single assailant rape, but these differences do not appear in Wright and West’s larger sample.

The legal construction of the wrong of rape hinges on lack of consent. As we have already seen, the concept of consent is problematic, and these difficulties are reflected in the trial process. ‘Consent’ was statutorily defined for the first time in the 2003 Act. The wider definition is reinforced by the use of presumptions, set out in sections 75 and 76 (see 15.b.iv. below). These definitional changes, along

with the evidential issues relevant to the treatment of rape victims and questions about sentencing practice, are discussed in the following sections. Throughout the discussion, we try to throw light on the images of ('normal') femininity and masculinity, of sexuality and sexual relations, which are embodied in law, as well as consider criminal law's conception of the value of sexuality or sexual autonomy and of the nature of sexual wrongs. We shall also consider the extent to which law can (or should) succeed in meeting the liberal ideal of gender-neutrality in an area in which – unusually – gender-specific subject positions remain written onto the surface of legal rules.

#### V.15.b.i. Penile penetration

*Steven Box, The Power, Crime and Aggression Paradigm, p. 121*

Students of rape are immediately confronted by a definitional problem. Does the legal definition, both in principle and juridical practice, refer to a reasonably inclusive category of behaviour? Or does it exclude behaviour which is very similar to that which it includes? ... Although there are minor variations amongst legislatures in western countries, there is a broad agreement that rape constitutes a particular act of sexual access, namely the penis penetrating the vagina, gained without the consent of the female concerned. This legal definition and its embodiment in legal practice has been criticized by feminists and other writers on at least three counts: it contains a suppressed and unjustified major 'exclusion' clause; it reflects a male fetish with one female orifice and one instrument for its violation; its notion of consent places an unfair burden of proof on the victim, and because it is premised on the idea of a voluntary actor, it fails to include a consideration for coerced consent or submission other than under physical duress.

The Criminal Justice and Public Order Act 1994 met one of these objections by extending the definition of rape to non-consensual anal intercourse, hence mitigating the law's heterosexual norm. Between 2008 and 2009 968 rapes of men were recorded (Home Office 2009, p. 54). The offence of rape remains gender-specific: the perpetrator will be male. This is accompanied by the offence of 'Causing a person to engage in sexual activity without consent' (Sexual Offences Act, s. 4); this penalises a woman who forces a man to penetrate her without his consent and 'compensates' for the gender-specificity of rape. However, the other criticisms enumerated by Box remain applicable: the definition of rape reflects an essentially masculine image of sexuality, and poses formidable difficulties of proof for the prosecution. Naffine suggests that although the legal definition of rape has been adapted in a more 'sexually democratic' direction, even in Australian jurisdictions where the definition is now gender-neutral, its underlying view of male and female sexuality remains unchanged:



*Ngairé Naffine, 'Possession: Erotic love in the law of Rape' (1994) 57 Modern Law Review 10, 14-25*

The sexual being still implicit in the law of rape has a rich history. Depictions of the strong, possessing male, mainly of a laudatory kind, are to be found in the Romantic and philosophical literature of the eighteenth and nineteenth century. In legal writing, he can be traced back at least until the time of Hale who specifically approved of sexual relations between strong men and capitulating women . . . [A] traditional possessive heterosexual form of 'erotic love' still . . . pervades the law of those Australian jurisdictions which have . . . instituted ostensibly dramatic changes to the meaning of rape.

In many parts of Australia, rape or its equivalent is now a crime which can be committed by and against either sex in a wide variety of ways. And yet we find that little has changed in substance. Though the crime has been sexually democratised on the statute books, faith has been kept with a simple, reductive and orthodox view of sexual relations . . .

In the modern Australian law of rape, women are now formal equal subjects (and objects). Each is now recognised to have the ability to rape the other and the law will intervene to stop it happening . . . Women have been granted equal rights with a vengeance. We have been given precisely the same rights formerly possessed only by men and we now have imposed upon us precisely the same prohibitions. The classic liberal solution has been achieved, that of granting equality (that is, the same) rights to women. In modern rape law it is this formal reciprocal capacity to rape and be raped which represents sexual equality. We now have two Cartesian or Kantian selves, not one, represented in the law of rape: two unities of subjective being – two abstract individuals.

But Australian feminists still feel a profound unease. Whatever the law says about it, we know that it is still men who are raping and women who are being raped. Hale and Blackstone knew this to be true, that rape was a crime of men against women; and yet this persistent fact – that it is men who rape women – seems to have escaped the modern Australian jurist. Rape laws may now be gender-neutral, but the behaviour is not. We sense also that there is something deeply wrong with the ideal of sexuality implicit in modern rape law. Ostensibly, then, there has been a rejection of the possessive form of heterosexual love in which men exclusively are the ravishers, women the ravished. Now it works both ways. Man can still take and possess woman but now woman can possess man. Australian rape law tells us that women can oblige men to surrender themselves to us utterly, and women can use force to achieve it when the man refuses to submit . . .

. . . Though the traditional Kantian idea of subjectivity has now, by necessary implication, been recognised reciprocally in Australian women, no attempt has been made to consider whether this idea makes sense to women (or at all). There has been no exploration of new sexual terrains in order to discover what sexual subjectivity to women might mean. Faith has been kept with the old ways. Though ostensibly dramatic in the changes it has effected, liberal rape law reform has not extended to the development of new meanings of male and female sexuality. The old dream of symmetry implicit in the traditional form of 'erotic love' remains: the dream is that one part (the man) possesses another (a woman), who wishes only to be possessed.

Modern Australian rape laws have simply inverted this possessive relation, without considering whether it is appropriate to regard the sex protected by such law as possession. The reciprocity of sex implicit in the new laws is a curiously mechanical thing, one which fails to convince.

Naffine's argument that gender-neutral definitions obscure the actual nature of the social phenomenon of rape raises an intractable difficulty. Can the law of rape create a framework which recognises the current asymmetry of sexual power without perpetuating a disempowering, victimised image of female sexuality?

Although the definition of rape in terms of penile penetration means that only men can perpetrate rape, women can be convicted as secondary parties, even where it is not clear that the perpetrator had full legal capacity (*R v. Cogan and Leak* (1976); *DPP v. K and C* (1997)). The irrebuttable presumption that a male under the age of 14 could not commit offences involving sexual intercourse was abolished by the Sexual Offences Act 1993 (s. 1).

#### V.15.b.ii. Rape and marriage

Janet Radcliffe Richards argues that men have overcome their natural problem of being unable to produce children which are identifiable as their own by taking control of women, and insisting on their sexual fidelity (1982, p. 252). Until 1991, the marital rape immunity in England and Wales gave this power an institutional legitimacy. The marital rape exemption commanded a remarkable degree of official support until relatively recently. For example, the Criminal Law Revision Committee (CLRC), in its 1984 Report on Sexual Offences, concluded that there were circumstances in which marital rape should not be an offence:

The majority of us... believe that rape cannot be considered in the abstract as merely 'sexual intercourse without consent'. The circumstances of rape may be peculiarly grave. This feature is not present in the case of a husband and wife cohabiting with each other when an act of sexual intercourse occurs without the wife's consent. They may well have had sexual intercourse regularly before the act in question and, because a sexual relationship may involve a degree of compromise, she may sometimes have agreed only with some reluctance to such intercourse. Should he go further and force her to have sexual intercourse without her consent, this may evidence a failure of the marital relationship. But it is far from being the 'unique' and 'grave' offence described earlier. Where the husband goes so far as to cause injury, there are available a number of offences against the person with which he may be charged, but the gravamen of the husband's conduct is the injury he has caused not the sexual intercourse he has forced [1984, para. 2.66].

The Committee thought that the institution of marriage would be under threat if the marital immunity were removed altogether.

Violence occurs in some marriages but the wives do not always wish the marital tie to be severed... Once, however, a wife placed the facts of an alleged rape by her husband before the police she might not be able to stop the investigative process if she wanted to... The effect of the intervention of the police might well be to drive couples further apart in cases where a reconciliation might have occurred. All of this, more likely than not, would be detrimental to the interests of any children of the family.

... Moreover, a prosecution for rape might necessitate a complicated and unedifying investigation of the marital history... Some of us consider that the criminal law should keep out of marital relationships between cohabiting partners – especially the marriage bed – except where injury arises, when there are other offences which can be charged [para. 2.69].

The Committee perpetuated, of course, the commonly held stereotype of the 'real' rapist as a stranger. The idea that rape by a non-stranger is not really grave unless actual injury is caused of course begs many questions about what is meant by injury. Acknowledging that many rape victims are known to their assailants does not itself displace the frequently held view that stranger rapes are more serious or threatening. Just five years after the CLRC report, however, the High Court of Justiciary in Scotland took a very different view, and decided that the marital immunity, along with its extraordinary vision of the asymmetrical marital relationship as central to social order, was no longer appropriate (*S v. HM Advocate* (1989)). Soon afterwards the exemption came under renewed and ultimately successful attack in the English courts:

#### ***R v. R* [1991] 4 All ER 481**

[The defendant was charged with raping his wife. His wife had left him; he forced his way into her parents' home and attempted to have intercourse with her against her will. The trial judge overruled the defence's submission of marital immunity, and R changed his plea to guilty of attempted rape. His appeal against conviction was dismissed by the Court of Appeal. This decision was upheld by the House of Lords, which took a rather different view of the strength of the common law authorities supporting the exemption than that taken in *Steele*.]

**Lord Keith:** ... For over 150 years after the publication of Hale's work there appears to have been no reported case in which judicial consideration was given to his proposition... It may be taken that the proposition was generally regarded as an accurate statement of the common law of England. The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects at the time it was enunciated. Since then, the status of women, and particularly married women, has changed out of all recognition in various ways which



are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as unacceptable.

... The position then is that part of Hale's proposition which asserts that a wife cannot retract the consent to sexual intercourse which she gives on marriage has been departed from in a series of decided cases. On grounds of principle there is no good reason why the whole proposition should not be held inapplicable in modern times. The only question is whether section 1(1) of the [Sexual Offences (Amendment) Act 1976] [which defined rape as 'unlawful' sexual intercourse] presents an insuperable obstacle to that sensible course. The argument is that 'unlawful' in the subsection means outside the bond of marriage. That is not the most natural meaning of the word, which normally describes something which is contrary to some law or enactment or is done without lawful justification or excuse. Certainly in modern times sexual intercourse outside marriage would not ordinarily be described as unlawful. If the subsection proceeds on the basis that a woman on marriage gives a general consent to sexual intercourse, there can never be any question of intercourse with her by her husband being without her consent. There would thus be no point in enacting that only intercourse without consent outside marriage is to constitute rape...

...

The fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent, and that the use of the word in the subsection adds nothing. In my opinion there are no rational grounds for putting the suggested gloss on the word, and it should be treated as being mere surplusage in this enactment...

Lord Keith's speech is driven by social considerations: he found legal reasons for following his social instincts. In doing so, he swept away one of the major formal injustices of modern criminal law. But he also adopted – notwithstanding the technical niceties in which he framed his argument – a quasi-legislative role. Lord Keith was conscious of this, and justified it with the argument that it was not the creation of a new offence, rather 'the removal of a common law fiction which has become anachronistic and offensive'. Yet the decision is one which expands rather than contracts the criminal law, and applies it (retrospectively) to a particular defendant. For this reason, some commentators who welcomed the substance of the decision nonetheless questioned its implications for the principle of legality and the proper relationship between courts and legislature (Giles 1992). 'R' appealed to the European Court of Human Rights on the ground that his conviction was in violation of Article 7 on retrospective punishment (*CR and SW v. UK* (1996)). The terms in which the court dismissed his



appeal imply that criminal law has an immanent capacity to adapt itself to prevailing social standards: the argument draws on an idea of 'manifestly' wrongful acts reminiscent of Fletcher's account of ideas of criminality underpinning the early common law (see Chapter 10.a.iv.).

Stephanie Palmer, 'Rape in Marriage and the European Convention on Human Rights' (1997) *Feminist Legal Studies* 91 at 95-96

The Court stressed the importance of the guarantee enshrined in Article 7 and stated that it should be construed 'to provide effective safeguards against arbitrary prosecution, conviction and punishment.' But clearly the object and purpose of this essential guarantee should not be interpreted at the expense of other objectives of the Convention itself. The Court seemed to acknowledge this by stating that '[t]he essentially debasing character of rape is so manifest that the result of the decision [of the English appellate courts] cannot be said to be at variance with the object and purpose of Article 7 of the Convention'. The Court then added that the abandonment of the 'unacceptable idea' of the marital rape exemption conformed not only with a 'civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention', namely human dignity and freedom.

In 1994, the legislature took the opportunity of the Criminal Justice and Public Order Act to endorse the House of Lords' decision by removing the word 'unlawfully' from the statutory definition of rape.

While the symbolic importance of these developments in the law of rape can hardly be overestimated, their practical significance is likely to be moderate. The general factors weighing against the reporting and successful prosecution of rape cases are particularly strong in marital cases, and courts take a more lenient view of relationship rape in terms of sentencing (see 15.b.vi. below; and on 'domestic' violence, see Chapter 18.b.).

#### V.15.b.iii. Consent, belief and mistake - the background

As we have seen, the essence of the conduct element of rape lies in the lack of the victim's consent (SOA 2003, s. 1). The capacity of consent to remove conduct from the ambit of criminal regulation in rape is in marked contrast to its incapacity to do so in the field of sado-masochist (homosexual) sexual practice (Brown 1993; see Chapter 16.a.ii. below). Two broad questions arise in relation to consent. First, how is consent to be defined and established, and what clues does this give us to the value attached to the autonomy of different sexual subjects? Second, what view of the wrong of rape, and of the meaning of sexual relationships, is implicit in the crime's definition in terms of non-consent? Intimately connected with the issue of consent is that of the defendant's belief in consent. Rape cases hinge on these two crucial issues: on the fact of non-consent on the part of the victim and on the defendant's state of mind or belief about whether the victim was consenting. The

2003 Act takes a radical step in partially defining the meaning of consent, and in setting out presumptions about consent and mistaken belief (SOA 2003, ss. 74–76). In order to understand the Act's approach, it is helpful first to rehearse some of the previous judicial attempts to nail the elusive flag of consent to a clear mast and to reconcile traditional principles of criminal responsibility with the complex area of human relations that comprises unwanted sexual activity.

### Consent pre 2003

*R v. Olugboja* [1981] 1 All ER 443, CA

**Dunn LJ:** We do not think that the issue of consent should be left to a jury without some further direction. What this should be will depend on the circumstances of each case . . . They should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent . . .

The following passage suggests that this common-sense summing up may obscure the assumptions on which inferences of consent are based:

Carol Smart 1990 'Law's Truth/Women's Experience' in R. Graycar (ed.) *Dissenting Opinions* (Allen and Unwin) pp. 9, 10, 14, 16, 17–18

The central concerns of the rape trial are consent and pleasure. Although the law is framed around mens rea and consent, the issue of mens rea only becomes relevant if consent/pleasure cannot be established. The man's intentions are therefore not a priority, the whole focus is on the woman, her intentions and her pleasure . . . The law in seeking to find innocence or guilt cannot accommodate the supposed ambiguity of a submission to a sexual assault. Either a woman does not consent or she consents. If the former cannot be established the latter must have occurred. Hence, in law's domain the more that non-consent can be made to look like submission, the more it will be treated like consent . . . It is important also to consider the sexual map onto which the idea of a woman's consent or non-consent is projected. I have argued above that in a phallogentric culture women's sexuality becomes mysterious – to themselves, it is argued, as much as to men. Women's rejection of sex is therefore always ambiguous. Submission is already a part of 'normal' heterosexual relations.

[I]n spite of feminist challenges to the sexual status quo, sexuality is comprehended as the pleasures of the phallus . . . the penis is constructed as the organising principle of the sex act. Female pleasure remains a mystery. One has only to consider the debate starting with Freud and continuing into the 1980s about the mystery of the site of the female orgasm, and whether it should be situated in one place or another . . . [T]he presumption in favour of

the pleasure/intercourse linkage makes it virtually impossible for women to establish that it was not pleasurable when there is a contested account such as in the rape trial...

The concept of phallogocentrism is one which allows us... to understand how the construction of femininity and masculinity, and the values attributed to these constructs, are part of our world view and identity. They are also part of law...

In the rape trial a woman's denial of pleasure must be taken in the context of layers of cultural contradictions over what this pleasure might be. Her denial of consent must be taken in the context of a woman's No meaning Yes. But the trial process itself adds another dimension, this is the process by which the trial becomes a pornographic vignette... The more an account of a rape has resonances with the standard pornographic genre, the less it will be regarded as rape. There are a number of narrative conventions within pornography. One is the vignette in which the woman says no, but her resistance is overcome and she becomes sexually voracious. Another is the woman who is ready for sexual adventure, will take on lots of men, and even surprises men with how willing and forward she is.

... [T]he story that the woman must tell... is the same story that gives pleasure in the tabloid newspaper or soft porn magazine. She cannot dissociate herself from her body, the body on which the assault was carried out. As MacKinnon has argued in relation to sexual harassment, for a woman to appear in person to complain of sexual abuse, is to lose the sympathy of the court. This is because they can see her and sexualise her... We cannot ignore that accounts of rape are sexually arousing – tabloid newspapers thrive on this fact... The process of the rape trial can be described as a specific sexualisation of a woman's body which has already been sexualised within the confines of a phallogocentric culture.

As well as the hazy line between submission and consent, there was an (apparently) difficult question about consent obtained through fraud. The courts severely limited criminal law's protection of women's sexual integrity by developing a distinction between fraud as to the nature of the act and other fraud.

*Papadimitropoulos v. R* (1957) 98 CLR 249, High Court of Australia

[The defendant appealed against a conviction for rape. He had misled a Greek woman who could not speak English into thinking that he had married her when in fact all he had done was give notice at the registry office of intention to marry. The intercourse took place during the 'honeymoon'. What follows is taken from the court's written judgment.]

**Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ:**... There has been some judicial resistance to the idea that an actual consent to an act of sexual intercourse can be no consent because it is vitiated by fraud or mistake. The key to the difficulty may perhaps be found in a brief sentence of Cussen J in *Lambert* (1919 at 212): 'Now, carnal knowledge is merely the physical fact of penetration though, of course, there cannot be consent even to that without some perception of what is about to take place...'

[After reciting a number of nineteenth-century cases concerning impersonation and fraud, the judgment continues:]

... At this point a declaration of law was made by statute. Section 4 of the Criminal Law Amendment Act 1885, after reciting that doubts had been entertained whether a man who induces a married woman to permit him to have connection with her by personating her husband is or is not guilty of rape, enacted and declared that every such offender should be deemed guilty of rape.

The next judicial step was taken in the case of *Clarence* (1888). The decision was simply that a husband who infects his wife with venereal disease is not thereby guilty of inflicting grievous bodily harm. But this led to the judges giving much consideration to what was involved in the wife's consent, ignorant as she was of her husband's condition. The judgments contain many observations which are pertinent to the distinction upon which this case turns... 'Take, for example, [said Wills J] the case of a man without a single good quality, a gaol-bird, heartless, mean and cruel, without the smallest intention of doing anything but possessing himself of the person of his victim, but successfully representing himself as man of good family and connections prevented by some temporary obstacle from contracting an immediate marriage, and with conscious hypocrisy acting the part of a devoted lover, and in this fashion, or perhaps under the guise of affected religious favour, effecting the ruin of his victim' (1888: 29, 30). The conception which Wills J had of what sufficed to vitiate consent is expressed as follows: 'The essence of rape is, to my mind, the penetration of the woman's person without her consent. In other words it is, roughly speaking, where the woman does not intend that the sexual act shall be done upon her either at all, or, what is pretty much the same thing, by the particular individual doing it, and an assault which includes penetration does not seem to me to be anything but rape.' (1888: 34)...

In *Williams* (1923) a new version of the 'medical treatment' cases was dealt with by the Court of Criminal Appeal. This time it was a singing master and the pretence was that the treatment was for breathing. Possibly the case went a little further than *Case* (1850) and *Flattery* (1887) but, if so, that is only with reference to the complexion the facts were given. The materiality of the case lies only in a broad statement which Lord Hewart C J quoted from a text book. 'A consent or submission obtained by fraud is, it would seem, not a defence to rape or cognate offences' (1923). It is interesting to notice that this statement is contradictory of that of Sir James Fitzjames Stephen in his note in his *Digest of the Criminal Law*, 3rd ed (1883) at p. 185, in which he describes the principle to be 'that where consent is obtained by fraud the act does not amount to rape'. It is contradictory too of that made by Bovill C J in *Barrow* (1868). From what has been said already, however, it should be clear that the truth lies between the two opposing generalisations.

In the language of a note to the Canadian decision of *Harms* (1944), fraud in the inducement does not destroy the reality of the apparent consent; fraud in the factum does. The note distinguishes 'between the type of fraud which induces a consent that would not otherwise have been obtained but which is none the less a valid consent and the type of fraud which prevents any real consent from existing'...

It must be noted that in considering whether an apparent consent is unreal it is a mistake or misapprehension that makes it so. It is not the fraud producing the mistake which is



material so much as the mistake itself . . . the identity of the man and the character of the physical act that is done or proposed seem now clearly to be regarded as forming part of the nature and character of the act to which the woman's consent is directed . . .

In the present case the decision of the majority of the Full Court extends this conception beyond the identity of the physical act and the immediate conditions affecting its nature to an antecedent cause – the existence of a valid marriage. In the history of bigamy that has never been done. The most heartless bigamist has not been considered guilty of rape . . . Rape, as a capital felony, was defined with exactness, and although there has been some extension over the centuries in the ambit of the crime, it is quite wrong to bring within its operation forms of evil conduct because they bear some analogy to aspects of the crime and deserve punishment. The judgment of the Full Court of the Supreme Court goes upon the moral differences between marital intercourse and sexual relations without marriage. The difference was indeed so radical that it is apt to draw the mind away from the real question which is carnal knowledge without consent. It may well be true that the woman in the present case never intended to consent to the latter relationship. But, as was said before, the key to such a case as the present lies in remembering that it is only the penetration of the woman's body without her consent to such penetration that makes the felony. The capital felony was not directed to fraudulent conduct inducing her consent. Frauds of that kind must be punished under other heads of the criminal law or not at all; they are not rape . . . To return to the central point; rape is carnal knowledge of a woman without her consent: carnal knowledge is the physical fact of penetration; it is the consent to that which is in question; such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing . . . the appeal should be allowed and the conviction quashed.

In the court's analysis, consent has become refracted and distorted. If the question were asked in many of the cases cited in *Papadimitropoulos*, 'did the woman consent to sexual intercourse in these circumstances?' the answer could only be 'no, she did not'. But the question which the courts have required to be put is 'did she mistake the nature of the act?' Hence, for example, a woman who agrees to have intercourse with a man in exchange for money is not raped if he refuses to pay (*Linekar* (1995)). Similarly, a woman who agrees to sexual intercourse in ignorance of the fact that she is thereby likely to be infected with a serious disease is not a victim of rape (*Clarence* (1888)).

The context in which consent to sex takes place brings us to our second question: the vision of sexuality, and of sexual abuses, implicit in criminal law's conception of rape as non-consensual intercourse. One way of looking at the wrong of rape is that it infringes a woman's right to the autonomous control over access to a rather curious form of property – her body (Dripps 1992). Such a reading, which constructs rape as a form of property offence, has a clear resonance with early conceptions of rape as protecting a husband or father's proprietary right to control sexual access to a wife or daughter. But, in focusing on a proprietary conception of sexuality, the wrong of rape is commodified in a

way which sits uneasily with modern conceptions of the affective dimension – and value – of sexuality (Lacey 1998a). Moreover, it might be argued that the construction of rape in terms of non-consent itself expresses the possessory view of erotic love identified by Naffine: by definition, the defendant – and hence, in English law, a man – is the active party, to whom the victim – a woman or a man ‘feminised’ by penetration – responds by granting or withholding consent. Moving on from this analysis, feminist commentators have tried to reconstruct the notion of consent in more substantive and reciprocal terms. Box, for example, suggests that rape could be defined as ‘sexual access gained by any means where the female’s overt genuine consent is absent’ (1983, p. 125); and Lees goes farther in calling for a definition of rape which would embody a ‘communicative view of sexuality’:

See Lees 1996 *Carual Knowledge Rape on Trial* (Harvish Hamilton), p. 260

The main reason why the rape law is so unsatisfactory in all advanced countries is the failure of judges to adopt a modern communicative model of sexuality which implies that there must be some positive responses by both parties... [a] concept of sexuality as mutually negotiated. As Naffine proposes, judges should be aware that women who do not actively resist, or say nothing, do not necessarily want to have sex, but may acquiesce because they see no alternative. This has already become law in Australia, where in 1992 the Victoria Parliament passed an amendment to its Crimes Act which requires a judge, in relevant circumstances, to direct the jury that ‘the fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without the person’s free agreement’. The South Australian Supreme Court has endorsed a similar model of communicative sexuality by indicating that where a man has received signals of non-consent, he can no longer assume that the woman is consenting. He must inquire. For such reforms to become acceptable requires dramatic changes in the attitudes and composition of the judiciary in England and Wales.

As we have seen, Naffine is sceptical about the capacity of gender-neutral reforms to achieve substantive justice. Conversely, it might be argued that the emphasis on positive signs of consent is unrealistic in the intimate context of sexual encounters. Nonetheless, in different ways these Australian and UK reforms embody a recognition of the way in which contextual factors such as unequal power relations may affect the ‘reality’ of consent, and respond both to this asymmetry and to the potential damage caused by mistakes about consent by somewhat easing the prosecution’s burden of proof. In doing so, they take a small but significant step towards constructing sexuality as involving reciprocal responsibilities.

As we will see below, the definition of consent in the Sexual Offences Act 2003 reflects a commitment to a communicative model of sexuality. However, one might question how far these changes alone can modify the practice of rape law.

For it must be borne in mind that a jury's interpretation of what would have been 'obvious' to a 'reasonable man' will itself be shaped by prevailing cultural assumptions about masculine and feminine sexuality (see the extract from Finch and Munro below). To the degree, therefore, that these are misogynistic, the move from a subjective to an objective test may make only a limited difference. A woman's 'no' is often regarded as 'yes': one influential commentator in the mid-1980s introduced his discussion of sexual offences with a verse expressing precisely this sentiment (Williams 1983, p. 238) and judges have been known to echo such views. This was evident in the acquittal of Quinten Hann, an Australian snooker player tried for rape, where his counsel remarked that:

... sometimes in the heat of passion when a woman says no, she doesn't necessarily mean no. You can say 'no' a thousand times, but if you show by your actions that you don't mean it, it doesn't necessarily mean that consent is withdrawn [*The Guardian*, 4 July 2002].

The need to counter this type of comment partly explains section 1 of the 2003 Act which replaces the *Morgan* 'defence' of honest belief with a belief based on reasonableness.

### Belief and mistake pre 2003

It is again instructive to survey the legal picture in the period immediately before the 2003 reforms. In 1976 statute declared:

If at a trial for a rape offence the jury has to consider whether a man believed that a woman or man was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is entitled to have regard, in conjunction with any other matters, in considering whether he so believed [Sexual Offences (Amendment) Act 1976, s. 1].

The background was the decision of the House of Lords in *DPP v. Morgan* (1976). The appellant invited three friends to have intercourse with his wife, telling them that her signs of resistance were not to be interpreted as lack of consent: she enjoyed it better that way. The friends were charged with rape, the appellant with aiding and abetting. They appealed against the direction of the trial judge that, if they were to be acquitted on the basis of their mistake, their belief in her consent must have been reasonable. The House of Lords decided by a 3:2 majority that it was irrelevant whether the defendants had reasonable grounds for their belief that she was consenting. The proviso to section 2(1) of the Criminal Appeal Act 1968 was, however, applied and the conviction upheld on the grounds that no jury would have failed to convict even if it had been given the right direction. In construing the 'defence' of mistaken belief as going to 'mens rea', Lord Hailsham found the logic of subjectivist criminal law doctrine compelling (1976 at p. 214):



Once one has accepted, what seems to me abundantly clear, that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic that there is no room either for a 'defence' of honest belief or mistake, or of a defence of honest and reasonable belief and mistake. Either the prosecution proves that the accused had the requisite intent, or it does not. In the former case it succeeds, and in the latter it fails. Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence for or against the view that the belief and therefore the intent was actually held...

If, as Lord Hailsham suggested, the definition of rape was so 'abundantly clear', it seems strange that it was necessary for the case to be appealed to the House of Lords which only decided the issue on a majority. What he failed to acknowledge was that the issue had previously been fudged, in that, although there was support for the view that rape consisted of intentional intercourse without consent, there were equally cases suggesting that mistakes had to be reasonable in order to exculpate. Lord Hailsham was right that those two propositions were irreconcilable. But there was nothing indicating which one would have to yield. What is particularly noticeable about Lord Hailsham's speech is that he hardly alluded to the actual issue before him, which was whether a man who believes without reasonable grounds that the woman is consenting should be guilty of rape. He referred neither to the prevalence of rape nor to the role of the criminal law in its control.

The question of how far the subjective approach could accommodate 'thoughtless' or 'inconsiderate' rape continued to trouble both commentators and the courts (Gardner 1991). The Law Commission suggested in 1995 – in marked contrast to its previous position (Law Commission 1994: see Leng 1994) – that the subjectivist approach to mistaken belief in the context of rape should be reconsidered (see Shute 1996). This reconsideration is reflected in the reforms contained in the Sexual Offences Act, although as we will see below, the legislative end product does not quite meet the earlier promise of the White Paper.

#### V.15.b.iv. Consent, belief and mistake – the 2003 reforms

Reflecting the widespread concern with the low conviction rate for rape, the Home Office made the argument for a more structured approach to consent in the White Paper preceding the Sexual Offences Act 2003:

Home Office 2002, *Protecting the Public: strengthening protection against sex offenders and reforming the law on sexual offences* (London 2002) (108880)

Human beings have devised a complex set of messages to convey agreement or lack of it. Agreement or lack of agreement is not necessarily verbal, but both parties should understand



it. Each must respect the right of the other to demonstrate or say 'no' and mean it. We do not of course wish to formalise such understanding into an unnecessary or semi-contractual agreement; it is not the role of Government or the law to prescribe how consent should be sought and given. It is, however, the role of the law to make it unambiguously clear that intimate sexual acts should only take place with the agreement of both parties.

The offence of rape, as we have seen above, has three components:

- (a) intentional penile penetration of B by A;
- (b) B's lack of consent; and
- (c) that A does not reasonably believe that B consents.

Subsection (c) introduces an objective element in contrast with the fully subjective approach that has applied since *Morgan*. The Bill as originally introduced in Parliament went to the other extreme by measuring the defendant's conduct against a reasonable person. If that 'reasonable person' would 'in all the circumstances' have doubted whether B consented, the defendant would then have been expected to act in way that the reasonable person would consider sufficient to resolve such doubts. The 'reasonable belief' standard now contained in the Act is more a half-way house for it may allow the defendant's reasonableness to be measured in relation to his own perception of the circumstances.

#### Section 74 'Consent'

For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.

#### Section 75 Evidential presumptions about consent

- (1) If in proceedings for an offence to which this section applies it is proved –
  - (a) that the defendant did the relevant act,
  - (b) that any of the circumstances specified in subsection (2) existed, and
  - (c) that the defendant knew that those circumstances existed,
 the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.
- (2) The circumstances are that –
  - (a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
  - (b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
  - (c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;

- (d) the complainant was asleep or otherwise unconscious at the time of the relevant act;
  - (e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;
  - (f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.
- (3) In subsection (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began.

Section 76 Conclusive presumptions about consent

- (1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed –
- (a) that the complainant did not consent to the relevant act, and
  - (b) that the defendant did not believe that the complainant consented to the relevant act.
- (2) The circumstances are that –
- (a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;
  - (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

Section 74 is groundbreaking in its definition of consent based around the philosophically contested terms of ‘choice’, ‘freedom’ and ‘capacity’. Coupled with the reference to ‘reasonable belief’ in consent in section 1, this reflects a commitment to the communicative model of sexual behaviour based on agreement and reciprocal responsibilities. However, substantive law reform is no magic wand for eliminating sexual stereotypes and cultural prejudices, as Finch and Munro’s study of mock jury deliberations (as close as we can get given the ban on researching *real* jury deliberations) applying the 2003 Act to a rape trial reconstruction reveals:

Emily Finch and Vanessa Munro, “Breaching Foundations? Sexual Consent in the Jury Room” (2008) 41 *Legal Studies* 101–26, at 111–16)

Across the different jury deliberations, it was apparent that the introduction of the requirement that the complainant agree by choice in circumstances of capacity and freedom, while predicted to promote a more proactive and communicative understanding of sexuality, did

little to prevent some jurors from continuing to presume consent in the absence of positive dissent. The statements cited above from jurors who concluded that the complainant retained the capacity to consent, despite intoxication, testify to this, since these jurors moved on to assert that failing to dissent in a context in which the complainant was capable of so doing constituted agreement to intercourse. Significantly, moreover, these jurors were far from isolated in taking this approach. Indeed, while some jurors read the terms of s 74 as requiring something 'active rather than passive' (Jury S), as 'saying that consent isn't just being there and not saying no' (Jury Q), many others did not concur, or at least did not allow this to prevent them from taking a different line. Thus, a number of jurors operated from the opposite direction, commenting, for example: 'I think maybe that's why she consented, because she didn't say anything' (Jury B), or 'in order to not consent you have to... she has to actually make it clear that she has not consented' (Jury I).

Although the jurors who took this latter approach did not all require evidence of dissent to take the form of physical resistance, there were some participants who insisted that, even in the case of a heavily intoxicated complainant, they would expect to find some evidence of struggle to establish non-consent. As one juror put it, 'a woman's got to cooperate with a man to be able to do it, to have intercourse, unless he thumps her or what, and he didn't - there was no bruising on her body anywhere. I would say she was probably drunk but at the same time she more or less consented' (Jury I). These comments testify to the tenacity of the force requirement in the popular understanding of rape, but their existence is particularly disconcerting here, since the jurors were specifically advised during medical evidence in the trial that lack of complainant injury does not necessarily contra-indicate rape. And while it is true that such comments, when voiced, were sometimes met with stark rebukes from fellow jurors, it is significant that the basis for this did not appear to lie in anything provided by the s 74 definition itself.

The reference in section 1(2) for reasonable belief to be judged in 'all the circumstances' always risked the return of the *Morgan* style defence of honest but unreasonable belief in consent, a glimpse of which is provided by the mock jurors in Finch and Munro's study (p. 317):

Indeed, many participants... concluded that, although they did not consider the belief in question to be reasonable in any absolute sense, they were nonetheless willing to accept it as a belief that this particular defendant reasonably held in the circumstances. In addition, it was apparent that the requirement under s 1(2) to consider the steps that the defendant took to ascertain consent, while on the face of it appearing to impose greater accountability even when reasonableness was assessed in a more contextualised manner, did not redress this tendency towards leniency. As one juror put it: 'If I were to put him in my shoes, I would have said it was not reasonable, but the evidence, and the way he thought, I know he didn't actually hear a yes, but he didn't hear a no, it's just too much to be able to say guilty' (Jury E).

Section 75 applies to both the issue of consent and to that of the defendant's reasonable belief in consent. In each case it creates a rebuttable presumption that there was no consent or no reasonable belief in consent where: violence was used or threatened; the victim was unlawfully detained; was asleep or unconscious, or otherwise incapable of communicating consent. The presumption that the victim did not consent where one of these circumstances is proved can be rebutted only if the defendant raises sufficient evidence for the issue to be considered. This is known as an evidential burden. Normally it is for the prosecution to raise evidence and prove each element of an offence. Here, however, the prosecution is relieved of that evidential burden. Without some evidence from the defence, it will be assumed, on proof by the prosecution of one of the circumstances outlined in section 75(2), that there was no consent. If that evidence is produced then the prosecution will have the usual burden of **proving beyond reasonable doubt that the victim did not consent**.

Partial reversals of evidential burdens, though not altogether uncommon, have never been free from controversy. Although Ashworth and Blake have suggested that around 40 per cent of indictable offences partially reverse the burden (1996, p. 306) this is especially significant in terms of serious sexual offences such as rape. It is rare for a serious offence to place an evidential burden on the defendant. The Bill in its original form went even further and required the defendant to satisfy the probative as well as the evidential burden in relation to belief in consent. This might have been incompatible with the fair trial provisions of Article 6 of the ECHR which states that: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.' Recent appellate activity, albeit in other criminal contexts, confirms that the government's original formulation could have been challenged on this point, though courts have struggled to formulate a clear approach for interpreting statutes which impose reverse burdens: see *Kebilene* (2000), *Lambert* (2001), *Daniel* (2003) and *Sheldrake v. DPP* (2004) – for discussion see Dennis (2005).

Whilst in theory this reversal of the burden for both consent and reasonable belief in consent seems radical, in practice the pull of the right to a fair trial has led to judges adopting a minimalist interpretation of 'sufficient' evidence, as illustrated by the Judicial Studies Board Specimen Direction:

*The court has an evidential presumption under sections 75 and 76 of the Sexual Offences Act 2003 (SOA) (see also s. 76(1)(a) Criminal Justice Act 1988).*

The Act does not specify whether it is for the judge or the jury to decide whether the evidential burden under (2) above has been discharged. The following direction assumes that it is for the judge. Thus the judge may decline to give a section 75 direction on the ground that there is no evidence under 1 above and/or on the ground that there is sufficient evidence under (2) above. Although each case will turn on its own facts, it is thought that



in many cases a section 75 direction will not be appropriate for either or both of these reasons.

If such a direction does have to be given, particular care will be needed if only one of the presumptions is relevant: for example if the evidence is insufficient to raise the issue of consent, but sufficient to raise the issue of D's belief in consent.

Section 75 presents an exhaustive list which is notable for its exclusion of the (very common) case of contested consent and the voluntary intoxication of the victim. Such a provision appeared in an earlier version of the Bill and in 'Setting the Boundaries' (2000, para. 2.10.9) but was left out on the basis of the risk of the presumption of no consent encouraging false accusations, a risk not borne out by the research evidence (see Rumney 2006). Temkin and Ashworth's (2004, p. 340) caution that such complainants will have to 'take their chances' under the consent provisions of section 74 has proved prescient with the persistence of the crude maxim that 'drunken consent is still consent' seemingly surviving the reformist aims of the 2003 Act (See *R v. Dougal* (unreported) 2005). *R v. Bree* was the first Appellate opportunity to consider such difficult cases.

### *R v. Bree* [2007] 3 WLR 600

[The defendant was charged with rape, contrary to section 1 of the Sexual Offences Act 2003. At the beginning of his trial, the prosecution alleged that he had raped the complainant when her level of intoxication was so great that she was effectively unconscious and incapable of consenting within the meaning of section 74 of the 2003 Act. However, by the end of the evidence, the prosecution case was that although the complainant had been conscious and capable of consenting, she had not in fact consented. The defence case was that notwithstanding, and possibly because of, drink the complainant consented and the defendant reasonably believed that she was consenting. When summing up, the judge directed the jury that a person consented if she agreed by choice and had the freedom and capacity to make that choice, but he made no reference to the effect of self-induced intoxication on that person's capacity to consent. The defendant was convicted.]

**Sir Igor Judge P:** 25 It is perhaps helpful to identify a number of features of the law relating to consent which although obvious are sometimes overlooked. On any view, both parties to the act of sexual intercourse with which this case is concerned were the worse for drink. Both were adults. Neither acted unlawfully in drinking to excess. They were both free to choose how much to drink, and with whom. Both were free, if they wished, to have intercourse with each other. There is nothing abnormal, surprising, or even unusual about men and women having consensual intercourse when one, or other, or both have voluntarily consumed a great deal of alcohol. Provided intercourse is indeed consensual, it is not rape.

26 In cases which are said to arise after voluntary consumption of alcohol the question is not whether the alcohol made either or both less inhibited than they would have been if

sober, nor whether either or both might afterwards have regretted what had happened, and indeed wished that it had not. If the complainant consents, her consent cannot be revoked. Moreover it is not a question whether either or both may have had very poor recollection of precisely what had happened. That may be relevant as to the reliability of their evidence. Finally, and certainly, it is not a question whether either or both was behaving irresponsibly. As they were both autonomous adults, the essential question for decision is, as it always is, whether the evidence proved that the defendant had sexual intercourse with the complainant without her consent.

27 Before the 2003 Act, it was not difficult to identify the relevant legal principles, and for a judge to explain the law relating to the voluntary consumption of alcohol (or drugs) by a complainant. Thus, for example, the Court of Appeal upheld the direction in *R v. Malone* [1998] 2 Cr App R 447, 452:

'She does not claim to have physically resisted nor to have verbally protested. She says the drink has disabled her from doing either . . . She has told you she did not consent . . . you must be sure that the act of sexual intercourse occurred without [her] consent. Submitting to an act of sexual intercourse, because through drink she was unable physically to resist though she wished to, is not consent. If she submits to intercourse because of the drink she cannot physically resist that, of course, is not consent. No right thinking person would say that in those circumstances she was genuinely consenting to what occurred. What occurred . . . not wishing to have intercourse but being physically unable to do anything about it . . . would plainly, as a matter of common sense, be against her will. It would be without her consent.'

28 We record this direction as illustrative of what was regarded as an appropriate direction in the circumstances of an individual case to a particular jury, rather than a learned disquisition of the law of consent as applied to rape. We should however highlight *R v. Lang* (1975) 62 Cr App R 50 which summarised the relevant principle. The jury sought guidance from the judge on the question of whether the complainant's alcohol consumption may have vitiated her consent to sexual intercourse. The court observed, at p. 52:

'there is no special rule applicable to drink and rape. If the issue be, as here, did the woman consent? the critical question is not how she came to take the drink, but whether she understood her situation and was capable of making up her mind. In *R v. Howard* [1966] 1 WLR 13, the Court of Criminal Appeal had to consider the case of a girl under 16. Lord Parker CJ (at p 15) said: "In the case of a girl under 16 the prosecution . . . must prove either that she physically resisted, or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist". In our view these words are of general application whenever there is present some factor, be it permanent or transient, suggesting the absence of such understanding or knowledge . . . None of this was explained to the jury. Their attention was focused by the judge upon how she came to take drink, not upon the state of her understanding and her capacity to exercise judgment in the circumstances.'

29 In the context of the statutory provision in section 74, it is noteworthy that *R v. Lang* decided 30 years or so ago, directly focused on the 'capacity' of the complainant to decide whether to consent to intercourse or not. These are the concepts with which the 2003 Act itself is concerned.

30 We are not aware of any reported decisions which deal with this aspect of the new legislation. We should however refer to the much publicised case of *R v. Dougal* (unreported) 24 November 2005, heard in the Crown Court at Swansea. Having heard the evidence of the complainant, the Crown decided to offer no further evidence. Before the jury counsel for the Crown explained:

'the prosecution are conscious of the fact that a drunken consent is still a consent and that in the answer, in cross-examination, she said, in terms, that she could not remember giving her consent and that is fatal to the prosecution's case. In those circumstances the prosecution will have no further evidence on the issue of consent. This is a case of the word of the defendant against that of the complainant on that feature. It is fatal to the prosecution's case ...'

31 The judge (Roderick Evans J) directed the jury that as the prosecution was no longer seeking a guilty verdict, there was only one verdict which could be returned, and that was an acquittal. He added that he agreed with the course the prosecution had taken.

32 Without knowing all the details of the case, and focusing exclusively on the observations of counsel for the Crown in *R v. Dougal*, it would be open to question whether the inability of the complainant to remember whether she gave her consent or not might on further reflection be approached rather differently. Prosecuting counsel may wish he had expressed himself more felicitously. That said, one of the most familiar directions of law provided to juries who are being asked to conclude that the voluntary consumption of alcohol by a defendant should lead to the conclusion that he was too drunk to form the intention required for proof of the crime alleged against him, is that a drunken intent is still an intent: *R v. Sheehan* [1975] 1 WLR 739. So it is, and that we suspect is the source of the phrase that a 'drunken consent is still consent'. In the context of consent to intercourse, the phrase lacks delicacy, but, properly understood, it provides a useful shorthand accurately encapsulating the legal position. We note in passing that it also acts as a reminder that a drunken man who intends to commit rape, and does so, is not excused by the fact that his intention is a drunken intention.

33 Some of the hugely critical discussion arising after *R v. Dougal* missed the essential point. Neither counsel for the Crown, nor for that matter the judge, was saying or coming anywhere near saying, either that a complainant who through drink is incapable of consenting to intercourse must nevertheless be deemed to have consented to it, or that a man is at liberty to have sexual intercourse with a woman who happens to be drunk, on the basis that her drunkenness deprives her of her right to choose whether to have intercourse or not. Such ideas are wrong in law, and indeed, offensive. All that was being said in *R v. Dougal* was that when someone who has had a lot to drink is in fact consenting to

intercourse, then that is what she is doing, consenting: equally, if after taking drink, she is not consenting, then by definition intercourse is taking place without her consent. This is unexceptionable.

34 In our judgment, the proper construction of section 74 of the 2003 Act, as applied to the problem now under discussion, leads to clear conclusions. If, through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting, and subject to questions about the defendant's state of mind, if intercourse takes place, this would be rape. However, where the complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape. We should perhaps underline that, as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious. Whether this is so or not, however, is fact-specific, or more accurately, depends on the actual state of mind of the individuals involved on the particular occasion.

35 Considerations like these underline the fact that it would be unrealistic to endeavour to create some kind of grid system which would enable the answer to these questions to be related to some prescribed level of alcohol consumption. Experience shows that different individuals have a greater or lesser capacity to cope with alcohol than others, and indeed the ability of a single individual to do so may vary from day to day. The practical reality is that there are some areas of human behaviour which are inapt for detailed legislative structures. In this context, provisions intended to protect women from sexual assaults might very well be conflated into a system which would provide patronising interference with the right of autonomous adults to make personal decisions for themselves.

36 For these reasons, notwithstanding criticisms of the statutory provisions, in our view the 2003 Act provides a clear definition of 'consent' for the purposes of the law of rape, and by defining it with reference to 'capacity to make that choice', sufficiently addresses the issue of consent in the context of voluntary consumption of alcohol by the complainant. The problems do not arise from the legal principles. They lie with infinite circumstances of human behaviour, usually taking place in private without independent evidence, and the consequent difficulties of proving this very serious offence.

Leaving aside the dubious point about the 2003 Act clarifying capacity and consent, especially in cases of intoxication, there is much of note in the judgment. The claim that 'it is not a question whether either or both was behaving irresponsibly' whilst directed at the decision to get drunk, risks losing sight of the model of responsible and communicative sexual behaviour underpinning the 2003 Act – which, after all, the jury presumably accepted was absent given their guilty verdict. Interestingly, the judge hints at what he regards as the responsible act of the defendant in washing vomit out of the victim's hair as indicating that he was 'behaving unselfishly' (p. 602), which of course is not an inevitable conclusion. For now, the judgment in *Bree* has halted the momentum for revisiting



the 2003 Act and offering a definition of capacity (OCJR 2006). Nevertheless, the problem of rape remains high on the political agenda, and is likely to lead to further reform given that the UK has the worst conviction rate of 33 European countries (*The Times*, 14 May 2009).

Section 76 restates the previous position in relation to the vitiation of consent, creating a conclusive presumption of no consent where the defendant either intentionally deceived the complainant as to the 'nature or purpose of the act', or induced consent by impersonating someone 'known personally' to the complainant. The former has led to an interesting (and heated) academic debate about the proper meaning of rape and the role of law in regulating sexual behaviour (Gross 2007; Herring 2007). In the following extract, Herring sets out his disagreement with Gross:

**Jonathan Herring, 'Human Rights and Rape: a Reply to Hyman Gross' (2007) *Criminal Law Review* 228**

The much more important point is the reason why Professor Gross and I disagree on this topic and that is because we have different attitudes towards sexual penetration. To Professor Gross sexual penetration is 'one of nature's blessings'; 'a commonplace of life'; 'to be enjoyed no less than eating or sleeping'; and 'an innocent and natural activity' involving 'harmless pleasures'. It is from this starting point of an idealised view of sexual intercourse that many of his points flow. It follows that:

'[i]n the absence of any indication of an objection it is in the nature of normal sexual activity to proceed without requiring assurances that no objection exists. Indeed, requiring such assurance could be off-putting, even fatally disconcerting.'

Facing the joys of 'normal sexual activity' a man can assume that a woman would consent. Further he wonders if 'mere acquiescence' might not be enough to authorise sexual intercourse. Hence he questions whether a woman who believes a man who has said he loves her and therefore agrees to sexual activities is really harmed. Despite her 'disappointment' is she really any worse off than if she had said 'no', he wonders. (Remember despite her 'disappointment' she has enjoyed the 'nature's blessing' of sexual intercourse).

But, alas, Professor Gross's world in which sexual penetration simply involves such unalloyed pleasures is not the real one. For while sexual penetration involves 'harmless pleasures' to him, to others it is the stuff of abuse, oppression and a tool of war. We live in a world in which 150 million girls, 14 per cent of the world's girl population, are sexually abused *each year*. Even within England and Wales, a Home Office Research Study found that 24 per cent of women had suffered some form of sexual victimisation in their lifetime and 7 per cent a serious sexual assault. I do not claim, of course, that sexual intercourse is always wrong, but rather that it is an act which requires a good justification. Agreement obtained by deception is woefully insufficient. If a legal system is to rely on consent as a justification

for what would otherwise be a grave wrong, it must demand consent in a rich sense: with full truthful understanding of what is involved and free from illegitimate pressures.

...

Respecting a person's sexual autonomy includes respecting that they are entitled to know the truth and to make an informed choice about whether to engage in sexual intercourse. Professor Gross asks revealingly 'Is the criminal law needed to protect women against the disappointments and humiliations that are a consequence of their bad judgement, their gullibility, or their too trusting nature?' So to Professor Gross when a man has lied in order to obtain a woman's so-called consent to sex and she suffers humiliation as a result the person to blame is not the lying man, but the poor judgment of the gullible and too-trusting woman! This claim reflects victim-blaming of the kind that is all too common in commentary on rape.

...

A man meets a woman to whom he is attracted. Their relationship progresses and one night he is keen to have sex. Despite his charms it is clear she is not interested. Without the use of threats, force or lies he will be disappointed. My proposed version of the law would require him to zip up and accept that he is not going to get any tonight. Does such a law infringe his human rights? Hardly. Does it protect the woman's right to sexual autonomy? Exactly.

Herring's argument for a broad interpretation of the 'nature and purposes' of sexual intercourse failed to convince the Court if Appeal in its first application of section 76. *R v. Jheeta* (2008) involved what the trial judge underplayed as a 'juvenile plot', whereby Jheeta sent threatening text messages to the female victim with whom he had a previous sexual relationship, followed by messages where he pretended to be police officers investigating the matter and proceeded to 'advise' her to have sex with Jheeta. She 'agreed' to sex on a number of occasions. Interestingly, Jheeta was advised by his counsel to plead guilty to rape on the basis that the conclusive presumption of no consent under section 76 applied. Although the Court of Appeal preferred a narrow interpretation of 'nature and purposes', thus raising doubts as to the usefulness of section 76, Jheeta's conviction was upheld given the lack of true consent under section 74.

*R v. Jheeta* [2006] 1 WLR 112 at 114-5

In our judgment the ambit of s. 76 is limited to the 'act' to which it is said to apply. In rape cases the 'act' is vaginal, anal or oral intercourse. Provided this consideration is constantly borne in mind, it will be seen that s. 76(2)(a) is relevant only to the comparatively rare cases where the defendant deliberately deceives the complainant about the *nature or purpose* of one or other form of intercourse. No conclusive presumptions arise merely because the complainant was deceived in some way or other by disingenuous blandishments of or

common or garden lies by the defendant. These may well be deceptive and persuasive, but they will rarely go to the nature or purpose of intercourse. Beyond this limited type of case, and assuming that, as here, s. 75 has no application, the issue of consent must be addressed in the context of s. 74.

...

On the written basis of plea the appellant undoubtedly deceived the complainant. He created a bizarre and fictitious fantasy which, because it was real enough to her, pressurised her to have intercourse with him more frequently than she otherwise would have done. She was not deceived as to the nature or purpose of intercourse, but deceived as to the situation in which she found herself. In our judgment the conclusive presumption in s. 76(2)(a) had no application, and counsel for the appellant below were wrong to advise on the basis that it did. However that is not an end of the matter.

We are being asked to examine the safety of convictions for rape where the appellant pleaded guilty. He did so on the basis of plea which accepted the accuracy of his admissions in interview with the police, and in particular did not question his unequivocal admission that there were occasions when sexual intercourse took place when the complainant was not truly consenting. This is entirely consistent with his acknowledgement that he persuaded the complainant to have intercourse with him more frequently than otherwise, and the persuasion took the form of the pressures imposed on her by the complicated and unpleasant scheme which he had fabricated. This was not a free choice, or consent for the purposes of the Act. In these circumstances we entertain no reservations that on some occasions at least the complainant was not consenting to intercourse for the purposes of s. 74, and that the appellant was perfectly well aware of it. His guilty plea reflected these undisputed facts. Accordingly the appeal against conviction is dismissed.

Whilst the narrow approach to section 76 is mitigated somewhat by the use of section 74, would the outcome have been different had the defendant not admitted during questioning by the police that the victim had not truly consented? Jheeta was also convicted of procuring the victim to have sex by false pretences under section 2 of the 1956 Sexual Offences Act, which partly because of their lack of practical significance (only 130 offences were recorded between 2001/2, Home Office 2002) and the set of rebuttable presumptions in section 75, was not replaced in the 2003 Act. This now seems a costly omission. It is difficult to extract a clear conception of sexual autonomy from such 'intentional deception' or 'mistake cases'. For example, in terms of sexual infection, whilst not knowing about the HIV positive status of a sexual partner may vitiate consent for purposes of aggravated assault offences, the same would not apply under section 76 of the 2003 Act (*R v. B* (2007)). In other words, there is no deception as to the nature and purpose of the act. Also, in *R v. Devonald* (2008), a conviction for causing sexual activity without consent was upheld on the basis of deception as to the purpose of masturbating. The defendant thought he was masturbating for an online friend to see via a webcam, but in fact it was watched by the father of his former girlfriend who had allegedly engineered this in order

to embarrass him. Such cases reveal the difficulties surrounding consent and illustrate the inconsistent and context driven use of section 75. Our next section sheds further light on the culture which shapes the interpretation of rape law in the courts.

V.15.b.v. Evidence and the rape trial

Laws of criminal evidence have a widespread impact on criminal trials. In the case of sexual offences, legislation introduced in 1976 attempted to control the extent to which a complainant is questioned about her past sexual experience – questioning which would generally be allowed under common law rules. The reform did not prevent cross-examination on or other evidence of her sexual past with the defendant, and judges were often willing to use their discretion to allow evidence of past sexual experience with other men (Adler 1987). In addition, until 1994, sexual offences, whether committed by men or women, formed one of the categories for which a corroboration warning was required. A recent review of legislation which seeks to regulate the use of sexual history evidence neatly sets out the ‘rape myths’ which despite being dispelled by research evidence, seem to persist in the courtroom.

See Kelly, Jennifer Toulton and Sue Griffiths (2006) *Section 41: an evaluation of the new legislation limiting sexual history evidence in rape trials*, Home Office White Paper 20/06, pp. 1-3

Women’s credibility has been at the centre of how rape is understood and dealt with by the legal system for centuries. In the seventeenth century Sir Matthew Hale explicitly articulated his distrust of women’s testimony where the accusation involved sexual crime, a sentiment echoed several hundred years later by the leading legal scholar Wigmore (Wigmore, 1940, para. 924A). Their attitudes, which greatly influenced the law and practice in this area, continue to resonate today. Concern to protect the accused from false rape allegations led to far-reaching protections for defendants, which included permitting a wide-ranging cross-examination of the complainant.

The prosecution of rape has thus taken place within a ‘hermeneutics of suspicion’ (Denike, 2000). This has been bolstered by a collection of myths and stereotypes which have pervaded this area of law and which may influence the decisions of criminal justice personnel as well as jurors.

Helena Kennedy (1992) has pointed out:

Myths are powerful tent pegs which secure the status quo. In the law, mythology operates almost as powerfully as legal precedent in inhibiting change, and the law is full of mythology. Women are particularly at its mercy ... mythology is a triumph of belief over reality, depending for its survival not on evidence but on constant reiteration (p. 32).



Table 1.1 presents some of the most common myths and stereotypes about rape in the first column, and contrasts them to recent research evidence in the second.

Table 1.1 Selected myths and stereotypes

| Rape Myth/Stereotype                                        | Research Evidence                                                                                                                                                                                                       |
|-------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Rape is committed by strangers                              | It is mainly committed by men known to the victim (Walby and Allen, 2004)                                                                                                                                               |
| 'Real rape' happens at night, outside and involves a weapon | Rape happens at many times, most commonly inside, often involving threats and other forms of coercion (Lovett <i>et al.</i> , 2004; Walby and Allen, 2004)                                                              |
| There are always injuries                                   | A minority of reported rapes involve major external or internal injuries (Lovett <i>et al.</i> , 2004)                                                                                                                  |
| Anyone facing the possibility of rape will resist           | Many do resist, many freeze through fear or shock, or decide that resistance would be futile and/or dangerous (Kelly, 1987)                                                                                             |
| Women 'ask for it' by their dress/behaviour/taking risks    | Most victims know and trust their attackers. In cases where they do not know them it is the targeting choices of rapists which are the determining feature (Polaschek and Hudson, 2004)                                 |
| All victims react in the same way after being raped         | There are a range of responses, from extremely distressed through to quiet and controlled (Herman, 1988)                                                                                                                |
| A rape victim will report promptly                          | The majority of rapes and serious sexual offences are not reported at all (Walby and Allen, 2004), and many victims take some time to speak with a close friend before deciding to report (Lovett <i>et al.</i> , 2004) |

...

Alongside, and reinforcing, myths and stereotypes about women's unreliability as witnesses on sexual matters, are notions of women's culpability when victims of sexual aggression. Depending on their actions at the time or their reputation they are located inside or outside the category of 'victim'. Included here are: implicit presumptions about how a reasonable woman should respond to sexual aggression; persisting stereotypes of good/bad women (the madonna/whore binary); and traditional notions about sexual agency on the part of men which is a sign of health and virility, whereas female sexual agency is a marker of low morals and 'promiscuity' (Jordan, 2004). There is also a longstanding construction of heterosexuality that presumes that men will seek sexual activity, and that it is the responsibility of women not only to set, but also to enforce, limits (Lees, 1993).

When a judge 'wrongly' allowed questioning on the victim's past sexual history there could be no appeal, since the mistake benefits the defendant (although the possibility of a retrial following acquittal was introduced in the Criminal Justice Act 2003, ss. 62–6). This explains the relatively small number of appellate decisions on the 1976 Act. In *Viola* (1982), the defendant was refused permission to cross-examine the complainant as to whether she had made sexual advances to two casual visitors only a few hours before the alleged rape, and whether a few hours after it she had entertained a naked man in her house. In allowing the appeal, Lord Lane said it was clear that the section was 'aimed primarily at protecting complainants from cross-examination as to credit, from questions which went merely to credit and no more' (at p. 77). He contrasted this with questions which were 'relevant to an issue in the trial in the light of the way the case is being run, for instance relevant to the issue of consent, as opposed merely to credit'. Such questions 'are likely to be admitted, because to exclude a relevant question on an issue in the trial . . . will usually mean that the jury are being prevented from hearing something which, if they did hear it, might cause them to change their minds about the evidence given by the complainant'. The difficulty with this approach is, of course, that the section would have had no purpose if it did not result in some questions being excluded on the ground that to allow them would cause the jury to change its mind. In other words, the section was of limited utility if its purpose was merely to prevent questions being asked rather than also to try to prevent the jury reaching unwarranted conclusions from this sort of evidence. The distinction between credit and issue can be a fine, or misleading, one (Zuckerman 1989, p. 102). Part of the problem seems to be a failure to recognise that concepts such as 'relevance' and 'probative usefulness' are themselves open to interpretation. In *Viola*, for example, it is not self-evident why the contested questions were relevant to issue or probatively useful. Their admissibility seems to rest on the assumption that having consented once, a woman is to be regarded with suspicion when she denies having consented subsequently. Why is it assumed that previous sexual experience tells us anything about a woman's veracity in relation to an alleged rape?

Inevitably, where sexual history evidence is admitted, the focus of the trial shifts from questions about the legality of the defendant's acts to those about the propriety of the victim's behaviour. Temkin's study of the operation of section 2 identifies a 'Catch-22' situation for rape victims: where they represent themselves as sexually inexperienced or 'chaste', hence seeking to benefit from stereotypes of feminine virtue (and, hence, veracity), evidence of any sexual experience will be likely to undermine their credibility. Conversely, if they admit sexual experience, they are almost routinely assumed to have been more likely to have consented to sex with the defendant on this occasion. Where the trial turns on the issue of consent, the defendant can attack the woman in this way without risking having any of his own past conduct brought in. Consent is seen as a separate issue: it is not assumed that a man's sexual history is relevant

to whether he imposed non-consensual sex on the woman on this occasion. So the risks of raising questions about sexual history are – like contemporary discourses of sexuality – entirely asymmetrical. Temkin's research revealed that, where judges refused to exercise their discretion to allow sexual history evidence under section 2, defendants were often successful in their appeals, on the basis that the verdict might have been different had the evidence been admitted (see, for example *Barnes* (1994); *Walker* (1994); *Redguard* (1991); *R v. C* (1992); on sexual history evidence, see also Brown *et al.* 1993; Lees 1996). The guarantee of anonymity accorded to rape victims by section 4 of the 1976 Act (and extended to victims of other sexual offences in 1992) is poor compensation for the damaging experience which the (non-)operation of section 2 inflicted upon them at trial. The lengthy and gruelling cross-examination of rape victims by defendants-in-person led to the removal of this 'right' in 1999 (Youth Justice and Criminal Evidence Act 1999, s. 34).

This was an early indication of the Labour government's promise to improve the plight of victims in the criminal justice system. A more structured approach to sexual evidence in rape trials was introduced by section 41 of the Youth Justice and Criminal Evidence Act 1999. This prohibited the defence (not the prosecution) from adducing evidence about the victim's sexual history except in circumstances defined in subsections (3) and (5), which are set out below.

### Youth Justice and Criminal Evidence Act 1999

#### Section 41 Restriction on evidence or questions about complainant's sexual history

- (1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court –
  - (a) no evidence may be adduced, and
  - (b) no question may be asked in cross-examination, by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.
- (2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied –
  - (a) that subsection (3) or (5) applies, and
  - (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.
- (3) This subsection applies if the evidence or question relates to a relevant issue in the case and either –
  - (a) that issue is not an issue of consent; or
  - (b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or
  - (c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar –

- (i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or
  - (ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.
- (4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.
- (5) This subsection applies if the evidence or question –
- (a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and
  - (b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

Section 41 extends the ban to evidence about the victim’s sexual history with the defendant, unless the previous occasion was ‘at or about the same time’ as the alleged incident (s. 41(3)(b)). Although this has been somewhat over generously interpreted to include sexual intercourse four months before and almost one year after an alleged rape (*R v. R* (2) *H* (2003)). More generally, any hope that section 41 represented a breakthrough in terms of victims’ rights was dealt a blow by the House of Lords in *R v. A* (No. 2) (2001). The accused alleged that the woman had consented to intercourse, or if not, that he had believed she had. At trial, the judge refused to allow cross-examination of the victim about a previous consensual sexual relationship they shared. The Court of Appeal allowed his appeal on the basis that such evidence was admissible on the issue of the defendant’s belief in consent (s. 41(3)(a)). The question for the House was whether the evidence was also admissible on the issue of whether she had in fact consented. Section 41 appeared to say no – but how would this stand in light of the fair trial provisions of Article 6? Using the new canon of interpretation under section 3 of the Human Rights Act 1998, section 41(3)(c) was construed in order to ensure the right to fair trial of the defendant. Lord Steyn, although accepting the prejudices surrounding rape and the legal process, refused to accept a blanket ban on the use of sexual history evidence between the victim and the accused:

*Excerpt from Lord Steyn’s judgment*

Following the 1939-45 war the general principle of the equality of men and women in all spheres of life has gradually become established. In the aftermath of the sexual revolution of the sixties the autonomy and independence of women in sexual matters has



become an accepted norm. It was this change in thinking about women and sex which made possible the decision of the House of Lords in *R v. R (rape: marital exemption)* [1991] 4 All ER 481, [1992] 1 AC 599 that the offence of rape may be committed by a husband upon his wife. It was a dramatic reversal of old-fashioned beliefs. Discriminatory stereotypes which depict women as sexually available have been exposed as an affront to their fundamental rights. Nevertheless, it has to be acknowledged that in the criminal courts of our country, as in others, outmoded beliefs about women and sexual matters lingered on. In recent Canadian jurisprudence they have been described as the discredited twin myths, viz 'that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief' (see *R v. Seaboyer, R v. Gayme* [1991] 2 SCR 577 at 604, 630 per McLachlin J). Such generalised, stereotyped and unfounded prejudices ought to have no place in our legal system. But even in the very recent past such defensive strategies were habitually employed. It resulted in an absurdly low conviction rate in rape cases. It also inflicted unacceptable humiliation on complainants in rape cases.

...

As a matter of common sense, a prior sexual relationship between the complainant and the accused may, depending on the circumstances, be relevant to the issue of consent. It is a species of prospectant evidence which may throw light on the complainant's state of mind. It cannot, of course, prove that she consented on the occasion in question. Relevance and sufficiency of proof are different things. The fact that the accused a week before an alleged murder threatened to kill the deceased does not prove an intent to kill on the day in question. But it is logically relevant to that issue. After all, to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue. It is true that each decision to engage in sexual activity is always made afresh. On the other hand, the mind does not usually blot out all memories. What one has been engaged on in the past may influence what choice one makes on a future occasion. Accordingly, a prior relationship between a complainant and an accused may sometimes be relevant to what decision was made on a particular occasion.

[With the unanimous support of the full house, Lord Steyn concluded that (at p. 1564):]

The effect of the decision today is that under section 41(3)(C) of the 1999 Act, construed where necessary by applying the interpretive obligation under section 3 of the Human Rights Act, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the convention.

Much debate has surrounded section 41. However, whilst some have questioned the confines of its categories approach, Temkin reminds us of the potential prejudicial effect that knowledge of previous sexual behaviour with the accused may have:

Jennifer Temkin, 'Sexual History Evidence: towards the Backlash' [2003] *Criminal Law Review* 217 at 233

The previous sexual behaviour could have taken place in circumstances which would be highly likely to excite the prejudice of the jury as where the complainant was involved in 'swinging', a 'one-night stand', adultery or infidelity. But even if none of these circumstances apply, the jury will undoubtedly be invited to buy in to the myth that rape of a previous partner is most unlikely to have occurred and, if it did, does not deserve to be categorised as true rape. Myths and prejudicial assumptions can unfairly distort the outcome of trials.

Temkin also questions whether the analysis of section 41(3)(c) in *R v. A* will continue to be confined to cases of previous sexual relationships with the accused. In *R v. Mukadi* (2004), the Court of Appeal felt the trial judge was wrong to prevent questioning about the victim's decision to accept a lift and exchange phone numbers with a stranger shortly before the alleged rape, thus seemingly endorsing a rape myth that women are 'asking for it' because of their 'risky' behaviour. It is disappointing that the Court refused leave to the House of Lords on the issue of previous sexual behaviour (if indeed it was sexual) with third parties. How can such an act be relevant to the issue of consent to sex with *someone else*?

Helen Page and Qi Barry, 'Evidence Rape: Youth Justice and Criminal Evidence Act 1999 s. 41' [2004] *Criminal Law Review* 373-4

[T]he Court of Appeal regard the evidence as 'relating to' consent because it tells us what the complainant was prepared to indulge in on the night in question. By this reasoning every woman going out on one of the 'dating in the dark' sessions, that have so captured the imagination of the press just recently, runs the risk of being assumed to be open to the advances of all and sundry the minute she admits that she is prepared to contemplate the prospect of sex with someone she finds attractive. As the trial judge said, this is the very thing that s. 41 was designed to prevent. Even if the correct reading of the 'car' incident was that the complainant was open to the idea of engaging in sexual activity with the driver, it by no means follows that she found M an equally pleasing prospect.

Perhaps the Act itself creates the framework for such an argument simply by appearing to suggest that events occurring 'at or about the same time' as the incident in question are presumptively relevant, but in fact it does no such thing: the defence still have to demonstrate that the earlier incident 'relates to' the issue of consent. In many cases the earlier incident will involve the defendant himself, and will be indicative of the complainant's state of mind in relation to him. But where it involves someone else, the defence have to get over the hurdle posed by the (rather obvious) objection that preparedness to consent is not generally a transferable commodity.

In the present case, although it is not spelled out, the suggestion may have been that the complainant's demeanour was consistent with prostitution – the emphasis on her dress, the dirty interior of the car (mine would not have passed muster with the Court of Appeal either, I fear) and the age of its solitary occupant, together with the business of the exchange of numbers at the filling station, suggest that this was no ordinary romantic encounter. But in the absence of any clear evidence it would seem improper to draw such an inference and then to apply it laterally to the complainant's relationship with M, who does not appear to have been suggesting that the relationship was a commercial one.

What is not permissible is for evidence to be adduced on the basis of ostensible relevance to consent when the real purpose is to discredit the complainant: s. 41(4) expressly forbids this tactic. The reasoning employed in the present case appears to draw on a dangerous generalisation about consent as an attitude of mind rather than as a choice made on an individualised, perhaps even capricious, basis. To the extent that the real purpose might have been, as the trial judge clearly suspected, to discredit the complainant, the evidence was doubly damned.

An evaluation of section 41 by Kelly *et al.* has revealed a generous judicial approach to sexual history cross-examination. In their observations of trials there was often no reference to the legislation at all, especially where the prosecution introduced the evidence and the defence proceeded to cross-examine. The study concludes by casting doubt on the ability of such legislation to stamp out gender bias:

*Liz Kelly, Jennifer Temkin and Sue Griffiths (2006) Section 41: an Evaluation of the New Legislation Limiting Sexual History Evidence in Rape Trials, Home Office Online Report 20/06, p. 77*

Few young people or adults in the twenty-first century have had only one sexual partner. The majority of the population, therefore, has a 'sexual history' and many people could be represented as having 'taken risks' in the sexual sphere. Yet these sexual experiences take on additional and negative meanings when introduced as 'evidence' in sexual offence trials. That they can be so used is a reminder that gender still functions as a social division, and women can easily be marked out as having a 'reputation' or being 'unreliable'. Evidential and rhetorical devices used by the defence, and unchallenged by prosecution and judge, impugn a complainant's character, rendering her testimony less credible. The attitudes underpinning these practices amount to discrimination, albeit in a subtle and widely accepted form. As one CPS lawyer put it:

I think there is still a reluctance to accept that women have the same rights to sexual freedom, if you like, that men have. (CPS1)

Section 41 was a sincere attempt to deal, through statute, with taken-for-granted, normalised gender bias. That it has proved necessary to do so despite profound changes in



sexual and social mores reveals much about the resistance to change of certain expectations and constructions of femininity and masculinity, that have been termed 'constitutive norms' (Lundgren, 1995). In this sense, it should not be surprising that the legislation has been evaded, circumvented and resisted, and that the prosecution is reluctant to pursue cases which require grappling with these complex and contested areas. There is considerable resonance in Patricia Easteal's reflection that legislative change is never sufficient to 'overcome the competing powerful though unwritten social and legal sub-text which continues to be revealed in struggles over rape law reform' (Easteal, 2001, p. 238). Continuing to develop the jurisprudence is one requirement of the necessary transformation but it needs to be connected to wider social change so that women can exercise the same rights and freedoms as men, without this rendering them less deserving or credible as witnesses.

Until the passage of the Criminal Justice and Public Order Act 1994, section 32, an evidential rule applying to all sexual offences required the judge to warn the jury that it may not be safe to convict the defendant on the uncorroborated evidence of the victim. As Temkin (2002, p. 256) notes, the rationale for such warnings 'rested on the alleged proclivities and weaknesses of women'. Women, it was said, might fabricate sexual assault out of jealousy, spite, revenge, or because of a tendency to tell lies and fantasize. Given that the victim's evidence is likely to be the principal basis for the prosecution case, the effect of the judge's opening his or her direction to the jury with such a warning was bound to have a significant impact on conviction rates. It was on this basis, as well as on the basis of a rejection of the assumptions about feminine unreliability which it embodied, that the government abolished the requirement. It is interesting (and somewhat painful) to reflect that the need for children's evidence to be corroborated was abolished by the Criminal Justice Act 1988 – six years before the abolition of the corroboration warning in sexual cases: see Chapter 16.a.iii. below. In the intervening years, the law of evidence treated children as more reliable than adult witnesses in sexual cases, the vast majority of whom were women. Since it is still open to judges to give a corroboration warning, it cannot be assumed that the sexual stereotypes which underpinned the old requirement are now irrelevant to the conduct of trials.

Although the abolition of the mandatory corroboration warning was a significant advance from a feminist point of view, Temkin notes the need for research into the compliance of trial judges. Research in New South Wales, which abolished the need for a corroboration warning in 1981, found that such warnings were given in 80 per cent of trials in a sample of 92 cases (see Temkin 2002, p. 266). More generally, the laws of evidence are still far from consistent. A trial judge dismissed a case of indecent assault against a woman suffering from multiple sclerosis on the basis that she could not be cross-examined (the woman had given evidence to the police using an alphabet board, and was eager to appear in court; see *The Times*, 20 August 1997, p. 3), confirming the



impression that criminal procedure is all too often bound by outdated and inflexible assumptions about the capacities of participants in the criminal process (see Ellison 2009).

In a belated attempt to tackle another rape myth, in 2008 the Court of Appeal has ruled that judges are entitled to warn juries that delay in reporting rape, so often seized upon by the defence to question the victim's credibility, may be because 'the trauma of rape can cause feelings of shame and guilt which might inhibit a woman from making a complaint' (*R v. Doody* (2008)). The government has also consulted about its plans to allow complaints of rape to friends and family automatically admissible, irrespective of the lapse of time, to make video recordings of rape victims admissible and to consider the use of expert evidence regarding psychological reactions to rape (CJS 2007).

In this Chapter, we have concentrated, for obvious reasons, on the influence of stereotypes of female sexuality on the construction of evidence in rape trials. Also relevant to the law of rape are assumptions which may mark non-white, and in particular Afro-Caribbean, defendants and 'complainants' as less credible witnesses because of stereotypes about black sexuality – an issue which is especially troubling because of the role of accusations of rape in the history of racial oppression. This analysis is, therefore, only one instance of the general power of cultural assumptions to shape the interpretation of testimony in criminal cases.

#### V.15.b.vi. Punishing rape

Custodial sentences are the norm for those (few) men convicted of rape. Sentencing in rape cases is structured by guidance set out by the Court of Appeal (on sentencing guideline judgments, see Chapter 2.c.v.):

*Billam* [1986] 1 All ER 985

**Lord Lane CJ:** We have had listed before us today a number of cases where there has been a conviction for rape or attempted rape, in order to give us an opportunity to restate principles which in our judgment should guide judges on sentencing in this difficult and sensitive area of the criminal law.

In the unhappy experience of this court, whether or not the number of convictions for rape has increased over the years, the nastiness of the cases has certainly increased, and what would ten years ago have been considered incredible perversions have now become commonplace. This is no occasion to explore the reasons for that phenomenon, however obvious they may be...

This court emphasised in *Roberts* (1982)... that rape is always a serious crime which calls for an immediate custodial sentence other than in wholly exceptional circumstances. The sort of exceptional circumstances in which a non-custodial sentence may be appropriate are illustrated by the decision in *Taylor* (1983) [in which a mentally retarded man raped a

woman of 19 with Down's Syndrome]. Although on the facts that offence amounted to rape in the legal sense, the court observed that it did not do so in ordinary understanding.

Judges of the Crown Court need no reminder of the necessity for custodial sentences in cases of rape. The criminal statistics for 1984 show that 95% of all defendants who were sentenced in the Crown Court for offences of rape received immediate custodial sentences in one form or another. But the same statistics suggest that judges may need reminding about what length of sentence is appropriate.

Of the 95% who received custodial sentences in 1984, 28% received sentences of two years or less; 23% over two and up to three years; 18% over three and up to four years; 18% over four and up to five years and 8% over five years (including 2% receiving life). . . Although it is important to preserve a sense of proportion in relation to other grave offences such as some forms of manslaughter, these statistics show an approach to sentences for rape which in the judgment of this court are too low . . . There are, however, many reported decisions of the court which give an indication of what current practice ought to be and it may be useful to summarise their general effect.

For rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be eight years.

At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime on a number of different women or girls. He represents a more than ordinary danger and a sentence of 15 years or more may be appropriate.

Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time, a life sentence will not be inappropriate.

The crime should in any event be treated as aggravated by any of the following factors: (1) violence is used over and above the force necessary to commit the rape; (2) a weapon is used to frighten or wound the victim; (3) the rape is repeated; (4) the rape has been carefully planned; (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual kind; (6) the victim is subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; (8) the effect on the victim whether physical or mental, is of special seriousness. Where any one or more of the aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.

The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence . . .

The fact that the victim may be considered to have exposed herself to danger by acting imprudently (for instance by accepting a lift in a car from a stranger) is not a mitigating factor; and the victim's previous sexual experience is equally irrelevant. But if the victim

has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some mitigation of the sentence. Previous good character is only of minor relevance.

The *Billam* guidelines have been followed consistently in subsequent appellate cases (for discussion see Henham 1994). Government emphasis on severe punishments for violence and sexual crimes since the decision in *Billam* has given further impetus both to the re-evaluation of the seriousness of rape and to public and judicial perceptions of the 'dangerousness' of repeat sex offenders. The Criminal Justice Act 1991, section 1(2)(b) provided for persons convicted of violent or sexual offences to be given custodial sentences longer than would be commensurate with the seriousness of the present offence on the ground of public protection, and the handing down of life sentences to such offenders is no longer exceptional (see Hann (1995)). 'Two strikes' laws, first introduced in 1997, mean an automatic life sentence for individuals committing a second serious offence, including those who repeat rape or attempted rape, unless there are exceptional circumstances (now Powers of Criminal Courts (Sentencing) Act 2000, ss. 94 and 109). Early release policies are similarly organised around a principle of public protection which has a special impact on those serving long sentences for sexual offences.

There was already evidence before the *Billam* guidelines that, in the small sample of cases reaching the conviction stage, sentencing for rape was becoming more severe (Lloyd and Walmsley 1989). The distribution of long sentences reflects the kinds of criteria mentioned in *Billam* – that is, sentences are longer where there has been additional violence, additional sexual acts or longer periods of coercion. But stranger rapists receive a much larger proportion of sentences of over five years than non-strangers. Lloyd and Walmsley's study concludes that the increase in severity in sentencing has been greater for rapes with aggravating features than for those without. So it is clear that at all stages of the criminal process stranger rape is the paradigm for serious or 'real' rape. For example, in *Berry* (1988), in reducing the sentence of a man convicted of raping his former girlfriend from six to four years, Lord Mustill said that 'in some instances the violation of the person and defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a long standing relationship' (at p. 15).

This discrimination is also graphically reflected in one of the first appellate cases dealing with a husband convicted of raping his wife, in which the defendant's appeal against a sentence of five years was rejected. What is interesting about the case is that the five-year term – the *Billam* 'standard' sentence – was given notwithstanding the existence of serious aggravating factors on the *Billam* criteria: the defendant had wielded a knife and threatened to kill his wife. The Court of Appeal's reference to these factors as 'overwhelming the fact



of marriage' suggest strongly that it regarded marriage as a mitigating factor (*R v. W* (1992)).

In *Millberry* (2003), the Court of Appeal broadly accepted revisions to the *Billam* guidelines proposed by the Sentencing Advisory Panel. This was the first major revision in 16 years and was driven by changes in the understanding of rape cases. New guidelines have followed the enactment of the Sexual Offences Act 2003 (SGC 2006). In *Millberry*, Lord Woolf CJ's judgment reflects the continued reluctance of the judiciary to embrace the notion of 'rape as rape':

***R v. Millberry* [2003] 1 Cr App R 25**

**Lord Woolf CJ:** All the circumstances of the particular offence, including the circumstances relating to the particular victim and the particular offender are relevant. Clearly, there can be mitigating circumstances as the Panel recognises. Where, for example, the offender is the husband of the victim there can, but not necessarily, be mitigating features that clearly cannot apply to a rape by a stranger. On the other hand, as the advice from the Panel points out, as is confirmed by the research commissioned by the Panel, because of the existence of a relationship the victim can feel particularly bitter about an offence of rape, regarding it as a breach of trust. This may, in a particular case, mean that looking at the offence from the victim's point of view, the offence is as bad as a 'stranger rape'. The court has the task of balancing any circumstances of mitigation against the aggravating circumstances. In drawing the balance it is not to be overlooked, when considering 'stranger rape', the victim's fear can be increased because her assailant is an unknown quantity. Is he a murderer as well as a rapist? In addition, there is the fact (not referred to specifically by the Panel) that when a rape is committed by a stranger in a public place, not only is the offence horrific to the victim it can also frighten other members of the public. This element is less likely to be a factor that is particularly important in a case of marital rape where the parties to the marriage are living together.

One might expect recognition of rape as an extreme breach of trust in supposedly loving relationships, and to the (not unreasonable) fear amongst marital rape victims of repeat attacks, especially given that most rapists know their victims (Walby and Allen 2004). However, Lord Woolf stopped short of endorsing the panel's view of regarding non-stranger rape as seriously as stranger rape (para. 26 of the advice):

There can be situations where the offender and victim are sharing the said same bed on a regular basis and prior to retiring to bed both had been out drinking and because of the drink that the offender consumed he failed to show the restraint he should have. It would be contrary to common sense to treat such a category of rape as equivalent to stranger rape as on one interpretation of the research material, the Panel could appear to be suggesting.

Lord Woolf's concern with common sense is not supported by research into rape trauma, which suggests that the psychological effect of relationship rape is



sometimes greater than stranger rape. As Rumney (1999) has demonstrated, the post *R v. R* position has not heralded equality in rape sentencing. His analysis of the majority of rape sentencing appeals in the Court of Appeal between 1986 and 1997, shows the sentence discrepancy between different types of rapes:

- stranger (9.7 years);
- acquaintance (8.2 years);
- marital rape (non-cohabitee) (6.3 years);
- relationship rape (5 years); and
- marital rape (cohabitee) (3.8 years).

Strikingly, the average sentence for attempted rape (5.7 years) is significantly higher than that for 'cohabiting' marital rape (3.8 years). The average sentence in all cases was 7.4 years (p. 260). Such apparent leniency is compounded by the fact that most rape is non-stranger rape. As the extract from Rumney below suggests, the judiciary's conception of rape continues to lag behind reality:

**Philip Rumney 'Progress at a Price: The Construction of Non-Stranger Rape in the Millberry Sentencing Guidelines' [2003] 66 *Modern Law Review* 880-94 at 882**

Millberry states that an eight-year starting point is appropriate where the 'offender is a person in whom the victim has placed his or her trust by virtue of his office or employment (for example, a clergyman, an emergency services patrolman, a taxi driver, or a police officer).' One could view this position as anomalous: a taxi driver who rapes a passenger whom he met for the first time ten minutes before will be rightly deemed to have committed an aggravated offence which attracts an eight year starting point. By contrast a case in which a woman is raped by a man she has known, loved and trusted for years will, with no other aggravating factors, attract a five-year starting point. Secondly, the breach of trust that non-stranger rape represents is a distinct, additional and ultimately unique harm that is not present in cases of stranger rape and arguably is at least as significant as that involved in cases involving taxi drivers, police officers or patrolmen. Repeated studies suggest that acquaintance rape tends to be traumatic or have longer-term effects than rape by a stranger. For example, in a British study of 116 rape victims it was found that '[w]omen raped by acquaintances found the experience even more difficult to come to terms with than those raped by strangers. They felt betrayed – not just by the men but by their own judgment. It also made them more fearful of men generally, since they no longer knew whom, to trust'.

In 2009, serial sex attacker John Worboys, a London taxi driver, was found guilty of 19 charges of drugging and sexually assaulting 12 victims including one of rape (*The Guardian*, 13 March 2009). Whilst he was given an indeterminate sentence, the minimum of eight years was criticised as lenient due to the presence of numerous aggravated factors of repetition, abuse of trust and the use of drugs to facilitate the offences. Nevertheless, the sentence is broadly in line with the

Sentencing Guidelines Council recommendations which specifies the following starting points:

- five years for rape of an adult;
- eight years where aggravating factors are involved;
- ten years for rape of a child between 13 and 16 where aggravating factors are involved;
- ten years for rape of a child under 13 where no aggravating factors are involved.

(SGC 2007, p. 25).

Rape law is both a product of the social construction of sexuality and a means by which that construction is reinforced. Thus, any reform of law alone is unlikely to have more than symbolic impact, and even that impact will be largely enfeebled if there is not an accompanying move towards a reconception of women as other than sexually attributed beings. In some jurisdictions, New South Wales, Michigan and Canada for example, reform moves have aimed to replace the separate offence of rape with a graded scheme of types of sexual assault. The Canadian Criminal Code (s. 246) goes so far as to remove the distinction between penetrative and other forms of sexual assault. These schemes are discussed in detail by Temkin (2002, Ch. 3) (see also Bronitt 1992, 1996).

Our discussion has shown that the legal definition of rape interacts with aspects of trial procedure and evidence to provide a very hostile climate for rape complainants. Whilst the revised definition of consent in the Sexual Offences Act 2003 offers some hope of protecting the personal and sexual autonomy of rape victims, the operation of rules of evidence, as well as negative 'official' attitudes throughout the legal process may ultimately undermine them.

## FURTHER READING

- Joanne Bourke, *Rape: A History from 1860 to the Present* (Virago Press 2008).
- Louise Ellison, 'The Use and Abuse of Psychiatric Evidence in Rape Trials' (2009) 13 *The International Journal of Evidence & Proof* 28.
- HM Crown Prosecution Service Inspectorate (HMCPs) and HM Inspectorate of Constabulary (HMIC), *Without Consent: A Report on the Joint Review of the Investigation and Prosecution of Rape Offences* (2007).
- Liz Kelly, J. Lovett, and L. Regan, *A Gap or a Chasm? Attrition in Reported Rape Cases*, Child and Women Abuse Studies Unit, Home Office Research Study 293 (2005).
- Liz Kelly, Jennifer Temkin and Sue Griffiths, *Section 41: an evaluation of the new legislation limiting sexual history evidence in rape trials*, Home Office Online Report 20/06.
- Sue Lees, *Carnal Knowledge: Rape on Trial* (Hamish Hamilton 1996).
- Philip Rumney, 'False Allegations of Rape' (2006) 65 *Cambridge Law Journal* 128.
- Victor Tadros, 'Rape without Consent' (2006) 26 *Oxford Journal of Legal Studies* 515.
- Jennifer Temkin, 'Criminal Procedure Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27 *Journal of Law & Society* 219.
- Jennifer Temkin, *Rape and the Legal Process* (2nd edn., Oxford University Press 2002).
- Jennifer Temkin and Andrew Ashworth, 'The Sexual Offences Act 2003: Rape, Sexual Assaults and the Problem of Consent' [2004] *Criminal Law Review* 328.

## Regulating Sexuality

The orthodox separation of sexual offences into consensual and non-consensual offences significantly shapes legal images of sexuality. Yet, as we have seen, the question of consent in adult sexual relationships is a contested one. Duncan notes that:

... the power of the criminal law in respect of physical and sexual violence is not merely or even mainly juridical, but, more importantly, disciplinary. As a disciplinary power, these aspects of the law's text demarcate the boundary between the normal and the abnormal and, in doing so, they define the normal around the notion of the heterosexual male subject in two principal ways: first, by a concept of consent which is very differently constructed as between offences and, secondly, by a subtext of visibility which privileges visible physical violence over (often) invisible sexual violence. The law disciplines bodies differentially as between different genders and different sexual orientations [Duncan 1995, p. 326].

The extraordinary number of different offences, albeit most now gathered in the Sexual Offences Act 2003, testifies to the confusions besetting what are regarded as appropriate legal and social responses in this area. What is the connection between sexual activity between two 15-year-olds and the persistent sexual abuse of a small child by a relative? Is child sexual abuse an abuse of sexual autonomy, or of trust, or of physical security, or all three? What does criminal law's construction of child abuse, along with what we know about domestic violence and about sexual aggression, tell us about the place that families possess in our culture? It would be foolish to attempt to answer these questions but it would be myopic to ignore them.

In this chapter we look at ages of consent, consensual violence, child sexual abuse and incest, before moving on to discuss the regulation of prostitution and pornography.

## V.16.a. Forbidden degrees

### V.16.a.i. Ages of consent

The varying levels and relevance of ages of consent provide important clues to how criminal law constructs different sexual subjects and different forms of sexuality. For most sexual activities the age of consent is 16, including male homosexual activity and heterosexual buggery, which was lowered from 18 when the Sexual Offences (Amendment) Act 2000 stuttered its way through Parliament.

A preoccupation with the sexual vulnerability of young girls (along with a consonant image of men as sexually predatory) is reflected in a number of specific offences. The pattern of offences in the Sexual Offences Act 2003 divides children into two classes of vulnerability. Consent is completely irrelevant in relation to children under 13. The following offences can be committed against them: rape, assault by penetration, sexual assault, and causing or inciting a child under 13 to engage in sexual activity (ss. 5, 6, 7 and 8).

Sexual conduct involving children aged between 13 and 15 is caught by two new offences: sexual activity with a child (s. 9), and causing or inciting a child to engage in sexual activity (s. 10). These offences are broader than their 1956 predecessors: beyond their gender-neutrality, sex has shifted to 'sexual activity', which includes touching or other activity that reasonable people would consider sexual (s. 78). Furthermore, the 'young man's defence' has become the 'reasonable person's defence' (i.e. the offence requires that 'A does not reasonably believe that B is 16 or over'. In addition the Act includes offences that apply to any child under 16: sexual activity in the presence of a child (s. 11) and causing a child to watch a sexual act (s. 12).

#### Sexual Offences Act 2003

##### 9 Sexual activity with a child

- (1) A person aged 18 or over (A) commits an offence if –
  - (a) he intentionally touches another person (B),
  - (b) the touching is sexual, and
  - (c) either –
    - (i) B is under 16 and A does not reasonably believe that B is 16 or over, or
    - (ii) B is under 13.
- (2) A person guilty of an offence under this section, if the touching involved –
  - (a) penetration of B's anus or vagina with a part of A's body or anything else,
  - (b) penetration of B's mouth with A's penis,
  - (c) penetration of A's anus or vagina with a part of B's body, or



- (d) penetration of A's mouth with B's penis, is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years.
- (3) Unless subsection (2) applies, a person guilty of an offence under this section is liable –
  - (a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

#### 10 Causing or inciting a child to engage in sexual activity

- (1) A person aged 18 or over (A) commits an offence if –
  - (a) he intentionally causes or incites another person (B) to engage in an activity,
  - (b) the activity is sexual, and
  - (c) either –
    - (i) B is under 16 and A does not reasonably believe that B is 16 or over, or
    - (ii) B is under 13.

The Sexual Offences Act (SOA) increases the age limit from 16 to 18 in relation to taking, permitting to be taken, possessing or publishing indecent photographs (Protection of Children Act 1978). No offence will be committed where the child over 16 consents to being photographed (SOA, s. 45). The increasingly popular practice of 'sexting' amongst teenagers (including the under 16), whereby individuals take and send sexual images of themselves via text messages, does in theory raise the prospect of criminal intervention here, and could call for difficult decisions into terms of prosecutorial discretion (*The Guardian*, 7 August 2009).

One of the controversial aspects of the SOA, and an example of its underlying paternalism, concerns consensual sexual activity between minors:

### Sexual Offences Act 2003

#### Section 13 Child sex offences committed by children or young persons

- (1) A person under 18 commits an offence if he does anything which would be an offence under any of sections 9 to 12 if he were aged 18.
- (2) A person guilty of an offence under this section is liable –
  - (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years.

This appears to be a striking example of over-criminalisation rendering adolescent sexual experimentation into a serious offence with a maximum penalty of five years' imprisonment. The provision is driven by concern about power and manipulation, in which the older child appears to occupy the position of trust. Doubts that this does indeed overstep the mark are even evident in the

White Paper, and are hardly reassured by its assertion that any over-zealousness in terms of criminalisation may be weeded out through the exercise of prosecutorial discretion, now even more important following the abolition of the *doli incapax* defence which allowed those between 10 and 14 to argue that they did not realise what they were doing was wrong (see Chapter 7.a.). The House of Lords held in *R v. JTB* (2009) that the defence itself was removed when the *presumption* was abolished by the Crime and Disorder Act 1998. JTB had pleaded guilty to 12 counts of offences of causing or inciting a child under 13 to engage in sexual activity contrary to section 13(1) of the SOA. The victims were young boys and the activity included anal penetration with the penis, oral sex and masturbation. At the time of the activity the appellant was 12 years of age. In interview he admitted the activity but said that he had not thought that what he was doing was wrong.

Prosecutorial discretion came into focus in the case of *R v. G* (2008). The facts were that a 15-year-old boy pleaded guilty to rape under section 5 of the SOA after having sex with a 12-year-old girl who told him that she was 15. He appealed on the grounds that section 5 was an offence of strict liability and incompatible with Article 6 of the ECHR, and that this represented a disproportionate interference with his Article 8 right to privacy given that as a person under 18 he could have been charged with the less serious section 13 offence. The House of Lords unanimously dismissed the Article 6 argument and, by a 3 to 2 majority, rejected the Article 8 argument. The facts are set out in the speech of Lady Hale.

#### *R v. G* [2008] UKHL 17

50 In this case, two 17-year-old friends of the 12-year-old complainant became concerned when she admitted to them that she had had sexual intercourse with the 15-year-old defendant. They took her to a family planning clinic. The clinic called the police. In a video-recorded interview she said that she had gone to the defendant's home and into his bedroom where they had chatted and he had then had sexual intercourse with her even though she said that she did not want to. The defendant was charged with the section 5 offence. No complaint is made about the initial decision to charge.

51 The defendant then offered to plead guilty on the basis that the complainant willingly agreed to have sexual intercourse with him and that he believed that she was 15 years old because she had told him so. The prosecution were at first unwilling to accept this basis of plea, because the complainant was adamant that she did not want to have sexual intercourse with the defendant. She did, however, accept that she might have told him that she was 15. Accordingly, a Newton hearing (see *R v. Newton* (1982) 77 Cr App R 13) was fixed in order that the sentencing judge could decide the facts. The complainant was, however, terrified of attending court and so, with the support of her mother, decided that she was content with the basis of plea.

52 The prosecution were then invited to drop the case altogether but declined to do so. They were not invited to consider substituting a charge under section 13. The judge sentenced the defendant to a 12-month detention and training order for the section 5 offence but this was reduced on appeal to a 12-month conditional discharge.

53 No complaint is now made about the decision to continue to prosecute. Nor is there any complaint about the eventual disposal. The complaint is that, despite the guilty plea and despite the defence not having suggested this course, the prosecution should have substituted a charge of the section 13 offence. Continuing to prosecute the section 5 offence was, it is said, a disproportionate interference with the defendant's right to respect for his private life under article 8(2) of the Convention.

54 In effect, therefore, the real complaint is that the defendant has been convicted of an offence bearing the label 'rape'. Parliament has very recently decided that this is the correct label to apply to this activity. In my view this does not engage the article 8 rights of the defendant at all, but if it does, it is entirely justified. The concept of private life 'covers the physical and moral integrity of the person, including his or her sexual life': *X and Y v. The Netherlands* 8 EHRR 235, para 22. This does not mean that every sexual relationship, however brief or unsymmetrical, is worthy of respect, nor is every sexual act which a person wishes to perform. It does mean that the physical and moral integrity of the complainant, vulnerable by reason of her age if nothing else, was worthy of respect. The state would have been open to criticism if it did not provide her with adequate protection. This it attempts to do by a clear rule that children under 13 are incapable of giving any sort of consent to sexual activity and treating penile penetration as a most serious form of such activity. This does not in my view amount to a lack of respect for the private life of the penetrating male.

55 Even supposing that it did, it cannot be an unjustified interference with that right to label the offence which he has committed 'rape'. The word 'rape' does indeed connote a lack of consent. But the law has disabled children under 13 from giving their consent. So there was no consent. In view of all the dangers resulting from under-age sexual activity, it cannot be wrong for the law to apply that label even if it cannot be proved that the child was in fact unwilling. The fact that the defendant was under 16 is obviously relevant to his relative blameworthiness and has been reflected in the second most lenient disposal available to a criminal court. But it does not alter the fact of what he did or the fact that he should not have done it. In my view the prosecution, conviction and sentence were both rational and proportionate in the pursuit of the legitimate aims of the protection of health and morals and of the rights and freedoms of others.

The majority's focus on protecting vulnerable victims, in line with the dominant concern of the modern justice system, risks losing sight of the Article 8 rights of the 15-year-old boy, a point taken up in the dissenting speeches of Lord Hope and Lord Carswell.

### Lord Hope of Craighead

39 Section 5, the rape of a child under 13, on the other hand is designed for a different and much more serious situation. The offence is one which only a male person can commit. It may be committed by a male person of any age, and he is liable on conviction to life imprisonment. The description of the offence as rape, and all the consequences that go with that description, are entirely appropriate where the act has been committed upon a child under 13 by a person over the age of 18. It may also be appropriate where the person who committed it was under that age. But the lower the age, the less appropriate it will be. The question in such a case, given the choice that is available, must be whether in all the circumstances to proceed under section 5 would be proportionate. The Court of Appeal said that the judge should have taken the view, having regard to the basis of the plea, that the offence in this case fell properly within the ambit of section 13 rather than section 5: para 51. I agree, but I would go further. I think that it must follow that, as the offence fell properly within the ambit of section 13, the defendant's conviction of rape under section 5 was disproportionate.

40 I would hold that it was unlawful for the prosecutor to continue to prosecute the defendant under section 5 in view of his acceptance of the basis of the defendant's plea which was that the complainant consented to intercourse. This was incompatible with his article 8 Convention right, as the offence fell properly within the ambit of section 13 and not section 5. There is a lesson to be learnt here which I very much hope will be taken into account in future cases of this kind. I would allow the appeal and quash the conviction.

The SOA contains two gender-neutral assault offences: assault by penetration (s. 2) and sexual assault (s. 3); the former carries a maximum sentence of life imprisonment. Because at one stage indecent assault was construed by the courts to require a touching of the victim by the defendant, the Indecency with Children Act 1960 was passed to cover the situation where a child is asked to touch the defendant. It provided that an offence is committed when any person commits 'an act of gross indecency with or towards a child under the age of 14, or who incites a child under that age to such an act with him or another'. In *B v. DPP* (2000), the House of Lords held that the offence required absence of honest belief that the child was 14 or over. The 2003 Act signals clearly when the defendant's belief is relevant, and when reasonable belief is relevant. It leaves no room for an 'honest' but unreasonable mistake. There is repeated use in the Act of the phrase 'Does not reasonably believe that B is 16 or over'.

### V.16.a.ii. Homosexuality

The age of consent for homosexual activities was lowered from 18 to 16 following the decision of the European Commission of Human Rights in *Sutherland v. UK* (1997). However, the formal expression of this was not straightforward. The House of Lords (in its legislative capacity) resisted its initial appearance



as an amendment to the Crime and Disorder Bill 1998, and only with the aid of the Parliament Acts 1911 and 1949 did it re-appear and become enacted as section 1 of the Sexual Offences (Amendment) Act 2000. The move to non-discrimination in the Sexual Offences Act 2003 in abolishing the homophobic offences of the past – buggery, gross indecency and soliciting by men – is to be welcomed. Nonetheless this remains a site for conflict. The SOA includes an offence of sexual activity in a public lavatory (s. 71).

Richard Collier 1995 *Law, Masculinity and the Family* (Routledge), pp. 91–5

On one level the law can be understood to serve as a barometer of social reactions to homosexuality. 'Repressive' or 'liberal' laws may be taken to be indicators of the degree to which homosexuality is tolerated in a certain society at a particular time. However... the law has a significance other than simply as the indicator of fewer or greater freedoms which are somehow granted by the liberal state. Law has been important in its capacity as a significant social source of stigmatisation of non-heterosexual behaviour.

What status has the law accorded homosexuality? The criminal law is concerned with homosexual relations in a number of different ways. The object of legal intervention has not tended to be homosexual desire as such so much as the carrying out of a specific range of homosexual acts. However, if the law has not been concerned to prosecute those men who are simply attracted to their own sex, then this is not to say that the law can be seen to approve of homosexuality or to condone homosexual activity. The law is not concerned, at least formally, with individuals who believe themselves to be homosexual. It is concerned with the denial of the legitimacy of homosexual relations as viable alternatives to the heterosexual norm (Weeks, 1991).

A variety of political, social, economic, legal and religious considerations have historically informed the negation of the legitimacy of homosexuality. We know that social and historical variations in the regulation of homosexuality are well established in histories of homosexuality, frequent reference being made to ancient Greece and Rome where pedagogic homosexual relations were accepted as part of the societal sexual mores. Yet the avowedly Christian-Judaic taboos against homosexuality which have influenced the moral regulation of homosexuality in the UK have not been reflected in any consistent level of legal sanction. Rather, the western tradition has witnessed, and continues to witness, considerable variation in the criminal law's treatment of homosexuality. More generally, different countries continue to vary considerably in setting an age of consent for homosexual acts... Even though other European countries have now seen fit to equalise the age of consent at which heterosexual and homosexual sex can take place, in Britain the distinction remains [s. 1 of the Sexual Offences (Amendment) Act 2000 equalised the age of consent].

Until the Criminal Law Amendment Act 1885 the law concerning homosexual behaviour had been constructed in terms of the offence of sodomy, a definition of which may be found in Chief Justice Coke's 'Institutions of the Laws of England' as

A detestable and abominable sin, amongst Christians not to be named, committed by carnal knowledge against the ordinance of the creator, and order of nature, by mankind with mankind, or with brute beast or by womankind with brute beast.

Significantly, this definition omits references to carnal knowledge of 'womankind with women' and does not actually name the sin to which it is referring. One effect of such a silence has been to cultivate an official and popular ignorance as to just what the sinful sexual acts are in the first place...

...

Sodomy in law involves intercourse when one man's penis enters the anus of another man or woman. It is not sex specific in this sense. Buggery, in contrast, seems to be a wider offence covering both sodomy and intercourse with an animal. Until 1861 buggery (sodomy or bestiality) remained punishable by execution... Various attempts had been made to repeal the death penalty... and, though it was not applied in practice after the 1830s, it was not to be until the Offences Against the Person Act 1861 that the death penalty was eventually replaced with sentences of between ten years and life imprisonment.

Before the statutory codification, therefore, the law was directed 'against a series of sexual acts, not a particular type of person, although in practice most people prosecuted under the buggery laws were probably prosecuted for homosexual behaviour (sodomy)' (Weeks 1981: 99). Part of the significance of the 1885 Criminal Law Amendment Act, very much the product of the social, economic and political climate of the mid- to late nineteenth century, lies in how it shifted the definition of the homosexual offence in law. The Labouchere Amendment to the Act brought all forms of homosexual activity within the criminal law and, at a stroke, the Act widened the range of offences covered by statute by bringing into the gaze of the law the new (though uncertain) category of 'gross indecency'. The law thus, in effect, made male masturbation as an intersubjective act a matter for the criminal law. Subsequent legislation, notably the Sexual Offences Act 1967, did not abolish the offences of the 1885 Act as such; they merely exclude consenting adult males in private from the operation of the law... It would be misleading to state that [the Act] 'legalised' homosexuality...

In law, any act which involves contact with the genitals of another man (unless justified by some good reason, for example, a medical examination) constitutes an act of 'gross indecency'. What this means is that masturbation in the presence of another man, even without contact taking place, might count as gross indecency (Hunt, 1950). A succession of cases have subsequently sought to define gross indecency. Yet these discussions remain bound up with the parameters of a moralistic condemnation of homosexuality... Although the law is now to be changed so as to reduce the homosexual age of consent to 18, a differential age of consent is to continue. Equality before the law, it would seem, is as elusive as ever. In a sense, therefore, homosexuality is similar to prostitution – not a crime, but clearly undesirable and contrary to public morality. What is the law saying about the male body here? It is explicitly concerned with sex, desire and male genital interaction. The parameters of this concern are marked by a discourse premised on the naturalness of heterosexuality; the very moralistic language of the law is archaic and, in a sense,

pre-sexual. It will be 'gross' and 'indecent' for two men to kiss in public or to act with clear sexual overtones... This is clearly not the case for heterosexuality, where 'public' displays of sexuality (though within certain limits) are accepted if not encouraged. Even a 'preliminary homosexual act' has constituted an offence in law, though what this might be is not clear (a glance, a stare, a touch or a kiss?). Procuring homosexual acts and soliciting or importuning in a public place for 'immoral purposes' are each subject to legal sanction... It appears to be the visibility of homosexuality which is the object of legal intervention...

Police officers have sought to entrap gay men with a variety of techniques... Ultimately... public displays of homosexual attraction involve a threat to no less than public order itself. In 1989, with an estimated 5,000 gay men convicted for consenting homosexual relations, laws as diverse as the 1986 Public Order Act and the Justices of the Peace Act 1361 had been used to push the number of convictions of consenting male adults in England and Wales to the highest level since the mid-1950s.

The policing of male homosexuality by invoking criminal laws well beyond the ambit of the sexual offences is spectacularly exemplified by the case of *Brown*. This decision both underlined the perceived public order dimension of homosexuality and illustrated the inconsistent way in which consent enters into the delineation of criminal liability, a topic we also discuss in Chapter 8.b.ii.

### *R v. Brown* [1993] 2 All ER 75, HL

[The appellants belonged to a group of homosexual men who willingly participated in the commission of sado-masochistic acts in relation to one another. These acts, which the law report describes as 'genital torture', were in each case consented to and resulted in no permanent injury. The conduct took place in private in the homes of members of the group and was recorded on video tapes which were then copied and distributed to members of the group. The appellants pleaded guilty to offences of assault and wounding under the Offences Against the Person Act 1861, sections 41 and 20 (see Chapter 8.a.), having changed their pleas to guilty following the trial judge's ruling that consent of the victim afforded no defence to these charges. Both the Court of Appeal and the House of Lords (by a 3-2 majority) dismissed their appeals against this ruling. The appellants took their case to the European Court of Human Rights, arguing that the ruling breached Article 8 of the European Convention, which states that: 'Everyone has a right to his private and family life, his home and his correspondence.' The European Court dismissed the case on the basis that the denial of the consent defence was capable of falling within Article 8(2). This subsection allows public authorities to limit the right of privacy 'in accordance with the law and [as] necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

Having reviewed the authorities on the defence of consent, which are taken to establish that consent cannot exculpate in charges of causing actual or grievous bodily harm or



wounding in the course of an 'unlawful activity' (*Coney* (1882); *A-G's Ref (No 6 of 1980)* (1981)).]

**Lord Templeman:** By the 1967 Act Parliament recognised and accepted the practice of homosexuality. Subject to exceptions not here relevant, sexual activities conducted in private between not more than two consenting adults of the same sex or different sexes are now lawful. Homosexual activities performed in circumstances which do not fall within s. 1(1) of the 1967 Act remain unlawful. Subject to the respect for private life embodied in the 1967 Act, Parliament has retained criminal sanctions against the practice, dissemination and encouragement of homosexual activities.

My Lords, the authorities dealing with the intentional infliction of bodily harm do not establish that consent is a defence to a charge under the 1861 Act. They establish that the courts have accepted that consent is a defence to the infliction of bodily harm in the course of some lawful activities. The question is whether the defence should be extended to the infliction of bodily harm in the course of sado-masochistic encounters. The Wolfenden Committee did not make any recommendations about sado-masochism and Parliament did not deal with violence in 1967. The 1967 Act is of no assistance for present purposes because the present problem was not under consideration.

The question whether the defence of consent should be extended to the consequences of sado-masochistic encounters can only be decided by considerations of policy and public interest. Parliament can call on the advice of doctors, psychiatrists, criminologists, sociologists and other experts and can also sound and take into account public opinion. But the question must at this stage be decided by this House in its judicial capacity in order to determine whether the convictions of the appellants should be upheld or quashed.

Counsel for some of the appellants argued that the defence of consent should be extended to the offence of occasioning actual bodily harm under s. 47 of the 1861 Act but should not be available to charges of serious wounding and the infliction of serious bodily harm under s. 20. I do not consider that this solution is practicable. Sado-masochistic participants have no way of foretelling the degree of bodily harm which will result from their encounters. The differences between actual bodily harm and serious bodily harm cannot be satisfactorily applied by a jury in order to determine acquittal or conviction.

Counsel for the appellants argued that consent should provide a defence to charges under both ss. 20 and 47 because, it was said, every person has a right to deal with his body as he pleases. I do not consider that this slogan provides a sufficient guide to the policy decision which must now be made. It is an offence for a person to abuse his own body and mind by taking drugs. Although the law is often broken, the criminal law restrains a practice which is regarded as dangerous and injurious to individuals and which if allowed and extended is harmful to society generally. In any event the appellants in this case did not mutilate their own bodies. They inflicted bodily harm on willing victims. Suicide is no longer an offence but a person who assists another to commit suicide is guilty of murder or manslaughter.

The assertion was made on behalf of the appellants that the sexual appetites of sadists and masochists can only be satisfied by the infliction of bodily harm and that the law should not punish the consensual achievement of sexual satisfaction. There was no evidence to support



the assertion that sado-masochistic activities are essential to the happiness of the appellants or any other participants but the argument would be acceptable if sado-masochism were only concerned with sex, as the appellants contend. In my opinion sado-masochism is not only concerned with sex. Sado-masochism is also concerned with violence. The evidence discloses that the practices of the appellants were unpredictably dangerous and degrading to body and mind and were developed with increasing barbarity and taught to persons whose consents were dubious or worthless.

A sadist draws pleasure from inflicting or watching cruelty. A masochist derives pleasure from his own pain or humiliation. The appellants are middle-aged men. The victims were youths some of whom were introduced to sado-masochism before they attained the age of 21. In his judgment in the Court of Appeal, Lord Lane CJ said that two members of the group of which the appellants formed part, namely one Cadman and the appellant Laskey were responsible in part for the corruption of a youth 'K' . . . It is some comfort at least to be told, as we were, that 'K' has now it seems settled into a normal heterosexual relationship. Cadman had befriended 'K' when the boy was 15 years old. He met him in a cafeteria and, so he says, found out that the boy was interested in homosexual activities. He introduced and encouraged 'K' in 'bondage' affairs. He was interested in viewing and recording on video tape 'K' and other teenage boys in homosexual scenes . . . One cannot overlook the danger that the gravity of the assaults and injuries in this type of case may escalate to even more unacceptable heights.

The evidence disclosed that drink and drugs were employed to obtain consent and increase enthusiasm. The victim was usually manacled so that the sadist could enjoy the thrill of power and the victim could enjoy the thrill of helplessness. The victim had no control over the harm which the sadist, also stimulated by drink and drugs, might inflict. In one case a victim was branded twice on the thigh and there was some doubt as to whether he consented to or protested against the second branding. The dangers involved in administering violence must have been appreciated by the appellants because, so it was said by their counsel, each victim was given a code word which he could pronounce when excessive harm or pain was caused. The efficiency of this precaution, when taken, depends on the circumstances and on the personalities involved. No one can feel the pain of another. The charges against the appellants were based on genital torture and violence to the buttocks, anus, penis, testicles and nipples. The victims were degraded and humiliated, sometimes beaten, sometimes wounded with instruments and sometimes branded. Bloodletting and the smearing of human blood produced excitement. There were obvious dangers of serious personal injury and blood infection. Prosecuting counsel informed the trial judge against the protests of defence counsel that, although the appellants had not contracted AIDS, two members of the group had died from AIDS and one other had contracted an HIV infection although not necessarily from the practices of the group. Some activities involved excrement. The assertion that the instruments employed by the sadists were clean and sterilised could not have removed the danger of infection, and the assertion that care was taken demonstrates the possibility of infection . . .

In principle there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty. The violence of sado-masochistic encounters

involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous. I am not prepared to invent a defence of consent to sado-masochistic encounters which breed and glorify cruelty and result in offences under ss. 47 and 20 of the 1861 Act.

It would be hard to imagine a more comprehensive condemnation of one form of sexuality: both homosexual conduct and homosexuals themselves are constructed as dangerous and as threatening public order in language which consistently evokes metaphors of disease and contamination. Doubt is repeatedly cast on the 'reality' of the 'victim's' consent – a question which would, of course, have had to be determined by the jury had the consent defence been allowed. Even the dissenting speeches are informed by a marked distaste:

**Lord Mustill:** My Lords, this is a case about the criminal law of violence. In my opinion it should be a case about the criminal law of private sexual relations, if about anything at all... The speeches already delivered contain summaries of the conduct giving rise to the charges... Fortunately for the reader my Lords have not gone on to describe other aspects of the appellants' behaviour of a similar but more extreme kind which was not the subject of any charge on the indictment. It is sufficient to say that whatever the outsider might feel about the subject matter of the prosecutions – perhaps horror, amazement or incomprehension, perhaps sadness – very few could read even a summary of the other activities without disgust. The House has been spared the video tapes, which must have been horrible.

In his dissent, Lord Mustill drew on the European Convention to argue for a reconsideration of the existing case law, arguing that willing consent should be regarded as legitimating actual bodily harm inflicted in private for the (non-commercial) gratification of sexual desire. His argument was that the appellants' conduct fell within a sphere of 'private morality' (at 115), and was not properly charged under the 1861 Act, which 'was clearly intended to penalise conduct of a quite different nature' (at 116). His conclusion, however, appears to associate sado-masochism with danger of crime more generally:

[P]lain humanity demands that a court addressing the criminality of conduct such as that of the present should recognise and respond to the profound dismay which all members of the community share about the apparent increase of cruel and senseless crimes against the defenceless.

It is interesting to compare this with Lord Mustill's judgment in *Kingston* (1994, Chapter 9.b.) in which the defendant's 'paedophilic tendencies', 'disinhibited' by alcohol, combine to conjure up an image of dangerousness inherent in his 'disposition' and hence a 'status-based' idea of responsibility which sits unhappily with criminal law doctrine's purported values.

As Lord Mustill's speech emphasises, the decision in *Brown* was very far from being determined by the logic of legal doctrine. Indeed, as Bibbings and Alldridge note, the case in fact has some striking doctrinal implications:

Lois Bibbings and Peter Alldridge, 'Sexual Expression, Body Alteration and the Balance of Consent' (1993) *Journal of Law and Society* 336 at 364-5

As a consequence of Operation Spanner, twenty-six people were cautioned for the (alleged) offence of aiding and abetting offences against themselves. This is not without difficulty. The principle in *R v. Tyrell* is that a victim cannot be an accomplice. If it is correct that the passive participants in *Brown* were not covered by this principle, the participant in sadomasochism seems to be getting the worst of all worlds. When it comes to criminal injuries, civil actions or participation in crime, s/he is not a victim, and consequently loses whatever benefits may accrue from being a victim. When it comes to the criminal liability of the perpetrators s/he is a victim, and so all participants are criminal. [On participation, see Chapter 10.b.]

At the Jim Rose circus, in addition to acts of self-mutilation, there are acts which may fall within the scope of the decision in *Brown*. For example, darts are thrown into the back of one of the participants by another performer, and members of the audience are invited to stand on the performer whilst he lies first on a 'bed of nails' and later, face down on freshly broken glass. If such activities are covered by the decision in the case, then any person attending is criminally liable as it is clear from *R v. Coney* that paying to watch an unlawful event can incur liability as an accomplice.

The decision in *Brown* seems to render unlawful sado-masochist parties where there are consensual whippings, beatings or spankings . . . which can sometimes result in injury. The legality of literature describing techniques or advertising equipment falls into question. The existence of offences also triggers police powers of surveillance and intervention in sado-masochist parties, and seizure of sado-masochistic equipment with consequent dangers of discriminatory enforcement. It has been suggested that it is significant that the first case to consider fully the legality of sado-masochist activities involved not a heterosexual couple but, rather, a group of gay men . . .

*Brown* suggests that sexual expression is limited and that the defendants' fears of a 'bedroom police' were justified. But, in the light of the Lords' decision, are we really to assume that householders hearing suspicious noises from their neighbours could telephone the police who may decide to investigate the situation? If such action is to be undertaken by the police in cases involving men 'dominating' women, this would contrast with past policing practices in relation to non-consensual 'domestic' incidents.

Given the split within the House of Lords, it was unsurprising that the case went to the European Court of Human Rights (*Laskey v. UK* (1997)). The applicants unsuccessfully argued that their convictions constituted a violation of their right to privacy under Article 8. The case hinged on whether the accepted interference with their privacy was 'necessary in a democratic society'. The extract below from Weait reflects on this decision and considers how it relates to the



post-*Brown* case law. In *Wilson* (1996), a man who had branded his initials on his wife's buttocks with a hot knife was charged with an offence under section 47 of the Offences Against the Person Act 1861. He claimed that this had been done 'for love' and not only with his wife's consent but 'at her instigation'. On the basis of *Brown*, the trial judge directed the jury to convict. Overturning this on appeal it was held that: *Brown* was not authority for the proposition that consent was not a defence to section 47 in all circumstances where actual bodily harm was deliberately inflicted; there was no logical difference between this type of branding and tattooing, which was a lawful activity; and it was not in the public interest that such consensual activity between husband and wife in the privacy of the matrimonial home should be the object of criminal sanctions. In *Emmett* (1999) the defendant was charged under section 47 after his partner sustained injuries during their consensual (although unusual) sexual activity. She suffered partial asphyxiation, after a plastic bag was placed over her head and tied at the neck, and burns after lighter fluid was lit on her breasts. In upholding his conviction, the Court of Appeal was unwilling to permit the private expression of bodily autonomy to go unchecked. Injuries that were more than transient or trivial, even in the heterosexual domestic setting, fell on the wrong side of consent's Maginot line. These cases illustrate a deep confusion about the relative importance of autonomy and of certain conceptions of order and morality in legal constructions of sexuality, as well as offering a glimpse of prevailing judicial attitudes.

Matthew Apple, 'John, Consent and the Limits of Privacy' (2005) 13 *European Legal Studies* 17-42, at 111-15.

For the ECtHR a democratic society depends on the imposition of limits, and those limits are not to be determined by those who are members of it, even where such determination is exercised in the context of mutually consensual activity inter-subjectively experienced as expressive of identity and sexuality and therefore of an embodied autonomy.

The themes explored in *Brown* and *Laskey* provide us with some insight into the ways in which harm, consent and privacy are understood within the context of the right to respect for private life; but they provide only a partial account. A more complex picture appears when we look at the reasoning applied in other domestic cases. In *Laskey*, the applicants relied in part on the case of *R v. Wilson*. This Court of Appeal decision concerned a man who had been convicted under section 47 of the OAPA 1861 for having branded his wife's buttocks with the letters 'A' and 'W' - his initials. Having been heard after *Brown* (in which branding had also been the basis of some of the charges) it was to be expected that the wife's consent would not provide him with a defence - and this is what the trial judge concluded. However, the Court of Appeal quashed the conviction. Russell LJ was excoriating in his criticism of the prosecution and of the wider implications of criminalising such behaviour. In his view, the facts of *Wilson* were entirely different from *Brown*. The wife had not merely consented to the injury, she had instigated it (as if this was not the case in S/M sex). He



quoted approvingly the husband's statement in interview, that his wife had said she was not 'scared of anybody knowing that I love you enough to have your name on my body'. The branding was, he thought, no different from tattooing – which the husband had wanted to do but said he did not have the skill to carry out. This would have been lawful, and so, therefore, should this be. Russell LJ concluded: Consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgement, a proper matter for criminal investigation, let alone prosecution.

The distinction drawn by Russell LJ with *Brown* rests explicitly on the affective dimensions of the facts before him. The injury took place within a marriage, within the institution that reinforces normative heterosexuality. The injury is a symbolic one that represents the tradition subordination of wife to husband. It marks his ownership of her. It represents the positive values of fidelity and loyalty. It took place in their home. The fact that the injury itself is no different in fact from that which was inflicted on some of the men in *Brown* is not the relevant consideration. It was not the product of aggression, or done for sensual gratification, or witnessed by others (other than the doctor who reported the injury to the police), or in a specially constructed dungeon; it was therefore properly private, and not a harm with which the law should be concerned.

These aspects of *Wilson* are critical to an understanding of why another case, also involving injuries sustained during sex, led to the opposite conclusion. In *R v. Emmett*, the appellant and his partner had been cohabiting, and at the time of the appeal had married. He too had been convicted under Section 47. He had asphyxiated his partner and set fire to lighter fuel which he had poured onto her breasts. In Wright J's words, the couple were 'deeply involved in an energetic, very physical sexual relationship which both greatly enjoyed'. The complainant, who Wright J said 'is hardly to be described as such', did not give evidence. As in *Wilson*, the only evidence came from her doctor. Emmett was convicted after the trial judge directed that – in the light of *Brown* – consent could not be raised as a defence, and his appeal against conviction failed. The Court of Appeal held that the facts were not properly comparable with those of *Wilson*, primarily on the basis that – although the charge was identical, and the injury similar – the risks associated with his conduct were far greater. As was emphasised in *Brown*, there was a risk that things could have got out of control and the consequences could have been more serious. In such circumstances consent was not available.

On the face of it, *Emmett* may be read simply as authority for the proposition that where the risk of serious harm is unacceptably high, consent may not be used as a defence. But it is also arguable that such risk is merely one factor among a set of more implicit considerations. Emmett and his partner were engaged in activities more akin to those of the men in *Brown*. Their purpose, unlike, that of Mr and Mrs Wilson, was sensual pleasure, albeit of an extreme kind. At the relevant time they were unmarried. Their home was not a matrimonial one. Insofar as Mr Emmett's claim to the defence of consent, and his partner's unwillingness to give evidence, may be seen as a claim to privacy, that claim failed. The only concession (albeit a significant one, and one that might reflect the nature of the parties' relationship) was that the sentence of nine months was suspended for two years – unlike the defendants in *Brown*, who received immediate terms of imprisonment.

Naffine eloquently identifies the heterosexual dynamics of criminal law's conception of physical integrity:

Stephen Naffine 1997 'The Body Bag' in R. Naffine and R. Owens (eds.), *Sexing the Subject of Law* (Law Book Co), pp. 83–6, 85–6

... Mill, like Kant, regarded embodied persons as essentially separate and distinct, as bodies whose dignity depended on a respect for the physical integrity of the self and the integrity of others.

A further common feature of the body written about by Kant and by Mill is that it is taken to be already constituted, a self-evident thing in itself; it is theorised as material suitable for the application of liberal rights and duties. Implicit in their theories is the idea that the body is by nature discrete and self-contained (once it has achieved adulthood). Certainly it needs tending and respect accorded by not indulging in inappropriate animal pleasures. But the body has its own nature and that nature is a self-enclosed and bounded one. This bounded nature is not a creation of liberal theory, but is instead a natural feature of physical being with which liberal theory must deal.

It is this bounded autonomous body of liberal theory which I wish to suggest has been incorporated into criminal law and still resides within it. The implicit sexing and sexualising of this bounded body, most evident in the writing of Kant, has I believe also been carried over into criminal law. In common with the liberal theory from which it derives, criminal law treats its behaviour to the body as simply a response to the body's own nature. In other words, implicit in our criminal law is the idea that law never legislates the nature of the body. It only ever responds to the body's own intrinsic character, which is by nature bounded. ... Law's purpose is to ensure that the person as flesh is treated with proper regard, the sort of regard which ensures human dignity ...

My reply to this criminal legal orthodoxy is that law's approach is always, and inevitably, constitutive rather than simply reactive. Criminal law is always assigning qualities to the body, seeing the body in terms of some things and not others, seeing some bodies in certain ways and other bodies in others. By examining criminal law's reaction to bodies coming into contact with one another, we can see that law is always interpreting and creating the meaning of bodies. Thus we will discover that a pierced body can be regarded as either whole or as invaded. A body can be enclosed by the body of another and yet still be regarded as separate and distinct, that is, as a suitably autonomous body. A body which encloses that of another can be regarded as pierced ... It all depends on how law legislates the body.

... The central concern of law is (to police the boundaries of) the bounded heterosexual male body. Bodies which are not like this, or are not allowed to be like this, are somehow deviant and undeserving bodies. They are 'unnatural', even 'loathsome', because they have apparently lost their clear definition ...

Despite the consistent modern trend towards liberalisation of laws against homosexuality, there are still ample contemporary legal statements to be found about the unnaturalness and inappropriateness of men having sex with men. [Naffine goes on to cite *Brown*] ... The ongoing reluctance of the British to part with the idea of the bounded masculine body is

also apparent in the Local Government Act 1988 which now proscribes the promotion of homosexuality by local authorities. In Australia the legal attitude to homosexuality remains mixed...

While the injury incurred on the sporting field often only does the man good, the consensual and loving penetration of a man by a man is highly corrosive to sovereignty (conceived as bounded status) and so has consistently been condemned by the criminal law as inappropriate human contact...

For a man to have sex with a man is to jeopardise his very autonomy and sovereignty. The man who reveals his cavity/vulnerability, who opens his body boundaries in a manner which is seen to resemble or mimic the female mode of opening, becomes a woman as non-bounded subject. To be entered sexually is to be feminised. Law, therefore, outlaws the incomplete man. It prohibits the violation of the male sovereign self and simultaneously, in the same act, constructs the incomplete female self. By necessary implication, laws against homosexuality have made penetrative sex of a woman the correct form of sex, the sexual norm.

As we saw in Chapter 8.b.ii. this confusion about the scope and meaning of autonomy extends well beyond the sexual field.

#### V.16.a.iii. Child sexual abuse

Sexual abuse of children might be thought to be an area in which dimensions of violence and the exploitation of sexual power combine with considerations of public order and 'decency' to over-determine criminalisation. However, the criminalisation of child abuse has, historically, been patchy, and sexual abuse of children poses distinctive problems for the criminal process. Partly in response to further revelations about systematic sexual abuse in institutions such as children's homes, legislative developments have moved towards the construction of sexual offenders against children – 'paedophiles' – as a dangerous group from whom society requires special protection. In the following extract, Hoyano and Keenan reflect on the role of criminal law in responding to moral panics and attempting to manage risk.

*Laura Hoyano and Caroline Keenan 2007 Child Abuse: Law and Policy Across Boundaries (Oxford University Press), pp. 10–11, 125–6*

Child deaths and sexual abuse within the family tend to make the headlines and thus enter public consciousness about child abuse when they are allied to concerns about the official response to the problem. The 'panics' which these cases have created relate to the cruelty which parents can inflict upon their children and the ineffectiveness of the existing child protection mechanisms to prevent its occurrence. Systemic problems have often been revealed within agencies involved in child protection linked to lack of skills, poor



record-keeping, and a paucity of mechanisms for coordination and information-sharing between agencies which led to the replication of some work and still other avenues of inquiry and intervention being overlooked.

The scandals emanating from systemic abuse in institutional settings have tended to be centred on situations where mismanagement, or denial that abuse could take place, created a culture in which those who wanted to exploit children could do so with impunity, and where the abuse was condoned by inaction, willful blindness or complicity by officials in the institution and public authorities. Numerous inquiry reports in every jurisdiction we examine have also attested to horrific and systematic abuse within children's residential care facilities and foster homes. The reports clearly concluded that children were abused because of serious failings in the public care system, including an inability to countenance the fact that children were being abused within the institution which was supposed to protect that from precisely that harm.

For the first time public discussion has identified abusers of children as being not only those at the margins of society but those ensconced in positions of trust who have exploited the belief of others that they were decent members of society. When combined with a further moral panic about paedophiles living unrecognized within the community, it has led to calls for more legal mechanisms in criminal and civil law by which the dangerous may be indelibly labeled and controlled. The communication of information to the public about those convicted or suspected of sexual assaults against children has become the key battleground in the debate about legal responses to sexual crimes against children, the premise of campaigners being that if the law can label the dangerous then the risk of abuse may be eradicated by avoiding them...

This 'moral panic' in relation to sexual offending and in particular sexual offending against children has had an enormous impact upon the development of the criminal law's response to child abuse. This has been primarily because the criminal law has been considered as the main mechanism by which the risk posed by sexual offenders may be monitored and contained. Strategies have been formulated for increased incarceration of the worst sexual offenders and monitoring for all those convicted of an offence. The Criminal Justice Act 1991 formed a twin-track approach creating 'public protection' sentences for sexual and violent offenders. Following this the Powers of Criminal Courts (Sentencing) Act 2000 singled out sexual offenders for special consideration in terms of the nature and length of the sentence imposed, the release of the offender at the end of the custodial sentence and the period of supervision following the custodial sentence. The Sex Offenders Act 1997 Part I created a mechanism for monitoring sexual offenders based on their convictions, which has been subsequently amended by the Criminal Justice and Court Services Act 2000. Convicted sexual offenders are required to place their names on a register of offenders kept by the police and to inform the police of any subsequent change of address...

The wide-scale changes to sexual offences implemented in the Sexual Offences Act 2003, were rooted in the wave of public concern, particularly about sexual offending against children, and the subsequent attempts to manage the risk which these offenders pose. These strategies depend upon the conviction of those who have committed sexual offences against children and their conviction for an offence which reflects the nature of the acts



that they committed. Neither of these requirements was in existence when the registration of sexual offenders was mooted in the mid-1990s. The Sexual Offences Act 2003 created numerous new offences. The drafters of the new law attempted to create offences which reflected the types of sexual predatory behavior in existence, in the hope that this would increase the number of convictions, and convictions for offences which reflected the nature of the sexually abusive behaviour, as part of an overall strategy of risk management.

The 'discovery' of child sexual abuse followed closely on the heels of the 'baby battering syndrome', which itself followed the emergence of 'wife battering'. Yet during the last decade, notwithstanding a doubling of the numbers of offences recorded by the police, the number of people cautioned for or convicted of 'gross indecency with a child' has fallen. Between 2008 and 2009 there were 122 recorded offences (Home Office 2009, p. 137). The problems of pursuing criminal enforcement of sexual violence discussed earlier in this chapter, as well as those of enforcing criminal law in the field of 'domestic' violence (see Chapter 18.b.), flow from a number of distinct although interrelated factors, including police and social attitudes as well as formal evidential restrictions at trial. The change in the rules of evidence relating to child witnesses must be viewed against this background. The Criminal Justice Act 1988, section 34, abolished the corroboration requirements for a child's sworn or unsworn evidence. The Act also authorised evidence by video link (s. 32). These provisions are now contained in the special measures provisions in the Youth Justice and Criminal Evidence Act 1999.

In 1996 criminal law's jurisdiction was extended to conspiracies to engage in conduct abroad which is criminal where performed and which, had it been committed in England, would have grounded a conspiracy offence (see Chapter 10). One significant feature of the legislation is that the 'condition' that the conduct be criminal where performed is 'taken to be satisfied if the defence fails to serve a notice denying it' – a pragmatic reversal of the presumption of innocence (see Chapter 3.a.ii.). This legislation originated in a Private Members' Bill prompted by the organisation in England of 'sex tourism' based on child prostitution in countries such as Thailand and the Philippines (Alldridge 1997). The Sex Offenders Act 1997 further extended criminal law's jurisdiction in this area by making it an offence for a UK resident to commit sexual offences against children abroad.

This provision, and the major institution of the Sex Offenders Register, are replicated and reinforced in the Sexual Offences Act 2003. Under these provisions, anyone who has been convicted of a sexual offence against children must tell the police where they live or if they change home. The period for doing this has been shortened from 14 to 3 days (s. 83). Failure to do so makes the person liable to a maximum penalty of five years' imprisonment (a hefty increase from the original six-month term). Section 82 provides for an indefinite notification period, striking given that the registration requirement

is not subject to appeal or review. It was only a matter of time then that this would lead to a declaration of incompatibility with Article 8 of the ECHR (see *R (on the application of F) v. Secretary of State for Justice* (2009)). Anyone imprisoned for 30 months or more will be required to register for the rest of their life; those imprisoned for between 6 and 30 months will have to register for 10 years. In terms reminiscent of Feeley and Simon's 'new penology' (1994) (see Chapter 2.c.v.), the police will be able in exceptional cases to pass on details of registration to third parties in accordance with the degree of risk an individual is judged to pose. The Home Office has estimated that about 6,000 offenders were liable to immediate registration, and that this figure would grow by up to 3,500 each year. The register, referred to by some commentators as a form of 'criminal apartheid' (Soothill and Francis 1997, p. 1285), groups together a large and very diverse range of offenders within a new legal status, and extends the effects of criminal conviction well beyond the scope of 'deserved' punishment and the time limits after which convictions are normally 'spent'. The fact that this includes men convicted of having consensual sex with 16- or 17-year-olds before equalisation of the age of consent in 2000 somewhat undermines the attempt to abolish such homophobic discrimination (*The Guardian*, 27 January 2003). Furthermore, continuing concerns about child sex abuse are reflected in the new offences of sexual activity with children in the 2003 Act (see above), and in the strengthened notification requirements so that offenders spending more than seven days at another address per year must inform the police. The range of offences subject to notification is also extended and includes for example the offence of meeting a child following 'sexual grooming'.

### Sexual Offences Act 2003

#### Section 15 Meeting a child following sexual grooming etc.

- (1) A person aged 18 or over (A) commits an offence if -
  - (a) having met or communicated with another person (B) on at least two earlier occasions, he -
    - (i) intentionally meets B, or
    - (ii) travels with the intention of meeting B in any part of the world,
  - (b) at the time, he intends to do anything to or in respect of B, during or after the meeting and in any part of the world, which if done will involve the commission by A of a relevant offence,
  - (c) B is under 16, and
  - (d) A does not reasonably believe that B is 16 or over.
- (2) In subsection (1) -
  - (a) the reference to A having met or communicated with B is a reference to A having met B in any part of the world or having communicated with B by any means from, to or in any part of the world; . . .

The offence will be accompanied by a civil preventive order where an adult has displayed inappropriate sexual behaviour prior to committing an offence. The explanatory notes accompanying the Act offer a striking insight into the breathtaking reach of this provision:

*Home Office, Sexual Offences Act 2003, Explanatory notes, paras 27–30*

The section is intended to cover situations where an adult (A) establishes contact with a child through, for example, meetings, telephone conversations or communications on the Internet, and gains the child's trust and confidence so that he can arrange to meet the child for the purpose of committing a 'relevant offence' against the child. The course of conduct prior to the meeting that triggers the offence may have an explicitly sexual content, such as A entering into conversations with the child about the sexual acts he wants to engage her in when they meet, or sending images of adult pornography. *However, the prior meetings or communication need not have an explicitly sexual content and could for example simply be A giving the child swimming lessons or meeting her incidentally through a friend.*

The offence will be complete either when, following the earlier communications, A meets the child or travels to meet the child with the intent to commit a relevant offence against the child. *The intended offence does not have to take place.*

The evidence of A's intent to commit an offence may be drawn from the communications between A and the child before the meeting or may be drawn from other circumstances, for example if A travels to the meeting with ropes, condoms and lubricants.

*Subsection (2)(a) provides that A's previous meetings or communications with the child can have taken place in or across any part of the world. This would cover for example A emailing the child from abroad, A and the child speaking on the telephone abroad, or A meeting the child abroad. The travel to the meeting itself must at least partly take place in England or Wales or Northern Ireland. [Emphasis added.]*

This provision responds to fears of sexual contact initiated by new forms of electronic engagement, such as internet chat rooms. However, it clearly extends the reach of criminal law to policing 'thought crimes' and raises obvious civil liberty concerns for those at risk of being labelled 'sexual groomers'. It also further undermines the notion of public space referred to in Chapter 7.a, casting a shadow of distrust over healthy adult-child relationships. Between 2008 and 2009 there were 315 recorded offences of sexual grooming (Home Office 2009, p. 138).

The Sexual Offences Act 2003 also re-enacts and extends provisions first contained in the Sexual Offences (Amendment) Act 2000. The 2003 Act contains four breach of trust offences: sexual activity with a child; causing and inciting a child to engage in such activity; sexual activity in the presence of a child; and causing a child to watch a sexual act (ss. 16–19). Furthermore, section 22 extends 'positions of trust' to include those involved 'in caring for, training, supervising' individuals. Provision for allowing the Secretary of State to extend this further suggests that there is some doubt as to whether this goes far enough.



There were 197 breach of trust offences recorded between 2008 and 2009 (Home Office 2009, p. 138). Whilst clearly seeking to protect those at risk from sexual predators on the one hand, how far do such provisions also shift criminal law towards the edges of excessive paternalism? One thinks of the consensual conduct between a 22-year-old college lecturer and her 17-year-old student which would be caught by such offences. Notwithstanding society's legitimate concern about sexual abuse of children, serious questions arise both about civil liberties and about the costs and potential effectiveness of what appears to be a very cumbersome system.

#### V.16.a.iv. Incest

Moral panics about practices such as organised and ritual abuse continue to pose both practical and ethical problems for the criminal justice system, not least because of the way in which they reflect society's perplexity about the capacities and sexuality of children and about the integrity of the family. This perplexity is perhaps even more evident in debates surrounding the law of incest. At the level of official enforcement, incest is a rare phenomenon: fewer than 50 convictions occurred each year between 1998 and 2002 (Home Office 2002j: Table 5.12). Incest is now categorised with the familial sexual offences introduced by the 2003 Act, and between 2008 and 2009, 1,045 such offences were recorded (Home Office 2009, p. 138).

Public perception of the 'dangerousness' of incest, however, has been accentuated not only by the debates about child abuse discussed above but also by the appalling case of Frederick and Rosemary West, whose killing of a number of young women, including one of Frederick West's daughters, was committed within a 'family home' in which incest and sexual abuse appear to have been integral to family relationships.

Reflecting the make-up of modern families and the pivotal concept of trust, the Sexual Offences Act 2003 extends incest involving children beyond the confines of blood ties, to include adoptive relationships (s. 27). The thinking behind this extension is explained in the White Paper:

*Home Office: 2002 Protecting the Public: Strengthening Protection against Sex Offences and Reforming the Law on Sexual Offences (Cm60566) (HMSO), p. 24, para. 11*

It is recognised that the balance of power within the family and the close trusting relationships that exist make children particularly vulnerable to abuse within its environment. The offence will therefore be designed to protect children up to the age of 18 from any form of activity that a person would consider sexual or indecent. The offence will be drawn widely to capture all those individuals of any age who have a 'familial' relationship with a child by virtue not only of blood-ties, adoption, fostering, marriage or quasi-marital relationship



but also by virtue of living within the same household as the child and assuming a position of trust or authority in relation to the child. The offender may be either an adult or another child who falls entirely within the clearly defined scope of the offence.

### Sexual Offences Act 2003

#### Section 25 Sexual activity with a child family member

##### Sexual activity with a child family member

- (1) A person (A) commits an offence if –
  - (a) he intentionally touches another person (B),
  - (b) the touching is sexual,
  - (c) the relation of A to B is within section 27,
  - (d) A knows or could reasonably be expected to know that his relation to B is of a description falling within that section, and
  - (e) either –
    - (i) B is under 18 and A does not reasonably believe that B is 18 or over, or
    - (ii) B is under 13.
- (2) Where in proceedings for an offence under this section it is proved that the other person was under 18, the defendant is to be taken not to have reasonably believed that that person was 18 or over unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.
- (3) Where in proceedings for an offence under this section it is proved that the relation of the defendant to the other person was of a description falling within section 27, it is to be taken that the defendant knew or could reasonably have been expected to know that his relation to the other person was of that description unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know that it was.

The penalty is a maximum of 14 years' imprisonment for offenders over 18 at the time of the offence, otherwise the maximum is 5 years.

Sexual activity offences involving adults in the family unit continues to be confined to blood relatives (parent, grandparent, child, grandchild, brother, sister, half-brother or half-sister) and to acts of penetration (ss. 64, 65). The prosecution power of appeal against sentence introduced in the Criminal Justice Act 1988 (s. 36) was first used in an incest case. The case provided an opportunity for Lord Lane to offer some guidelines for sentencing in incest cases:

#### *R v A-G's Reference (No. 1 of 1989)* [1989] 3 All ER 571

At one end of the scale is incest committed by a father with a daughter in her late teens or older who is a willing participant and indeed may be the instigator of the offences. In such a case, the court usually need do little more than mark the fact that there has been

a breach of the law and little if anything is required in the way of punishment. The next class of case is that where the girl has achieved the age of 13, which in most cases will mean that she has achieved puberty. This of course is the demarcation line chosen in the Sexual Offences Act... Sentences in this area seem to vary between about 2 years to 4 or 5 years on a plea of guilty, depending on the mitigating or aggravating factors... The last and much the most difficult area is that involving girls under the age of 13. As in the case of those between 13 and 16, sexual intercourse is an offence, quite apart from the parental relationship. For victims under the age of 13, however, a further factor comes into play. Although the girl may 'consent' to the act of intercourse in such a way as to render a charge of rape inappropriate, the girl is from the very relationship in a particularly vulnerable position, which the father is in a position to exploit due to her dependence and inexperience and possibly fear of disrupting relations between mother and father if she lets it be known what is happening, or fear of her father if she refuses to comply with his demands. In those circumstances, the crime although falling far short of rape, has some of the unpleasant aspects of that particular crime...

[On the basis of a plea of 'not guilty', the following sentence levels were recommended:]

- (1) Where the girl is over 16. Generally speaking a range from 3 years' imprisonment down to a nominal penalty will be appropriate depending in particular on the one hand on whether force was used, and upon the degree of harm, if any, to the girl, and on the other the desirability where it exists of keeping family disruption to the minimum. The older the girl the greater the possibility that she may have been willing or even the instigating party to the liaison, a factor which will be reflected in the sentence. In other words, the lower the degree of corruption, the lower the penalty.
- (2) Where the girl is aged from 13 to 16. Here a sentence between about 5 years and 3 years seems... appropriate. Much the same principles will apply as in the case of a girl over 16, though the likelihood of corruption increases in inverse proportion to the age of the girl...
- (3) Where the girl is under 13. It is here that the widest range of sentence is likely to be found. If one can properly describe any type of incest as the 'ordinary' type of case, it will be one where the sexual relationship between husband and wife has broken down; the father has probably resorted to excessive drinking and the eldest daughter is gradually, by way of familiarities, indecent acts and suggestions made the object of the father's frustrated sexual inclinations. If the girl is not far short of her thirteenth birthday and there are no particularly adverse or favourable features on a not guilty plea, a term of about 6 years on the authorities would seem to be appropriate...

Other aggravating factors, whatever the age of the girl may be (*interalia*) as follows. (1) If there is evidence that the girl has suffered physically or psychologically from the incest. (2) If the incest has continued at frequent intervals over a long period of time. (3) If the girl has been threatened or treated violently by or was terrified of the father. (4) If the incest has been accompanied by perversions abhorrent to the girl, eg buggery or fellatio. (5) If the girl has become pregnant by reason of the father failing to take contraceptive

measures. (6) If the defendant has committed similar offences against more than one girl.

Possible mitigating features are . . . the following. (1) A plea of guilty . . . (2) If it seems that there was a genuine affection on the part of the defendant rather than an intention to use the girl simply as an outlet for his sexual inclinations. (3) Where the girl has had previous sexual experience. (4) Where the girl has made deliberate attempts at seduction. (5) Where, as very occasionally is the case, a shorter term of imprisonment for the father may be of benefit to the victim and the family.

Lord Lane seems to introduce a presumption that girls over 16 collude in incest and that in other cases sexual abuse by fathers of their daughters can be understood in terms of their failure to maintain a satisfactory sexual relationship with their wife. It would not be a very big step from this to the proposition that the wife is to blame for the incest. The list of mitigating features perpetuates the idea that 'nice girls don't get raped'. If the girl has sexual experience this somehow provides an element of excuse for the father's abuse. There has been no attempt to disentangle the complex dynamics of family emotional life. Who is to say that the girl's sexual precocity is not attributable to her upbringing? The guidelines seem to assume that incest can be an unfortunate aberration. Even if it can be, it is inherently unlikely that such a case would ever be reported let alone prosecuted. The guidelines seem to assume throughout that the man is not necessarily responsible for his own actions, and conversely, that the women in his life get what they ask for. The Sentencing Guidelines Council has now issued new guidance in view of the 2003 Act (SGC 2007).

### V.16.b. Prostitution

The Report of the Wolfenden Committee (1957) considered the 'proper role' of law in relation to homosexuality and prostitution. It often passes without comment that these two topics were thought to present sufficiently similar problems to be considered together. Perhaps if the report had been entitled 'Homosexuality and Heterosexuality', the oddity would have been at once removed and highlighted; because, of course, heterosexuality in the 'right place', i.e. amongst married couples, was not 'a problem'. Or the report could have been more accurately entitled 'Offensive Public Manifestations of Sexuality'. As is well known, the report adopted a liberal approach based on Mill's 'harm principle', and led to the Street Offences Act 1959, which outlawed public soliciting.

Like other areas of sexual conduct, prostitution poses questions both about the relative value to be accorded to autonomy and about how sexual autonomy should be conceived. Are women who engage in prostitution 'victims' of a patriarchal sexual order, or competent subjects exercising their sexual autonomy and making rational choices about their lifestyle, or both? How far should we trust individuals to do as they wish with their own bodies? Before examining

the legal regulation of prostitution, we consider some provocative analyses of the phenomenon of prostitution.

Kate Millett 1976 *The Prostitution Papers* (Ballantine Books), p. 93

... [P]rostitution is ... the very core of the female's social condition. It not only declares her subjection right in the open, with the cash nexus between the sexes announced in currency, rather than through the subtlety of a marriage contract (which still recognises the principle of sex in return for commodities and historically has insisted upon it), but the very act of prostitution is itself a declaration of our value, our reification.

Carole Pateman 1988 *The Sexual Contract* (Polity), p. 189

Prostitution is an integral part of patriarchal capitalism ... Prostitutes are readily available at all levels of the market for any man who can afford one and they are frequently provided as part of business, political and diplomatic transactions. Yet the public character of prostitution is less obvious than it might be. Like other forms of capitalist enterprise, prostitution is seen as private enterprise, and the contract between client and prostitute is seen as a private arrangement between a buyer and seller. Moreover, prostitution is shrouded in secrecy despite the scale of the industry. In Birmingham, a ... city of about one million people, some 800 women work either as street prostitutes, or from their homes or hotels, from 'saunas', 'massage parlours', or 'escort agencies'. Nearly 14,000 men each week buy their services, i.e., about 17 men for each prostitute. A similar level of demand has been recorded in the United States, and the total number of customers each week across the country has been conservatively estimated at 1,500,000 men. One estimate is that \$40 million per day is spent on prostitution in the United States. The secrecy exists in part because, where the act of prostitution is not itself illegal, associated activities such as soliciting often are. The criminal character of much of the business of prostitution is not, however, the only reason for secrecy. Not all men wish it generally to be known that they buy this commodity. To be discovered consorting with prostitutes can, for example, still be the downfall of politicians. The empirical evidence also indicates that three-quarters of the clients of prostitutes are married men. Certainly, the prostitutes in Birmingham find that trade slackens during holiday periods when men are away from the city with their wives and children.

The sexual subjection of women has never lacked defenders, but until very recently an unqualified defence of prostitution has been hard to find ... A radical change has now taken place in arguments about prostitution. Prostitution is unequivocally defended by contractarians ... Many recent feminist discussions have argued that prostitution is merely a job of work and the prostitute is a worker, like any other wage labourer ... Contractarians argue that a prostitute contracts out a certain form of labour power for a given period in exchange for money ... A prostitute does not sell herself, as is commonly alleged, or even sell her sexual parts, but contracts out use of sexual services ...

Defenders of prostitution admit that some reforms are necessary in the industry as it exists at present in order for a properly free market in sexual services to operate. Nevertheless,



they insist that 'sound prostitution' is possible . . . A universal defence of prostitution entails that a prostitute can be of either sex. Women should have the same opportunity as men to buy sexual services in the market . . . A moment's contemplation of the story of the sexual contract suggests that there is a major difficulty in any attempt to universalize prostitution . . . The story of the sexual contract reveals that there is good reason why 'the prostitute' is a female figure . . .

Contractarians who defend an ostensibly sexually neutral, universal, sound prostitution have not, as far as I am aware, taken the logic of their arguments to its conclusion. The final defeat of status and the victory of contract should lead to the elimination of marriage in favour of the economical arrangement of universal prostitution, in which all individuals enter into brief contracts of sexual use when required.

Any discussion of prostitution is replete with difficulties. Although contractarians now deny any political significance to the fact that (most) prostitutes are women, one major difficulty is that, in other discussions, prostitution is invariably seen as a problem about the prostitute, as a problem about women . . . To argue that there is something wrong with prostitution does not necessarily imply any adverse judgement on the women who engage in the work . . . [T]he patriarchal assumption that prostitution is a problem about women ensures that the other participant in the prostitution contract escapes scrutiny. Once the story of the sexual contract has been told, prostitution can be seen as a problem about men. The problem of prostitution then becomes encapsulated in the question why men demand that women's bodies are sold as commodities in the capitalist market. The story of the sexual contract also supplies the answer; prostitution is part of the exercise of the law of male sex-right, one of the ways in which men are ensured access to women's bodies.

However we view this general interpretation of prostitution, the influence of prevailing ideas of 'normal' femininity on the treatment of prostitute women is well established:

Kathryn Chadwick and Catherine Little 1987 'The Criminalization of Women' in P. Scraton (ed.) *Law, Order and the Authoritarian State* (Open University Press), pp. 254, 264

Women's respectability is judged largely by their sexuality and, placed along a continuum, women are either 'good' or 'bad', virgins or whores. The ideological construction of the prostitute serves to divide and separate women into different categories. Sheila Jeffreys considers some of the reasons for this separation:

It is in the interests of men that women are divided into groups whose interest are apparently opposed. 'Good' women have been encouraged to turn their anxiety at their precarious position into anger at prostitutes who can appear to threaten the married woman's security and home, to undermine her efforts to control her man and his sexual demands. Or we are told that prostitution is necessary to protect the married woman's security. Neither is true . . . It is vital to male supremacy that women be divided into

the 'pure' and the 'fallen' so we may not pool our knowledge and engage in the fight against male sexuality as the social control of women.

... These divisions serve to undermine any shared class or gender interests and lay the foundations for the process of criminalization.

Traditional explanations for the occurrence of prostitution invariably are biological and focus on the abnormal sexuality of women. In these portrayals women are seen to lack any moral fibre; they are promiscuous, sex-crazed or simply men-haters who wish to use prostitution to exercise their power over men. Coupled with this they are seen to be lazy, and in search of easy work, hence easy money. They are predators on men's sexual needs...

In reality prostitution is far from easy work or a comfortable style of living. Prostitutes are alienated from the rest of society, they are subjected to personal degradation and social stigma, they work long and unsociable hours, and run the constant risks of attacks or murder. Many women, as a result of the processes of the labour market... find themselves economically marginalized, so that prostitution becomes an economic necessity. Poverty and lack of real employment opportunities often leaves many women with little choice. The commonly held view that prostitutes choose this form of employment because they 'like it' is strongly rejected by prostitutes...

It is important to notice the relevance of class relations within prostitution. Those who work on the streets tend to be working-class women, while 'escort' or 'agency' workers are not only involved at a different economic level, but also are less likely to come into contact with the law. The 'street-walkers' are the most vulnerable and exposed of all prostitutes and they are likely to come into most regular contact with the police.

One of the difficulties with accounts such as that of Pateman is that they might be taken to represent prostitute women as mere 'dupes' of an oppressive social order rather than as responsible agents making choices within an (unfair) set of circumstances. Ironically, the law on prostitution is one of the few areas of sexual offences in which the images of women produced by criminal law involve positive agency rather than passive victimisation. Nonetheless, it can hardly be doubted that the phenomenon of prostitution reflects prevailing differentiated-sexual relations. To the extent, therefore, that prostitution is consonant with the values and demands of a patriarchal social order, what could be the rationale for proscribing it? The following extracts return us to the public/private distinction, and to criminal law's preoccupation with the visibility of 'deviant' sexualities:

Kathleen de Doncker, *Sexual Deviance in Law* (Woolenfield & Mellenby), p. 103.

The regulation of prostitution, since the enactment of the Street Offences Act 1959, depends on the distinction between public and private. According to the Wolfenden Report the

criminal law should not concern itself with matters of private morality but should 'aim to protect the citizen from what is offensive or injurious'. This expression of liberal philosophy has come to dominate thinking about control of sexuality. The result was a recasting of legal provisions whereby prostitution itself is not illegal but any public manifestation such as soliciting, advertising or making agreements with clients, is. Street offences, since 1959, are punished more severely than previously because: 'both loitering and importuning for the purpose of prostitution are so self-evidently public nuisances that the law ought to deal with them, as it deals with other self-evident public nuisances, without calling on individual citizens to show that they were annoyed'. To safeguard citizens from having to prove their annoyance the law uses the notion of the 'common prostitute' as part of the mechanism of control of prostitutes' behaviour in public.

... The use of the term 'common prostitute' dates back to the Contagious Diseases Acts in force from 1864 to 1886, when state control of prostitution was established in certain military and naval towns. By 1869 there were eighteen such districts in which any woman could be arrested on suspicion of being a common prostitute. Unless she could prove otherwise to the police, or in court, she was registered a common prostitute and had to submit to fortnightly medical examinations. Refusal to be examined meant imprisonment. If found to be suffering from venereal disease she would be interned in a lock hospital for up to nine months.

The object of the measures was to protect military men from disease, but the legislation contained assumptions about male and female sexuality which continue to inform law-making today. Sex was considered essential for the fighting men of the empire and no effort was directed at preventing them from visiting prostitutes. But the women were criminalised and controlled. A social identity, which had not previously existed, the prostitute, was constructed. What had been for many poor women a transitional stage in their working lives became, through criminalisation, the only means of livelihood. Prostitutes as sexually active women were separated from virtuous and passive models of femininity.

Josephine Butler led the successful campaign against the Acts, which were seen as a threat to all women. Feminist repealers stressed the double standard implied in the legislation, which punished women but not their clients. This double standard, so prevalent in Victorian beliefs and morality, remains part of prostitution law. The middle-class women who belonged to the Ladies' National Association, the repeal organisation, had quite different views of morality from those enshrined in the law of today. They subscribed to an ideology of separate spheres for women and men that stressed women's purity, moral supremacy and domestic virtue. They were indignant when confronted by a prostitute who adhered to her way of life. Their public discourse was a condemnation of male sexual licence and it was proposed that the standards of domestic purity and fidelity replace the double standard.

In their criticism of the double standard reformers were confronted not only with differential standards for female and male behaviour, but also with Victorian hypocrisy in which public pronouncements were not matched with private behaviour. The separation, in bourgeois ideology, of public and private morality was complex. On the one hand family, home and domesticity constituted the private place in which those female virtues of chastity



and moral purity were upheld and respected. On the other hand the private sphere was that of male sexual licence . . . In the public sphere politicians laid down high standards of public morality; the public was also the place of prostitution, vice on the streets, crime. The resolution of this was to be the imposition of those private, domestic, womanly values on all, in both private and public, through the social purity movement. Later liberal reforms which imply that private behaviour is personal and no concern of the law, but that what is done in public is what matters, are the direct antithesis of the moral purity reforms.

Clearly, prostitution raises questions relating to human rights. But is the major human rights issue the violation of women's bodies or state repression which continues to marginalise prostitutes?

Enslava Alexander (1997) *Torments, Sex Workers, and Human Rights* in J. Nagle (ed.) *Whores and Other Feminists* (Routledge), pp. 26, 32

Prostitutes' human rights have long been violated by agencies – police and public health – charged with protecting people from harm. The desire to isolate the prostitute, to wall her off from the rest of society, goes back almost to the origins of what we call 'civilization'. Early Sumerian texts, written around 4,000 years ago, described prostitutes as wise women, able to educate, civilize and tame men. But as men took over the early city states, they separated harlots – often poets, teachers, musicians, dancers, and priestesses – from other women. One of the oldest sumptuary laws, written around 1250 B.C.E., required 'wives' to walk veiled in the street. Although Sumerian law-makers permitted concubines to veil themselves if they lived with a man and his family, they prohibited the independent prostitute from doing so, threatening to take all her clothes, pour pitch on her head, and punish any man who knowingly walked with her. In medieval France, an endless series of laws prescribed prostitutes' dress, or symbols on their dress, to distinguish them from the good women, whom they admonished not to dress like whores. Medieval lawmakers also allowed prostitutes on one street for a while, then forced them to move to another. Sometimes these streets were inside, sometimes outside the city wall. Sometimes authorities required women to work alone, one woman to a house, while at other times they made them work in groups with a manager. Whenever laws have become more repressive, the management of prostitution has moved from the hands of women to the hands of men, and vice versa, down through the ages to our own time . . .

There are some days when I feel overwhelmed by the woman-hatred that shores up these policies and practices. In every century, on every continent, in every country, societies use such measures to control women who dare to step outside of the normative role of virgin daughter / chaste wife. Although the stigma and repression have been greater in some times and places than others, they have never been absent. I have trouble understanding why – in the face of all the documentation provided by individual sex workers and sex workers' rights organizations to show the enormous cost to them, and to society, of the continued enforcement of laws prohibiting prostitution – anti-prostitution activists are calling



for greater enforcement of those laws. I can only conclude that they, like most of society, are anti-prostitute.

*Cate Haste 1992 Rules of Desire: Sex in Britain, World War I to the Present (Pimlico), p. 262*

The rights of prostitutes began to be scrutinized mainly because the women began to organize to publicize their case. They exposed their vulnerability under the law, but also the anomalous position of women in the new sexual ethic. Since the earliest days of emancipation, women had challenged the marriage contract as one in which men agreed to support women for life in return for sexual favours. There had been no shortage of people who pointed out the basic contract was not dissimilar to the bargain of prostitution, the main difference being that one was culturally and morally respectable and protected by the law and the other was not. The continuing economic disadvantage of women and their cultural subordination served to perpetuate this bargain. The aims of nineteenth-century emancipationists and twentieth-century feminists had been to transform those power relations in the name of equality, freedom and justice. They had continually come up against the dual obstacles of the double sexual standard, and the continuing economic disadvantages of women, chiefly low pay, limited occupational opportunities, the undervaluation of women's work and their expendability in a job market which tended to see women as a reserve labor force, all of which narrow women's choices.

The so-called oldest profession remains young in terms of collective trade organisation. The creation of the International Union of Sex Workers (IUSW) in 2000 represents the most notable development since the formation of the English Collective of Prostitutes (ECP) in 1975. The Union's determination to move sex work from the margins to mainstream is reflected in its decision to affiliate with the GMB (*The Guardian*, 8 March 2002). The shift of language from the morally maligned prostitute to the neutral sex worker selling services in the sex industry may also be significant. As such language gains cultural recognition it may become harder to resist calls for regulation. Reflecting this, in 2000 the Netherlands legalised voluntary prostitution, seeking to regulate sex work as any other business, and thus bringing with it the promise of legal and employment rights and reduced stigma (Kilvington *et al.* 2001). In 2002, a symposium of sex workers, police officers, judicial personnel and academics, brought together as part of Channel 4 television series on prostitution, demanded a 'national enquiry into the sex industry and existing laws chaired by an independent national figure' (*Dispatches, Sex on the Street*, 16 September 2002). However, IUSW membership is very low (around 200) out of around 90,000 prostitutes. Furthermore, as O'Connell Davidson suggests below, any meaningful transformation in the status of the prostitute may require far more substantial changes:

Julia O'Connor Davidson 1991 *Prostitution, Power and Freedom (Polity)*, pp. 190–1

Prostitution, like both wage and labour slavery, is an institution through which certain powers of command over the person are transferred from one individual to another. It is not fully distinguished from either slavery or wage labour...

It is also important to note that both wage labour and slavery, like prostitution, are institutions which involve more than just economic oppression of human subjects. However, in terms of possibilities for collective political action implicit in these institutions, it seems to me that prostitution is distinguished by the fact that the contradictions implicit in the relationship between prostitute and clients, both as individuals and collective groups, does not generate an immediate or straightforward dialectic for change.

... Certainly clients are often just as much interested in exploiting willing and co-operative prostitutes as employers are in exploiting willing workers... but clients have no direct economic interest in securing prostitutes' co-operation – it is not necessary for clients, as a collective group, to accumulate sexual value, or to socialize prostitution, or then to deal with prostitutes as a collective group. From the client's point of view the prostitute contract involves a relation of consumption, not production. Negotiations over the prices and terms of prostitution contracts are thus highly atomized. They represent an individualized form of haggling over an existing exchange value, not a struggle over how much sexual 'Value' is collectively produced and retained by prostitutes, and this seriously limits the potential for collective resistance by prostitutes.

We are now in a position to unpack the legal regime in relation to prostitution.

### Street Offences Act 1959

#### Section 1

(1) It shall be an offence for a common prostitute (*whether male or female*) to loiter or solicit in a street or public place for the purpose of prostitution. [Words in italics inserted by the Sexual Offences Act 2003, Sch. 1, s. 2.]

Before the Sexual Offences Act 2003, the designation 'common prostitute' had only applied to women (*DPP v. Bull* (1994)); men could not be convicted under this section. 'Common prostitution' for the purposes of section 1 is proven by police evidence that the person persisted in conduct for which she has previously been cautioned by a constable. The Home Office approves a system whereby the police do not charge a woman unless she has been formally cautioned on two occasions and the cautions have been formally recorded. (Status offences and the tension between the operation of the category 'common prostitute' and the presumption of innocence are also discussed in Chapter 3.) Prosecutions for 'loitering or soliciting' have fallen in recent years. In 2002, around 4,000 women

were found guilty of soliciting each year (Home Office 2002j, Table 5.20). This figure has fallen to 1,071 recorded offences by 2008/9 (Home Office 2009, p. 138).

When the option of imprisonment for this offence was removed by the Criminal Justice Act 1982 (s. 71), magistrates were effectively left with a penalty choice between probation and fine. The number of women imprisoned for fine default decreased substantially from 1,370 in 1995 to 70 in 2001 (Home Office 2002m, p. 33). However, as we saw in Chapter 5, there are large numbers of provisions that can be used to regulate prostitutes and others whose lifestyles are perceived as inappropriate. In particular, anti-social behaviour orders (ASBOs) under the Crime and Disorder Act 1998 are widely used for these purposes. A civil order accompanied by criminal penalties for breach, an ASBO may be made if a person 'has acted . . . in an anti-social manner . . . that caused or was likely to cause harassment, alarm or distress' (s. 1). Prostitution accounts for around 5 per cent of ASBOs (Campbell 2002), and in the first two years after they were introduced at least 14 prostitutes were imprisoned for between three and six months for breaching the terms of their ASBOs (see Jones and Sagar 2001). Despite the widely drafted terms of ASBOs they have been accompanied by the use of the equally vague (and archaic) tool of the public nuisance injunction against street sex workers (Sagar 2008).

The implications of the current legal regime for women working as prostitutes are discussed in the following extracts:

Teela Sanders and Rosie Campbell 2008, 'What's Criminal About Female Indoor Sex Work?' in Letherby *et al.* (eds.) *Sex as Crime?* (Willan) pp. 47–62

Up until recently, the prostitution laws in the UK have been more concerned with public nuisance and 'decency' according to the influential Wolfenden Report in 1957. The Street Offences Act 1959 that resulted from this inquiry set out the laws against street prostitution, establishing laws such as soliciting and loitering as crimes against public decency. However, the Wolfenden Report staunchly believed that there was a point where the law had no place in private morality and therefore did not seek to make the buying or selling of consensual sexual services illegal. Instead, a loophole was left open whereby it was, and still is, legal for a woman to work on her own in her own premises without charges of brothel keeping. Yet this legality sits uncomfortably with other historical and more recent legislation that has been written directly and indirectly to control the sex industry. Most notably the Sexual Offences Act 1956 makes it illegal to procure (encourage) a woman into prostitution, live off immoral earnings or keep a brothel, essentially placing those who manage, own or organize massage parlours at risk of prosecution. These laws can also be applied to sex workers who are working together in small numbers as the charge of 'procurement' could be brought against those who are more experienced or introduce women into the industry.



Nicole Westmarland 2006 'From the Personal to the Political: Shifting Perspectives on Street Prostitution in England and Wales' in Geetanjali Ganguli and Nicole Westmarland (eds.) *International Approaches to Prostitution: Law and Policy in Europe and Asia* (Policy Press), pp. 21-44 at 29

Although many of the activities associated with prostitution are illegal... in practice many of these laws are not actively enforced. The policing of prostitution tends to be reactionary led by community complaints and varying over time and place. When complaints in an area reach a high level the police sometimes launch zero-tolerance style 'crackdowns' on prostitution where a higher than usual police presence is put in place, often for a pre-defined period. The new Strategy [the government's 2006 Co-ordinated Prostitution Strategy] suggests that such 'crackdowns' will focus predominantly on men as 'buyers' in the future, and those involved in prostitution will be signposted towards services that might help them leave prostitution. Some vice units allow 'unofficial' tolerance zones to operate, where women are urged to work in some areas rather than in others; however, in practice this has often led to confusion. Because it is unofficial it is difficult to communicate to the women and other police officers where the specified areas are, particularly if this changes. Changes in senior police staff and / or complaints from residents have sometimes led to the specified area changing location with little or no notice.

As these extracts explain, criminal law also encompasses a variety of offences aimed at those (men and women) who profit from and exploit prostitute women, but the number of prosecutions is relatively low. Before 1985, it could have been argued that the disparity in the numbers prosecuted for procuration etc., compared with those for soliciting under the Street Offences Act 1959, was a result of easier police access to evidence of public loitering. Although the Sexual Offences Act 1956 provided in section 32 for persistently soliciting or importuning in a public place for immoral purposes, courts refused to sanction the use of this offence to control kerb-crawling (*Crook v. Edmondson* (1966)). The only exception was where the object of the crawler's attention was under 16 (*R v. Dodd* (1977): cf *Kirkup* (1993) in relation to homosexuality). This implicitly endorsed the view that women out on the street are fair game for sexual harassment. Police in some areas sought to avoid this by using binding-over powers under the Justices of the Peace Act 1361 or, in London, by the use of the Metropolitan Police Act 1839, which allows the control of 'insulting behaviour'.

The Sexual Offences Act 1985 introduced an offence of kerb-crawling (s. 1) as well as an offence of persistently soliciting in a street or public place for those on foot (s. 2). In its first year of operation there were 189 prosecutions under section 1, with 161 convictions. By 1996 the number of men convicted for kerb-crawling had risen to 1,096. This figure has fallen annually to a low of 491 in 2007 (*Hansard* 11 December 2008 Column 304W), representing a small number compared with that of women held liable for prostitution-related



offences. The wording of the Act creates some interpretative difficulties, but it seems unlikely that this is the sole reason for the low number of prosecutions. It seems more likely that the criminal justice system is either disproportionately targeting prostitutes over their clients, or that soliciting is easier to prove than kerb-crawling (see Westmarland 2006, p. 30).

Despite the increased criminalisation surrounding prostitution, the plight of prostitutes as victims of crime is often overlooked. A survey of 110 street prostitutes across 18 locations in the UK found that 72 per cent claimed to have been attacked by clients, while 60 per cent claimed to have been badly beaten up or raped during the previous 12 months (*Dispatches, Sex on the Street*, 16 September 2002). Such risks have, some argue, been exacerbated by the extension of police powers of arrest, detention, and to take DNA samples from kerb-crawlers in the Criminal Justice and Police Act 2001 (s. 71). The rationale is that this will deter kerb-crawlers and further 'clean up the streets'. The reality is that sex will be bought in more desolate and dangerous places. Furthermore, section 46 of the 2001 Act reflected further the law's rejection of prostitution by criminalising the placing advertisements in relation to prostitution in a public telephone. As the following extract from Sanders suggests, the strong message about tackling kerb-crawling has not ensured more convictions or consistent police practice.

**Teela Sanders 2008 *Paying for Pleasure: Men Who Buy Sex* (Willan), pp. 140–1**

The message that men who buy sex from the street will not be tolerated has been gaining momentum for several years. In areas such as Middlesbrough and West Yorkshire, the police have fairly regularly (every few months) moved in on the street beats and made arrests of men looking for sex. Continual and sometimes high-profile reporting in local and national media gives the impression to the public that the police operations yield significant success and are apprehending many men through decoys and sting operations to combat a significant social 'problem'. Yet these reports in the newspapers do not provide a fair picture of the policing operations across the country... [T]he numbers of men convicted for kerb-crawling offences actually fell from 1996 to 2005. During 2005, the middle of the government consultation period, there were only 635 convictions, the lowest rate for ten years.

Policing practice with regard to implementing the law on kerb-crawling is sporadic and concentrated in a few key cities. The majority of police forces have not engaged in anti-kerb-crawler operations over the past ten years. In 2005, less than half of police forces, 20 out of 43, cautioned a total of 269 men for offences of kerb-crawling. In total, 18 police forces convicted 629 men of the offence. Forces with the highest conviction rates were: Metropolitan Police (286); Cleveland (106); West Midlands (66); West Yorkshire (45). These numbers remain small but represent the political will of a handful of local authorities and policing partnerships rather than a systematic attempt to implement the law or policy.

Given that a new anti-kerb-crawling campaign has been underway since 2007, the figures are likely to rise, but it is probable, due to the resource-intensive nature of enforcement operations, that the message will weigh heavier than convictions.

The Sexual Offences Act 2003 removed the gender specificity of these offences (Sch. 1, s. 4 changes in square brackets):

### **Sexual Offences Act 1985, ss 1, 2(1), 4(3)**

#### **[Soliciting for the purpose of prostitution]**

- 1 A man [person] commits an offence if he solicits a woman [another person] (or different women [persons]) for the purpose of prostitution—
  - (a) from a motor vehicle while it is in a street or public place; or
  - (b) in a street or public place while in the immediate vicinity of a motor vehicle that he has just got out of or off, persistently or, subject to section 5(6) below, in such manner or in such circumstances as to be likely to cause annoyance to the woman [person] (or any of the women [persons]) solicited, or nuisance to other persons in the neighbourhood.

#### **[Persistent soliciting]**

2(1) A man [person] commits an offence if in a street or public place he persistently solicits a woman [another person] (or different women [persons]) for the purpose of prostitution.

4(3) Paragraphs (a) and (b) of section 6 of the Interpretation Act 1978 (words importing the masculine gender to include the feminine) do not apply to this Act. [Section omitted.]

The Sexual Offences Act 2003 partly consolidated this array of prostitution-related offences by criminalising commercial sexual exploitation (i.e. replacing those from the Sexual Offences Act 1956). There are separate offences for those found 'causing or inciting prostitution for gain' (s. 52) and those 'controlling prostitution for gain' (s. 53), which have been rarely prosecuted: there were only 25 convictions under both sections in 2007 (*Hansard* 15 January 2009 Column WA178). These are accompanied by the offence of trafficking people for commercial sexual exploitation, which carries a maximum penalty of 14 years' imprisonment (ss. 57–9). In addition, as we have noted, the existing prostitution offences under the Street Offences Acts of 1956 and 1985 are now gender-neutral (s. 56). Reflecting the drift towards over-criminalisation, and no doubt influenced by the need to respond to the brutal murder of five prostitutes in Ipswich by Steven Wright (*The Guardian*, 23 February 2008), only a few years after the 2003 Act the government signalled its desire to surround prostitution with more offences. The passage of the Criminal Justice and Immigration Act 2008 saw an aborted attempt to introduce compulsory rehabilitation for sex workers, which has reappeared in section 17 of the Policing and Crime Act 2009. This requires the offender to attend a series of three

meetings with a named supervisor in order to try and rehabilitate them away from prostitution. Breach of the order may bring the offender back to court for further punishment. The 2009 Act reflects the strategic shift of policy in terms of targeting those buying sex by creating a strict liability offence of 'paying for sexual services of a prostitute subjected to force etc' (s. 14). This applies where a third party has engaged in exploitative conduct likely to induce or encourage an individual to provide sexual services, irrespective of whether the person paying is aware of the exploitation or of whether the sexual services are actually provided. Section 16 amends the offence of soliciting or loitering for the purposes of prostitution by inserting a requirement that it be 'persistent' (two or more occasions within three months). It also ditches the derogatory term 'common prostitute' in favour of the more neutral term 'person'. Finally, and perhaps most controversially, the Act removes reference to 'persistence' from sections 1 and 2 of the 1956 Act, with a single offence of soliciting (s. 19), thus allowing for prosecution following the first allegation of kerb-crawling, and thus possibly paving the way for miscarriages of justice here. But despite the shift of strategy detected in these reforms and the expansion of other sites of regulation, Phoenix is pessimistic about the prospects of improving the plight of street sex workers:

Jo Phoenix 2008 'Reinventing the Wheel: Contemporary Contours of Prostitution Regulation' in G. Letherby *et al.* (eds) *Sex as Crime* (Willan), pp. 27-46 at 43-4

One of the key changes that has occurred in the governance of prostitution in the last 50 years has been the expansion of sites of regulation. Whereas in the 1950s, criminal justice responses were the key site through which the policing and regulation of prostitution was achieved, now voluntary organizations, sexual health outreach programmes, children's services and criminal justice agencies are all involved in the governance of prostitution. This expansion of the sites of governance produces contradictory effects – personal, welfare, and health support is offered to many of those involved in prostitution, most particularly those working from the streets, at the same time that formal control and punishment have also been extended. In addition, whereas traditional criminal justice responses have tended in the past to focus on the law-breaking activities of street-based sex workers, newer systems of regulation also target the totality of sex workers' lives in ways that leave them vulnerable to state-sponsored and sanctioned assessment and intervention. In this way, new trends in the governance of prostitution are directed at a small group of poor women, their relationships and their choices in the struggle to survive their own poverty. What remains unaddressed in policy and practice is that it is precisely those women who are most vulnerable to victimization and poverty who continue to bear the brunt of regulation and punishment, i.e. women working from the streets.

More than this, however, the shift from the management of 'nuisance' and harm minimization approaches to enforcement plus support has the potential to undermine what support is currently offered to the more vulnerable working women. Put simply, current



support services could find themselves caught between continuing to support women in prostitution and being forced to reorient their work towards getting women to leave prostitution. And of course, when these support services fail, new reforms ensure that the women face greater and harsher punishment.

It is perhaps somewhat misleading to talk of the regulation of prostitution, because what we have had, prior to the 2003 reforms, are laws which specifically discriminated against prostitute women. Not only were women singled out in terms of enforcement, but the very structure of the offence of soliciting labelled and condemned them in advance. Furthermore, notwithstanding Pateman's analysis, she is denied the status of contracting subject: 'public policy' dictates that prostitution contracts are unenforceable as being for 'immoral purposes'. The image of women as either chaste or impure on which the control of soliciting depends and which it reinforces can be seen in many other areas. The idea that women with previous sexual experience might lie about rape is one example (see Chapter 15.b.v.); another is judicial guidance on sentencing in incest cases (see 16.a.v. above).

### V.16.c. Pornography

#### V.16.c.i. Pornography, obscenity and freedom of speech

As we move from serious sexual offences through the regulation of homosexuality and prostitution to pornography, we find ourselves in areas in which the consensus about the proper role of criminal law is increasingly fragmented. Should pornography be regulated by criminal laws at all? Is it a manifestation and cornerstone of patriarchal power, an offensive and possibly dangerous social practice, or a valuable form of sexual expression, experimentation and fantasy? Should the legal regulation of pornography be regarded as an illiberal violation of free expression, a manifestation of concern for public order and decency, or an attempt to eliminate sex discrimination? Before turning to the actual criminal regulation of obscenity, we consider some of these deeply contested questions.

*Justifying this Offence to Others* (Oxford University Press)  
pp. 127, 147

There is no more unfortunate mistake in the discussion of obscenity than simply to identify that concept, either in meaning or in scope of designation, with pornography. To call something obscene, in the standard uses of that term, is to condemn that thing as shockingly vulgar or blatantly disgusting, for the word 'obscene', like the word 'funny', is used to claim that a given response (in this case repugnance, in the other amusement) is likely to be the general one and/or to endorse that response as appropriate. The corresponding term



'pornographic', on the other hand, is a purely descriptive word referring to sexually explicit writing and pictures designed entirely and plausibly to induce sexual excitement in the reader or observer. To use the terms 'obscene' and 'pornographic' interchangeably, then, as if they referred to precisely the same things, is to beg the essentially controversial question of whether any or all (or only) pornographic materials really are obscene. Surely, to those thousands or millions of persons who delight in pornographic books, pictures, and films, the objects of their attachment do not seem disgusting or obscene. If these materials are nevertheless 'truly obscene', they are not so merely by virtue of the definitions of the terms 'obscene' and 'pornographic' but rather by virtue of their blatant violation of some relevant standards, and to establish their obscenity requires serious argument and persuasion. In short, whether any given acknowledged bit of pornography is really obscene is a logically open question to be settled by argument, not by definitional fiat...

In the absence of convincing evidence of its causal tie to social harms, pornography ought to be prohibited by law only when it is obscene and then precisely because it is obscene. But obscenity (extreme offensiveness) is only a necessary condition, not a sufficient condition, for rightful prohibition. In addition, the offending conduct must not be reasonably avoidable, and the risk of offence must not have been voluntarily assumed by the beholders.

It is not clear what Feinberg hopes to achieve by this strongly put argument that 'pornography' should be reserved for descriptive purposes only. Can his approach help to advance the debate as to whether material, whether obscene in his terms or not, portraying women as objects for sexual gratification is properly proscribed? In criticising the use of a 'definitional fiat' in relation to the word obscenity, Feinberg may be open to the same criticism in relation to 'pornography'. In arguing for a clear distinction between the concepts of obscenity and pornography, he ignores the advantages of a prescriptive use of the term 'pornography', as well as its potential usefulness as an expression in other situations, such as 'the pornography of the rape trial' (cf Smart, above).

It may be useful, before considering more fully arguments for and against the control of pornography, to examine current legal responses. Control of pornography in the UK has been ad hoc, deploying a range of public order offences such as 'conspiracy to corrupt public morals' (see Chapter 1.a.ii.). But it often relies in particular on the concept of obscenity. The major legislation is the Obscene Publications Act 1959, subsequently amended to cover a broader range of activities by the Cinemas Act 1985, the Broadcasting Act 1990, the Criminal Justice and Public Order Act 1994, Pt VII. More recently the Criminal Justice and Immigration Act 2008 criminalises the possession of extreme pornographic images. The 1959 Act adopted the common law test under which obscenity is defined in terms of its tendency to 'deprave and corrupt' (*Hicklin* (1868)).

## Obscene Publications Act 1959

### Section 1

[An article is obscene if] its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained as embodied in it.

### Section 4

[No conviction should follow] if it is proved that publication of the article in question is justified as being for the public good on the grounds that it is in the interests of science, literature, art or learning or of other objects of general concern.

The Act creates offences of publishing, whether for gain or not, an obscene article and having an obscene article for publication or gain. 'Publish' is defined to include all forms of distribution, including giving and lending, and offering to sell or rent. The word 'article' is defined to include written and pictorial material, sound recordings, objects and films. Section 3 authorises the issue of warrants entitling police officers to seize material believed to be obscene. A jury must consider the effect on a significant proportion of the likely readers (*R v. Calder and Boyars Ltd* (1969)). A 'significant proportion' may be much less than half of the relevant group and the jury may find that the article tends to deprave if it encourages private sexual fantasies even without overt sexual activity (*DPP v. Whyte* (1972)). Articles encouraging drug abuse or violence have also been found obscene under this definition (*John Calder Publications v. Powell* (1965) and *Calder and Boyars Ltd* (1969)). The 'deprave and corrupt' definition is therefore capable of wide interpretation by judge and jury alike. There is also a plethora of legislation dealing with the import and export of obscene material, with films, with the use of child models and with indecent public displays (Broadcasting Act 1990; Customs Consolidation Act 1876; Cinemas Act 1985; Video Recordings Act 1984; Protection of Children Act 1978; and Indecent Displays (Control) Act 1981). The Local Government (Miscellaneous Provisions) Act 1982 gives local authorities broad powers over 'sex establishments', including the power to exclude such businesses entirely from certain areas and districts. The City of Westminster has used its powers to exclude sex establishments from a large number of areas within London and to set a maximum for the number of licences it will grant. Most of these were allocated to Soho. In 1982 the Act was extended to cover exhibitions of moving pictures.

None of this has, however, been taken to interfere with common law offences of blasphemy and outraging public decency (*R v. Lemon* (1978); *Knuller (Publishing etc.) Ltd v. DPP* (1973)). In January 1989 an artist and a gallery owner were convicted of the common law offence of outrage to public decency. They were fined £500 and £350 respectively. (The level of fine could be compared with those for breaches of health and safety regulations following injuries or deaths

to workers; see Chapter 19.a.ii.) The prosecutions followed the exhibition of a sculpture of a mannequin's head with two freeze-dried human fetuses as earrings. The judge directed an acquittal on charges of public nuisance. The defendants failed in their arguments that their cases should be dealt with under the Obscene Publications Act 1959 so that they could invoke a defence of artistic merit. Judge Brian Smedley told the jury that: 'In any civilised society, there has to be a constraint on freedom to act in a way which has an adverse effect on other members of the society in which we live' (*Independent*, 10 February 1989). As Rosalind Coward commented:

The charges presume a shared morality, outraged by this apparent trivialisation of human death. But equating an embalmed foetus with a dead person carries as a logical concomitant the idea that abortion is murder, which is currently neither law nor a point of shared morality [*New Statesman and Society*, 27 January 1989].

The defendants' appeal was dismissed on the basis that common law charges were only ruled out by section 2(4) of the Obscene Publications Act 1959 where the essence of the offence was a tendency to corrupt public morals. It followed that the common law offence had properly been charged in this case, where the essence of the allegation was outraging public decency (*Gibson* (1991)). Furthermore, the Court of Appeal confirmed that no intention or recklessness as to outraging public decency had to be proved: the Crown needed merely to show that the defendants had intentionally done something which in fact outraged public decency (on this point the decision mirrors the position in the law of blasphemy: *Lemon* (1978); see further *Brown* (1998), Robertson 1993, pp. 247–54). The Court of Appeal similarly endorsed the use of the common law outrage to decency charge in place of an available statutory alternative in *May* (1990), notwithstanding that the facts would also have supported an offence under section 1(1) of the Indecency with Children Act 1960 (replaced and expanded by the Sexual Offences Act 2003, ss. 9–19). The latter, unlike the common law offence, carries a maximum sentence of two years' imprisonment. In the following passage, Robertson considers the statutory concept of obscenity and its specific implications for pornography:

Geoffrey Robertson 1993 *Freedom, the individual and the law* (7th edn, Penguin), pp. 227–30

The enforcement of obscenity laws is now directed largely at 'hard-core pornography'. This has no legal definition, although juries are often told that 'pornography is like an elephant. You cannot define it, but you know it when you see it.' [Cf MacKinnon's comment above.] . . .

Any material which combines violence with sexual explicitness is a candidate for prosecution. Yet there are many gradations between a friendly slap and a stake through the heart, and most 'spanking' books and articles escape indictment. 'Video nasties', however,



which combine pornography with powerful scenes of rape and terror have been successfully prosecuted . . .

The very existence of a law against literature which 'tends to deprave and corrupt' offers a temptation to prosecutors to 'have a go' at publications they - and most of the community - find obnoxious . . .

The Obscene Publications Act gives a broad discretion to prosecuting authorities to take action against any publication which a jury might consider to 'deprave and corrupt'. In order to achieve some national consistency in prosecution targets, decisions are referred to the DPP, who has been reluctant since the acquittal of *Inside Linda Lovelace* to prosecute the publisher of books and films which have any claim to merit. But the law allows two ways of avoiding a major 'test case' trial. One way is to prosecute the shop-owner who stocks the book or the video, rather than its publisher. The shop-owner will not have the commitment or the resources to mount full-blooded opposition, and will probably rely on a special defence that he had not examined the article and had no reason to believe it obscene. In 1983 the DPP sanctioned a large number of obscenity prosecutions against video shops for stocking so-called 'video nasties' - the results were chaotic, as juries in different parts of the country reached different decisions in respect of the same video title, and major distributors were powerless to intervene to defend their works as they would have wished. In an effort to reduce confusion, the DPP issued an index of some sixty titles which he regarded as candidates for prosecution. Some of these films had claims to merit, but shopkeepers took fright and refused to stock them. The distributors once again were powerless to protest against this back-door state censorship: the DPP was reluctant to prosecute them, but sought to have their films withdrawn from sale by a form of intimidation. The particular problem was resolved by the Video Recordings Act, which requires every video to be submitted to the British Board of Film Classification, and it is to be hoped that law-enforcement authorities never again succumb to the temptation of imposing censorship by threat rather than by prosecution.

The other deficiency in the 1959 legislation is that it permits police to avoid jury trial entirely by seizing books and magazines from local stores and applying for 'forfeiture orders' at local magistrates' courts. This procedure, under section 3 of the Act, is used in some areas to destroy material which the police are well aware would never be convicted by a jury. Local Justices are less broadminded, and can generally be relied upon to make forfeiture orders against 'adult' magazines on national sale.

Section 3 may well have been appropriate to meet the situation where a bookshop or street-stall proprietor stocks only a few obscene books, perhaps inadvertently, and does not deserve to be convicted of a criminal offence. But the forfeiture power has been exploited in a number of cases for the wholly objectionable purpose of depriving publishers of their right to trial by jury.

In 2000, tension between freedom of expression and prevention of harm surfaced around the interpretation of section 4 of the Video Recordings Act 1984. The Act allows the British Board of Film Classification (BBFC) to issue certificates in relation to video works. Appeals against refusals to certify videos



are heard by the Board's Video Appeals Committee. The Board's more liberal approach of awarding R18 certificates to hardcore videos, which enabled their sale in licensed sex shops, set the scene for political and judicial attention to the issue, the background to which Travis describes below:

*Alan Travis 2000 Bound and Gagged: A Secret History of Obscenity in Britain (Profile), pp. 283-8*

In late 1996, with calls for the sacking of the 'feeble censors' ringing in his ears, Lord Birkett, vice-president of the British Board of Film Classification, defended the decision not to ban the film *Crash* by arguing that it had to cause lasting harm, and not just offence, to prove unacceptable. He felt the sight of Holly Hunter taking her clothes off in a damaged car was simply not a good enough reason to ban it. This liberal view shocked the new home secretary, Jack Straw, to such an extent that in November 1998 he secretly blocked Birkett becoming president of the BBFC. Instead he installed Andreas Whittam Smith, former editor of the *Independent*. The fight was sparked by the BBFC's decision to allow hardcore videos to be sold in licensed sex shops under the adult-only R18 category. Those licensed featured explicit scenes, including oral sex and buggery, as long as they were non-violent and appeared consensual. Birkett and BBFC director James Ferman argued that the thriving black market traded in degrading material including torture, bestiality and violence. The 80 or so licensed sex shops were failing because, as Tory Home Office minister Tom Sackville informally suggested, they were not allowed to sell anything the punters wanted to see. So, without parliamentary approval or debate, the sex shops stocked up with videos such as *Makin' Whoopee!*, which included erect penises and consensual sex.

... Straw said the BBFC had failed to consult the Home Office, the police, customs and the crown prosecution service and was now licensing videos that were being seized by the enforcement authorities...

... The BBFC withdrew the R18 certificates, and Birkett was replaced by Whittam Smith. A new director, Robin Duval, was also appointed and the new regime made its mark by permitting the release of such long-banned videos as *The Exorcist* and *Driller Killer*. Their liberal approach did not extend to R18 videos. However, the companies that had produced the videos, Sheptonhurst and Prime Time (Shifhal), went to the independent Video Appeals Committee (VAC). The VAC, applying the 'harm test' set out in the 1984 video-nasties legislation, allowed *Makin' Whoopee!* through. The companies did not stop there. They argued that since *Makin' Whoopee!* had been let through, seven similar videos should also be classified R18. Whittam Smith and Duval said no and refused the certificates. They argued the VAC did not have the legal power to make such a judgment and if allowed to stand it would have implications for all the BBFC's decisions. It was left to the high court to sort out this shambles. In a ruling that left Straw fuming, Mr Justice Hooper said the VAC had acted within its powers and said the seven videos, including *Horny Catbabe*, *Nympho Nurse Nancy* and *Office Tarts*, should be given R18 certificates. The judge said the risk of the videos being viewed by and causing devastating harm to young people was 'on the present evidence insignificant'.

The High Court's rejection of the Board's application for judicial review of the VAC decision enabled the legal purchase of certain hardcore porn films (*R v. Video Appeals Committee of the BBFC ex parte The BBFC* (2000)). The Home Office swiftly responded by issuing a consultation paper on the regulation of R18 videos. This included a proposal for creating new criminal offences under the 1984 Act including 'failing to take reasonable care to prevent a child from watching R18 videos' (Home Office 2000f). There has been a strange silence on the matter since.

Criminal law has not historically been concerned with the possession of poronography for private use, although section 63 of the Criminal Justice and Immigration Act 2008 now criminalises the 'possession of extreme pornographic images'.

### **Section 63 Possession of extreme pornographic images**

- (1) It is an offence for a person to be in possession of an extreme pornographic image.
- (2) An 'extreme pornographic image' is an image which is both -
  - (a) pornographic, and
  - (b) an extreme image.
- (3) An image is 'pornographic' if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.
- (6) An 'extreme image' is an image which -
  - (a) pornographic, and
  - (a) falls within subsection (7), and
  - (b) is grossly offensive, disgusting or otherwise of an obscene character.
- (7) An image falls within this subsection if it portrays, in an explicit and realistic way, any of the following -
  - (a) an act which threatens a person's life,
  - (b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals,
  - (c) an act which involves sexual interference with a human corpse, or
  - (d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive), and a reasonable person looking at the image would think that any such person or animal was real.
- (8) In this section 'image' means -
  - (a) a moving or still image (produced by any means); or
  - (b) data (stored by any means) which is capable of conversion into an image within paragraph (a).

Section 65 provides for a defence where an individual has either a legitimate reason for possession, has not seen the image or cause to suspect it is one of **Extreme Pornography**, or received it without request.

McGlynn and Rackley note that the legislative end product is a weak version of the original proposals and loses sight of the appropriate account of harm here:

Clare McGlynn and Erika Rackley, 'Criminalising Extreme Pornography: a Lost Opportunity' [2009] *Criminal Law Review* 245, 256ff

The Government lacked clarity in its attempts to justify its actions. Three different, and somewhat contradictory, arguments were offered by the Government during the legislative process: the cultural context of sexual violence, arguments of direct harm, and those grounded in disgust. We suggest that as the Government came under pressure, it lost sight of the nature of the harm it was seeking to legislate against and reverted to the weakest possible justification for action, disgust. This has important effects not just in how the legislation is received, but also led to the last-minute introduction of problematic clauses and will affect enforcement and interpretation.

When first introducing the proposals to criminalise the possession of extreme pornography in 2005, the Government appeared keen to emphasise that extreme pornography may contribute to a cultural context in which violent sexual activity is encouraged or legitimated, what we would call a form of 'cultural harm'. Thus, at this stage, it was not making a claim that there was a direct link between viewing extreme pornography and committing acts of sexual violence. Indeed, it was upfront in noting that no 'definite conclusions' could be reached as to the 'likely long term impact of such material on individuals generally'. Rather its argument was that extreme pornography 'may encourage' an interest in 'violent or aberrant sexual activity' and, in so doing, contribute to a climate in which sexual violence is not taken seriously. This was closely aligned with other justifications offered at the time including a concern over images of 'the torture of (mostly female) victims who are tied to some kind of apparatus or restrained in some other ways and stabbed with knives, hooks and other implements' presented in a 'sexually explicit context' as well as 'material contain[ing] sexualized images of women hanging by their necks from meat hooks, some with plastic bags over their heads'. Further, the Government was also keen to 'protect those who participate in the creation of sexual material containing violence, cruelty or degradation, who may be the victim of crime in the making of the material whether or not they notionally or genuinely consent to take part'.

However, in the face of sustained criticisms of its proposals by arch-liberals demanding evidence of physical harm and direct, causal links, the Government retreated from the argument about cultural harm to one of direct harm. Just prior to the Bill being published in the summer of 2007, the Government published *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: a Rapid Evidence Assessment* (REA), which investigated the possible causal connection between viewing extreme pornography and committing acts of sexual violence. This research found 'evidence of some harmful effects from extreme pornography on some who access it' including 'increased risk of developing pro-rape attitudes, beliefs and behaviours and committing sexual offences' which were more significant for 'men predisposed to aggression, or [who] have a history of sexual or other aggression'. The REA, and the material on which it is based its conclusions, has been subject to much academic debate. Indeed, the whole premise of there ever being a research method that could reveal 'direct' links is disputed by those both for and against the regulation of pornography. Nonetheless, the Government did utilise this research on a few



occasions to justify its proposals. To us, what this reveals is the Government's lack of belief in its purpose which should be about changing the cultural and social environment in which sexual violence is marginalised, in which rape conviction rates are at an all time low and in which pornography is becoming (if possible) even more ubiquitous. The Government was succumbing to the arguments of arch-liberals that the only form of harm to justify criminal action is that which, to use Vanessa Munro's phraseology, is concerned with 'specifying a particular injury, typically inflicted upon the body, which can be identified independently of both the context in which it takes place and the understanding of the experience from the point of view of the people involved'. Further, arguments about privacy and free speech can equally be met with arguments about the freedom of expression of women which may be circumscribed in a society which condones extreme pornography and in which their privacy is invaded by unwanted sexual violence or objectification.

Ultimately however the Government fell back on the easy tradition of the conservative-moralistic and disgust-based arguments which consume the OPA. This was nascent in the 2005 consultation, with references to 'aberrant' sexuality, but was arguably not a primary plank of the Government's justifications. Regrettably, however, it came to the fore as the legislative process wore on. When introducing the Bill, Secretary of State for Justice Jack Straw referred to the 'vile material' which the measures were seeking to address. Others speaking in support of the measures referred to 'obscene and disturbing material', 'nasty, horrible and unpleasant stuff', and to material that 'most people find abhorrent'. The Government appealed to exactly those sentiments underpinning the OPA and eschewed any vaguely 'feminist' idea that regulating pornography was part of a programme to achieve equality for women.

#### V.16.c.ii. Beyond the liberal approach?

Debates about the regulation of pornography highlight the tension between liberal conceptions of freedom, particularly freedom of speech, and feminist concerns about the sexual objectification of women. The view that the publication and distribution of pornographic and/or obscene material should be allowed is usually defended on grounds of freedom of speech:

Richard A. Posner, *2006 Unfolding Pornography: Free Speech, Sex and the Fight for Women's Rights* (New York: University Press), pp. 20–21

Taken together, the traditional and feminist anti-pornography, anti-sex crusaders appeal to a broad gamut of the ideological spectrum in both the government and the public. They pose an unprecedented danger to sexual expression, which has always been uniquely vulnerable in the US, as well as to the concept that the First Amendment protects such expression. Moreover, their attacks have been alarmingly successful.

We are now in the midst of a fully fledged 'sex panic', in which seemingly all descriptions of human sexuality are becoming embattled. Right wing senators have attacked National



Endowment for the Arts grants for art whose sexual themes – such as homoeroticism or feminism – are allegedly inconsistent with ‘traditional family values’. At the opposite end of the political spectrum, students and faculty have attacked myriad words and images on campus as purportedly constituting sexual harassment. Any expression about sex is now seen as especially dangerous, and hence especially endangered. The pornophobic feminists have played a very significant role in fomenting this sex panic, especially among liberals and on campuses across the country.

...  
Because the domain of sexual expression, always a difficult terrain, has lately been laced with land mines placed by diverse enemies, it has become more treacherous than ever. Not surprisingly, artists, academics, and others are increasingly deterred from entering and exploring this potentially explosive – but also rich, wonderful, and important – territory.

The Williams Committee on Obscenity and Film Censorship (1979) recommended that material should be restricted if it is offensive to reasonable people by reason of the manner in which it portrays or deals with violence, sexual functions or the genital organs:

A. W. B. Simpson 1983 *Pornography and Politics: The Williams Committee in Retrospect* (Waterlow Publishers), p. 19

The Report of the Williams Committee (1979) characterised the period preceding its appointment as being marked by the retreat of the law, a retreat culminating in the failure of the attempt, in 1976, to prosecute Johannes Hanau, the publisher of *Inside Linda Lovelace*. This book first became generally available in England in 1974, and was a pornographic work particularly concerned with oral and anal sexual intercourse, and with the use of vibrators, contraptions now becoming readily available and selling, one is told, briskly. To an older generation, it seemed quite incredible that such a book could be lawfully sold – the judge who tried the case at the Central Criminal Court whose experience of such matters was obviously limited put it thus:

If this book is not obscene within the definition of the [Obscene Publications Act 1959] it might well be difficult to imagine anything that would fall within that category.

... But perhaps as significant as the retreat of the law has been the discrediting of the law, both in the eyes of those who seek stronger controls over pornography and those who would prefer the controls to be weakened or abolished.

Robertson points out that, before the trial, only a few thousand copies of *Inside Linda Lovelace* had been sold, whereas after the trial the sales leapt to 600,000. This confirms his observation that ‘[t]he history of obscenity provides a rich and comic tapestry about the futility of legal attempts to control sexual imagination’ (Robertson 1993, p. 213). The resultant change in prosecution policy is described by Robertson above. The Williams Committee attempted to satisfy

critics from a variety of directions by tempering its liberal approach with a deft deployment of the public-private distinction. The Committee (whose proposals have not been implemented) endorsed the liberal principle that complete censorship of pornographic material could only be justified if it caused harm. If the only complaint was that the material was offensive, this could, however, be dealt with by restricting its public availability and display. In other words, offensiveness could not justify depriving those who were not offended by pornography from obtaining it. As a result, the Committee proposed a tripartite approach of non-restricted, restricted and prohibited material.

Restrictions would apply to matter (other than the printed word) and to a performance whose unrestricted availability is offensive to reasonable people by reason of the manner in which it portrays violence, cruelty or horror, or sexual, faecal or urinary functions or genital organs (paras. 9.36 and 11.8). Restriction would consist in a ban on the display or sale of such material other than by way of postal delivery or, in the case of performance, other than in premises to which persons under 18 are not admitted and to which access involves passing a prominent warning notice (paras. 9.15 and 11.8). No material or performance would be exempt from these restrictions on the ground of any intrinsic merit it might possess (para. 9.41). Breach of the restrictive scheme would amount to a relatively minor offence, triable by magistrates and punishable, except in cases of wanton persistence, by a fine.

Prohibition would apply to photographs and films whose production appears to the court to have involved the exploitation for sexual purposes of any person where either:

- (a) that person appears to have been under the age of 16; or
- (b) the material gives reason to believe that actual physical harm was inflicted on that person (para. 10.6).

A live performance would be prohibited if:

- (a) it involves actual sexual activity of a kind which would be offensive to reasonable people; or
- (b) it involves the sexual exploitation of any person under the age of 16 (para. 11.15).

It would be an offence to present, organise or take part in a performance which contravenes the prohibition (para. 11.16).

Some critics have questioned whether the Williams Committee went far enough in its analysis. If pornography is seen, as Williams sees it, and as Wolfenden saw prostitution, as essentially a problem of offensiveness, then the type of control proposed will rely on a distinction between private and public display. The Williams proposals accepted that pornography could be harmful, and therefore justifiably banned, only if the models used in its production caused actual physical harm or were under 16. But many commentators now see pornography in a very different light. Two sorts of arguments have been

deployed. The first moves the focus from that of the viewer to that of the viewed. Here the emphasis shifts from seeking to protect those who are the witting or unwitting consumers of pornography to examining its effect on the image of women generally, and on those, mainly women, who participate in its production. This argument seeks to undermine the liberal case for free pornographic expression by pointing out that, to the extent that pornography 'silences' women – for example by changing the meaning of their speech by constantly portraying them as sexualised – non-regulation in fact protects the speech of pornographers at the expense of women's speech. This first argument also asserts the need to understand freedom not merely negatively – as the absence of constraint in the form of regulation – but also positively – as the provision of facilities such as a public culture in which all subjects have the chance not only to speak, but to be heard (Lacey 1993). The second argument turns on the question of harm, and seeks to demonstrate that pornography and the representations which it portrays are a contributory cause not only of the social degradation of women but also of violence against women (see Chapter 18.b.).

Some American feminists have attempted to turn the liberal argument about free expression on its head. Drawing an analogy with hate speech, they have argued that instead of invoking the Constitution to protect pornography, the law should provide a civil remedy against producers of pornography precisely on grounds of its violation of civil rights:

**Catharine MacKinnon 1987 *Feminism Unmodified* (Harvard University Press), pp. 156, 148, 140, 175, 200, 201, 177**

First Amendment logic, like nearly all legal reasoning, has difficulty grasping harm that is not linearly caused in the 'John hit Mary' sense. The idea is that words or pictures can be harmful only if they produce harm in a form that is considered an action. Words work in the province of attitudes, actions in the realm of behaviour. Words cannot constitute harm in themselves – never mind libel, invasion of privacy, blackmail, bribery, conspiracy or most sexual harassment. But which is saying 'kill' to a trained guard dog; a word or an act? Which is its training? How about a sign that reads 'Whites only'? Is that the idea or the practice of segregation? Is a woman raped by an attitude or a behaviour? Which is sexual arousal? ... The trouble with this individuated, atomistic, linear, isolated, tort like – in a word, positivistic – conception of injury is that the way pornography targets and defines women for abuse and discrimination does not work like this. It does hurt individuals, not as individuals in a one-at-a-time sense, but as members of the group 'women' ...

Pornography, in the feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality. In this perspective, pornography is not harmless fantasy or a corrupt and confused misrepresentation of an otherwise natural and healthy sexuality. Along with the rape and prostitution in which it participates, pornography institutionalizes the sexuality of male supremacy, which fuses the erotization [sic] of dominance and submission with the social construction of male and female. Gender is sexual. Pornography



constitutes the meaning of that sexuality. Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way . . .

The First Amendment absolutist position . . . supposes that we all have an equal interest in the marketplace of ideas it supposedly guarantees. This is not the case for women. First of all, the marketplace of ideas is literal: those with the most money can buy the most speech, and women are poor. Second, protecting pornographers, as the First Amendment now does, does not promote the freedom of speech of women . . . Understanding how speech also exists within a substantive system of power relations is a feminist position . . .

Based on the observation and analysis that everything is not just fine, Andrea Dworkin and I considered pornography to be a violation of civil rights – the civil rights of women and children primarily, but of everyone who is hurt by it on the basis of their sex.

At the request of the city of Minneapolis, Andrea Dworkin and I conceived and designed a local human rights ordinance in accordance with our approach to the pornography issue. We define pornography as a practice of sex discrimination, a violation of women's civil rights, the opposite of sexual equality. Its point is to hold those who profit from the benefit from that injury accountable to those who are injured. It means that women's injury – our damage, our pain, our enforced inferiority – should outweigh their pleasures and their profits, or sex equality is meaningless.

We define pornography as the graphic sexually explicit subordination of women through pictures or words that also includes women dehumanized as sexual objects, things, or commodities; enjoying pain or humiliation or rape; being tied up, cut up, mutilated, bruised, or physically hurt; in postures of sexual submission or servility or display; reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture; shown as filthy or inferior; bleeding, bruised or hurt in a context that makes these conditions sexual. Erotica, defined by distinction as not this, might be sexually explicit materials premised on equality. We also provide that the use of men, children, or transsexuals in the place of women is pornography. The definition is substantive in that it is sex-specific, but it covers everyone in a sex-specific way, so is gender neutral in overall design.

There is a buried issue within sex discrimination law about what sex, meaning gender, is. If sex is a difference, social or biological, one looks to see if a challenged practice occurs along the same lines; if it does, or if it is done to both sexes, the practice is not discrimination, not inequality. If, by contrast, sex has been a matter of dominance, the issue is not the gender difference but the difference gender makes. In this more substantive, less abstract approach, the concern with inequality is whether a practice subordinates the basis of sex. The first approach implies that marginal correction is needed; the second requires social change . . . Although it is consonant with both approaches, our anti-pornography statute emerges largely from an analysis of the problem under the second approach . . .

The definition does not include all sexually explicit depictions of the subordination of women. That is not what it says. It says, this which does that: the sexually explicit that subordinates women. To these active terms to capture what the pornography does, the definition adds a list of what it must also contain. This list, from our analysis, is an exhaustive



description of what must be in the pornography for it to do what it does behaviourally. Each item in the definition is supported by experimental, testimonial, social, and clinical evidence...

Our civil rights law allows victims of four activities, and four activities only – coercion, force, assault, and trafficking – to sue civilly those who hurt them through pornography.

To focus what our law is, I will say what it is not. It is not a prior restraint. It does not go to possession. It does not turn on offensiveness. It is not a ban, unless relief for a proven injury is a 'ban' on doing that injury again. Its principal enforcement mechanism is the civil rights commission, although it contains an option for direct access to court as well as de novo judicial review of administrative determinations, to ensure that no case will escape full judicial scrutiny and full due process.

Although the Minneapolis City Council passed the ordinance in 1983 and in 1984, the Mayor twice vetoed it. The Indianapolis City Council also passed the ordinance but it was struck down as unconstitutional on First Amendment grounds by the Indiana State Supreme Court in 1984. That decision was upheld by the US Supreme Court in *American Booksellers Association Inc v. Hudnut* (1986). This affirmed the result of the state decision, but the reasons are open to debate in any subsequent case (MacKinnon 1989, p. 213). Meanwhile, a similar approach has been accepted in Canada – a country in which the idea of pornography as sex discrimination has also received constitutional recognition (Butler 1992; on pornography as hate speech, see further Butler 1997; Matsuda *et al.* 1993):

Geoffrey Robertson 1993 *Freedom, the Individual and the Law* (7th edn., Penguin), pp. 233–4

The feminist case has been accepted to some extent in Canada, where a recent Royal Commission recommended that material depicting violence against women or female submissiveness should be banned. It argued for a distinction between 'good clean pornography' which would be publicly available as 'erotica', and 'bad dirty pornography' which should be punished by heavy prison sentences. This distinction is being applied, with some difficulty and at enormous expense, by an army of customs censors who carefully scan every work of rubbishy US magazines for innuendoes derogatory to women. It remains to be seen how effectively this well-intentioned censorship works in practice – there is something unedifying and prurient in obliging state officials to decide which sexual fantasies are to be 'authorized' and which are to be turned back at the border. Ultimately, perhaps, it makes the mistake of taking pornography too seriously...

Some have taken the 'pornography as harm' thesis a stage further by claiming that it causes rape (Russell 1998). Unsurprisingly, this has been criticised as somewhat crude and simplistic. In particular, it fails to account for the opposing argument that pornography may help reduce sexual crimes. Others have linked

the more liberal stance towards pornography in Japan and Scandinavia with their relatively low rates of sexual crime.

More fundamentally, as the extracts below reveal, some have called for the concept of objectification to be reconsidered, whilst others criticise anti-pornography feminism as unwittingly contributing to the plight of sex workers:

*Margie Kemmerer (Lecturer and Social Justice Activist, University of Victoria, Sept. 2013. Originally published in (1995) 24 Philosophy and Public Affairs 249–91)*

Sexual objectification is a familiar concept. Once a relatively technical term in feminist theory, associated in particular with the work of Catharine MacKinnon and Andrea Dworkin, the word 'objectification' has by now passed into many people's daily lives. It is common to hear it used to criticize advertisements, films, and other presentations and also to express skepticism about the attitudes and intentions of one person or another, or of oneself to someone else. Generally it is used as a pejorative term, connoting a way of speaking, thinking, and acting that the speaker finds morally or socially objectionable, usually, though not always, in the sexual realm. Thus, Catharine MacKinnon writes of pornography, 'Admiration of natural physical beauty becomes objectification. Harmlessness becomes harm.' The portrayal of women 'dehumanized as sexual objects, things, or commodities' is, in fact, the first category of pornographic material made actionable under MacKinnon and Dworkin's proposed Minneapolis ordinance. The same sort of pejorative use is common in ordinary social discussions of people and events.

Feminist thought, moreover, has typically represented men's sexual objectification of women as not a trivial but a central problem in women's lives, and the opposition to it as at the very heart of feminist politics. For Catharine MacKinnon, 'women's intimate experience of sexual objectification . . . is definitive of and synonymous with women's lives as gender female.' It is said to yield an existence in which women 'can grasp self only as thing.' Moreover, this baneful experience is, in MacKinnon's view, unavoidable. In a most striking metaphor, she states that '[a]ll women live in sexual objectification in the way fish live in water' – meaning by this, presumably, not only that objectification surrounds women but also that they have become such that they derive their very nourishment and sustenance from it. But women are not fish, and for MacKinnon objectification is bad because it cuts women off from full self-expression and self-determination from, in effect, their humanity.

But the term 'objectification' can also be used, somewhat confusingly, in a more positive spirit. Indeed, one can find both of these apparently conflicting uses in the writings of some feminist authors, for example, legal theorist Cass Sunstein, who has been generally supportive of MacKinnon's critique of sexuality. Throughout his earlier writings in pornography, Sunstein speaks of the treatment of women as objects for the use and control of men as the central thing that is bad in pornographic representation. On the other hand, in a recent, mostly negative, review of a book by Nadine Strossen defending pornography, Sunstein writes the following:

People's imaginations are unruly... It may be possible to argue, as some people do, that objectification and a form of use are substantial parts of sexual life, or wonderful parts of sexual life, or ineradicable parts of sexual life. Within a context of equality, respect and consent, objectification – not at all an easy concept to define – may not be so troublesome.

To be sure, Sunstein expresses himself very cautiously, speaking only of an argument that might be made and not indicating his own support for such an argument. Nonetheless, to MacKinnon and Dworkin, who have typically represented opposition to objectification as at the heart of feminism, this paragraph might well seem puzzling. They might well wish to ask: What does Sunstein wish to defend? Why should 'objectification and a form of use' ever be seen as 'wonderful' or even as 'ineradicable' parts of sexual life? Wouldn't it always be bad to use a 'someone' as a 'something'? And why should we suppose that it is at all possible to combine objectification with 'equality, respect, and consent'? Isn't this precisely the combination we have shown to be impossible? My hunch, which I shall pursue, is that such confusions can arise because we have not clarified the concept of objectification to ourselves, and that once we do so we will find out that it is not only a slippery but also a multiple concept. Indeed, I shall argue that there are at least seven distinct ways of behaving introduced by the term, none of which implies any of the others, though there are many complex connections among them. Under some specifications, objectification, I shall argue, is always morally problematic. Under other specifications, objectification has features that may be either good or bad, depending on the overall context. (Sunstein was certainly right to emphasize the importance of context, and I shall dwell on that issue.) Some features of objectification, furthermore, I shall argue, may in fact in some circumstances, as Sunstein suggests, be either necessary or even wonderful features of sexual life. Seeing this requires, among other things, seeing how the allegedly impossible combination between (a form of) objectification and 'equality, respect, and consent' might after all be possible.

Lynne Segal and Mary McIntosh 1993 *Sex Exposed: Sexuality and the Pornography Debate* (Rutgers University Press), pp. 9–10

But of course most sex workers are not looking for feminist salvation. On the contrary, they complain bitterly about the stigmatization of women who work in the sex industry by anti-pornography feminists. Speaking for themselves, both individually and collectively, some sex workers have described why they choose the work they do and the type of control they feel it gives them over their lives, as well as their feelings of victimization caused not so much by how they are treated at work as by their fears of arrest, low pay, poor working conditions, inadequate health care and social stigmatization. These are all dangers they see exacerbated by state censorship and criminalization of their work. Sex workers provide an important corrective to feminist debates around pornography by suggesting that it is the privileges of largely white and middle-class anti-pornography feminists, who are not as exploited or oppressed as many other women, which enable them self-centredly to present the issue of women's sexual objectification by men as the source of oppression of all women.



A thoroughgoing critique of pornography does not, however, entail that its legal proscription is either justifiable or wise (Lacey 1993). The argument for legal regulation of pornography is accordingly a matter of deep controversy even among feminists, and has been criticised both for overplaying the power of pornography and for reproducing the very assumptions about gender to which it objects:

*Women Cannot Help the Industry: Women, Harassment, Pornography and Sexual Harassment (Routledge), pp. 95-6, 99*

The pornography debate portrays its contestants within sex and gender stereotypes, its contending figures drawn in the broad outlines of a Harlequin romance. Rapacious men with libidos of mythological proportions heartlessly brutalize innocent women as the hopeless victims of their lust, while the anti-pornography feminist poses herself as the sacrificial victim, the barrier to a tide of male sexuality that threatens violence. Bold freedom fighters ride out, drawing their lances against the oppressive feminists, the purported enemy of these brave warriors.

Meanwhile, there thrives an eight to thirteen billion dollar a year industry, churning out hundreds of low-budget videos every month. If pornography was once a powerful political tool, produced in secret places by revolutionary groups, it is now also big business.

How can a feminist approach to pornography that challenges rather than replicates gender stereotypes be developed? How can we both recognize the nitty-gritty of the industry and the suffering it can impose upon its workers at the same time that we affirm the need for women to freely explore their own sexuality? The first step in answering these questions is to insist on an important distinction. Feminists need to separate political action from legal action in the sphere of pornography. I advocate an alliance with two forms of representational politics currently being undertaken by women pornographers and porn workers that are challenging the terms of production in the mainstream heterosexual porn industry. Political action, not legal action, should be the main mode of intervention in the production of pornography. In accordance with this distinction between the political and the legal a second distinction must be made, one which can help us clarify what kind of legal action should be taken - and at what point it should be taken - in the area of pornography.

We need to separate legal action to be taken in the production of pornography from action addressed specifically to the distribution of pornography. I insist on these distinctions primarily to serve the feminist purpose of treating women, including porn workers, as selves individuated enough to have undertaken the project of becoming persons. To treat women in the industry as reducible to hapless victims unworthy of solidarity refuses them that basic respect.

The alternative to such solidarity has been an attempt to correct for the abuse in the production of pornography through indirect, primarily legal means that focus on curtailing the distribution of pornography. This approach treats the women in the industry as if they were incapable of asserting their own personhood and, in this way, assumes that others need to act on their behalf. The wealthy woman as moral rescuer has a long history in both the United States and England. The prostitute, in particular, has always been a favorite



candidate for rescue. By remaining 'other', the epitome of victimization, she stands in for the degradation of all women. Her life is then reduced to that figuration of her. Now, porn workers have become the ultimate figuration of the victim who needs to be rescued. But this is certainly not how most porn workers see themselves . . .

I am suspicious of overreliance on law in the regulation of pornography for two specifically feminist reasons. The first is that we must not entrench stereotypes of femininity as the basis of discrimination law. We do not, in other words, want law to endorse the culturally encoded femininity that, in the work of Catharine MacKinnon, reduces woman to the 'fuckee', or the victim, and demands her protection as such. Thus I reject MacKinnon and Andrea Dworkin's civil rights ordinance as an appropriate legal means to regulate pornography.

Second, law is, at least in part, a force for accommodation to current social norms, even if it also provides us with a critical edge in its normative concepts such as equality. But feminism expresses an aspiration to struggle beyond accommodation, beyond those symbolic forms that have been deeply inscribed in and by the structures of gender. Feminism, particularly in the complex area of sexuality, demands that we live with the paradox that we are trying to break the bonds of the meanings that have made us who we are as women.

Cornell's conclusion touches upon a general question about the use of criminal law reform: can a system which is marked by certain structures of power itself be used to reshape those structures? This general question is highly relevant to the issues discussed in the next chapter.

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## Criminalising Healthcare Choices

Criminal laws have long had something significant to say about regulating the maternal-fetal conflict. Principally, this has been expressed through provisions in the Offences Against the Person Act 1858 and the Abortion Act 1967. However, scientific and technological advances in the field of reproductive medicine, coupled with shifting expectations and moral attitudes, have prompted the creation of various criminal offences designed to prevent science taking us out of our ethical comfort zone. This takes place at a time when the criminal justice system and healthcare are no longer such strange bedfellows (see Erin and Ost 2007). In this chapter we start by considering the state of the abortion debate today, before moving on to consider criminal law's rather ambivalent attitude to surrogacy and its more clear moral misgivings about cloning. We end by considering the compromises criminal law makes in relation to individual requests for assistance in ending their lives.

### V.17.a. Reproductive crimes?

#### V.17.a.i. Contraception and abortion

Female sexuality is constructed and regulated through a wide variety of social practices. Significant among these are medical practice and laws on various aspects of reproduction: contraception, abortion, sterilisation and surrogacy arrangements. The use of criminal law as opposed to other forms of regulation appears to be unpredictable, if not arbitrary. Abortion is the clearest and historically best established example of control through criminal powers. Historical evidence shows that abortion has existed in practically all societies (Petchesky 1986). Notwithstanding its gradual (and partial) legalisation in the late twentieth century (see Lewis 1984, below), the dangers of poorly carried out abortions continue to provide a rationale for regulation. Regulatory power is divided, however, between law and medicine: the Abortion Act 1967 established a certification scheme exclusively within the control of doctors.

Petchesky, in the first extract below, places the abortion debate firmly in the context of the broader struggle by women for control of their bodies,

and distinguishes the biological from the social and economic imperatives of reproduction:

*Control Over One's Body: The Autonomy and Control of Women* (Vetter), pp. 3–6

The principle that grounds women's reproductive freedom in a 'right to bodily self-determination', or 'control over one's body', has three distinct but related bases: liberalism, neo-Marxism, and biological contingency. Its liberal roots may be traced to the Puritan revolution in seventeenth-century England. In that period, the Leveller idea of a 'property in one's own person' was linked explicitly to nature and paralleled the idea of a 'natural right' to property in goods . . . A person, to be a person, must have control over himself or herself, in body as well as in mind. This Leveller notion of individual selfhood, although phrased in masculine terms, had specific applications to the conditions of women in the seventeenth century: the enactment of the Puritan idea of marriage as a contract, restrictions against wife-beating, and the liberalization of divorce. It had other applications that affected men and women: . . . above all, a resistance to the idea of selling, or alienating, one's body to another through wage labour. Thus, the original notion of 'property in one's person' was not only an assertion of individualism in an abstract sense but had a particular radical edge that rejected the commoditization of bodies through an emergent labour market. The Levellers were saying: My body is not property; it is not transferable; it belongs only to me.

While the liberal origins of the 'bodily integrity' principle are clear, its radical implications should not be forgotten . . . Control over one's body is an essential part of being an individual with needs and rights, a concept that is the most powerful legacy of the liberal political tradition . . .

A certain idea of individuality is also not antithetical to a Marxist tradition, which distinguishes between the idea of individual human beings as historically determined, concrete, and particular in their needs and the ideology of 'individualism' (i.e. 'the individual' conceived as isolated, atomized, exclusive in his possessions, disconnected from larger social fabrics) . . .

Similarly Marcuse argues in favour of restoring a sense of individual 'happiness' to a revolutionary ethic ('general happiness apart from the happiness of individuals is a meaningless phrase') Through his analysis of contemporary forms of domination and repression that alienate individuals from a sense of connectedness with their own bodies and thus with the physical and social world, Marcuse arrives at a hedonism containing a liberatory element. That element is a sense of 'complete immediacy', of sensuality, which is a necessary precondition for the 'development of personality' and the participation of individuals in social life. The link between eroticism and politics is a 'receptivity that is open and that opens itself [to experience]'. Control over one's body is a fundamental aspect of this immediacy, this 'receptivity', a requirement of being a person and engaging in conscious activity. Understood thus, it is a principle of radical ethics that should never be abandoned.

The direct connection between 'control over one's body' and feminist claims regarding women's control over reproduction seemed obvious to early birth control advocates . . . This



connection is as real today. Because pregnancies occur in women's bodies, the continued possibility of an 'unwanted' pregnancy affects women in a very specific sense, not only as potential bearers of fetuses, but also in their capacity to enjoy sexuality and maintain their health. A woman's right to decide on abortion when her health and her sexual self-determination are at stake is 'nearly allied to her right to be'.

Reproduction affects women as women; it transcends class divisions and penetrates everything – work, political and community involvements, sexuality, creativity, dreams . . . As long as women's bodies remain the medium for pregnancies, the connection between women's reproductive freedom and control over their bodies represents not only a moral and political claim but also, on some level, a material necessity . . .

[W]omen's control over their bodies is not like preindustrial workers' control over their tools; it cannot be wrested away through changes in technology or legal prohibitions and repression – which is why no modern society has succeeded for long in outlawing abortion or birth control, only in driving it 'underground'.

It is important, however, to keep in mind that woman's reproductive situation is never the result of biology alone, but of biology mediated by social and cultural organization. That is, it is not inevitable that women, and not men, should bear the main consequences of unintended pregnancy and thus that their sexual expression be inhibited by it. Rather, it is the result of the socially ascribed primacy of motherhood in women's lives . . .

The principle of 'control over our bodies', then, has a material as well as a moral and a political basis. The 'liberal', the 'radical' or 'neo Marxist', and the 'biological' elements of this principle should not be seen as alternatives to one another but as different levels of meaning that give the principle its force and complexity. Sorting out these levels should make it easier for us to distinguish between situations when we are describing 'control over our bodies' as a material fact, when we are asserting it as a right, and when we are defining it as part of a larger set of socially determined human needs.

In similar vein, Cornell traces the relationship between the right to abortion and women's status as full legal subjects:

*Drucilla Cornell 1995 The Imaginary Domain: Abortion, Pornography and Sexual Harassment (Routledge), p. 53*

Abortion should be protected as a right necessary for the establishment of the minimum conditions of individuation for women, which must include the protection of the individual's projection of bodily integrity. I stress the word 'individual' here to reiterate . . . that what the feminine within sexual difference 'is' has been defined by the masculine imaginary, and then resymbolized in law so that women are not representable as fully individuated beings with their own imaginary. The move from the objectification of the feminine within sexual difference as a 'what', as a container for a fetus in the case of abortion, and to a 'who', a sexual being with her own imaginary, is precisely what my own re-articulation of the right to abortion seeks to effectuate.

The right to abortion should not be understood as the right to choose an abortion, but as the right to realize the legitimacy of the individual woman's projections of her own bodily integrity, consistent with her imagination of herself at the time that she chooses to terminate her pregnancy...

As we imagine women re-imagining themselves, our captivity by a discourse that has told us what we are as women is also challenged. Recognizing the right to abortion challenges the discourse which legitimizes our social status as objects to be manipulated, since it insists that it is women who must be empowered to define and re-imagine what maternity means to them.

The idea that abortion is best thought of in terms of individual rights has, however, been called into question. Rights discourse can equally be invoked in relation to the foetus, hence constructing a 'competitive' relation between woman and foetus. Furthermore, cases in both England and Scotland, in which men have attempted to persuade courts to grant injunctions preventing their partners from having abortions, illustrate the fact that rights discourse is potentially capable of accommodating the interests of fathers, too (see, for example, *Kelly v. Kelly* (1997)). The paternal interest argument did not ultimately prevail, but the possibility of a legal change in this direction cannot be ruled out. In the following extract, De Gama explores the way in which a rights analysis may set up competitive and ultimately indeterminate arguments, and draws analogies between legal and medical/scientific regimes of regulation:

*Catherine De Gama: 'A Brave New World? Rights Discourse and the Politics of Reproductive Autonomy' (1993) 10 Journal of Law and Society 311-16.*

New medico-legal technologies, from in vitro fertilisation to ultrasound, are redrawing the boundaries between the biological and the social. As such, they are located at the centre of struggles over sexuality and gender relations. Medicine has long been used to subject women to a centralized, panoptic mode of containment reducing them to the status of objects of reproduction. However, in recent years, an anti-feminist New Right ideology emerging in Europe and North America has sought to construct rights discourses within law which redefine the interests of fetuses and fathers in the reproductive process. Attempts have been made to attribute to the foetus the status of personhood and patient, thereby asserting control over the bodies and lives of women. Similarly, the quest for genetic parenthood which informs and underpins all new reproductive technologies has found expression in an extension of the legal concept of paternity. In this context, it is hardly surprising that the practice of surrogacy and the possibility of 'Virgin births' have attracted great disapprobation. In a patriarchal, phallogocentric society the resistance to autonomous motherhood reveals most graphically the problematic, politicized nature of reproduction.

Headlines proclaimed the birth fourteen years ago of Louise Brown, the world's first test-tube baby, as a 'miracle of science'. In the years that have followed terms such as in

vitro fertilisation, egg donation, and surrogacy have become incorporated into our vocabularies. The elaboration of new reproductive technologies cannot but evoke the apocalyptic nightmare of Aldous Huxley's *Brave New World*. First published in 1932, his fable remains one of the most enduring of anti-utopias in that its chilling prophecy retains a capacity to prefigure current concerns and crises. Huxley offers a vision of a new world order secured by a sophisticated technological apparatus of discipline and control. Mass production and scientific management are Huxley's metaphors for debasement and dehumanization. The logic of Fordism is, of course, applied not only to production but also to reproduction. Embryos are gestated in bottles, decanted in hatcheries, and carried on conveyor belts to conditioning centres where hypnosis and behaviourism are used to ascribe to them the fixed identities required by a rigid, hierarchical, scientific/biological caste system. In the brave new panoptic world, science and technology are employed to create docile minds and bodies. Order is bought at the price of a de-humanized, mechanical existence in which diversity and creativity are unthinkable and all emotion is reified and conventionalized.

*Brave New World* throws out a challenge to science's claim to rationality, objectivity and moral neutrality remarkably similar to feminism's challenge to law and legal ideology. Huxley questions science's triumphant status as the 'father of progress'. He recognizes the relativity of science's claim to truth and, as part of a politics embracing feminism, ecology, and much more besides, scorns its emancipatory potential. Interestingly, his concerns have much in common with feminist critiques of the Enlightenment which start with the insight that science has from its very beginnings embraced a highly partial view of objectivity. Contesting the assumption that science is committed to the ungendered, objective pursuit of the truth, feminism has sought to distinguish the parochial from the universal...

The same critique of objectivity [applied by feminism to science] has been applied to law. Its shiny ideological adjuncts of equality, neutrality, and universalism are just as vulnerable to charges of epistemological oppression. With its emphasis on rules, rights, and their enforcement, law fosters and privileges a historically and culturally specific form of ordering the world. Rights discourse, its ideological underpinning, speaks of an individualizing, competitive system of values in which the individual is abstracted from her or his social context. Connectedness, mutuality, and reciprocity are systematically effaced. The detached, mechanistic, deterministic view of the world, which is reflected, reinforced, and reproduced by both law and science, in the words of Shulamith Firestone, 'duplicates and exaggerates the catalogue of male vices' (*The Dialectic of Sex* 1970). Both discourses are of crucial importance to feminism because they are instruments employed to silence and disempower. By denying the experience of their subject, law and science deny and degrade women's experiences.

This is symbolically revealed in the politics of 'foetal rights'. Law and science are yoked together to produce a chillingly Hobbesian representation of man as isolated, atomistic and egotistical. The technology of ultrasound, for example, allows a visual image of the foetus to be presented which appears free-floating and unconnected. As such, it accords it both the appearance of an objective reality and obscures the contingent nature of its existence. In this reification of pre-natal life, the status of the pregnant woman is reduced to that of reproductive object while the foetus is presented as the personification of



abstract individualism. Pro-natalists have juxtaposed images of the rights-bearing foetus with representations of conflict, competition, and distrust appropriate to the battlefield or marketplace. Keyserlingk, for example, seeks to persuade us that 'unless armed with juridical personality as the basis of his right to care and protection', the foetus would be 'unable to compete on a more or less equal basis with other parties with whom his needs and rights may be in conflict' because they would be legal persons and 'he [the foetus] would remain more or less at the mercy of their ethics, whims or compassion'.

A similar rights discourse, buttressed by the institutions and ideologies of science, has been appropriated by a coalition of right-wing doctors and lawyers in the United States to promote campaigns for curbs on abortion and restrictions on the activities of all pregnant women. 'Foetal rights', backed by sanction of criminal and civil penalties for 'foetal abuse', have become an emotive rallying cry. Pregnant women in the United States have been compulsorily hospitalised, subjected to non-consensual surgical interventions and even jailed for disregarding medical advice. Most prominent in this context is the issue of abortion. Mass protests outside clinics, challenges mounted in the Supreme Court, and the drafting of new restrictive legislation all too often evidence an increasing concern for the rights of the foetus at the expense of women's physical and emotional integrity.

In terms of the foetus, judges have resisted recognition of its rights until its birth and separation from its mother (*Paton v. British Pregnancy Advisory Service Trustees* (1979)). In that case a husband unsuccessfully sought an injunction to stop his wife from having an abortion without his consent. But is this settled view challenged by the seemingly clear terms of Article 2 of the ECHR and its protection of 'everyone's right to life'? In *Vo v. France* (2005), which arose following the death of a foetus caused by medical error rather than its mother's request for an abortion, the Strasbourg court struggled with how far Article 2 protects the life of the unborn foetus. O'Donovan argues that the court misplaced its focus on abortion rather than the real harm to reproductive freedom.

Excerpt from O'Donovan, 'Taking a neutral stance on the legal protection of the foetus' [2007] *Medical Law Review* 111

The Court observed that at European level there is no consensus on the nature of status of the embryo and/or fetus. The Oviedo Convention on Human Rights and Biomedicine gives no definition of 'everyone' and the explanatory report shows that in the absence of unanimity on the definition it was agreed to leave this to domestic law. The Court concluded 'it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for purposes of the Article of the Convention ("personne" in the French text)'. In its desire to avoid making a morally contentious ruling on the scope of a fetal right to life, the Court adopted a 'neutral stance' and devolved the



determination of any such right to national authorities, by way of the margin of appreciation doctrine:

the issue of when the right to life begins comes within the margin of appreciation which the court generally considers that states should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a 'living instrument which must be interpreted in the light of present-day conditions' . . . The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the contracting states themselves, in France in particular, where it is the subject of debate (see para. 83 below) and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life.

Effectively, the decision on the applicability of Article 2 to fetal life was left in abeyance. The remainder of Mrs Vo's complaint was determined by the Court 'even assuming' that the Article applied to her fetus. The majority in the Court therefore reached no conclusion either way on the question of whether this particular fetus, or indeed any other fetus, had a right to life protected by Article 2 of the European Convention. Notwithstanding the adoption of this 'neutral stance' by the Court, there was considerable disagreement amongst the majority of 14 as to whether Article 2 applied to Mrs Vo's fetus. Five judges, led by Judge Rozakis, objected to the neutral stance in the judgement. Their view that Article 2 was inapplicable in the present case was premised on two distinct arguments: first, the unborn life is considered worthy of legal protection distinct in quality and scope from than [sic] that afforded to the child after birth, and therefore Article 2 is inapplicable; second, the majority's consideration of the procedural guarantees afforded by Article 2 to the present case was unnecessary and irrelevant if the fetus did not have protection under Article 2. By contrast, Judge Costa of France, with whom Judge Traja agreed, found that Article 2 applied but had not been violated. So the majority of 14 comprised seven who thought it unnecessary to determine whether Article 2 is applicable, five who disagreed saying Article 2 was inapplicable and two who considered Article 2 applicable but not violated . . .

Perhaps the right to found a family under Article 12 should have been the basis of the complaint, thus, making the mother's autonomy and freedom to procreate the focus of legal reasoning. If the woman's rights and interests limit those of the fetus, as acknowledged by the Court, why are her rights not central when she intends to have the child? Disentangling the rights of the fetus from those of the mother is difficult. They are one person and yet not one. In a wanted pregnancy the fetus is protected by the mother through her body. Interference by a third party against the will of the mother is a violation of her bodily integrity. In failing to distinguish the position of the mother from that of third parties, and in its lack of clarity about the relationship of a mother with her wanted fetus, the Court does less than justice to Mrs Vo.

The relationship between a mother and her fetus does pose problems for legal systems, which look only to the individual and therefore cannot cope with 'one but not one, but two'. Whilst admitting that the life of the mother is indissociable from that of the unborn child and that the mother represents the child's interests, the Court seems unable to comprehend that the fetus is "'of her and is hers more than anyone's" because it is, more than anyone

else's, her creation and her responsibility; it is alive because *she* made it come alive'. The practical point is that there was a third-party interference with Mrs Vo's autonomy and bodily integrity, with her life plans, with her relationship with her unborn child. To say that this is a question of the child's rights only and that it must be born alive in order to vindicate its rights, is inadequate.

It is surprising how few philosophical accounts of abortion are by women (for exceptions, see Thompson 1971; Whitbeck 1983). Whitbeck suggests that this may be because women find it difficult to defend something which at best is only ever what she calls a 'grim option': no one wants abortion for its own sake, and if a woman opts for abortion it is because the other choices she has are considered to be worse. Also, as Petchesky (1986) notes, arguments for a right to choose abortion take place against a backdrop of socially ascribed roles and responsibilities in relation to motherhood. These arguments are vividly put by Rich:

*Women and the Limits of Womanhood: Motherhood as Oppression and Individual Abortion*, pp. 273-4

No free woman, with 100 percent effective, non-harmful, birth control readily available, would 'choose' abortion. At present, it is certainly likely that a woman can - through many causes - become so demoralized as to use abortion as a form of violence against the ecology of guilt and victimization in which so many women grow up. In a society where women entered sexual intercourse willingly, where adequate contraception was a genuine social priority, there would be no 'abortion issue'. And in such a society there would be a vast diminishment of female self-hatred - a psychic source of many unwanted pregnancies.

Abortion is violence: a deep desperate violence inflicted by a woman upon, first of all, herself. It is the offspring, and will continue to be the accuser, of a more pervasive and prevalent violence, the violence of rapism.

We turn now to consider the laws relating to the destruction of a foetus, based on the Offences Against the Person Act 1861, the Infant Life (Preservation) Act 1929 and the Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990). It is interesting to speculate on the messages which these laws bear. What do they tell us about the status of the foetus, or about women and men as reproductive beings?

*Offences Against the Person Act 1861, s. 58*

Every woman being with child who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and, whosoever, with

intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony.

The maximum penalty is life imprisonment.

### Offences Against the Person Act 1861, s. 59

Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour.

The maximum penalty is five years' imprisonment.

In 2002, the Society for the Protection of Unborn Children (SPUC) sought to argue (by way of judicial review) that the prescription, supply and use of the morning-after pill was contrary to sections 58 and 59 of the 1861 Act. Although Mr Justice Munby had little legal difficulty dismissing the application, reasoning that since the pill prevented implantation there could be no (mis)carriage, the wider implications of the case led to a detailed history of abortion law, and afforded a good opportunity for the 'always speaking' approach to statutory interpretation (see also *Ireland/Burstow* (1997); Chapter 8.b.i.):

*R (John Stanton on Behalf of the Society for the Protection of Unborn Children) v. The Secretary of State for Health* [2002] FLR 146

**Munby J:** A poet famously suggested that 'Sexual intercourse began / In nineteen sixty-three'. That caustic comment, which Larkin mordantly related to what he called 'the end of the Chatterley ban', conceals an important truth. The simple fact is that, as in so many other matters sexual, so far as concerns contraception, in both its technological and its social aspects, the modern world – our world – is a world which has come into being during the lifetime of many of us alive today. It is a development of the 1960s – whether 1963, the poet's *Annus Mirabilis*, or 1967, Parliament's year of activity, matters not for present purposes.

But that does not mean that a judge can simply re-write the 1861 Act in the light of all these medical, social and cultural changes. On the contrary, the very fact that the world of 1861 is almost irrecoverable to us – 'there lies a gulf of mystery which the prose of the historian will never adequately bridge. They cannot come to us, and our imagination can but feebly penetrate to them' – makes it all the more important, as it seems to me, to resolve the issue at hand not by conducting the debate either on some assumption, almost certainly erroneous, as to how the wider debate was being conducted in 1861, or in the

modern terms in which it is currently so often pursued, but rather, strictly and faithfully, within the narrow parameters of the debate which is enjoined on us by the language in which in 1861 Parliament chose to legislate.

I must explain in a moment why in my judgment SPUC's case is wrong both in fact and in law. In summary, however, SPUC is wrong in law in seeking to tie the meaning of the word 'miscarriage' to the sense in which it was understood in 1861 (whatever that was) and in the limited effect it allows to the principle of updating construction. There is nothing in the 1861 Act to demonstrate a Parliamentary intention to protect 'life' from the point of fertilisation. The construction for which the defendants contend does not involve any alteration in the conceptual reach of the 1861 Act. Parliament's intention in 1861 was to criminalise the procuring of 'miscarriages'. The content of that Parliamentary intention has, as a matter of law, to be assessed by reference to current – not nineteenth century – understanding of what the word means.

There are, in my judgment, a number of separate reasons why SPUC is wrong and why, as I have concluded,

- (i) the word 'miscarriage' when used in sections 58 and 59 of the 1861 Act presupposes that the fertilised ovum has become implanted in the endometrium of the uterus; and
- (ii) accordingly there is nothing in sections 58 and 59 of the Act which in any way criminalises, makes unlawful, or otherwise prohibits or inhibits the prescription, supply, administration or use of the pill, the mini-pill or the morning-after pill (or, so far as the evidence before me bears on this aspect of the case, of IUDs).

Although no one sought to raise human rights arguments in relation to the right to life of the fertilised ovum, Munby J considered that the use of contraception fell within the respect for private and family life under Article 8:

No one has addressed me on any aspect of either the Human Rights Act 1998 or the European Convention for the Protection of Human Rights and Fundamental Freedoms. Thus Mr Gordon has not sought to argue that the fertilised ovum has a right to life under Article 2: cf *Paton v. United Kingdom* (1981) 3 EHRR 408, *H v. Norway* (1992) 73 DR 155, *Open Door Counselling and Dublin Well Woman v. Ireland* (1992) 15 EHRR 244. Nor, on the other hand did Mr Parker or any of the others seek to argue that the right to respect for private and family life protected by Article 8 extends to confer the kind of privacy interest protected right to distribute and use contraceptives...

...  
Decisions on such intensely private and personal matters as whether or not to use contraceptives, or particular types of contraceptives, are surely matters which ought to be left to the free choice of the individual. And, whilst acknowledging that I have had no argument on the point, I cannot help thinking that personal choice in matters of contraception is part of that 'respect for private and family life' protected by Article 8 of the Convention.



**Infant Life (Preservation) Act 1929, s. 1**

- (1) . . . any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable [to life imprisonment]: Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.
- (2) For the purposes of this Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive.

Section 2 provides that on a charge of murder or manslaughter of a child, or of infanticide, or an offence under section 58 of the Offences Against the Person Act 1861, the jury can give an alternative verdict of child destruction.

**Abortion Act 1967, s. 1 [as amended by the Human Fertilisation and Embryology Act 1990, s. 37]**

- (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion formed in good faith –
  - (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or to any existing children of her family; or
  - (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
  - (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
  - (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

The 1990 Act also amended section 5, uncoupling the Abortion Act from the Infant Life Preservation Act by providing that no offence under the 1929 Act 'shall be committed by a registered medical practitioner who terminates a pregnancy in accordance with the provisions of the 1967 Act'. Until 1990, the relationship between child destruction under the 1929 Act and the Abortion Act had been the subject of much debate. In *C v. S* (1987) the Court of Appeal held that a child was not capable of being born alive unless it had the capacity to breathe. This supported the view that the 1929 Act is concerned with viability rather than with any fleeting sign of life (see Tunkel 1985). Under the amended Act, there remains uncertainty as to the time limits to be applied in

cases other than those falling under subsection (a). The 1929 Act now covers non-consensual killing other than in the course of an abortion. For example, in 1987 a man who had attacked his girlfriend and caused the death of the foetus she was carrying was convicted of child destruction and sentenced to life imprisonment (*The Guardian*, 26 September 1987). If the foetus had been born alive and subsequently died, the defendant would have been liable for murder or manslaughter. A threat to kill a foetus is not, however, covered by section 16 of the Offences Against the Person Act 1861 (see *Tait* (1989)). The reasoning given in that case illustrates well the confusion which arises when issues relating to the protection of both the interests of the foetus and those of the pregnant woman are insufficiently articulated. The interests of the woman may, as in *Tait*, be concerned with protecting her foetus or, as in abortion, be concerned with her ability to control her reproduction. The legality of the practice in fertility clinics of selectively reducing multiple foetuses and the problematic issues in relation to the general regulation of the health of the foetus are discussed by Price (1988) and by Grubb (1991). For discussion of liability for deaths caused by pre-natal injuries and of the (non-)status of the foetus as an object of homicide, see Chapter 20.e. and *A-G's Reference (No 3 of 1994)* (1997). The following extracts explain the background to the 1967 Act and note the control it invests in the medical profession.

*Jeffery, Thomas, 1987, Beyond Criminal Medical Power and Abortion Law (Oxford: pp. 11-12)*

The Abortion Act is fundamentally underpinned by the idea that reproduction is an area for medical control and expertise and that the doctor is the most appropriate expert to deal with abortion. This reflects not merely a belief in his technical expertise, but also the notion that the doctor is in the best position to observe the woman, assess her needs and interests, and take charge of her situation. The doctor is here seen as taking on many of the pastoral functions which have in previous times been associated with the priest: he is guardian of the social body and a bastion of moral values.

... The casting of abortion as a matter for medicine has had a particular effect in the way abortion has come to be viewed. Science – and especially medicine – has a special role in justifying a particular type of power, and making its exercise seem logical and neutral. Scientific knowledges can legitimate and depoliticise, providing grounds for making what might otherwise be seen as an inherently political decision seem neutral or commonsensical.

Reproduction is the most important area where doctors operate control over women's lives. Birth, an event long controlled by women with help from friends, older women and midwives, has gradually fallen under hegemonic medical control... Whatever benefits the medicalisation of reproduction may have brought in the way of safety (and these are not undisputed), it has also led to considerable erosion of women's autonomy. As reproduction has become more and more technologised, reproductive knowledge has become increasingly privatised, available only to the medically trained. This has provided the rationale for all sorts of reproductive decisions traditionally made by women (regarding pregnancy, contraception, infertility and abortion) to be made instead by – or at best in conjunction with – doctors.

Ellie Lee 2007 'The Abortion Debate Today' in Harney and Biggs (eds.) *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge: Cavendish), pp. 243-4

Medicalisation, in the current abortion debate seems to be a process driven in part at least by a reaction against the idea of choice. What should be made of this development? It can certainly be argued that there are problems with its proponents' consequent lack of accuracy and objectivity regarding medical developments. It does not help the abortion debate when the truth of what science suggests and what medical advance has generated is misrepresented. Other criticisms of this hostility to the idea of choice can also be made.

Taking claims made by some feminist commentators first, while presented in the language of medicine, it is their personal experience of a wanted pregnancy that animates their case. It was Naomi Wolf's own experience of being pregnant and seeing the foetus on a screen during an ultrasound scan, for example, that made her reject her previous support for choice. Allison Pearson similarly argues that it is the experience of women like her, who 'have modified our ideas about abortion after having our own babies', that means she had a case that there should be a change to the law. Julia Black's documentary is tellingly entitled *My Foetus*, its making being motivated by her own experience of pregnancy. Feminists making claims against late abortion therefore do so on the basis of their own feelings and experiences of wanted pregnancy.

This can be put another way: these claims are based upon a failure to recognize the experience and perceptions of other women whose pregnancy is unwanted, or where the pregnancy is wanted but foetal abnormality is diagnosed . . . It is this deficit in understanding that also accounts for [the] claim that it is a problem for doctors to both try to save the lives of premature babies and perform late abortions.

There are women with wanted pregnancies whose babies are born early. There are women with unwanted pregnancies or for whom there has been a diagnosis of foetal abnormality seeking abortion. These different groups of women have varying needs, but why should medicine only strive to address those of one group? It can be considered moral and right for medical practice to fight as hard as it can to save babies born early to women from the first group and also help women who do not want to be pregnant terminate pregnancies.

An approach that cannot see this point demonstrates a very troubling inability to take seriously the concept of individual autonomy, this being apparently overwhelmed by self-absorbed emotionalism born of the experience of motherhood. In effect, what is being said on the basis of this experience is that the perceptions of those women who seek abortion count for little. Their feelings about the prospect of continuing a pregnancy they feel very negatively towards, of giving birth and becoming a mother should be ignored, indeed to the point that the woman concerned should be prosecuted under the criminal law if she acted upon her own feelings about her pregnancy and sought to terminate it.

Particular controversy is provoked by the disability ground for abortion. This was illustrated in 2003 when Joanna Jepson sought to challenge a decision by



West Murcia Police Constabulary not to investigate doctors who aborted a 28-week foetus with bilateral cleft lip and palate. Whilst successful in obtaining leave for judicial review, the CPS decided against prosecuting (*Jepson v. The Chief Constable of West Mercia Police Constabulary* (2003)). The development of pre-implantation genetic diagnosis, whereby prospective parents seek to screen embryos for genetic diseases has been sanctioned in the 'saviour sibling' situation (*Quintavalle v HFEA* (2005)), yet continues to raise difficult questions. In the following extract, Scott reflects on the role of the regulatory (as opposed to rights based) abortion regime in England and Wales.

MORAMUNDI SCOTT, 'The Uncertain Status of Reproductive Autonomy in Preimplantation Genetic Diagnosis and Selective Abortion' (2005) 13 *Medical Law Review* 291-327, at 318ff.

Whether the reasons for wishing to exercise reproductive autonomy in any given case need to be judged by others is in fact a question which lies at the divide between a regulatory and a rights-based system. Even if we accept that the decision to abort should require some moral justification – since the death of the fetus is entailed – legally it is because abortion has been criminalised in England that third parties (doctors, in their own defence) must decide whether that justification is met. The fact that we do not have a rights-based abortion law reflects the pragmatic development of the law in a country which, before the Human Rights Act 1998, did not deeply engage with rights language. So far this method of regulation has helped to depoliticise the abortion issue to some degree, unlike in the United States. Regulating PGD through broad alignment with the disability ground of the Abortion Act likewise helps to preempt possible disputes about its legitimate extent. Of course, PGD can only accompany IVF, itself heavily regulated for a variety of reasons beyond my current concerns. To feel comfortable with a rights-based – rather than a regulatory – system (albeit most likely time-limited to some degree in the case of abortion) would entail trusting that the relevant rights would be exercised with moral reflection. If we were ever to consider moving to such a system for abortion in particular, there would likely be concern that the reproductive autonomy protected by a legal right would be abused. Yet the *Jepson* case illustrates fears also about abuse of the current regulatory system under the Abortion Act. The case exposes the uncertain place of a woman's autonomy in a predominantly regulated, rather than rights-based, system and points to the need for clarification of the place and value of a woman's (and her partner's) reasons: in relation to fetal impairment – her perception both of risk and seriousness. As we have seen, these uncertainties are present also in the recommendations and associated guidance governing the provision of PGD. How should these be resolved?

...

[T]he difficulty now is to define 'serious'. Beyond the extremes of conditions such as Tay-Sachs or Leuchs Nyan syndrome there is a large range of 'mid-spectrum' conditions whose seriousness is the subject of disagreement between parents, health professionals and those mindful of the interests of those with disabilities. This has been noted by the



Hastings Center working party which looked at these issues. In the United Kingdom it has also been noted by the HGC: we saw earlier that it has declared the task of defining 'serious' with reference to PGD 'impossible'. An important distinction which has a bearing on the meaning of 'serious' should also be recalled. As noted earlier in relation to the 'welfare of the child' section of the HFE Act, it is sometimes argued that it is only if a child could not have a reasonable quality of life that a welfare-of-the-child judgment could be made against implanting it in embryonic form. In relation to the interpretation of the disability ground of the Abortion Act, it is arguable that it is only in relation to conditions as serious as Tay-Sachs or Leuchs Nyan syndrome that it could be said that termination is actually in the fetus's interests (loosely understood – since it may be argued that it has none until it acquires them at sentience) and hence that the 'welfare' of the future child (now the fetus) is truly at stake. If so, it follows that where a child's birth remains compatible with it having a good or reasonable quality of life but it is reasonably considered seriously impaired in a way which will impact on its prospective parents, there may well be a conflict of interests between the parents and the embryo or fetus. In essence, prospective parents may still consider the condition in such a case to be 'serious' and are likely to have views (which should be appropriately informed) about the impact on them of the birth of a given child.

As for the determination of 'serious', then, in cases of reasonable disagreement it could be argued that prospective parents' views should carry the most weight. This is because parents are the ones who would undertake the primary responsibility of caring for and raising a child. One way of reflecting on this (which I cannot explore here) could highlight that for parents to undertake this task entails the acceptance of a positive duty and that the reasonableness of positive duties can be harder to determine than that of negative ones, including in the reproductive context. In essence, then, where there is reasonable disagreement about the seriousness of a condition in a future child, it might be thought appropriate that parents have the 'final say'.

In addition, the principle of control over one's body (and over reproductive choice) immediately raises the question of when it begins. Are we born with it? Can others – parents, doctors, spouses, friends – control it on our behalf? If so, do they do so as an exercise of paternalism or as a form of substituted judgment? Paternalism involves determination of another's best interests while substituted judgment requires the decision-maker to try to decide what the person themselves would have decided (see also *F v. West Berkshire Health Authority*, and b.ii below). The notion of parental authority is so well entrenched that it is only relatively recently that these issues have been confronted in a legal forum. It was so confronted, however, in *Gillick v. West Norfolk and Wisbech Area Health Authority* (1985). In 1980 the DHSS issued a Health Service Notice which outlined arrangements for the organisation and development of NHS Family Planning Services. It was accompanied by a Memorandum of Guidance which suggested that a doctor was entitled in exceptional circumstances to prescribe contraception for girls under 16 without consulting their parents. Mrs Gillick sought two declarations: (1) that the Health Service Notice (HN(80)46) had no

authority in law since it gave advice which was unlawful in both contravening parental rights and duties and encouraging doctors to aid and abet unlawful sexual intercourse; and (2) that no doctor or other professional within the Family Planning Services would be permitted to give contraceptive advice or treatment to any child of Mrs Gillick below the age of 16 without Mrs Gillick's consent.

Strictly speaking, the declarations should have been sought in the alternative. If, as Mrs Gillick claimed, the advice would be unlawful, then presumably parental consent would not make it lawful. 'The debate in the courts was phrased in terms of parental rights versus those of the medical profession, but the subject of the debate was in fact the control of female sexuality and the role of mothers' (Lewis and Cannell 1986, p. 328). Their Lordships' arguments in *Gillick* are summarised by Kennedy below:

*Law Reports 1986 Lord Scarman Report (Oxford University Press), pp. 90, 98*

The issue before the House was, of course, the criteria to be applied in law to determine the capacity of a child below the age of 16 to consent to contraceptive treatment... The criterion of capacity to consent in law, they decided, is not a matter of age, but of the ability of the person to understand what is involved in any particular transaction or procedure, which in turn involves a combination of maturity, intelligence, and understanding. The age of discretion, resurrected, or exhumed, by the Court of Appeal as the correct legal criterion of capacity, was returned to the shadows or laid to rest again, for the last time, it is to be hoped.

In applying these legal principles to the specific issue at hand, Lord Scarman held that a girl below the age of 16 could give valid consent to receive contraceptive and other medical treatment. Conscious, however, of the great sensitivity of the issue, he was at pains to emphasize that the determination of a girl's competence by a doctor was a matter of great responsibility, particularly in the context of contraception. Before she could be regarded as entitled to make her own decisions and, consequently, as free of parental control, Lord Scarman made it clear that:

[I]t is not enough that she should understand the nature of the advice which is being given: she must also have a sufficient maturity to understand what is involved. There are moral and family questions, especially her relationship with her parents; long-term problems associated with the emotional impact of pregnancy and its termination; and there are the risks to health of sexual intercourse at her age, risks which contraception may diminish but cannot eliminate.

Lord Fraser expressed the criterion of capacity somewhat differently at different stages during his speech. First, he spoke of the girl being 'capable of understanding what is proposed'. Later, he spoke of the necessity of the girl to have 'sufficient understanding and intelligence'. Later still, however, he made it a requirement 'that the girl (although under 16 years of age) will understand his [the doctor's] advice'. Lord Fraser was equally anxious, however, to emphasize the great care which must be taken in translating the principle of

legal capacity into practice in the case of any particular young girl. To this end he laid down five requirements on which the doctor must be satisfied if he is to be entitled to act upon the girl's consent and treat her without involving others. They are:

- (1) that the girl... will understand [the doctor's] advice; (2) that he cannot persuade her to inform her parents or to allow him to inform the parents that she is seeking contraceptive advice; (3) that she is very likely to begin or to continue having sexual intercourse with or without contraceptive treatment; (4) that unless she receives contraceptive advice or treatment her physical or mental health or both are likely to suffer; (5) that her best interests require him to give her contraceptive advice, treatment or both without the parental consent.

It is these five requirements which have come to be regarded as the principal ruling in the case, even though Lord Scarman makes no mention of them and may... have contradicted at least one of them. The importance they have acquired can be gauged by the fact that they form the central part of the redrafted Memorandum issued by the DHSS in the light of the case [Appendix HC (86) 1]...

The argument that the doctor, by following the advice contained in the Memorandum, is an accessory to a crime under the Sexual Offences Act 1956, which was largely ignored by the Court of Appeal, was advanced with renewed vigour before the House of Lords. Lords Fraser, Scarman, and Bridge were unpersuaded... Lord Scarman summed up the majority's position somewhat pithily. 'It would depend... on the doctor's intention, a conclusion hardly to be wondered at in the field of the criminal law'.

Lord Templeman, although in dissent, appears also to have adopted the view of the majority... in this regard. To him too, it is a matter of the doctor's intention. Where contraceptive treatment is given because the girl cannot be deterred from sexual intercourse or it is otherwise judged to be in her best interests, Lord Templeman takes the view that it is provided 'not for the purpose of aiding and abetting an offence under s. 6 but for the purpose of avoiding the consequences, principally pregnancy, which the girl may suffer from illegal sexual intercourse'...

Lord Brandon's view is as follows:

On the footing that the having of sexual intercourse by a man with a girl under 16 is an unlawful act, it follows necessarily that for any person to promote, encourage or facilitate the commission of such an act may itself be a criminal offence, and must, in any event, be contrary to public policy. The question again arises whether the three activities to which I referred earlier should properly be regarded as, directly or indirectly, promoting, encouraging or facilitating the having, contrary to public policy, of sexual intercourse between a man and a girl under 16. In my opinion there can be only one answer to this question, namely that to give such a girl advice about contraception, to examine her with a view to her using one or more forms of protection and finally to prescribe contraceptive treatment for her, necessarily involves promoting, encouraging or facilitating the having of sexual intercourse, contrary to public policy, by that girl with a man.

[Aiding and abetting is considered further in Chapter 10.b.i.]



In their use of the term 'intention', the majority in *Gillick* seem to be subscribing to a narrow 'purpose' construction. There is therefore a suggestion of motive being a relevant consideration: something which conventional doctrinal analysis strenuously denies (see Chapter 3.b.ii. and Chapter 21.b.) The interconnection between sexuality and reproduction is illustrated well by the *Gillick* case. In 2006, a similar challenge to the legality of updated government guidance on advice and treatment in relation to adolescent sexual health was also unsuccessful (*R (on the application of Axon) v. Secretary of State for Health & Another* (2006)).

#### V.17.a.ii. Surrogacy arrangements

The responses to commercial surrogacy arrangements, which first became a matter of public cognisance in 1984, provide a somewhat different instance of criminal law's role in the regulation of reproduction. Unlike abortion and many other aspects of reproductive control, surrogacy has not been 'medicalised'. Yet the surrogacy debate raises similar questions to those about abortion. Evidence that reproduction has appeared increasingly on the legislative agenda can be seen not only in the Human Fertilisation and Embryology Act 1990 but also in the Surrogacy Arrangements Act 1985, which criminalised commercial surrogacy agreements.

David J. G. (2003) *English Law and Surrogacy: Rights and Reproductive Freedom* in *Law & Ethics, Surrogate Motherhood: Constitutional Perspectives* (Hart), pp. 83-100.

English law on surrogacy is, at least at first sight, simple and straightforward. Surrogacy arrangements are not unlawful, nor is the payment of money to a surrogate mother in return for her agreeing to carry and hand over the child. Commercial surrogacy arrangements, however, are unlawful. The core of the Surrogacy Arrangements Act 1985 is directed towards commercial agencies. The Act does not attempt to deal with 'altruistic' or family arrangements, neither does it deal with those in which the offices of a charitable organisation have assisted the establishment of the contract. The expressed reasoning behind these exemptions is to avoid the birth of a child whose mother or family are 'subject to the taint of criminality'.

Although the law prohibits neither 'altruistic' surrogacy nor surrogacy for which the surrogate is paid without the involvement of a commercial agency, the restraints on advertising surrogacy services attempt to ensure that, to all intents and purposes, surrogacy will be 'kept within the family'. Section 3 of the 1985 Act makes it an offence to advertise to act as a surrogate mother, to advertise in the search for a surrogate mother, or to say that one is willing to set up a surrogacy agreement. The prohibition is exhaustive, making it clear that it is not only newspaper or periodical advertising that is caught, but also advertising which uses telecommunication systems or through putting a card in the local corner shop. Whether this would catch the increasingly prevalent use of the internet... is a moot point. Contravention of these provisions can only be prosecuted by or with the consent of the DPP.



The Surrogacy Arrangements Act 1985 was based on the recommendations of the Warnock Report (1984), which adopted a 'moralistic, paternalistic' position (Freeman 1989, p. 166). The Report recommended regulating only the commercial aspects, not because it approved of non-commercial surrogacy, but on grounds of practicality and the need to avoid labelling the surrogate as a criminal. As Dame Mary Warnock herself explained it (Warnock 1985, p. vii):

Not only was the wrongness of surrogacy compounded by its being exploited for money, but also a law against agencies would not be intrusive into the private lives of those who were actually engaged in setting up a family.

This is a position towards one extreme on a continuum which includes a number of options: total opposition to surrogacy plus total prohibition; through total opposition but favouring commercial prohibition (the Warnock position); commercial opposition/commercial prohibition; commercial opposition/no regulation; to no opposition/no regulation. Surrogacy arrangements may be seen as a pivot around which turn many of the arguments about sexual autonomy which we have already discussed. On one side lie arguments that regulation of women's reproductive choices is paternalistic, and on the other arguments that surrogacy (either in its commercial form or in all forms) is exploitative. On the paternalism side it can be said that controlling or regulating surrogacy would be based on the 'very rationales that feminists have fought against in the contexts of abortion, contraception, non-traditional families and employment' (Andrews 1988, p. 73). These rationales include the ideas that surrogacy is demeaning to society since it involves baby-selling and that it is potentially harmful to women and children. The baby-selling point can be countered by comparing surrogacy with the sale of sperm for AID (artificial insemination by donor). The analogy may be inexact – AID is closer to egg donation. But, conceptually, AID and surrogacy can both be seen as 'preconception termination' of parental rights (Andrews 1988, p. 74).

The 'harm to women' point rests on the view that surrogacy is exploitative. Exploitation assumes a form of coercion – that women would not enter such arrangements if they had alternative means of earning money. In answer to this the proponents of surrogacy argue that women do not act as surrogates purely for money but also because they enjoy the status which pregnancy brings and regard themselves as being altruistic (Steinbock 1988, p. 48). In other words, it enhances their self-worth. Is it significant that the suggestion that an activity should be done for altruism rather than money relates to an activity undertaken exclusively by women (Andrews 1988, p. 76)?

As Brazier explains below, the prevailing wish of the majority of the Warnock Report, that the problem of surrogacy would subside, led to an Act that fails properly to regulate surrogacy, i.e. through a licensing authority.

*Marion's Review: 'Regulating the Reproduction Business?' (1991)*  
*Medical Law Review* 166-93, at 180

Surrogacy did not wither on the vine. At least two non-profit making groups, COTS and SPC, established themselves as 'agencies' who introduced surrogates and couples, and advised and assisted with surrogacy arrangements. A number of infertility clinics actively started to engage themselves in helping to establish surrogate pregnancies. Reported payments to surrogates reached, in some instances, levels of £10K to £15K. Despite some favourable media attention, a number of high profile cases emerged where surrogacy had gone disastrously wrong. In July 1997, the British government decided to institute a review of certain aspects of the law pertaining to surrogacy. Essentially, government concern focused on whether some additional degree of regulation of surrogacy was desirable and whether payments to surrogate mothers should be allowed.

The Brazier review of surrogacy (1998) rejected the 'medicalisation' or 'professionalisation' of surrogacy in favour of a more specialised solution:

*The Brazier Review: 'Regulating the Reproduction Business?' (1998)*  
*Medical Law Review* 166-93 at 182-3

Thus two variants of professionalisation arrive on the agenda. We could develop and regulate medical surrogacy services, or, endorse and regulate professional surrogacy. The first option was rejected by the review team because most of the aspects of surrogacy which make it 'special', which raise social and ethical questions absent in relation to other fertility services, are not medical questions. The professional expertise required to advise and assist those contemplating surrogacy is not a clinical expertise... The second 'solution', professional surrogacy, radically challenges both our perceptions of fertility services as an essential clinical and scientific endeavour, and, society's understanding of motherhood.

To endorse the latter solution, in effect to create a regulated market in motherhood, would take Britain in a markedly different direction from its European partners and well down the road of express recognition of a reproduction business. The proposals made to the government in the Surrogacy Review Report seek to develop special solutions for the special problems of surrogacy. Regulation should be implemented by requiring all agencies involved in assisting in surrogacy to be registered with the Department of Health and subject to a Code of Practice. That Code, binding on all agencies, would also operate as an advisory document for all surrogacy arrangements, a manual of good practice. Given that the Review also rejects overt payment for a surrogate's services, the number of surrogacy arrangements would be unlikely to grow. Were the Review's proposals to be accepted, a policy of 'containment' might best describe the legal response to surrogacy.

The Human Fertilisation and Embryology Act 2008 did little to upset the surrogacy status quo. Section 59 amends the 1985 Act to allow not-for-profit agencies to receive 'reasonable payment' in relation to initiating negotiations

leading to surrogacy arrangement and compiling information about surrogacy. This section also removes the prohibition on advertisements placed by, or on behalf of a non-profit-making body, provided that the advertisement only refers to activities which may legally be undertaken on a commercial basis – for example, advertising that it holds a list of people looking for surrogates and those looking to be surrogates. Yet, it remains an offence for anyone to advertise that they want a surrogate mother or want to be a surrogate mother.

On the other side of the exploitation debate are those who argue that the ‘free’ choice of women to become surrogate mothers is an ideological myth. Dworkin argues that the current social, economic and political situation is such that the sale by women of sexual or reproductive capacities are essential to their survival (1983, 180–8). According to this argument, in protecting a woman’s choice we are engaging in a fiction. ‘Women, by definition, are condemned to a predetermined status, role, and function’ (Dworkin 1983, p. 182). The analogy being drawn here between surrogacy and prostitution (and indeed between these institutions and marriage) relates to the discussion by Carole Pateman (1988, quoted at Chapter 16.b. above). Is there a relevant difference between prostitution and surrogacy? Should surrogacy be left unregulated while prostitution is condemned? Whatever the answer to that question, it is important to recall that the present regulation of prostitution is highly discriminatory. However appealing are arguments which derive from a realism about the social and economic position of women, they confront the objection that regulating on the basis of anything other than choice involves an exercise of paternalism by (largely) male legislatures. Arguing for deregulation, in this as in other areas such as pornography, does not necessarily amount to arguing that the activity is itself an unqualified good.

#### V.17.a.iii. Human fertilisation and cloning

Criminal laws have also been written to control the limits of reproductive science and technology and to prevent what are deemed unacceptable expressions of autonomy. Plummer notes this shift towards new reproductive technologies and summarises the arguments for and against the most controversial of these, that of cloning:

Ken Plummer 2003 *Intimate Citizenship. Private Decisions and Public Dialogues* (University of Washington Press), pp. 38–40

[C]ontraception and birth regulation have been on the moral agenda for a long time now, and abortion, adoption, and fostering children have continually raised issues about the right to have a child and the rights of the fetus. But only in the past thirty years or so have the politics of the new reproductive technologies and of assisted conception led to much more focused discussion...



Ultimately, these conflicts go to the heart of what it means to be a human being. They raise questions about what it means to be born, to give birth, and to raise children – issues that cut to the core of intimacies...

Symbolically at any rate, the idea of cloning is the most controversial of these emerging technologies, and it has brought with it significant political realignments. Most governments formally denounce and legislate against cloning, and in general thinkers on both the right and the left can find new grounds to support it. In the most traditional terms, cloning is said to be 'against God's will' and 'contrary to nature'. What it brings – the severing of procreation from sex, love and intimacy – is 'Inherently dehumanizing'. If cloning were permitted, we would be led to ask, what will father, grandfather, aunt, cousin, and sister mean? Others, such as the conservative thinker James Q. Wilson, believe that as long as the cloned child were loved and raised in a 'proper' family of heterosexual parents, then cloning could be acceptable, although its practice would have to be governed by appropriate restrictions. Still others believe that cloning must be allowed in the name of freedom: in order for science to advance, for people to reproduce as they choose, to foster progress. Once again, an issues culture emerges, conflicts flourish, and new communities are shaped.

The UK has adopted a position of regulating therapeutic cloning – with its promise of developing therapies for diseases such as Alzheimer's and Parkinson's – and banning reproductive cloning, driven by the horrors of eugenics and the health risks to the clone. In terms of the legislative framework, the Human Fertilisation and Embryology Act 2008 updated its 1990 predecessor, which was a landmark attempt to regulate the reproductive revolution (see Jackson 2001). The 1990 Act prohibited the placing of non-human gametes or embryos in a woman (s. 3(2) and s. 41). A loophole was exposed in *R (on the application of Quintavalle) v. Secretary of State for Health* (2001) where it was decided that cloned organisms produced by cell nuclear replacement were not 'embryos' under the Act. Fuelled by media driven images of an 'attack of the clones' this prompted Parliament to hurry the Human Reproductive Cloning Act 2001 through Parliament which clarified the criminal prohibition. The Act made it an offence to place in a woman a human embryo which has been created otherwise than by fertilisation. This has been replaced by section 3 of the Human Fertilisation and Embryology Act 2008 (HFEA), which specifies that only 'permitted embryos' may be placed in a woman. Much of the public debate surrounding the passage of the 2008 Act through Parliament involved the issue of human/animal hybrids – i.e. mixing human and animal gametes. The Act confirms that placing an admixed embryo in a woman is an offence, and prohibits the mixing of such gametes except when done under licence of the HFEA (s. 4). These are good examples of criminal laws which are unlikely ever to be pressed into service or trouble British Crime Survey statisticians, and function more as symbolically marking out 'no go' areas.

In the next section we turn to an area (euthanasia) where criminal law certainly is called into action, but where its interpretation reveals numerous



inconsistencies and illogical distinctions, and where a greater recognition of bodily autonomy is building a case for legalising assisted dying.

## V.17.b. Euthanasia

### V.17.b.i. Respect for life and death

Our final example illustrates perhaps most vividly of all the issues discussed in this chapter the complexity of social attitudes towards bodily autonomy, and the difficulties which this poses for criminal law. It also tells us something about how far we trust individuals to make end of life decisions. And such decisions are becoming increasingly public, reflected in the high-profile efforts of so-called death doctors, such as Jack Kevorkian and Philip Nitschke, the latter via a voluntary euthanasia and advocacy organisation called Exit International. In May 2008 it was reported that Salford City Council were piloting the use of 'right-to-die cards' for use as evidence of advanced refusals of life sustaining treatment (*Salford Advertiser*, 8 May 2008). As the extract below from Somerville explains, our society is increasingly engaging in death talk.

Margaret Somerville 2001 *Death Talk: The Case Against Euthanasia and Physician-Assisted Suicide* (McGill-Queen's University Press), pp. 111-12

... [O]urs is a death-denying, death obsessed society. Those who no longer adhere to the practice of institutionalised religion, at any rate, have lost their main forum for engaging in death talk... Arguably, our extensive discussion of euthanasia in the mass media is an example of contemporary death talk. Instead of being confined to an identifiable location and an hour a week, it has spilled out into our lives in general. This exposure makes it more difficult to maintain the denial of death, because it makes the fear of death more present and 'real'. One way to deal with this fear is to believe that we have death under control. The availability of euthanasia could support that belief. Euthanasia moves us from chance to choice concerning death... Although we cannot make death optional, we can create an illusion that it is by making its timing, and the conditions and ways in which it occurs, a matter of choice.

We are frightened not only as individuals, however, but also as a society. Collectively, we express the fear of crime in our streets. But that fear, although factually based, might also be a manifestation of a powerful and free-floating fear of death in general. Calling for the legalization of euthanasia could be a way of symbolically taming and civilizing death – reducing our fear of its random infliction through crime. If euthanasia were experienced as a way of converting death by chance to death by choice, it would offer a feeling of increased control over death, and, therefore, decreased fear. We tend to use law as a response to fear, often in the misguided belief that the law will increase control over the things that frighten us and so augment our safety...

Matters such as euthanasia, which would once have been the topic of moral or religious discourse, are now explored in courts and legislatures, especially through concepts

of individual human rights, civil rights, and constitutional rights. Man-made law (legal positivism), as compared with divinely ordained law or natural law, has a very dominant role in establishing the values and symbols of a secular society. In the euthanasia debate, it does so through the judgments and legislation that result from 'death talk' that takes place in the 'secular cathedrals' – courts and legislatures.

Public attitudes towards voluntary euthanasia reveal strong support for legalizing medical assistance for those suffering with terminal illness:

Elizabeth Clancy, Sheila McLean and Amanda Phillips 2007 'Outlining Issues in the Euthanasia Debate' pp. 37-53 in Ford et al. (eds.), *The British Social Attitudes Perspectives on a Changing Society the 33<sup>rd</sup> report* p. 48, 50

One general question on attitudes towards voluntary euthanasia has been asked on a number of occasions on previous *British Social Attitudes* surveys. The question reads:  
Suppose a person has a painful incurable disease. Do you think that doctors should be allowed by law to end the patient's life, if the patient requests it?

TABLE 2.5  
Should law allow doctor to end life of patient with painful incurable disease?

| Should law allow doctor to end life of patient with painful incurable disease? | 1984 | 1989 | 1994 | 2005 |
|--------------------------------------------------------------------------------|------|------|------|------|
| Yes                                                                            | 75   | 79   | 82   | 80   |
| No                                                                             | 24   | 20   | 15   | 18   |
| Base                                                                           | 1562 | 1274 | 1000 | 1786 |

Table 2.5 shows that, in fact, the answers to this question have indeed been rather stable since it was first asked in 1984. However, whereas in 1984 three-quarters said the law should allow voluntary euthanasia in these circumstances, by 1994 the figure had increased to 82 per cent. It appeared that there was a slow secular trend towards increasing support for voluntary euthanasia. But if such a trend did exist between 1984 and 1994 it certainly seems subsequently to have come to a halt – now the proportion responding affirmatively to our question has slipped slightly to 80 per cent...

In certain respects, at least, the current law that prohibits assisted dying seems to be at odds with public opinion. Clear majorities accept that a doctor should be allowed to hasten the death of someone who is painfully and terminally ill. Support for this position appears to be particularly strong in the case of voluntary euthanasia administered by a doctor, somewhat less so for physician-assisted suicide. On the other hand, only a minority support assisted dying if someone is in pain or dependent, but not terminally ill.

One of our objectives was to assess how well-informed public views are on this issue. Our evidence suggests two reasons why this balance of public support for and opposition to assisted dying cannot be dismissed as uninformed or superficial. First, despite the explosion

of debate and media commentary on the subject, what is most remarkable about public opinion now is how similar it is to ten years ago. The picture of public opinion we have painted seems largely to be a stable one. Secondly, we have demonstrated that public attitudes reflect the arguments that have been put forward by advocates and opponents of the legislation of assisted dying in recent years. Those who demonstrate a concern for the sanctity of life are those who are most opposed to assisted dying, especially if they practise a religion. Those who are concerned about individual autonomy are inclined to the opposite view. Attitudes towards assisted dying appear to be consistently rooted in a wider set of values.

The disjuncture between the current law on assisted dying and majority public opinion thus seems unlikely simply to disappear. Pressure to mount further attempts to change the law in some ways at least looks set to continue.

These social and cultural attitudes provide the context within which legal arrangements have to operate and command legitimacy. But how, if at all, do they affect the moral case for euthanasia?

*Ronald Dworkin 1997 *Life's Dominion: An Argument about Abortion and Euthanasia* (HarperCollins), pp. 215–17*

Anyone who believes in the sanctity of human life believes that once a human life has begun it matters, intrinsically, that that life go well, that the investment it represents be realized rather than frustrated. Someone's convictions about his own critical interests are opinions about what it means for his own human life to go well, and these convictions can therefore best be understood as a special application of his general commitment to the sanctity of life. He [sic] is eager to make something of his own life, not simply to enjoy it; he treats his own life as something sacred for which he is responsible, something he must not waste. He thinks it intrinsically important that he live well, and with integrity . . .

Someone who thinks his own life would go worse if he lingered near death on a dozen machines for weeks or stayed biologically alive for years as a vegetable believes that he is showing more respect for the human contribution to the sanctity of his life if he makes arrangements in advance to avoid that, and that others show more respect for his life if they avoid it for him. We cannot sensibly argue that he must sacrifice his own interests out of respect for the inviolability of human life. That begs the question, because he thinks dying is the best way to respect that value. So the appeal to the sanctity of life raises here the same crucial political and constitutional issue that it raises about abortion . . . [T]he critical question is whether a decent society will choose coercion or responsibility, whether it will seek to impose a collective judgment on matters of the most profound spiritual character on everyone, or whether it will allow and ask its citizens to make the most central, personality-defining judgments about their own lives for themselves.

. . . [T]he public discussion [of euthanasia] . . . centres on difficult and important administrative questions . . . But much of it concerns moral and ethical issues, and that part of the debate has been seriously compromised by two misunderstandings . . .

The first is a confusion about the character of the interests people have in when and how they die. Many arguments against euthanasia presuppose that patients who are not suffering great pain, including patients who are permanently unconscious, cannot be significantly harmed by being kept alive. That assumption underlies . . . the procedural claim that relatives urging that an unconscious patient would have wanted to die must meet an especially severe standard of proof, the 'slippery slope' argument that the law should license no euthanasia because it may end by licensing too much, and the claim that doctors will be corrupted and their sense of humanity dulled if they are asked and allowed to kill. When we understand how and why people care about their deaths, we see that the assumption on which each of these arguments depends is fallacious and dangerous.

The second misunderstanding arises from a misapprehension about . . . the sanctity of life. It is widely supposed that active euthanasia – doctors killing patients who beg to die – is always offensive to that value, and should be prohibited for that reason. But the question posed by euthanasia is not whether the sanctity of life should yield to some other value, like humanity or compassion, but how life's sanctity should be understood and respected. The great moral issues of abortion and euthanasia, which bracket life in earnest, have a similar structure. Each involves decisions not just about the rights and interests of particular people, but about the intrinsic, cosmic importance of human life itself. In each case, opinions divide not because some people have contempt for values that others cherish, but, on the contrary, because the values in question are at the center of everyone's lives, and no one can treat them as trivial enough to accept other people's orders about what they mean. Making someone die in a way that others approve, but he believes a horrifying contradiction of his life, is a devastating, odious form of tyranny.

How do these moral and cultural issues affect the legal regulation of medical treatment?

*Lawrence, "The Sanctity of Life and the Moral Duty of the Physician to Kill,"*  
 2002, 101 Harv. L. Rev. 1303.

Perhaps the most fundamental precept of the common law is respect for the liberty of the individual. In a medical-legal context this means that a person's right to self-determination, to deal with his body as he sees fit, is protected by law. The doctor's first duty is to protect this right. This applies as much to the terminally ill patient as to any other . . . Thus, if a patient who is aware of the nature of his condition and competent to make a decision refuses further treatment from his doctor, then continued treatment is unlawful, as constituting a battery or a criminal assault. This is so notwithstanding the fact that the doctor may find the patient's decision as wrong or ill-advised. To abide by the refusal may be difficult for the doctor; but it is required by law, the principle of self-determination overruling any notion that 'the doctor knows best' or some vague notion of there being a public policy in favour of preserving life . . .

[R]espect for life is a cardinal principle of English law. It follows that the taking of a patient's life by some conduct deliberately designed with the primary intention of bringing



about his death is unlawful, whether it be at the patient's request or without his knowledge or consent. This is homicide . . .

Medical treatment which involves any touching of a patient is still analysed generally in law as lawful because the patient has consented to what would otherwise have been an assault. There are two key concepts involved in such an analysis. The first, which will not concern us here, is that of 'treatment'

. . . The second concept, and the one we are concerned with here, is consent.

If consent makes a touching lawful, then it must follow that if a patient withholds consent, if he refuses to be touched by a doctor, any further touching will be unlawful, and will give rise to civil and criminal liability . . .

The general principle contemplates a model of a patient of an age recognized as endowing him with the competence to exercise a valid choice, and who is lucid in the sense not only that he regards himself as being in control of his mental faculties, but also that he is recognized to be so by others. There are, therefore, two key features: first, that the patient is of an age the law regards as proper, and second, that he is of sound mind. This latter feature has two distinct negative qualities: first, that the patient must not be someone categorized as chronically mentally unfit, and second, that he must not be someone who is regarded as suffering from temporary unsoundness of mind. The philosophical premise which underlies the general principle is the right of self-determination. My submission is that the identification and analysis of the two key features mentioned above indicate that it is a right which is far from being the general bulwark it purports to be . . . Indeed, there exists an equally strong, and in this context often contradictory, philosophical premise, that of paternalism. Clearly, the basis of paternalism – that decisions concerning a particular person's fate are better made for him than by him, because others wiser than he are more keenly aware of his best interests than he can be – conflicts with the notion of a right to self-determination, whereby a person is deemed entitled to make his own decisions concerning himself, within tolerable limits, free from the interference of others.

Paternalism, however, makes its demands which have to be met. Indeed, it is the purpose of this article to suggest that what was alleged at the outset to be the general principle, that of self-determination, is in fact the exception. I shall suggest that the dominant philosophy in practice is paternalism . . . Because we are dealing with what purport to be exceptions to a general principle, it is sometimes argued that there is no single legal principle of justification, merely a number of disparate responses to the specific factual and legal details of a particular case. Alternatively, a general principle of justification is advanced and given the name of 'necessity' or 'privilege' or some kind of 'comprehensive justification in relation to medical procedures'. Or it is merely called 'public policy' . . . if it is necessary for my argument, I am prepared to say that there is, as regards the particular situation under review, a general legal justification, and I will call it 'necessity' . . .

Everything turns on the capacity of the patient and, just as important, who makes the final determination as to that capacity. My position is that the law is so constructed that in all probability, only the lucid, self-assertive patient who has a sympathetic, understanding doctor is able in most circumstances to have his way and be left alone, free from other

interference, to die. All other patients run the risk of having their wishes flouted. Consent is represented as the critical feature of the law which ensures the patient's right to self-determination, whereas, in fact, it is referred to and manipulated so as to produce the opposite result.

A number of legal and extra-legal factors combine to produce this result. First, the determination of capacity to consent or to withhold consent is not made by the patient, but by those treating him... Second, the presumption made by the healthy is that no one really wants to die. When these two factors are put together, it is readily understandable that a request that treatment should cease should be seen as not really meant, but as merely the response to either a passing mood or a loss of mental fitness. Thus – and this is a critical point – refusal of consent is seen not as an assertion of will, but rather as a symptom of unsoundness of mind... Once a patient is deemed incapable... his powers of self-determination are taken from him. The law, as ever in these areas, is unclear. Some state categorically that the fact that a patient is judged mentally unfit does not mean that he can therefore have treatment forced upon him against his will and despite his express refusal... The real problem here, because of the nature of the legal framework, is not so much a legal one as one of evidence. For it is the doctor who makes the determination that the view expressed by the patient is unreliable and that the particular treatment is called for. Once this determination has been made, two consequences follow. First, the way is made clear to invoke the plea of necessity; and, in the majority of cases, such a determination is, as a practical matter, virtually impossible to overturn. Second, the patient's right to self-determination, in other words, becomes not a matter of legal principle, but rather a consequence of the degree of paternalism exercised by the doctor, supported by societal attitudes which reinforce such paternalism...

Kennedy suggests that the paternalism which allows medical treatment to be given without the patient's consent may be legally justified through a defence of necessity. Confirmation of Kennedy's conclusion that consent may be a rather limited device in the protection of autonomy can be found in the House of Lords' decision in *F v. West Berkshire Health Authority* (1989).

#### V.17.b.ii. Consent and necessity

Refusal of medical treatment is one way in which a person might ensure their own death (see *Re B* (2002) below). The case below considers the circumstances in which treatment can be given without consent:

##### *F v. West Berkshire Health Authority* [1989] 2 All ER 513

[F, a 36-year-old woman with learning difficulties, sought, through her mother as next friend, a declaration that the absence of her consent would not render unlawful an operation to sterilise her. The judge granted the declaration, which was approved by the Court of Appeal and the House of Lords.]

**Lord Goff:** . . . [I]t is well established that, as a general rule, the performance of a medical operation on a person without his or her consent is unlawful, as constituting both the crime of battery and the tort of trespass. Furthermore, before Scott Baker J. and the Court of Appeal, it was common ground between the parties that there was no power in the court to give consent on behalf of F . . . or to dispense with the need for her consent . . . I for my part have become convinced that the concessions made below on these points were rightly made . . . It follows that . . . if the operation on F is to be justified, it can only be justified on the applicable principles of common law. The argument of counsel revealed the startling fact that there is no English authority on the question whether as a matter of common law (and if so in what circumstances) medical treatment can lawfully be given to a person who is disabled by mental capacity from consenting to it. Indeed the matter goes further, for a comparable problem can arise in relation to persons of sound mind who are, for example, rendered unconscious in an accident or rendered speechless by a catastrophic stroke. All such persons may require medical treatment and in some cases, surgical operations . . . It is necessary first to ascertain the applicable common law principles and then to consider the question of sterilisation against the background of those principles . . .

I start with the fundamental principle, now long established, that every person's body is inviolate . . . of course, as a general rule physical interference with another person's body is lawful if he consents to it; though in certain limited circumstances the public interest may require that his consent is not capable of rendering the act lawful. There are also specific cases where physical interference without consent may not be unlawful: chastisement of children, lawful arrest, self-defence, the prevention of crime and so on. As I pointed out in *Collins v. Wilcock* [1984] at 374, a broader exception has been created to allow for the exigencies of everyday life: jostling in the street or some other crowded place, social contact at parties and such like. This exception has been said to be founded on implied consent . . . Today this rationalisation can be regarded as artificial . . . I consider it more appropriate to regard such cases as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of everyday life . . .

. . . [I]n the case of medical treatment, we have to bear well in mind the libertarian principle of self-determination which, to adopt the words of Cardozo J. (in *Schloendorff v Society of New York Hospital* 211 NY 125 (1914) at 126), recognizes that –

Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault . . .

[After rejecting the argument that the treatment of mentally disabled people could be brought within the exception for everyday events, Lord Goff continued:]

On what principle can medical treatment be justified when given without consent? We are searching for a principle on which, in limited circumstances, recognition may be given to a need in the interests of the patient, that treatment should be given to him in circumstances



where he is (temporarily or permanently) disabled from consenting to it. It is this criterion of a need which points to the principle of necessity as providing justification.

That there exists at common law a principle of necessity which may justify action which would otherwise be unlawful is not in doubt. But historically the principle has been seen to be restricted to two groups of cases, which have been called public necessity and private necessity . . . There is, however, a third group of cases . . . concerned with action taken as a matter of necessity to assist another person without his consent. To give a simple example, a man seizes another and forcibly drags him from the path of an oncoming vehicle, thereby saving him from injury or even death, commits no wrong . . . we are concerned here with action taken to preserve the life, health or well-being of another who is unable to consent to it . . . Doubtless, in the case of a person of sound mind, there will ordinarily have to be an emergency before such action taken without consent can be lawful; for otherwise there would be opportunity to communicate with the assisted person and to seek his consent. But this is not always so . . . Emergency . . . is simply a frequent origin of the necessity which impels intervention. The principle is one of necessity, not of emergency.

. . . [T]he basic requirements, applicable in these cases of necessity [are] that to fall within the principle, not only (1) must there be a necessity to act when it is not practicable to communicate with the assisted person, but also (2) the action must be such as a reasonable person would in all the circumstances take, acting in the best interests of the assisted person.

. . . The distinction I have drawn between cases of emergency and cases where the state of affairs is (more or less) permanent is relevant in another respect. We are here concerned with medical treatment, and I limit myself to cases of that kind. Where, for example, a surgeon performs an operation without his consent on a patient temporarily rendered unconscious in an accident, he should do no more than is reasonably required, in the best interests of the patient before he recovers consciousness . . . But where the state of affairs is permanent or semi-permanent, as may be so in the case of a mentally disordered person, there is no point in waiting to obtain the patient's consent. The need to care for him is obvious; and the doctor must then act in the best interests of his patient, just as if he had received the patient's consent so to do. Were this not so, much useful treatment and care could, in theory at least, be denied to the unfortunate . . .

I have said that the doctor has to act in the best interests of the assisted person. In the case of routine treatment of mentally disordered persons, there should be little difficulty in applying this principle. In the case of more serious treatment . . . the doctor must act in accordance with a responsible and competent body of relevant professional opinion on the principles set down in *Bolam v. Friern Hospital Management Committee* (1957). No doubt in practice, a decision may involve others besides the doctor. It must surely be good practice to consult relatives and others who are concerned with the care of the patient . . . It is very difficult, and would be unwise for the court, to do more than to stress that, for those who are involved in these . . . decisions, the overriding consideration is that they should act in the best interests of the person who suffers from the misfortune of being prevented by incapacity from deciding for himself what should be done to his own body in his own best interests.



Although Lord Goff suggests that necessity has always been recognised as a criminal law defence, it has in fact only recently been accepted outside the specific areas of self-defence and prevention of crime (see Chapter 12.f.). *Re A (Conjoined Twins)* (2000), discussed in Chapter 20.a. is another example of its revival. The decision in *F v. West Berkshire Health Authority* implied that a patient who is not competent to make decisions would not be able to resist treatment which would prolong life. However, in recent cases the appellate courts have moved some distance towards recognising the legitimacy of ending the lives of those in a 'persistent vegetative condition' who have no chance of recovery and whose relatives are in favour of 'allowing' the person to die. In the widely discussed case of Anthony Bland, a young man reduced to a persistent vegetative state as a result of being crushed by crowds at the Hillsborough Stadium football disaster, the House of Lords confirmed the legality of withdrawal of treatment (*Airedale NHS Trust v. Bland* (1993); see further Chapter 20.b.). However, the grounds specified as a legitimate basis for doing so were narrowly drawn, and rested on a tenuous distinction between acts and omissions (see Chapter 3.b.i.). The House of Lords explicitly distanced itself from the more wide-ranging judgment of Hoffmann LJ in the Court of Appeal. Lord Justice Hoffmann had argued that the case should be recognised as posing a moral rather than a legal dilemma, and – echoing Dworkin's argument above – that although a belief in the sanctity of human life and its corollary, the inviolability of human life, requires that the criminal law be invoked to punish those who kill others even with consent, there might be cases in which a proper recognition of the mortal nature of human life requires that the duty to provide care and assistance should cease. In another case, a prisoner on hunger-strike was recognised as having a right to self-determination which took precedence over any countervailing interest of the state in preserving life and preventing suicide (*Secretary of State for the Home Department v. Robb* (1995)).

#### V.17.b.iii. Assisted suicide

In 2002, the principles of autonomy and the sanctity of human life were the ethical focus of two high-profile cases involving women seeking help to end their lives. In *Re B* (2002), a 43-year-old woman paralysed from the neck down and sustained by artificial ventilation was allowed to end her life by refusing further ventilation. In the same year, Dianne Pretty, terminally ill with motor neurone disease, failed in her attempt to secure death on her own terms. In particular, she sought an undertaking from the Director of Public Prosecutions not to prosecute her husband who was willing to assist with her suicide. In dismissing her appeal against the refusal of such prosecutorial immunity (*Pretty v. DPP* (2002)), respect for bodily autonomy appears incomplete and inconsistent:

Peter Singer, 'Mr B and Dianne Pretty: a Commentary' (2002) 28 *Journal of Medical Ethics* 234

To a lay observer, there seems to be an inconsistency in the way in which these two cases were decided. Ms B, a paralysed competent adult, was allowed to end her life; Mrs Pretty, another paralysed competent adult, was not. How can this make sense? To a lawyer, on the other hand, there is no inconsistency. Indeed, both decisions were entirely predictable. It is a well established principle of law that a competent adult has the right to refuse medical treatment... On the other hand, courts in Canada, the United States, the United Kingdom and elsewhere have held that laws prohibiting assisted suicide prevent anyone assisting a person to die, even if that person is paralysed and unable to bring about their own death. So putting these two principles together, we get a right to refuse medical treatment, even if that means you will die, but no right for someone else to assist you to die, if the mere withdrawal of medical treatment will not bring about that end, or will not bring it about in an acceptable manner. Technically, the lawyers are correct. The two cases can be reconciled. They are not inconsistent, in the strict meaning of that term. But in a deeper ethical sense, the lay observers are right. We have arrived at the absurd situation where a paralysed woman can choose to die when she wants if her condition means that she needs some form of medical treatment to survive; whereas another paralysed woman cannot choose to die when or in the manner she wants, because there is no medical treatment keeping her alive in such a way that, if it were withdrawn, she would have a humane and dignified death. What we have done is build legal doctrines based on two separate rules of law, and thereby we have reached a situation that makes no ethical sense at all.

As Singer remarks, on one level the decisions in *Re B* and *Pretty* were predictable. The assessment that Ms B was competent freed her to refuse any treatment. In this sense the decision continues the commitment to autonomy and the departure from a rigid adherence to sanctity of life (seen also in *Bland* (1993) and *Re A (Conjoined twins)* (2001) see Chapter 20.a. and b). Nevertheless, the absurdity to which Singer refers is arguably exacerbated by the fact that whilst Dianne Pretty would die within a matter of months, Ms B would have lived for years (albeit a life she had no wish for). Are there other clues to help understand what appears to be a confused and selective use of autonomy? Do such apparent inconsistencies reflect the extent to which we trust particular individuals to make the 'right' decision? For instance, was it significant that Ms B was regarded as a 'most impressive witness' and previously worked as a social worker in the NHS? Of course, it cannot be said that such cases hinge on such factors, but to what extent do they creep into judicial decisions, for instance the assessment that Ms B was competent?

The margin of bodily autonomy respected by the law at the 'limits of life' is therefore a narrow one. Suicide is a lawful option open to a person who is physically capable of carrying out the act of killing herself. But for those like Dianne Pretty requiring assistance, any person so helping her may commit an offence under section 2 of the Suicide Act 1961 (or of murder or attempted

murder, see *Hough* (1984)). Section 59 of the Coroners and Justice Act 2009 merges the substantive and attempt offences of assisted suicide into a single offence of 'encouraging or assisting' suicide or attempted suicide. Yet the scope of the law remains the same.

### Suicide Act 1961

#### Section 1

The rule of law whereby it is a crime for a person to commit suicide is hereby abrogated.

#### Section 2

- (1) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on indictment to imprisonment for a term not exceeding fourteen years.
- (2) If on the trial of an indictment for murder or manslaughter it is proved that the accused aided, abetted, counselled or procured the suicide of the person in question, the jury may find him guilty of that offence.

Dianne Pretty challenged the refusal to grant her husband immunity from prosecution, claiming it violated various rights of the European Convention. In particular, she argued that: the right to life in Article 2 extended to the right to end life; her situation involved inhuman or degrading treatment contrary to Article 3, a failure to respect her private and family life under Article 8, her freedom of thought under Article 9; and that it was discriminatory contrary to Article 14. In unanimously dismissing her appeal, the House of Lords revealed the tension between individual autonomy and societal concerns underpinning human rights:

#### *R (on the application of Pretty) v. DPP* [2002] 1 AC 1329

**Lord Steyn:** [T]his is the first occasion on which the House of Lords has been asked to consider the question of assisted suicide by a terminally ill individual. She suffers from motor neurone disease and she has not long to live. The specific question before the House is whether the appellant is entitled to a declaration that the Director of Public Prosecutions (the Director) is obliged to undertake in advance that, if she is assisted by her husband in committing suicide, he will not be prosecuted under s 2(1) of the Suicide Act 1961. If Mrs Pretty is entitled to this relief, it follows that it may have to be granted to other terminally ill patients or patients suffering excruciating pain as a result of an incurable illness, who want to commit assisted suicide. Her case is squarely founded on the Human Rights Act 1998, which incorporated 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 that Act) into English law. For her to succeed it is not enough to show that the convention allows member states to legalise assisted suicide. She must establish that at least that part of s 2(1) of the 1961 Act which makes aiding or abetting suicide a crime is in

conflict with her convention rights. In other words, she must persuade the House that the convention compels member states of the Council of Europe to legalise assisted suicide.

Counsel for Mrs Pretty argued that art 2 and in particular its first sentence acknowledges that it is for the individual to choose whether to live or die and that it protects her right of self-determination in relation to issues of life and death. This interpretation is not sustainable. The purpose of art 2(1) is clear. It enunciates the principle of the sanctity of life and provides a guarantee that no individual 'shall be deprived of life' by means of intentional human intervention. The interpretation now put forward is the exact opposite, viz a right of Mrs Pretty to end her life by means of intentional human intervention. Nothing in the article or the jurisprudence of the European Court of Human Rights can assist Mrs Pretty's case on this article.

Article 3 provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' The core of counsel's argument is that under art 3 the state's obligations are to take effective steps to ensure that no one shall be subjected to inhuman or degrading treatment. For my part art 3 is not engaged. The word 'treatment' must take its colour from the context in which it appears. While I would not wish to give a narrow interpretation to what may constitute degrading treatment, the concept appears singularly inapt to convey the idea that the state must guarantee to individuals a right to die with the deliberate assistance of third parties. So radical a step, infringing the sanctity of life principle, would have required far more explicit wording. But counsel argues that there is support for his argument to be found in the jurisprudence of the European Court of Human Rights on the 'positive obligations' of a state to render effective the protection of art 3. For this proposition he cites the decision of the European Court of Human Rights in *D v. UK* (1997) 2 BHRC 273. The case concerned the intended deportation of an individual in the final stages of an incurable disease to St Kitts where there would not be adequate treatment for the disease. The European Court of Human Rights held that in the exceptional circumstances of the case the implementation of the decision to remove the individual to St Kitts would amount to inhuman treatment by the United Kingdom. Unlike *D v. UK* the present case does not involve any positive action (comparable to the intended deportation) nor is there any risk of a failure to treat her properly. Instead the complaint is that the state is guilty of a failure to repeal s 2(1) of the 1961 Act. The present case plainly does not involve 'inhuman or degrading treatment'.

Counsel submitted that . . . [Article 8] . . . explicitly recognises the principle of the personal autonomy of every individual. He argues that this principle necessarily involves a guarantee as against the state of the right to choose when and how to die. None of the decisions cited in regard to art 8 assist this argument. It must fail on the ground that the guarantee under art 8 prohibits interference with the way in which an individual leads his life and it does not relate to the manner in which he wishes to die.

If I had been of the view that art 8 was engaged, I would have held (in agreement with the Divisional Court) that the interference with the guarantee was justified. There was a submission to the contrary based on the argument that the scope of s 2(1) is disproportionate to its aim. This contention was founded on the supposition that Mrs Pretty and others in her



position are not vulnerable. It is a sufficient answer that there is a broad class of persons presently protected by s 2 who are vulnerable. It was therefore well within the range of discretion of Parliament to strike the balance between the interests of the community and the rights of individuals in the way reflected in s 2(1).

Counsel submitted that Mrs Pretty is entitled to manifest her belief in assisted suicide by committing it. This cannot be right. This article was never intended to give individuals a right to perform any acts in pursuance of whatever beliefs they may hold, eg to attack places where experiments are conducted on animals. The article does not yield support for the specific proposition for which it is invoked. In any event, for the reasons already discussed, s 2 is a legitimate, rational and proportionate response to the wider problem of vulnerable people who would otherwise feel compelled to commit suicide.

Counsel submits that Mrs Pretty is in effect treated less favourably than those who are physically capable of ending their lives. The Divisional Court held that art 14 is not engaged. The alleged discrimination can only be established if the facts of the case fall within arts 2, 3, 8 or 9 (*Botta v. Italy* (1998) 4 BHRC 81 at 90 (para 39)). They do not. This is a sufficient reason to reject this argument. But there is a more fundamental reason. The condition of terminally ill individuals, like Mrs Pretty, will vary. The majority will be vulnerable. It is the vulnerability of the class of persons which provides the rationale for making the aiding and abetting of suicide an offence under s 2(1) of the 1961 Act. A class of individuals is protected by s 2(1) because they are in need of protection. The statutory provision does not therefore treat individuals in a discriminatory manner. There is no unequal treatment before the law. In any event, for reasons already given, s 2(1) is fully justified.

Although Dianne Pretty's appeal to the European Court of Human Rights was dismissed (*Pretty v. UK* (2002)), the Court held that Article 8 was engaged. Following her failure lawfully to secure death on her own terms, others have sought assisted death outside the UK with so-called 'suicide tourists' visiting the offices of the assisted dying group *Dignitas* in Zurich. One of the most recent and controversial cases involved 23-year-old Daniel James, paralysed following an accident during a rugby match, and who travelled to Zurich to commit suicide. Whilst such cases trigger investigations of those who may have in some way 'assisted' by making travel arrangements for example, these have not translated into a single prosecution. In the *James* case, the DPP took the unusual step of issuing a detailed explanation of the decision not to prosecute his parents (who accompanied him to Zurich), explaining that despite sufficient evidence, it was against the public interest to prosecute. Such apparent transparency in prosecution decision making prompted the landmark decision in the case of Debbie Purdy, terminally ill with multiple sclerosis. Echoing the request made by Dianne Pretty, she sought assurances that should her husband accompany her to *Dignitas* he would not face prosecution, although her case was put on the grounds of requiring information to weigh up this risk as part of her private life. Her challenge to the DPP's refusal to clarify prosecutorial policy in this area met with unanimous support in the House of Lords.

*R (on the application of Purdy) v DPP [2009] UKHL 45*

**Baroness Hale of Richmond**

57. As I begin to write this opinion, the House of Lords in its legislative capacity has just been debating an amendment to the Coroners and Justice Bill which might have made it unnecessary for the House in its judicial capacity to decide this case. Lord Falconer's amendment was designed to take one type of assistance out of the scope of the offence of assisting or encouraging suicide. This was 'enabling or assisting [another adult] to travel to a country or territory in which assisted dying is lawful' but only if two conditions were satisfied. Two doctors would have to certify that the person to be helped was terminally ill and that she had the capacity to make the required declaration. She would have to make a written declaration, independently witnessed, that she knew the contents of the medical certificates and had decided to travel to a country where assisted dying was lawful for the purpose of obtaining that assistance.

58. After three hours of anxious, thoughtful and well-informed debate the House rejected the amendment by 194 votes to 141. In his closing speech, Lord Falconer commented that 'Although huge passions were expressed during the debate, I never detected at any stage that anybody in the Committee wanted to prosecute the well intentioned person who went with their loved one to help them in their assisted dying' (*Hansard (HL)*, vol 712, col 633). Many who opposed the amendment were concerned that, as Baroness O'Neill of Bengarve put it, 'we have to take account not merely of compassionate assistance but of interested assistance and it is extraordinarily difficult to imagine any drafting that would do that' (col 609). Another former Lord Chancellor, Lord Mackay of Clashfern, explained that 'The main reason why I feel that this amendment is not justified is that the present law, with and on the assumption that what is involved is a criminal offence, permits the circumstances to be looked at by the criminal prosecuting authority... The fact that they felt that there was no obligation to raise a prosecution [in recent cases] showed that the circumstances in their view made that a proper decision' (cols 599 – 600).

59. Thus there would appear to be a general feeling that, while there are cases in which a prosecution would not be appropriate, it is necessary to retain the offence, with its current wide ambit, in order to cater for the cases in which prosecution would be appropriate. But a major objective of the criminal law is to warn people that if they behave in a way which it prohibits they are liable to prosecution and punishment. People need and are entitled to be warned in advance so that, if they are of a law-abiding persuasion, they can behave accordingly.

...

64. My Lords, I accept that argument on Ms Purdy's behalf. Ms Dinah Rose QC, on behalf of the DPP, made a valiant attempt to suggest that all the factors which the DPP was likely to take into account in these cases could be gleaned from the current Code for Crown Prosecutors. But the way in which the DPP had to explain his decision in the case of Daniel James (*Decision on Prosecution – The Death by Suicide of Daniel James*, 9 December 2008) shows that some of the listed factors have to be turned on their head and other unlisted

factors introduced in order to cater for these difficult decisions. Furthermore, as it seems to me, the object of the exercise should be to focus, not upon a generalised concept of 'the public interest', but upon the features which will distinguish those cases in which deterrence will be disproportionate from those cases in which it will not. The exercise will be important, not only in guiding the small number of Crown Prosecutors who decide the small number of cases which are actually referred to them by the police, but also in guiding the police and thus the general public about the factors to be taken into account in deciding whether a prosecution will or will not be in the public interest.

65. I do not underestimate the difficulty of the task. Clearly, the prime object must be to protect people who are vulnerable to all sorts of pressures, both subtle and not so subtle, to consider their own lives a worthless burden to others. These were the pressures about which the Members of this House were most concerned. But at the same time, the object must be to protect the right to exercise a genuinely autonomous choice. The factors which tell for and against such a genuine exercise of autonomy free from pressure will be the most important.

66. But I have also been concerned about whether account should be taken of the reasons why a person might wish to die. Take the example of Lord Falconer's amendment, which would have restricted the right to exercise choice to those who were terminally ill. If we are serious about protecting autonomy we have to accept that autonomous individuals have different views about what makes their lives worth living. There are many, many people who can live with terminal illness; there are many, many people who can live with a permanent disability at least as grave as that which afflicted Daniel James; but those same people might find it impossible to live with the loss of a much-loved partner or child, or with permanent disgrace, or even with financial ruin. Yet in attitudinal surveys the British public have consistently supported assisted dying for people with a painful or unbearable incurable disease from which they will die, if they request it, while rejecting it for people with other reasons for wanting to die (National Centre for Social Research, *British Social Attitudes*, The 23rd Report, 2007, chapter 2).

67. Here we are, of course, concerned about people who are unable or unwilling to end their own lives without assistance. The need for more precise guidelines governing the prosecution of those who may help them stems from the right to respect for their private lives protected by article 8. So I come back to what the European Court said about that right in *Pretty*, in the well-known passage at para 65:

'The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of the sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.'

68. It is not for society to tell people what to value about their own lives. But it may be justifiable for society to insist that we value their lives even if they do not. In considering



the factors for and against prosecution in the Daniel James case, the DPP did not focus upon the reasons why Daniel wished to die. Rather, he focussed upon the fact that he was 'a mature, intelligent and fiercely independent young man with full capacity to make decisions about his medical treatment', who had tried to commit suicide before, and whose parents had tried relentlessly to persuade him not to do so; also, far from gaining any advantage from his death, it had caused his parents profound distress. These are obviously among the most important factors, although no doubt there are many more. But among them, I would hope that some attention would be paid to the reasons why the person (whose Convention rights are engaged) wished to be helped to end his or her life. The House, when debating Lord Falconer's amendment, was clearly concerned that some of the people who had made use of the services of Dignitas in Switzerland were not suffering from terminal or seriously debilitating diseases. If it is the Convention which is leading us to ask the Director for greater clarity, a relevant question must be in what circumstances the law is justified in interfering with a genuinely autonomous choice.

Ms Purdy's argument was subtly different to that advanced by Mrs Pretty, in that she claimed that the interference with her right to privacy under Article 8 was not 'in accordance with the law' as required by Article 8(2), given the absence of an offence-specific policy by the DPP. In accepting this argument, the law lords take a significant step in acknowledging the powerful force of respect for individual autonomy in end of life decision making. In September 2009 the DPP published interim policy on prosecuting cases of assisted suicide which has been put out for public consultation (CPS 2009).

As Kennedy has suggested, the medical application of the principle of self-determination is fraught with contradiction. The same contradiction can be seen in legal rules. The defendant in *Blaue* (1975) was convicted of manslaughter after the woman he stabbed refused a life-saving blood transfusion because she was a Jehovah's Witness. The medical evidence was that she would not have died had she accepted the transfusion. The decision was predicated on her refusal to have life-saving treatment being respected by those treating her. Why was she 'allowed' the self-determination or autonomy denied to those with painful, terminal illness? Should the defendant have had to bear responsibility for his victim's exercise of the right to self-determination? This transfer of responsibility effectively qualifies that right. This aspect of the case is consistent with the decision in *Stone and Dobinson* (1977). The defendants were convicted of the manslaughter of Stone's sister who suffered from anorexia nervosa. She starved to death while living as a lodger in the house which the defendants shared. The case is troubling because the evidence indicated that the defendants' mental capacities were such that they would have found it difficult to care for the sister, or to summon help. But even if they had been better endowed with mental, social and financial resources, it is not clear why they should have been regarded as responsible for the sister's own decisions in relation to her health. It is argued, however, that to allow a person to be helped or assisted in their decision to neglect themselves or to die or both, albeit thus respecting their



autonomy, is too dangerous a principle to be formally legalised. In the following passage, Rachels argues against this position. The distinction between active and passive euthanasia which he discusses is one on which medico-legal discourse often implicitly relies (cf the distinction between acts and omissions distinction applied in *Bland*):

James Rachels 1986 'Euthanasia' in Regan *et al.* (eds.), *Matters of Life and Death* (Random House), pp. 18, 49, 61

The phrase 'active euthanasia' is used to refer to cases in which the patient is killed – for example, by being given a lethal injection. The phrase 'passive euthanasia' refers to cases in which the patient is not killed but merely allowed to die. In passive euthanasia we simply refrain from doing anything to keep the patient alive – for example, we may refuse to perform surgery, administer medication, give a heart massage, or use a respirator – and let the person die of whatever ills are already present. It is important to note this distinction because many people believe that, although active euthanasia is immoral, passive euthanasia is morally all right . . . In addition . . . it is important to bear in mind the difference between voluntary, non-voluntary, and involuntary euthanasia. Voluntary euthanasia occurs whenever the patient requests death . . . Non-voluntary euthanasia occurs when the patient is unable to form a judgement or voice a wish in the matter and, therefore, expresses no desire whatever . . . Finally involuntary euthanasia occurs when the patient says that he or she does not want to die but is nevertheless killed or allowed to die . . . I shall not be concerned with involuntary euthanasia. My view is that it is simply murder and that it is not justified. If a person wants to live on, even in great pain and even with the certainty of a horrible end, that is the individual's right . . .

What are we to understand by the word 'euthanasia'? Primarily it means killing someone – or letting someone die – who is going to die soon anyway, at the person's own request, as an act of kindness . . .

The single most powerful argument in support of euthanasia is the argument from mercy . . . Terminally ill patients sometimes suffer pain so horrible that it is beyond the comprehension of those who have not actually experienced it . . . The argument for mercy says euthanasia is justified because it provides an end to that . . . In connection with this argument, the utilitarians should be mentioned . . . They argued that actions and social policies should be judged right or wrong exclusively according to whether they cause happiness or misery; and they argued that when judged by this standard, euthanasia turns out to be morally acceptable. The utilitarian argument may be elaborated as follows:

1. Any action or social policy is morally right if it serves to increase the amount of happiness in the world or to decrease the amount of misery. Conversely, an action or social policy is morally wrong if it serves to decrease happiness or to increase misery.
2. The policy of killing, at their own request, hopelessly ill patients who are suffering great pain would decrease the amount of misery in the world . . .
3. Therefore, such a policy would be morally right . . .

Although the foregoing utilitarian argument is faulty, it is nevertheless based on a sound idea. For even if the promotion of happiness and the avoidance of misery are not the only morally important things, they are still very important. So, when an action or a social policy would decrease misery, that is a very strong reason in its favour. In the cases of voluntary euthanasia . . . great suffering is eliminated, and since the patient requests it, there is no question of violating individual rights . . . I believe that the following argument is sound and proves that active euthanasia can be justified:

1. If an action promotes the best interests of everyone concerned and violates no one's right, then that action is morally acceptable.
2. In at least some cases, active euthanasia promotes the best interests of everyone concerned and violates no one's rights.
3. Therefore, in at least some cases, active euthanasia is morally acceptable . . .

There has been one famous case in which the question of nonvoluntary passive euthanasia was put before the courts. In April 1975, a twenty-one-year-old woman named Karen Ann Quinlan, for reasons that were never made clear, ceased breathing for at least two fifteen-minute periods. As a result, she suffered severe brain damage, and, in the words of the attending physicians, was reduced to 'a chronic persistent vegetative state' in which she 'no longer had any cognitive function'. Accepting the doctors' judgement that there was no hope of recovery, her parents sought permission from the courts to disconnect the respirator that was keeping her alive in the intensive-care unit of a New Jersey hospital. The Quinlans are Roman Catholics, and they made this request only after consulting with their priest, who assured them that there would be no moral or religious objection if Karen were allowed to die.

Various medical experts testified in support of the Quinlans' request . . . The trial court, and then the Supreme Court of New Jersey, agreed that the respirator could be removed and Karen Quinlan allowed to die in peace. The respirator was disconnected. However, the nuns in charge of her care in the Catholic hospital opposed this decision, and anticipating it, had begun to wean Karen from the respirator so that by the time it was disconnected she could remain alive without it . . . So Karen lingered on in her 'persistent vegetative state', emaciated and with deformed limbs and with no hope of ever awakening, but still alive in the biological sense. Finally, she died in June 1985.

Rachels goes on to propose a simple statute binding on criminal courts and declaring that a plea of mercy-killing would be acceptable as a defence to a murder charge in the same way that a plea of self-defence is. The defence would need to prove: (a) that the deceased was suffering from a painful terminal illness; and (b) that she had 'requested death'. In its recent review of the law of murder, the Law Commission decided against making any recommendations in relation to the creation of an offence or defence of mercy killing (2006, p. 151–2). Given its focus on the major task of reforming homicide law, the commission was understandably reluctant to be drawn into the treacherous ethical terrain of the rights and wrongs of legalising euthanasia. As we will see in the next part of

this chapter, Parliament continues its now customary position of discussing but ultimately avoiding such reform.

#### V.17.b.iv. Avoiding reform

The House of Lords Select Committee on Medical Ethics decided unanimously in 1994, primarily on the basis of the 'slippery slope' argument criticised by Dworkin, that there should be no change in the substantive law on euthanasia, mercy killing or complicity in suicide (Report of the Select Committee, 1993–94). The Committee did, however, endorse case law which recognises that an adult person of sound mind should be entitled to refuse invasive medical treatment, either on a contemporary basis or in anticipation of future incapacity (e.g. see *Re B* (2002) above).

However, in a judicial capacity, the House of Lords has repeated its earlier call in *Bland* for parliamentary attention to law reform:

#### *R (on the application of Pretty) v. DPP* [2002] 1 All ER 1

**Lord Steyn:** If s. 2 of the 1961 Act is held to be incompatible with the convention, a right to commit assisted suicide would not be doctor-assisted and would not be subject to safeguards introduced in the Netherlands. In a valuable essay Professor Michael Freeman trenchantly observed: 'A repeal of Section 2 of the Suicide Act 1961, without more, would not be rational policymaking. We would need a "Death with Dignity" Act to fill the lacuna.' (See 'Death, Dying and the Human Rights Act 1998' (1999) 52 CLP 218 at 237.) That must be right. In our parliamentary democracy, and I apprehend in many member states of the Council of Europe, such a fundamental change cannot be brought about by judicial creativity. If it is to be considered at all, it requires a detailed and effective regulatory proposal. In these circumstances it is difficult to see how a process of interpretation of convention rights can yield a result with all the necessary in-built protections. Essentially, it must be a matter for democratic debate and decision-making by legislatures.

...

The logic of the convention does not justify the conclusion that the House must rule that a state is obliged to legalise assisted suicide. It does not require the state to repeal a provision such as s 2(1) of the 1961 Act. On the other hand, it is open to a democratic legislature to introduce such a measure. Our Parliament, if so minded, may therefore repeal s 2(1) and put in its place a regulated system for assisted suicide (presumably doctor-assisted) with appropriate safeguards.

#### *R (on the application of Purdy) v. DPP* [2009] UKHL 45

**Lord Hope:** 26. It must be emphasised at the outset that it is no part of our function to change the law in order to decriminalise assisted suicide. If changes are to be made, as to which I express no opinion, this must be a matter for Parliament. No-one who listened to

the recent debate in the House of Lords on Lord Falconer of Thoroton's amendment to the Coroners and Justice Bill, in which he sought to define in law acts which were not capable of encouraging or assisting suicide, or has read the report of the debate in Hansard (HL Debates, vol 712, 7 July 2009, cols 595–634) can be in any doubt as to the strength of feeling on either side or the difficulties that such a change in the law might give rise to. We do not venture into that arena, nor would it be right for us to do so. Our function as judges is to say what the law is and, if it is uncertain, to do what we can to clarify it.

Over the years members of both houses of Parliament have sought to legalise assisted suicide. The most recent detailed proposals were contained in Lord Joffe's Assisted Dying for the Terminally Ill Bill, introduced in November 2004 and re-introduced a year later. Although it had little chance of becoming law, it would have allowed competent adults suffering from a terminal disease or a serious, incurable physical illness to request medical assistance to die. The slippery slope would be safeguarded by the confirmation of diagnosis by two doctors and consideration of all the alternatives to assisted suicide, including hospice and palliative care. A patient would have to make a written statement declaring their wish to die, witnessed by a solicitor who was satisfied of the patient's mental competence to understand their decision. The Bill advanced as far as its second reading, and after a six-month pause for a review, it was eventually (and seemingly inevitably) defeated by religious and palliative care based objections. More recently, Lord Falconer sought to amend the Coroners and Justice Bill 2009 to legalise assisted dying, although as Baroness Hale noted in *Purdy* this was defeated by 194 votes to 141. And yet, as we have seen, in its judicial capacity, the House of Lords has repeated its call for Parliament to act. In the meantime, following the decision in *Purdy*, the ethical buck has been passed to the prosecution service, which hardly seems a fair or indeed legitimate way to deal with such a major issue of societal importance. It remains to be seen whether detailed prosecution guidelines will dampen demands for substantive reform, though this seems unlikely. If the combined effect of high-profile cases such as *Pretty* and *Purdy* and the rather feeble passing of responsibility over to prosecutors do not stir government into legislative action, it is difficult to conceive that it ever will.

This is in contrast to the limited legislative developments towards the legalisation of euthanasia that have appeared in other jurisdictions, an example is the California Natural Death Act 1976, adopted in a large number of states. Notwithstanding its affirmation of human autonomy in relation to medical treatment, the scheme instituted by the California Act is, however, a restrictive one: it employs the distinction between passive and active euthanasia and reaffirms legal prohibition of the latter. A survey of physicians' understanding of the Act indicated that only approximately 17 per cent of dying patients receive



artificial life support and so qualify to opt for a natural death (Note 1979). Even the Netherlands, often regarded as at the forefront of legalising euthanasia, only formally reformed the law in 2001 by passing the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, after previously providing doctors with an immunity from prosecution on satisfying certain conditions. In the same year, Belgium followed by legalising euthanasia. Legislation legitimating euthanasia in the Northern Territory of Australia proved deeply controversial, not least on the grounds that it might be used for racist and eugenic purposes, and was annulled by the Federal Euthanasia Law Act in 1997.

Whilst the current position is characterised by disparities between the theory and practice of criminal law, and there is a frustrating impasse in terms of parliamentary reform, some defend the compromise position, subject to some modification:

Richard Huxtable 2007 *Euthanasia, Ethics and the Law: From Conflict to Compromise* (Routledge-Lavendish), pp. 143, 172-3, 174

I will suggest, perhaps controversially, that a compromise position will mean that the legal answers that should be given to the questions posed by Dianne Pretty *et al.* are essentially those already offered by our courts. This might seem surprising but adjustments will be required in order to restore a much-needed measure of coherence to the law. The task will be difficult since the contours of the compromise, indeed the very attempt to move to the middle ground, might be attacked from all sides. Nevertheless, serious thought must now be given to moving beyond 'the present impasse', in which 'we heatedly debate "right-to-die" legislation' (Fraser and Walters 2000: 122)...

There are, in summary, three areas of the law that are amenable to reconfiguration along the lines of compromise... The first, central reform is that the law ought explicitly to recognise mercy killing as an offence, which is also available as a partial defence to other homicide charges. In keeping this a crime, we can remain focussed on the moral pause that should precede any attempt to kill; in making it a lesser crime, it is possible to admit that some deaths are not so bad, at least when the deceased was suffering and, in some cases, desperately wanted the escape that death can afford. The crime, which should be rigorously enforced against laypersons and health professionals alike, should be subject to a maximum term of life imprisonment, although community disposals should be anticipated in typical qualifying cases. Which cases do qualify requires careful thought, so that we can reach a workable understanding of what it means for two cases to be 'alike' and thus amenable to similar disposals. In this manner, I have suggested that even involuntary euthanasia must be covered – although, here at least, a more punitive penalty should be expected.

This new category of killing will then have to be made to work alongside existing offences, particularly complicity in suicide. The compromiser must certainly strive to clear up many of the ambiguities surrounding the latter crime. The legality of 'death tourism', for example, should be clearly signalled; but so too should the illegality of assisting a suicide in this jurisdiction. This might not leave us with a fully coherent law; however, when considered

in a compromising spirit, proponents of euthanasia gain something here, albeit something which ought not to pose too great a threat to its opponents' viewpoints.

The same can be said of the two other areas of the law that are due for some revision, the omission of life-sustaining treatment and the double effect defence. As is currently the case, fatal omissions should be allowed, but efforts must again be directed towards clarifying the qualifying criteria and ensuring that disputes can be resolved effectively in practice. Given the (ethical and practical) disputes that can arise in such cases, recourse to ethics committees and mediators should help to air diverse viewpoints and identify a way forward. No single viewpoint should automatically take priority here and unilateral decisions must be avoided. This should even be the case where the patient refuses treatment in order to die: he or she will only be entitled to have that decision respected if it is clear that they have satisfied the relevant criteria for autonomous decision-making. Once again, that position broadly mirrors the existing rules, but it does at least clarify when and why the state has an entitlement to intervene in suicide attempts, at least until the patient's autonomy is confirmed.

Finally, the doctor's defence of double effect will also remain, but it must be subjected to greater scrutiny and more rigorous policing. Advice from the experts, specifically in palliative medicine, must be brought to the attention of the legal officials, who should in turn ensure that the defence is not used as a cloak for killing or negligent malpractice. Related changes, such as the possible abandonment of *Woollin* [1998] 4 All ER 103, could also help to restore coherence to the law in this area. Complete coherence may not be attainable but, for the compromiser at least, that will not be the goal as such: instead, the aim is to meld the conflicting contributions into a set of legal rules that are as rational as possible, in the sense that they can guide the various agents whose conduct will, or might, shorten patients' lives.

...

This is but the start of a discourse and process, in which we all have a stake. Allowing everybody's voices to be heard is an essential pre-condition to locating the middle ground, on which democratic and liberal premise we should still not find ourselves wholly committed to honouring personal autonomy, with the result that we end up embracing voluntary euthanasia. Instead... we need to find the point between seeing the value of life as determined by the individual, as dependent on the happiness or suffering of the individual, and as inviolable in recognition of its intrinsic worth. In moving from justification to excuse, by marking out euthanasia as a distinct (but reduced) crime, I believe that we begin to get there.

We already have, and have long had, an 'unofficial defence of euthanasia' (Lanham 1973: 202); it now needs to be made official. Nothing else seems to work; or, remaining mindful of the fact that theory will (necessarily) evolve and expand, it does not work yet. In short, the time has come to compromise.

In this section we have examined a number of criminal laws organised around the concept of bodily autonomy. Like public order, bodily autonomy can be seen both as a specific area of criminal law and as an underlying concern of criminal

law in general. Our principal focus has been on sexuality and on the extent to which people in general, and women in particular, are able to use their bodies in ways in which they wish. Criminal law does not explicitly recognise the concept of bodily autonomy, and this provides a partial explanation of the varied legal responses to social practices and situations that put in issue the proper scope for decision-making about physical integrity. Both the understanding of bodily autonomy and its regulation are markedly gendered, and gendered in entirely asymmetrical ways: this is shown both in the law's historical construction of sexual violence and in its regulation of prostitution and pornography. Our analysis of relevant aspects of criminal law has farther revealed the extent to which the operation of the law interacts with and depends upon the practices of other institutions and professional groups. This is particularly clear in relation to the medical profession – a powerful interest group influencing and regulating a diverse range of choices in the fields of contraception, abortion and euthanasia.

### FURTHER READING

- Russell Blackford 'Slippery Slopes to Slippery Slopes: Therapeutic Cloning and the Criminal Law' (2007) 7:2 *The American Journal of Bioethics* 63.
- Margaret Brazier *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation* (Cm 4068 1998).
- John Coggon 'Ignoring the Moral and Intellectual Shape of the Law after Bland: the Unintended Side-effect of a Sorry Compromise' (2007) 27 *Legal Studies* 110.
- Richard Huxtable *Euthanasia, Ethics and the Law: From Conflict to Compromise* (Routledge-Cavendish 2007).
- John Keown *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* (Cambridge University Press 2002).
- Penney Lewis *Assisted Dying and Legal Change* (Oxford University Press 2007).
- Roger Magnusson *Angels of Death: Exploring the Euthanasia Underground* (Melbourne University Press 2002).
- John Seymour *Childbirth and the Law* (Oxford University Press, 2000).
- John Spencer and Antje du Bois-Pedain (eds.) *Freedom and Responsibility in Reproductive Choice* (Hart, 2006).
- Judith Jarvis Thomson 'A Defense of Abortion' (1971) *Philosophy and Public Affairs* 47.
- Richard Tur 'Legislative Technique and Human Rights: The Sad Case of Assisted Suicide' [2003] *Criminal Law Review* 3.
- Mary Warnock and Elisabeth Macdonald *Easeful Death: Is There a Case for Assisted Dying?* (Oxford University Press 2008).
- Glanville Williams *The Sanctity of Life and the Criminal Law* (Stevens 1958).

## Section VI

# Making a Killing

## Conceptions of Violence

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### 18 The Social Construction of Violence and Personal Harm

- a. Conceptions of violence
- b. Domestic violence

### 19 The Criminal Regulation of Public Safety

- a. Regulation in context
  - i. Road traffic
  - ii. Work hazards
- b. Characteristics of regulatory offences
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- c. Corporate liability for crime
  - i. The rise of corporate manslaughter
  - ii. Vicarious and 'direct' liability
  - iii. The Herald of Free Enterprise story
  - iv. Corporate killing: the new offence

### 20 Homicide: Boundary Issues

- a. Is killing wrong?
- b. Medical non-treatment
- c. Definitions of death
- d. Causing death
- e. Who can be killed?

### 21 Murder and Manslaughter

- a. The penalty for murder
- b. The mental element in murder



- c. Reform: Three tiers for homicide?
  - i. Murder – one and two?
  - ii. Partial defences to murder (one?)
  - iii. Involuntary manslaughter
- d. Self-defence

In this final section we explore the relationship between behaviour which is regarded as violent by the formal processes of the criminal justice system (that is, police investigation, prosecution and trial), and that which is condoned or seen as appropriately controlled by other means. In Chapters 18 and 19 we consider different contexts in which violence occurs (at home, on the roads and in the workplace) and use them to demonstrate the ways in which the line between acceptable and unacceptable killing is socially constructed. We show that the criminal law definitions of unlawful homicide (murder, manslaughter and infanticide) cannot on their own explain the ways in which deaths are culturally understood as acceptable or not acceptable. At the same time, we seek to emphasise the argument that criminal regulation has an uneven and contested relationship with other forms of social control. We trace the history which explains how large corporations have tended to remain beyond the reach of criminal law and consider whether the Corporate Manslaughter and Corporate Homicide Act 2007 will significantly alter this.

Chapter 20 considers the boundary issues of homicide, and begins by questioning whether all killing is wrong. Medical practices in relation to the non-treatment of neonates (i.e. newly born infants), and the extent to which doctors can use pain-killing drugs to hasten death presents difficult questions at the margins of life and the margins of law. The medical context will show that systems of control and regulation, even over matters as crucial as life and death, are determined by social and professional mores as much as by criminal law. This prepares the ground for Chapter 21 where we unpack the important relationship between murder and manslaughter, which includes examination of the case for introducing a three-tiered structure of homicide. This includes a gendered analysis of the two main partial defences to homicide – diminished responsibility and provocation – and consideration of the latter's relationship with self-defence.

# The Social Construction of Violence and Personal Harm

## VI.18.a. Conceptions of violence

The term 'violence' is rarely found in statutory definitions, although, as we saw in our exploration of violence in the public order context, the Public Order Act 1986 provides an exception (see Chapter 6). Violence, however, is a concept which informs and underlies the practice of criminal law. For example, robbery is treated more seriously than theft because it involves the use of direct force. Violence is hidden in other ways. Road traffic offences exist in part to protect people from injury, yet until the emergence of 'road rage' they were never perceived as being connected with the stereotype of violent behaviour; academic studies of criminal law routinely ignore road traffic offences. This academic sidelining, as though the issues raised were inherently less interesting than the intellectual challenge of theft of a wild anemone or criminal damage of a greenhouse, reflects their wider marginalisation from issues of serious concern.

As the next two extracts emphasise, violence has to be viewed as historically, culturally and situationally contingent: it does not define itself. As Cotta argues, ideas and images of violence are contested and changing. Perceptions of violence are affected by changes in 'space, time and field'. We live in an era of intensive communication and increased mobility, which has rendered 'space' less fixed. Into this continuous and continuing space, the concept of 'time' has become compressed so that news is conveyed almost contemporaneously. One of the effects of this immediacy is to expand the conceptual 'field' of concepts such as violence. The word 'violence' is no longer confined to interpersonal physical harms: it is used for all kinds of unjust behaviour and wrongful acts (Cotta 1985, pp. 9–11).

In the first extract, Beattie places current preoccupations in an historical context. This is followed by a more philosophically centred discussion by Harris:

J. M. Beattie 1976 *Crime and the Courts in England, 1600–1800* (Lutterton Press), p. 74

Violent physical conflict brought men and women to court charged with a wide variety of offenses against the person that had differed in the violence employed and in their motives

and consequences, and that differed in the way they were regarded by society and the courts. Prosecutions that arose from some form of personal violence have some common characteristics, for usually a real victim suffered some harm. But murder, manslaughter, infanticide, rape, assault, and riot were so fundamentally different that they simply do not form themselves into a neat and coherent subject. A more serious difficulty arises from the fact that the view of violence from the courts is inevitably very limited. Most confrontations in which physical force or intimidation was used in the resolution of conflicts did not give rise to legal actions, and it is clear that the character and the full extent of violence in society cannot be adequately judged from the small number of prosecutions that were undertaken. There is good reason to think that violent physical conflict and physical abuse were commonly experienced in seventeenth and eighteenth century society. The family was the scene of much of it, for family discipline was commonly maintained by physical force . . . Physical intimidation within the household was matched and sustained by a broader acceptance of violence in society, and by the expectation that disagreements among men might reasonably be solved by physical means, or an insult redressed by fighting. On the whole such matters would have been regarded as private, not something that would normally engage the attention of the authorities . . . revealing of the general attitude toward violence and of the violent temper of the society is the use of terror and physical intimidation by the State in combating crime.

John Harris 1980 *Violence and Responsibility* (Routledge and Kegan Paul), p. 11

Despite its pervasive interest, there is surprisingly little agreement on the question of what violence in fact is, and what is in fact violence.

Some philosophers have felt that the most important feature of violence is that it involves violation of person's dignity or of his rights and have adopted conceptions of violence that give these features central place. In contrast to these rather broad conceptions of violence and perhaps as a reaction to them, other philosophers have produced very strict conceptions of violence. Their preoccupation is with law and order, and violence is contrasted with this to yield a narrow definition designed to capture the twin monsters of civil disorder and criminal assault. Other thinkers, impressed by political violence, have farther limited the conception of violence by confining its application to acts directed towards political change . . .

What can and what can't be called an act of violence? Are some people who use the word violence in the grip of a linguistic compulsion to which clear and decisive objections can be made, or must we perhaps accept a wide and all-embracing definition? . . . A concept of violence must enable us to distinguish violent methods of dealing with people from methods that are not violent; it must make clear the difference between acts of violence and acts which are not acts of violence. Such a concept may capture what we might call the rape, murder, fire-and-sword paradigm; it will outline a concept which preserves the fearful associations with which we have loaded the notion of violence, it will be such as to include the violent events of history, and finally this concept will show why almost everyone

insists on a moral distinction between violent methods and methods which do not involve violence.

The first thing to note is a distinction between violent acts and acts of violence. 'Violent' is an adjective, and a violent act, an act appropriately qualified by that adjective. An act of violence, on the other hand, is an act belonging to a particular category or class of actions not co-extensive with violent acts... [S]ome acts, while not themselves violent in character, may result in the sort of harm which we would unhesitatingly classify as an act of violence if deliberately inflicted by human agency. For example, if a gangster throws acid in the face of a policeman we would call it an act of violence. If the same gangster were to creep into the same policeman's house at dead of night and pour the acid over his face we would, I think, still be inclined to classify it as an act of violence. But perhaps this is because the burning action of acid is itself in a sense violent. A death can, after all, be a violent death even if not brought about by a violent act...

An act of violence occurs when injury or suffering is inflicted upon a person or persons by an agent who knows (or ought reasonably to have known) that his actions would result in the harm in question.

### VI.18.b. Domestic violence

We turn now to violence against women – an area which causes difficulties in terms of categorisation. In conventional criminal law texts, sexual offences are usually treated *sui generis* and placed adjacent to, rather than within, the section on offences against the person. This tends to reinforce the widespread notion that sexual offences are more about sex than about violence, when in reality they are about violence (Clark and Lewis 1977, pp. 128–9; and see Chapters 14 and 15). While not all sexual offences are committed against women, most of them are, and the vast majority of defendants tried at Crown Courts for sexual offences are male. Women are subjected to violent sexual abuse both inside and outside of the home. The existence and enforcement of sexual offences contribute to the way in which sexuality is regulated, and for that reason we considered them in Section V. Women are also subjected to 'non-sexual' domestic violence, which we discuss in this chapter. The division between domestic violence and sexual offences is clearly artificial. By drawing it, we do not mean to suggest that there are any fundamental differences between the violence to which women are subjected in the form of beatings and killings and that which comes in the form of rape and other varieties of sexual assault. Both have to be understood in the context of the institutions and ideologies which nurture patriarchal relations between men and women.

The social control exercised through law is often that of last resort after the processing effect of many other systems of example or discipline. The family, school, work, neighbours, friends, doctors, all exert forms of social, moral, religious and medical control. Social control has diversified, with the result



that it is less obvious. While it is pervasive it is not always perceptible (Cohen 1985, p. 63). Community control has developed alongside, and in many cases replaced, the formal institutions such as psychiatric hospitals. However, the decarceration movement has not necessarily resulted in an absolute reduction in the use of traditional custody. The length of sentences for offences of violence has significantly increased since 1993. Not only has the last decade witnessed the success of 'law and order' conservatives in maintaining the prison as an observable institution of social control, but even when the relative proportions between community and custodial control change, the system overall 'expands relentlessly' (Cohen 1985, p. 49). The net result is a vast increase in the reach of the state into everyday life.

New professional groups have been established to police norms of conduct: 'The paradox of decarceration is that it was founded on a principle of removing the state from many areas of activity, of limiting its agency, yet it has led to a vastly increased and pervasive mechanism for state regulation' (Garton 1987, p. 328). This can be observed in the increasing role of social workers in policing family life. Child abuse scandals, cuts in resources and the increasing demands from rising unemployment have forced social workers back onto their statutory responsibilities (see also the discussion of child abuse in Chapter 16.a.iv.)

The role of the family itself as a form of control is one of the most interesting because of its characterisation as a private institution. This tends to reinforce the false idea that violence largely takes place between strangers rather than amongst relatives or acquaintances. The tendency to characterise crime as happening outside the family and outside known circles is particularly distorting in relation to violence; homicide is overwhelmingly domestic and rape amongst spouses, cohabitants and acquaintances is not in the least uncommon. Violence in families, whether explicitly sexual or not, is frequent, and to call it 'domestic' makes it sound cosy. But in many ways it is far more alarming than stranger violence, not least because of the opportunity for it to be repeated continually against the same person. The family is ideologically portrayed as safe for its members from the outside world (in the words of Lasch (1977), 'a haven in a heartless world'), as well as being a locus of discipline, a standard-setter for its members in their relations with non-family. If it is in the family itself that people are vulnerable, then that rhetoric is more than inappropriate; it serves an ideological purpose of obfuscation.

The people who are most at risk in this family 'haven' are women and children. Although it would be wrong to suggest that these groups are not recognised at all as 'victims', the interaction between the institutions of the family and those of criminal justice is inevitably complex. The family is perceived as a strong and vital mediator between individuals and society, which renders recognition that it also harbours appalling levels of violence and abuse more difficult. The reality of much violence should, as the extract below suggests, be a source of discomfort:

Richard Dobash and Susan Dobash 1998 'Violent Men and Violent Contexts' in Dobash and Dobash (eds) *Rethinking Violence Against Women* (Sage), pp. 141–68

Popular conceptions of violent acts and those who commit them often reflect the notion that this is mindless, incomprehensible, unpredictable, and unpatterned behavior enacted by the alcoholic, the mentally unstable, or the socially desperate. Such notions are less uncomfortable and less challenging than the notion that violence might be functional, intentional, and patterned. If violence is a form of random deviance rather than a reflection of recurring social relations, then one need not worry about the shape and form of everyday social life but only about deviations from it. The concern about violence and its attending circumstances can thereby be removed from the concerns of those who have had no direct experience of it and expect none. It is the problem of others, the behavior of others, and an issue for others. If, however, violence is seen as intentional acts undertaken in order to achieve ends that are deeply embedded in the circumstances of daily life, it becomes an issue for us all, may affect anyone, and is about daily life. This conception requires a detailed account of violent actions and the circumstances and contexts in which they occur. Locating violence in the midst of daily life demands a focus on the mundane, the ordinary rather than extraordinary, the conflicts of interest embedded in daily life, and the rationales and justifications of perpetrators as well as the reactions and responses of victims...

The term 'domestic violence' has been criticised on a number of grounds. First, it does not specify that it is mainly women who are victims, although a further dimension to the whole debate is the extent to which violence by women has been suppressed (Heidensohn and Gelsthorpe 2007, p. 391). Use of the term 'victim' is open to the criticism that it obscures 'the real nature of the violence; that it is violence committed by men against the women they live with' (Maguire 1988, p. 34). The tendency to marginalise women as crime victims is further emphasised in the choice of the term 'battered wives' rather than 'violent husbands'. Historically, English common law clearly articulated the rights of husbands over their wives' property and of control of their daily affairs. This included the right to use reasonable force to chastise them. Thus, physical force (albeit reasonable!) was legitimate, both socially and legally.

All this adds up to huge difficulties in the quest to capture the essence or estimate the extent of domestic violence. Individuals are reluctant to disclose information on their experience of sexual and domestic violence in the context of face-to-face interviews, and as a result, additional questions have been included in the British Crime Survey since 2004/5 to better ensure privacy and thus more accurate responses. The 2008/9 report confirms the general trend that most offenders are male (74 per cent) and most victims are female (77 per cent), although both these figures have decreased in recent years (Home Office 2009, p. 70). Repeat victimisation accounts for 66 per cent of all domestic violence incidents. The growth of mass and local victim surveys has produced much conflicting data. Despite methodological problems and disparities produced

from differing perceptions of what counts as violence, these studies all tend to indicate low levels of reporting of domestic violence (Zedner 1997, p. 582). For example, the most recent British Crime Survey self-completion questions on intimate, domestic or sexual violence shows that 6 per cent of women were victims of domestic abuse in the past year compared with 4 per cent of men (Home Office 2005, p. 45). Research estimates suggest a much greater prevalence. In a survey of 1,100 married women, Painter and Farrington (1998) found that 14 per cent of married and 54 per cent of divorced/separated women had been hit by a husband or ex-husband. Similarly, research suggesting that 1 in 4 women and 1 in 7 men will experience domestic violence in their lives captured the headlines and the government's attention (Mirrlees-Black 1999). Despite the fact that a considerable proportion of all requests for assistance to the police involve 'domestic disturbances', non-intervention is not an uncommon police response.

One result is that victims of domestic violence are far less likely to receive compensation. The Criminal Injuries Compensation Scheme originally excluded victims of domestic violence, underlining the view that these were not worthy victims. The bar was removed in 1979, but one condition for claiming is that offences should be prosecuted unless there are practical, technical or 'other good reasons' why a prosecution has not been brought. It is not always easy to comply with this condition. Awards are also unlikely if there continues to be a link between the offender and victim, given the risk that this could benefit the offender (Criminal Injuries Compensation Authority 2001).

Over the last 50 years, there has undoubtedly developed a greater awareness of the prevalence of domestic violence and police forces have developed initiatives to handle complaints of both sexual and domestic assault more sensitively and to reduce the attrition rate. However, empirical research casts severe doubt about whether a pro-prosecution policy serves the interests of domestic violence victims, with criminal justice interventions risking exacerbating the problem (Cretney and Lewis 1996; Hovie and Sanders 2000). One option discussed in the next extract is to pursue 'victimless prosecutions':

James Allan, *Compensation to Victim Battered by Domestic Violence Perpetrators* [2001] *Criminal Law Review* 768, at 769-71

A principal potential benefit of victimless prosecution is that it effectively removes power and control from the defendant. The strategy specifically eliminates incentives for an abuser to resort to intimidation for the express purpose of deterring her from testifying against him in court. Victimless prosecution is also comparatively less burdensome for victims when compared to a system of forced or mandated participation. Key objections to mandated participation in domestic violence cases centre on the threat to the victim's autonomy. Critics specifically argue that the state should not substitute itself for the batterer by taking control of the woman's life. Some have argued that forced participation risks re-victimising the victim by subjecting her to further coercion at the hands of the state. Others have



voiced concerns that forcing a woman to participate effectively holds her responsible for stopping the abuse and disempowers her from responding to the abusive relationship on her own. Victimless prosecution may attract similar criticism as prosecutions may proceed regardless of the victim's expressed wishes. Prosecuting a case without a victim's testimony and support is however distinguishable from forcing a reluctant or hostile victim to attend court and testify against her wishes under the threat of contempt proceedings. The latter clearly poses a more potent threat to the victim's autonomy. Moreover, it gives victims no choice but to participate in a process they may well find stressful and intimidating and exposes them to an increased risk of retaliatory violence. One may also question the extent to which the decision to withdraw support for a prosecution following an initial complaint is likely to be an autonomous choice in many cases. Research indicates that it is in fact a decision often shaped by significant situational constraints and the controlling behaviour of a violent partner. As Casey Gwinn explains:

'Taking the responsibility for the prosecution away from the victim, and placing it on the prosecution agency, is done to insulate the victim from the batterer's anger, retaliation and coercion to "drop" the charges while simultaneously recognizing the fact that the victims face a multitude of competing survival necessities that may lead them to believe that having the criminal case dismissed is ultimately in their interest.'

...

It is suggested that a shift towards victimless prosecution would also improve police responsiveness to domestic violence situations and possibly address the continued marginalisation of domestic violence units within forces. Removing victims from the equation would specifically eliminate a key source of uncertainty and police frustration. The police response is not of course shaped merely by evidential considerations. Research suggests that officers are also influenced by concerns that the criminal justice system was unable to meet the needs of many of domestic violence victims and by working rules regarding the sanctity of the family unit. Nevertheless, officers may be more inclined to commit limited resources to an investigation when attainability of a 'positive result' (successful prosecution) is independent of complainant support. This may be attributed to a recognised commitment to crime control values and the concordant tendency to view discontinuance as a 'failure'.

Finally, reports from the United States suggest that victimless prosecution may improve conviction rates in domestic violence cases either through successful prosecutions or offenders pleading guilty prior to trial when confronted with physical evidence including photographs of victims' injuries. This may serve a useful symbolic purpose, sending a clear message to perpetrators that violence between intimate partners in private is taken as seriously as violence between strangers in public. It would also provide the state with an opportunity to intervene in a greater number of cases where dangerous men pose substantial risks to the physical safety of their partners or ex-partners and hopefully engage constructively with those men with the aim of changing their offending behaviour. As Hanna maintains, prosecution offers at least some hope for controlling violence against women and for ultimately reducing the physical injury and related social, economic and personal costs caused by domestic violence.



The Family Law Act 1996 introduced civil remedies for domestic violence victims in the form of protective orders (see Pt IV of the Act). Any use or threat of violence brings with it the presumption of powers of arrest (s. 47(2)). In 2002, the government signalled its intent to throw more criminal law at the problem of domestic violence in its criminal justice White Paper (Home Office 2002b). Amongst numerous changes introduced in the Domestic Violence, Crime and Victims Act 2004, the most notable (and controversial) is making breach of non-molestation orders a criminal offence, punishable by up to five years' imprisonment (s. 1), following in the footsteps of other hybrid provisions such as anti-social behaviour orders. The Act also allows courts to impose restraining orders when sentencing for any offence (under s. 12), although this did not come into force until 30 September 2009. Until this point, such orders could only be imposed on offenders convicted of harassment or causing fear of violence under section 4 and section 2 of the Protection from Harassment Act 1997. Breach of an order is a criminal offence punishable by a maximum five years on indictment. This enables courts to impose restraining orders on acquittal for any offence (or if a conviction has been overturned on appeal) if they consider it necessary to protect the victim from harassment. This will deal with cases where the conviction has failed but it is still clear from the evidence that the victims need protecting (s. 12). This is clearly at odds with a due process perspective and reflects the victim centredness which characterises recent criminal justice policy. It also ignores the critique that in focusing on the disregard for state authority, such penalties often lose sight of the conduct in question and the protection of the victim (see Burton 2003, p. 301). The Act also strengthens the civil law on domestic violence to ensure cohabiting same-sex couples have the same access to non-molestation and occupation orders as opposite-sex couples, and extending the availability of these orders to couples who have never lived together or been married (ss. 2, 3 and 4)

Section 5 creates a new homicide offence of causing or allowing the death of a child or vulnerable adult:

### Domestic Violence, Crime and Victims Act 2004

#### Section 5

- (1) A person ('D') is guilty of an offence if –
  - (a) a child or vulnerable adult ('V') dies as a result of the unlawful act of a person who –
    - (i) was a member of the same household as V, and
    - (ii) had frequent contact with him,
  - (b) D was such a person at the time of that act,
  - (c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and

- (d) either D was the person whose act caused V's death or –
  - (i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),
  - (ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and
  - (iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.
- (2) The prosecution does not have to prove whether it is the first alternative in subsection (1)(d) or the second (sub-paragraphs (i) to (iii)) that applies.

The rationale for the offence is clear – giving prosecutors an easier alternative to proving principal or secondary liability to homicide – yet it possesses the complexity which characterises much contemporary criminal law making, and incorporates omissions liability based on an objective 'ought to have known' of the 'significant risk' basis. There were eight convictions for this offence in 2008/9 (Home Office 2009b, p. 30). It was for this offence that the killers of Baby Peter, a 17-month-old boy killed after persistent abuse and neglect from his mother, her boyfriend and his brother which led to much criticism of the social services provided by Haringey Council, were convicted in November 2008. His mother pleaded guilty to the offence (*The Guardian*, 12 November 2008). Whilst such a case is on the extreme end of the scale, more generally, some have questioned the fairness of the state prosecuting women victims of domestic violence whom it has previously failed.

*Jonathan Herring, 'Fatal Homicide: Failure to Protect and Domestic Violence: Who's the Victim?' [2007] Criminal Law Review 923, at 928ff.*

It is naive and simplistic to say that a woman whose partner is violent should simply leave the house or alert the authorities. For a mother to intervene to protect her child by warning the relevant authorities or restricting contact between the abuser and the child may be extremely dangerous. It is often more dangerous for a victim of domestic violence to leave her partner than to remain with the abuser. Women and children seeking to escape violence face dangers not only from the abuser. They are likely to face inadequate housing; financial insecurity; social exclusion; and the guilt of depriving the children of their relationship with their father. Extraordinary efforts are required of the 'reasonable mother'. Mothers do, and are expected to, give up everything for the child. For the law to require the mother so to endanger her life is to demand too much. In many cases it is a choice between the risk of violence in staying in the house or the risk of violence that will arise from seeking protection. An abused woman may well decide that for herself and her children the violence to which she has become accustomed is safer than the violence that may be provoked by an attempt to leave or seek assistance. Can we be confident that such an assessment is wrong?

Further, what is so easily overlooked by juries and prosecutors, at least without expert assistance, is the myriad of ways that abused mothers do seek to protect their children:

placing themselves as a buffer or alternative source for the abuser's violence; seeking to ensure that the child is alone with the abuser as little as possible; cutting back on working hours to be present with the child. These may not appear to be much, but they may be the best that can be expected. Writers who support failure to protect statutes often create an image of a mother idly standing by as her child is abused or killed. In fact, such complete non-action is rare. The kind of avoidance tactics, such as already mentioned, are often used, but are rarely given the attention they deserve.

Under s. 6 of the Human Rights Act 1998 public authorities and the state have a duty to protect children's rights under Arts 2 and 3 of the European Convention on Human Rights. This duty requires the public authority to intervene where they have or ought to have knowledge that a child is facing a risk of death or inhuman or degrading treatment. They will breach their duty if they fail to do all they reasonably can to protect a child from such risks. Consider, then, a case where a mother is aware that her partner is posing a risk to the children. He has been increasingly violent. She notifies the local authority of her fears. They fail to intervene and subsequently the children are killed by the partner. In such a case there may be little difficulty in convicting the mother under s. 5. A jury may well feel that she should have done more to protect the children. However, both the local authority and the mother have failed in their duties to the child. Indeed, the state will not have the argument that the mother may have, that they were intimidated by a fear of violence. Yet it will be the mother who will be blamed in the courts.

Now, of course, the fact that someone else is also to blame for the injuries to the victim is not normally a defence to a criminal charge. My concern, however, is that s. 5 may be used to reprivatise the responsibility for child abuse. By emphasising through s. 5 the mother's responsibility towards the children, the state's obligation can easily be overlooked. Indeed there is even a danger that the state may claim its obligation towards abused children is met by placing onerous obligations on the mother to protect them.

If the state is to impose obligations on victims of domestic violence to protect their children then the state needs to ensure that assistance is in place to enable them to do so. The provision of services for women seeking to escape violence is inadequate, especially given the vulnerable state they are in. There is still a desperate shortage of adequate shelters, financial help and wider social support for victims of domestic violence. Allegations of domestic violence are still not taken sufficiently seriously by the courts and police. For the state to punish victims of domestic violence for failing to protect their children, while the state fails to ensure adequate legal and social protection for them when they seek to do so, renders the law hard to justify.

Children under one are the most at risk group to be victims of homicide, followed by those between the ages of 16–29 (Home Office 2009b, p. 13). Child abuse engenders extreme reactions. On the one hand, those who attempt to protect vulnerable children are seen as interfering with the privacy of family life, while on the other, social workers are frequently criticised for failing to prevent deaths from child battering (see Chapter 16.a.iv.). Once such a death, or child abuse, has been acknowledged to have occurred, people do not doubt

that it is properly a matter for criminal law. The contradictions it raises are more about perceptions of the sort of family an abuser is likely to come from and conflicts of interest between different members of the family.

But there are other circumstances of death and injury about which we do have doubts – we do not seem to know whether to classify them as wrongdoing. We will be examining some of these in the following chapters – road traffic deaths and deaths at work (Chapter 19), and deaths from medical non-treatment (Chapter 20).

#### FURTHER READING

- Crown Prosecution Service *Violence Against Women Crime Report* (CPS 2008).
- Carolyn Hoyle *Negotiating Domestic Violence: Police, Criminal Justice and Victims* (Oxford University Press 1998).
- Carolyn Hoyle and Andrew Sanders, 'Police Response to Domestic Violence: From Victim Choice to Victim Empowerment' (2000) *British Journal of Criminology* 40.
- Mangai Natarajan (ed.) *Domestic Violence: The Five Big Questions* (Ashgate 2007).
- Patrizia Romito *A Deafening Silence: Hidden Violence Against Women and Children* (Policy Press 2008).
- Evan Stark *Coercive Control: The Entrapment of Women in Personal Life* (Oxford University Press 2007).
- Sandra Walklate 'What is to be Done About Violence Against Women? Gender, Violence, Cosmopolitanism and the Law' (2008) 48(1) *British Journal of Criminology* 39–54.



## The Criminal Regulation of Public Safety

### VI.19.a. Regulation in context

In this chapter we consider the wider context of serious injuries and deaths: those caused in road traffic accidents and at work. Both are marginalised from the mainstream of criminal law by the provision of separate offences, by differential enforcement and, in the case of workplace deaths, by the provision of a separate regulatory scheme. The marginalisation both results from and reinforces the notion that some criminal offences are neither 'really' criminal nor violent, despite causing death or serious injury.

One way of looking at criminal law and criminal regulation is in terms of the different conceptions which have arisen of 'real' crime and 'quasi' crime. 'Quasi' crime is a term used to describe offences committed largely by white collar criminals pursuing their business interests and those committing road traffic offences. We do not mean, by using these terms, to endorse that distinction. To do so would be to suggest that environmental pollution or injuries resulting from breaches of health and safety regulations are conceptually different from assaults or thefts. This is difficult to justify. It is the existence of the distinction in the ideology of criminal law that we emphasise. Although it has been thought necessary to subject much business activity to a form of regulation and, frequently, to back this up with a criminal sanction, completely separate enforcement agencies have developed with distinctive styles of operation. So, whereas the police generally adopt a 'them and us' approach to criminal law breaking, the dominant mode for many regulatory agencies is negotiation and compliance. However, the example of road traffic indicates that the difference cannot be explained merely by the different agendas of the police and of regulatory agencies.

#### VI.19.a.i. Road traffic

Although there has been a significant reduction over the last 40 years, nearly 3,000 people still die in UK road traffic accidents each year, yet few of these result in manslaughter prosecutions. And few are prosecuted for non-fatal offences against the person in respect of the 25,000 who suffer serious injuries.

This 'tolerance' of vehicle accidents is not new. Dangers arose in early modern Britain from the very large numbers of horses in circulation. London accounted for 8,000 private and public coaches in the middle of the eighteenth century, which suggests many thousands of horses. The earliest reliable survey suggests 1,000 deaths from accidents involving horses and carriages in the year 1840 (Hair 1971, pp. 5–24). Then, as now, very few of the homicide cases before the courts arose from death caused by transport accidents. Juries tended to find a verdict of death by 'misfortune' and to acquit the accused entirely when faced with homicide charges arising from accidents with horses, coaches or wagons (Beattie 1986, p. 86). Causing death by dangerous driving is less well tolerated nowadays. As a result of safety campaigns, and improved car and road design, the number of fatal accidents has decreased by nearly 40 per cent in the last 20 years, the number of children killed or seriously injured by 59 per cent and the overall casualty rate by 36 per cent (see [www.dft.gov.uk/pgr/statistics/datatablespublications/accidents/casualtiesmr/rcgbmainresults2008](http://www.dft.gov.uk/pgr/statistics/datatablespublications/accidents/casualtiesmr/rcgbmainresults2008)).

Until the passage of the Road Safety Act 2006, the choice of charge (if any) following road traffic deaths was between manslaughter and one of the offences under the Road Traffic Act (RTA) 1988 (as inserted by the RTA 1991). These include causing death by dangerous driving (s. 1); causing death by careless driving when under the influence of drink or drugs (s. 3A); or dangerous driving (s. 2). The maximum penalty for causing death by dangerous driving was increased to 10 years' imprisonment by the 1993 Criminal Justice Act (s. 67(1)) and then to 14 years by the 2003 Criminal Justice Act (s. 285(3)). Although causing death by dangerous driving now attracts more serious sentences (the average is three years in prison), nonetheless its survival as a separate offence marks it out from the generic manslaughter offence. The 2006 Act introduced two additional offences of causing death by careless or inconsiderate driving with a maximum of five years' imprisonment (s. 20) and causing death by unlicensed, disqualified or uninsured driving (s. 21) with a two-year maximum sentence. The former has been criticised for creating a homicide offence based on simple negligence whilst the latter is a constructive crime requiring no culpability in relation to the actual driving itself. For criticisms of the rationale underlying these offences see Cunningham (2007). There is therefore something of a paradox that road safety is taken seriously in the UK in terms of both preventive strategies and a raft of offences to respond to those who cause death yet there is still a reluctance to see dangerous drivers as serious offenders.

There were 448 recorded offences for the various driving-death offences in 2008/9. This can be compared with the 648 offences for unlawful homicide from all other causes (Home Office 2009b, Table 2.04). The death-driving offences are recorded separately, thus confirming their distance from the 'real' criminality of homicide. Males comprise the vast majority of those found guilty of causing death by dangerous driving. Where a death arises from aggravated vehicle-taking, the penalty is five years (Theft Act 1968, s. 12A as inserted by the Aggravated Vehicle Taking Act 1992). The introduction of the aggravated

offence of temporary vehicle-taking to deal with the social problem of 'joyriding' is a good illustration of the use of labels to stigmatise certain types of offender (young, inner-city rebels) for mimicking the widely accepted macho styles of driving which attract far less opprobrium. It also illustrates the thesis that legal solutions to perceived social problems are often superfluous, given the range of other offences. There were only 15 recorded offences for this offence in 2008/9 (Home Office 2009b, Table 2.04). There is a discernible shift in mood in relation to road deaths and custodial penalties are more likely to be imposed than in the past. The power to refer lenient sentences to the Court of Appeal under section 36 of the Criminal Justice Act 1988 has provided a useful focus for victim groups such as the Campaign against Drinking and Driving (Shute 1994, p. 749), and partly as a result, a number of sentences have been increased. The tone was set early on when, in the first year after the introduction of the procedure, the Court of Appeal imposed custodial sentences on two people convicted of causing death by reckless driving in place of the non-custodial sentences they had received at trial (*A-G's Reference (Nos. 3 and 5 of 1989)*). Over 70 per cent of these offenders receive custodial penalties, but a significant proportion are fined or placed on community service orders, sentences rarely deployed for those convicted of manslaughter.

There is some correlation between serious traffic offenders and more general criminal behaviour.

*Gerry Rose 2000 The Criminal Histories of Road Traffic Offenders, Research Study No 206 (Home Office) Executive Summary*

Serious traffic offenders were of a similar age profile to mainstream offenders with the exception of drink drivers, many of whom were older (48% of the... sample were aged over 33). For disqualified drivers, dangerous drivers, and mainstream offenders, between 60 per cent and 75 per cent of convicted offenders were in the age-range 18 to 32. The prevalence of traffic offending was higher for young white people than for those from other ethnic groups...

Analysis of criminal histories... concentrated on the links between serious traffic offending, 'mainstream' criminal offending and vehicle theft... Clear differences were found between the three serious traffic offender groups, especially in comparison with mainstream offenders.

**Drink drivers** were about twice as likely to have previous convictions as would be expected in the general population. Although 40 per cent of drink drivers had a criminal history, this was less extensive than any other group of offenders examined in this study and the average time since a last conviction was eight years. Drink drivers usually appeared in court for only that offence, rather than a number of offences (as was the case with other offender groups). Drink driving was not closely associated with criminal offending.

**Disqualified drivers** had criminal histories similar to those of mainstream offenders (79% had a criminal record as compared with 72% of mainstream offenders). They had a similar

number of previous convictions, and their likelihood of subsequent conviction within a year was the same (at 37%). The reconviction patterns of this group showed some tendency to repeat disqualified driving but within a more generalised context of offending.

**Dangerous drivers** showed less involvement with crime than disqualified drivers but more than drink drivers. Approximately 50 per cent had a previous conviction and a quarter was reconvicted within a year. The research suggested there may be two groups of dangerous drivers: about a third had previous convictions that included car theft, and were otherwise similar to recidivist mainstream offenders and disqualified drivers; the other two-thirds showed criminal histories more similar to those of drink drivers.

Although road traffic offences are enforced by the police, in other respects the system by which they are regulated shares many of the characteristics of business and corporate regulation. In particular, there is a set of specialised offences, many of which are strict liability, and enforcement practices differ from those used for 'mainstream' violence offences. The notion that these offences are not quite the same sort of crime as burglary or drunken brawls is reinforced through such substantive and procedural differences. The interactive process between the social reception and the legal response to driving offenders means that even where people use a vehicle as a weapon of deliberate harm, they are treated surprisingly gently.

#### *Dr. R. J. G. 'Weapons of Offence' [1985] Criminal Law Review 71*

There were three heart-warming items in the newspapers recently. The first was the happy news that although compulsory seatbelts had dramatically reduced the number of fatalities in cars, 'the number of organs available for transplant has not been affected because most come from pedestrians or cyclists involved in accidents.' The second was that a driver who turned his car round and drove for 40 yards on the wrong side of the road at a cyclist who had annoyed him, killing him instantly, had received a sentence of six months' imprisonment. And the third was a claim by a cycling organisation that where cyclists are killed or injured by even the most terribly bad driving, derisory sentences are often imposed. These prompt the question: has society in general, and have the criminal courts in particular, got their moral values mixed up when it comes to damage done to pedestrians and cyclists by motor vehicles? In an attempt to answer it, I tried to make a little study of the usual legal consequences of the worst conceivable case: where a driver deliberately turns his vehicle on a pedestrian or cyclist, using it against him as a weapon of offence.

It shows how common this behaviour is that I had no difficulty in collecting over 30 such cases. A few were old, but most were modern: 17 from the 1980s, and six were from the late 1970s. In most of them the prosecution case was that the driver drove straight at his victim, usually intending to scare him, but in some instances he did so intending to cause him serious harm. In three cases, the driver accidentally or deliberately impaled his victim on the front of his car, and then zigzagged at speed in order to throw him off... I fear the



evidence strongly suggests that the answer to this question is 'yes'. Drivers who behave in this fashion, although usually guilty of serious offences against the person, often seem to be treated as mere motoring offenders, and to escape lightly.

We would expect to find the motorist who drives at a pedestrian or cyclist in serious trouble. If he kills he is usually guilty of murder. This is obviously so if he runs his victim down intending to kill or maim. As the law stands, however, he is equally guilty of murder if he so kills without any premeditated intention to kill or maim... The penalty for murder is mandatory imprisonment for life. Where a person gets convicted of the lesser offence of manslaughter for killing a pedestrian or cyclist by deliberately running him down with a car, we would expect him also to receive a fairly severe prison sentence. The 'tariff' for manslaughter resulting from an attack on another with a gun, axe, knife or broken bottle is around the five-year mark, and the same should surely apply to the manslaughterer who chooses the bluntest of all blunt instruments, a car.

Even where he does not kill, one would expect the motorist who runs someone down on purpose to be in serious trouble. To run someone down intending to kill him is attempted murder; to do so intending serious injury is causing grievous bodily harm with intent, contrary to the Offences Against the Person Act 1861, s. 18, or an attempt if the intended victim jumps clear. In any of these cases the maximum penalty is life imprisonment. The tariff for a section 18 offence is in the region of three to five years' imprisonment, towards the upper end if a lethal weapon was used, and as a car is obviously a very lethal weapon this is therefore the sort of sentence one would expect a motorist to receive for this offence...

...

[T]he use of a motor vehicle as a weapon of offence is often treated with remarkable lenity. First, in fatal cases murder charges are usually not pressed where they could be. Murder charges have occasionally been pressed against motorists who ran over with premeditated intention to kill or injure... but where they have killed... by driving at them to frighten them, or have done so by driving at them in a blind rage, they usually seem to be charged with manslaughter at the most. Thus, if a man, exasperated by a noisy party, shoots a gun at random into the house and kills, he gets prosecuted for murder; but if he kills by driving straight at a group of cyclists, one of whom has offended him by giving a rude sign, he will almost certainly be prosecuted for manslaughter only. In *Stratton* (1983), for example, a driver shot some traffic lights at red, impaled a pedestrian on the front of his car, and drove off at top speed swerving violently to throw him off. The pedestrian, a 14-year-old-boy, was killed when his head struck the pavement. The similarity with *DPP v. Smith* (1961) is obvious: yet the driver was prosecuted for manslaughter only, and at the trial the prosecution and the judge agreed to the manslaughter charge being dropped in return for a plea of guilty to causing death by reckless driving... The only cases I have discovered where the prosecution have pressed a murder charge against a risk-taking driver are *DPP v. Smith*, where the victim was a policeman, *Hedley* (1945), where the driver was an escaping robber and *Key* (1983), where the driver deliberately drove at a senior citizen who rebuked him for kerb-crawling...

Secondly, accepting that manslaughter rather than murder is the proper charge where the driver kills, and accepting the scale of sentences approved by the Court of Appeal, there are

many cases where the court of trial has imposed sentences which were amazingly light. For crushing her lover, the driver in *English* (1981) was conditionally discharged and disqualified from driving for 12 months. Perhaps this can be dismissed as a *crime passionnel* by a woman with genuine medical problems, but the same can hardly be said of *Leonard* (1983) and *Haste* (1983), where young men used their cars to kill total strangers who had temporarily offended them. Each of these defendants received sentences of only six months...

[B]ehind all the practical explanations for lenity in this sort of case there probably lurk psychological factors related to public attitudes to the motor-car... [T]he motor vehicle is firmly linked in everyone's mind with accidental death, and in the minds of lawyers with the criminal offences associated with carelessness rather than intentional injury.

The concern, or moral panic, about 'road rage' has not translated into prosecutions for more serious offences and more severe sentencing. According to the criminal statistics, in only a minority of recorded homicides (murders and manslaughters) was a vehicle used as the method of killing: there were 12 in 2008/9 (Home Office 2009b, Table 1.03). Any road traffic deaths recorded as offences of death caused by dangerous driving or careless driving under the influence of drink or drugs are not categorised as homicides in the official statistics. This separation both contributes to, and reflects, the way these offences are perceived.

#### VI.19.a.ii. Work hazards

Box (1983, p. 29) estimated that, adjusting for the population at risk, seven times as many people die from occupational accidents or disease than from homicide. Few of those deaths result in any form of prosecution. When charges are brought they are more usually pursued as health and safety offences rather than the more serious manslaughter offence. As the extract below from Tombs suggests, rigorous regulation of workplace health and safety is low on the agenda of capitalist nation states.

Steve Tombs 2003 'Workplace Injuries and the Illusions of Law' in *Criminal Offences: Why Harm Matters More Than Crime* (Leicester for Crime and Justice Studies), pp. 311f.

Work kills. It kills workers and members of the public through acute injury and chronic illness. The scale of this routine killing – deaths occur across all industries, all types of companies – is almost incomprehensible. That said, relatively little is known about the numbers of people killed by work activities.

This notable lack of knowledge says a great deal about the priorities of the societies in which we live. To take deaths from work-related disease, the official statistics do not begin to capture the scale of physical harm wreaked by employing organisations. However, it is possible to highlight the sheer scale of deaths involved. One example is the deaths from

asbestos exposures in the UK. The Health and Safety Executive (HSE) noted that in 2000, there were 1,628 deaths from mesothelioma, an asbestos-related cancer, and 186 death certificates mentioning asbestosis (HSE, 2002). In fact, as the HSE itself recognises (*ibid*), actual deaths related to asbestos exposure are far, far higher. Asbestos-related deaths continue to rise in this country (not to peak until around 2025, according to the British government), years after the demise of the industry (the worst affected group are men born in the 1940s), and 70 years after the first official recognition of the cancer-causing properties of this magic mineral. Thus 'excess deaths in Britain from asbestos-related diseases could eventually reach 100,000... One study projected that in western Europe 250,000 men would die of mesothelioma [just one asbestos-caused cancer] between 1995 and 2029; with half a million as the corresponding figure for the total number of West European deaths from asbestos' (Tweedale, 2000). A later study extrapolates from current asbestos-related deaths and concludes that more than three per cent of men in Europe will die of asbestos-related diseases in the next ten to 20 years (Randerson, 2001).

Thus, asbestos-related deaths are not simply a matter of historical record – the industry remains vibrant globally. Even more chillingly, 'asbestos is only one of a number of hazardous substances in our lives' (Tweedale, 2000). In many respects, it is one of the safest since there is now generally accepted knowledge regarding its deleterious health effects and it is highly regulated, at least in most advanced economies.

Now, if there are some technical reasons for this lack of knowledge with respect to deaths from work-related ill-health, then one might expect that deaths from work-related injuries would be much more accurately recorded. This is not the case. For example, despite HSE claims that fatality data are virtually complete, recording 633 in 2001/2, recent work using official data and the HSE's own categories indicates that there are closer to 1,500 occupational fatalities per year (Tombs, 1999). In comparison, the annual number of homicides in England, Wales and Scotland stands in recent years between 700 and 850. This is an apt comparison, since the HSE's own evidence indicates that 'management failure' is the cause of about 70 per cent of occupational fatalities (Bergman, 2000), suggesting that there is at least a criminal case to answer.

Reference to this point has been to deaths. These fatalities are only the most visible forms of physical harm caused by work-related activities. Much more common are major and minor (over-three-day) injuries. According to most recent HSE data, there were 30,666 major injuries and 129,143 minor injuries to workers in Britain in 2001/02 (HSE); members of the public suffered 13,575 non-fatal occupational injuries.

Yet even these official data fail to capture the extent of physical harm caused by working in the fourth most developed economy in the world...

To be clear at the outset, whilst occupational safety and health protection falls squarely within the criminal law, criminalisation in practice has never formed a central part of states' agendas. In general, across developed economies, the records of protection in relation to workers' health and safety have historically been poor, as a tough regulatory climate tends to be antagonistic towards the interests of firms operating within a capitalist economy...

That is, all things being equal, the preference of capital is for less rather than more regulation, and this preference is more or less reflected through the state's practices and



rhetoric. Thus it is important to recognise that historically, health and safety legislation, and any improvements in enforcement, have been forced upon states by pro-regulatory forces and, notably, by trade unions, the representative organisations with the key interest in this area.

Tombs usefully draws our attention to a number of issues that afflict any attempt to obtain a clear picture of work-related injuries and deaths: first, it is not always suspected that ill health is a result of exposure to work hazards; second, it is not always easy to prove even if it is recognised as a likely cause; third, accidents at work are not always reported; fourth, those that are reported are not always subject to formal enforcement. We have already seen some of these problems in establishing the 'true' rate of crime in general, but the under-reporting and differential enforcement is particularly exaggerated in relation to work-related injuries. We explore these issues by examining the nature of regulatory offences and then at the connected development of corporate manslaughter.

#### VI.19.b. Characteristics of regulatory offences

The main characteristics of the regulatory model are that the form in which the offences are defined often omits any mention of the consequential harm; liability is technically 'strict'; and the model of enforcement is based on a consultative, us-and-us, rather than them-and-us, conception of the regulated employer or company. We now explore these characteristics in more detail.

##### VI.19.b.i. Offence labels

Although breaches of health and safety offences often cause serious injury and sometimes death, any conviction under the Health and Safety at Work etc Act 1974 will not reflect that result. Instead of being held criminally liable 'for the death of x', the employer will be convicted (if at all) of a breach of the duty to **provide for the safety of her workers**.

An example which illustrates the sanitising effect of the separate systems of both road traffic and health and safety regulation is that of a driver who failed to secure the arm of a mechanical digger he was transporting by lorry. Having driven 500 miles and worked a 16-hour day, this slip cost the lives of five motorists whose roofs were peeled off as they drove at night into the unlit digger arm straddling their side of the road. Neither the driver nor the company which had contracted him to deliver the digger was charged with manslaughter. The driver was charged with causing death by dangerous driving, which at least reflected in its offence label the fact that death had resulted. The company which had contracted him was prosecuted for an offence under section 3 of the Health and Safety at Work etc Act 1974 (see below). The company was fined half a



million pounds, which reflects a level of culpability beyond the baseline for the offence (*Independent*, 11 October 1997). This still leaves the question why a culpable death is not routinely prosecuted as manslaughter. As our discussion of involuntary manslaughter will disclose, Saturday night brawls frequently result in manslaughter prosecutions based on relatively low culpability.

*Health and Safety at Work etc Act 1974, ss. 2, 3*

2. It is the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.
3. It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety.

Section 33(1) states that it is an offence for an employer to fail to discharge these duties. The maximum penalty is £20,000 or 12 months' imprisonment on summary conviction (unlimited fine or 2 years on indictment) (Health and Safety (Offences) Act 2008). The employer can be an individual or a company. Most 'employers' are companies. Individual company directors can additionally be charged where the offence has been committed with their 'consent or connivance . . . or is attributable to any neglect on their part'. Under the Company Directors' Disqualification Act 1986, the courts may also disqualify directors who have been found guilty of health and safety offences. To conclude that this power has been used sparingly would be an understatement, there would appear to have been 10 such disqualifications (from a total of 110 directors' convicted under s. 37) in the period 1986–2005 (HSE 2007). We consider the prosecution rates and average level of fines imposed for health and safety offences below in 19.b.iii.

VI.19.b.ii. The prevalence of strict liability

Strict liability is a key feature of regulatory offences. Where strict liability is imposed, a person can be convicted of an offence without proof of a mental element such as intention or knowledge, or with the possibility of a reverse-onus defence of due diligence, or reasonable practicability.

*David Janway Davies v. Health and Safety Executive, Court of Appeal (Criminal Division) [2003] IRLR 170*

[The appellant ran a plant hire firm. One of his employees was killed when a JCB reversed into him. The appellant was convicted under sections 3 and 33, and fined £15,000, following a ruling by the trial judge that section 40 was compatible with the ECHR and therefore there was a legal (persuasive) burden on the appellant to prove (on the balance of probability)

that it was not reasonably practicable for him to do more than he had in fact done. The appellant contended that section 40 was only compatible if read down so as to impose an evidential burden.]

**Tuckey LJ:** Once again this court has to consider whether a reverse burden of proof provision in a statute creating offences is compatible with the presumption of innocence enshrined in Article 6(2) of the ECHR. The statute in question is the Health and Safety at Work Act 1974. The combined effect of sections 3(1) and 33 of the Act make it an offence for an employer to fail to discharge the duty to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

Section 40 says that in any proceedings for an offence consisting of a failure to comply with a duty ... to do something ... so far as is reasonably practicable ... it shall be for the accused to prove ... that it was not reasonably practicable to do more than was in fact done to satisfy the duty ...

... A Health and Safety Executive witness produced a leaflet entitled 'Reversing Vehicles'. This said that nearly a quarter of all deaths involving vehicles at work occur while the vehicle is reversing and that most happen at low speeds and could be prevented by taking some simple safety precautions. These included the use of a banksman to ensure safe reversing.

In some cases where a statute provides for a reverse burden of proof the court first has to consider as a matter of construction whether the burden is legal (persuasive) or merely evidential. No such issue arises in this case. The language of the statute, 'it shall be for the accused to prove', clearly imposes a legal burden.

Equally the authorities show that if it is necessary to achieve compatibility by reading such clear language down so as to provide simply for an evidential burden, the court should do so.

The only issue of construction in this case is whether the section 40 defence relates to an ingredient of the offence created by sections 3 and 33. If it does not, some cases suggest that there is no infringement of the presumption of innocence ...

The duty cast on the defendant is a 'duty ... to ensure as far as is reasonably practicable'. It is a breach of this qualified duty which gives rise to the offence. [Counsel for the Crown] had to concede that but for section 40 it would be for the Crown to negative reasonable practicability. This makes the point against him.

This construction of the statute means that section 40 does make some inroad into the presumption of innocence. It does not follow however that it is incompatible with the Convention. As the ECHR said in *Salabiaku v France* (1988) 13 EHRR 379 at para. 28.

Presumptions of fact or law operate in every legal system. Clearly the Convention does not prohibit such presumptions in principle. It does however require the contracting States to remain within certain limits in this respect as regards criminal law ... Article 6(2) does not therefore regard presumptions of fact or law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.

It is worth adding at this point that in the field of health and safety the EEC accept that it is possible to impose absolute duties on employers. Thus Article 5.1 of Council Directive 89/391/EEC requires member states to provide that:

The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work. Member states may, but are not required:

...to provide for the exclusion or the limitation of employers responsibility where occurrences are due to unusual and unforeseeable circumstances beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care.

... The first point to be noted about the legislation is that it is regulatory rather than prescriptive. This is important in the balancing exercise. A strict responsibility may be acceptable in the case of statutory offences which are concerned to regulate the conduct of some particular activity in the public interest. The requirement to have a licence in order to carry on certain kinds of activity is an obvious example. The promotion of health and safety and the avoidance of pollution are among the purposes to be served by such controls. These kinds of cases may properly be seen as not truly criminal. Many may be relatively trivial and only involve a monetary penalty. Many may carry with them no real social disgrace or infamy.

The reasons for the distinction between truly criminal and regulatory offences were spelt out cogently by Cory J in the Canadian Supreme Court in *R v Wholesale Travel Group* (1991) 3 SCR 154. He expressed the rationale for the distinction as follows:

The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, common consumers and motorists to name but a few) from the potentially adverse affects of otherwise lawful activity. Regulatory legislation involves the shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.

... We have concluded that the imposition of a legal burden of proof in section 40 of the Act is justified, necessary and proportionate for the reasons which we set out below which take account of the various points we have discussed above.

First the Act is regulatory and its purpose is to protect the health and safety of those affected by the activities referred to in sections 2 to 6. The need for such regulation is amply demonstrated by the statistics with which we have been supplied. These show that fatal injuries reported to the UK enforcing authorities by industry are running at an average of about 700 a year and non-fatal major injuries at nearly 200,000 a year. Following a survey in 1995/6 the Office of Statistics put the financial costs of accidents at work in the UK at between £14.5 and £18.1 billion. The Act's purpose is therefore both social and economic.

The reversal of the burden of proof takes into account the fact that duty holders are persons who have chosen to engage in work or commercial activity (probably for gain) and are in charge of it. They are not therefore unengaged or disinterested members of the public and in choosing to operate in a regulated sphere of activity they must be taken to have accepted the regulatory controls that go with it. This regulatory regime imposes a continuing duty to ensure a state of affairs, a safety standard. Where the enforcing authority can show that this has not been achieved it is not unjustifiable or unfair to ask the duty holder who has either created or is in control of the risk to show that it was not reasonably practicable for him to have done more than he did to prevent or avoid it.

Before any question of reverse onus arises the prosecution must prove that the defendant owes the duty . . . and that the safety standard . . . has been breached. Proof of these matters is not a formality. There may be real issues about whether the defendant owes the relevant duty or whether in fact the safety standard has been breached, for example where the cause of an accident is unknown or debateable. But once the prosecution have proved these matters the defence has to be raised and established by the defendant. The defence itself is flexible because it does not restrict the way in which the defendant can show that he has done what is reasonably practicable.

. . . The facts relied on in support of the defence should not be difficult to prove because they will be within the knowledge of the defendant. Whether the defendant should have done more will be judged objectively.

If all the defendant had to do was raise the defence to require the prosecution to disprove it, the focus of the statutory scheme would be changed. The trial would become focused on what it was the enforcing authority was saying should have been done rather than on what the defendant had done or ought to have done which is what Parliament intended.

In complicated, and therefore potentially the most serious cases, the prosecution might face considerable difficulties in assuming this burden of proof where the only relevant expertise was with the defendant or even its state of the art supplier or licensor abroad. In such cases therefore enforcement might become impossible if the defendant only had an evidential burden.

Last but not least the defendant in cases where the reverse burden of proof applies does not face imprisonment. The offence involves failure to comply with an objective standard. The consequences of such failure may be newsworthy in some cases but the moral obloquy is not the same as that involved in truly criminal offences . . .

For these reasons we think the judge reached the right conclusion in this case. The reverse legal burden of proof contained in section 40 of the Act is compatible with the ECHR. The appellant's conviction on this basis was not therefore unsafe.



This judgment is a clear demonstration of the double thinking that regulatory crime induces. It is consistent with a number of cases, such as *British Steel* (1995), *Howe* (1999), and *Chargot* (2008) in which the appellate courts have shown a much tougher attitude towards health and safety offences. In *Chargot*, Lord Hope specifically approved the following passage by Tucker LJ in the *Janway* case (at para. 29):

Regard had to be had to the fact that the Act's purpose was both social and economic, to the fact that duty holders were persons who had chosen to engage in work or commercial activity and were in charge of it and that in choosing to operate in a regulated sphere they must be taken to have accepted the regulatory controls that went with it.

Yet the argument appears to be both that these are serious offences (witness the need for regulation mentioned by Tuckey LJ) and that they are not very serious (witness the lack of the imprisonment as a possible penalty to which he later refers). The Health and Safety (Offences) Act 2008 has both raised the maximum fine for most health and safety offences to £20,000 on summary conviction and, significantly, introduced imprisonment (12 months on summary and 2 years on indictment) as an option.

Nonetheless, as the following extracts show, strict liability (or reverse onus offences) supply a multi-edged sword. It might make prosecution easier, but it undermines the seriousness of the offence, especially where enforcement practice is to prosecute only where fault is manifest.

David Nelken 1987 'Criminal Law and Criminal Justice: Some Notes on Their Irrelation' in I. H. Dennis (ed.) *Criminal Law and Justice* (Sweet & Maxwell), p. 139

It is now many years since Carson showed how strict liability rules governing factory safety were enforced in such a way that the only offenders prosecuted were those who deliberately ignored repeated warnings and advice as to their breach of the rules (in addition to those prosecuted after incidents of serious injury and death). The same pattern has been shown to exist in the enforcement of laws dealing with other regulatory offences involving business and industry. Offenders against these criminal provisions therefore benefit from the reduced stigma attaching to what are seen as merely 'regulatory' or 'quasi-crimes' whilst in actuality they often may possess more than the usual requirements of intentional mens rea. Whilst not all strict liability offences are enforced in this way it is nonetheless strange to see textbooks continue to agonize over the justifications of strict liability without building on this work. The importance of law in context studies for problems of institutional design in the criminal law should not need further to be demonstrated.

But this strategy is not without its weaknesses. The division of labour between the concerns and methods of doctrinal scholarship and those who specialize in the description of the criminal process (reproduced in the distinction between 'law in books' and 'law in action') is too neat. It makes it too easy for criminal law scholars to minimize the importance

of these contextual findings. They may treat them as unrepresentative or idiosyncratic reports of particular institutional settings or local practices. They may deny that there is anything problematic about any given use of law, or, even if some deviation is acknowledged, may insist that it is the nature of normative standards that they be distorted or broken without detracting from their significance. Some doctrinal scholars even give the impression that they see themselves as providing a framework which is important in its own right, as something which can appeal directly to citizens over the heads, as it were, of the legal actors (not excluding the judges!) who operate the criminal process in such a way as to confuse their counsels.

As the following passage suggests, this is not to imply that the distinction between offences of strict liability and those requiring 'mens rea' is of no practical or social importance:

Leslie T. Babbe 'Is Mens Rea a Component of Perceived Offense Seriousness?' (1980) 11 *Journal of Criminal Law and Criminology* 111, 127-35

The first and main hypothesis of this study was that respondents will attribute greater seriousness to prohibited acts committed with a higher level of mental element than to the same acts committed with a lower level of mental element . . . Yet it is indisputable that the degree of harm actually inflicted, whether or not foreseen by the offender, traditionally has played a significant role in the criminal law, and it seems probable that public attitudes to some degree, would reflect such 'objective' concepts of seriousness. Therefore, it will be hypothesized that, in addition to the significance of the mental element, the seriousness of the physical act constitutes an independent component in the judgment of offense seriousness . . .

The empirical investigation reported here . . . found: (i) that the form of mental element accompanying the offense, controlling for the degree of harm inflicted, has a significant effect on the estimation of offense seriousness; (ii) that where no mental element is specified in an offense definition respondents generally are attributing intentionality to the perpetrator of the offense, if it be of a traditional 'street-crime' nature, they may be attributing only recklessness or negligence where regulatory offenses are concerned . . . ; and (iii) that the degree of harm inflicted, controlling for the mental element, has a significant effect on the estimation of offense seriousness . . .

One further topic requires consideration: the problem of the weight to be attributed to unforeseen harm resulting from the commission of the offense. While the criminal law traditionally has inflicted heavier penalties where greater harm is caused even though such harm was not anticipated, the classical example being the felony-murder doctrine, this approach has been strongly criticized on grounds of morality and efficacy . . . On the other hand, the present study indicates that the public (at least as represented by student respondents) in fact attributed seriousness weighting to resulting harm, even where unforeseen . . .

The implication of studies of the measurement of offense seriousness have become acutely relevant in contemporary criminal policy in light of the trend away from rehabilitation

toward a retributive justice model of sentencing, with its emphasis on proportionality between the gravity of the offense and the severity of the sentence.

The precise orientation of such a model may take different forms. In particular, in determining the gravity of the offense, emphasis may be laid either on the seriousness of the harm inflicted, following the ancient concept of 'talio', or on the moral gravity of the act, as reflected in the term 'just desert'. Insofar as this new penal philosophy is to reflect public attitudes, it seems that both these concepts have a role to play: for in determining the seriousness of a criminal offense, respondents relate to both the mental element which accompanied it and its harmful consequences.

This suggests, therefore, that the harm versus culpability equation is complex, and that how seriously we view different types of conducts cannot be addressed simply through a comparison of strict liability versus 'mens rea':

**Genevra Richardson 'Strict Liability for Regulatory Crimes: The Empirical Research' [1987] Crim LR 295**

Strict liability, it is claimed, provides an improper basis for the imposition of criminal sanctions since it can lead to the punishment of the 'faultless'. Such an outcome is said to be both unacceptable of itself and damaging to the criminal law. In response several arguments have been advanced. For some the demotion of fault is welcome since it signifies a move away from the punitive concept of the criminal law. Alternatively it can be argued that the strict liability regulatory offender is not a 'blameless innocent'. By indulging in the regulated activity she has voluntarily adopted the risks of regulatory infraction and her supposed 'innocence' flows from the law's traditional tendency to view the criminal act 'only in the context of its immediate past'.

Most frequently the case for strict liability in the regulatory context is put in utilitarian terms. Government regulation is required to protect the public from specific harms and the criminal sanction is frequently provided as a device for achieving compliance with such regulations. The primary role of the regulation is preventive rather than retributive and the criminal law is employed in order to deter non-compliance. In such a context, it is said, regulatory infraction is not criminal in any real sense and, provided the penalties imposed are low, strict liability is justified in so far as it furthers deterrence and aids the enforcement of the regulatory requirements.

That strict liability does in fact increase the deterrent impact of the regulations is open to question but, on the assumption that it does, some claim that the presence of strict liability also serves to deter welcome activities, the selling of meat, for example, when all reasonable steps have been taken to ensure that it is uncontaminated. The imposition of liability for negligence, it is argued, would adequately protect the public. In response it can be claimed that most regulatory offences, including those of strict liability, do in fact incorporate a notion of culpability 'akin to certain kinds of negligence'. Further, it is now widely recognised that the specialised agencies commonly entrusted with the enforcement of regulatory codes apply notions of fault when exercising their prosecutorial discretion



and rarely proceed in the absence of 'negligence' at the very least. However, while this *de facto* introduction of fault may go some way to meeting the claim that strict liability over-prohibits, it is itself open to the charge both that it removes crucial questions of culpability from the courts and that it delegates too much to the 'uncontrolled' discretion of the enforcement agency.

Thus, the debate surrounding strict liability remains obstinately unresolved and it might plausibly be argued that it will remain so as long as it is based on the questionable assumption that the existing fault-based principles of criminal law successfully avoid penalising the innocent. Indeed, some argue that the outcry surrounding the condemnation of the innocent by way of strict liability plays an important role in reinforcing the impression that the rest of the criminal law is concerned exclusively with condemning the morally blameworthy. Further it is alleged that the presence of strict liability favours the regulated since it serves to marginalise their non-compliance and to distinguish it from real crime...

In the first place, there is evidence that enforcement personnel to some extent share the widespread belief that many regulatory offences are not real crime...

Secondly, it is clear that, whether or not the regulatory prohibitions are part of the true criminal law, enforcement personnel are concerned with their legitimacy [The legitimacy of a regulation refers to the extent to which it appears justified and thus obligatory. It will flow not only from the substance of the regulation but also from its form and the manner of its enforcement] and that that concern extends beyond the question of blameworthiness.

... Much protective regulation creates offences which may be regarded as morally neutral in the sense that the conduct prohibited can closely resemble acceptable business practice. In such circumstances officers are concerned about the precise definition of the prohibited conduct. They are particularly influenced both by the relationship between the prohibited event and the threatened harm and by the degree of liability attaching, and will reflect in their enforcement practice any dissatisfaction they feel.

... Whether or not regulatory offences constitute 'real' crime, the majority can be readily distinguished from the mass of traditional street crime as currently regarded...

Legislative schemes regulating corporate conduct are primarily designed to prevent particular harms and are certainly seen in that light by those responsible for their enforcement... With regard to traditional offences the prevention of harm as the justification for criminal punishment has been severely challenged. In relation to regulatory offences, however, the argument may carry less weight. In the first place corporate offending is often regarded as less intractable than traditional criminality: the application of criminal sanctions might successfully deter, incapacitate, or even rehabilitate. Secondly, with regard to the problem of inequality of treatment, which is often linked to the preventative use of criminal sanctions, Braithwaite has argued that complete equality for regulatory offenders is beyond the scope of any criminal justice system and that the need to prevent serious harm, Thalidomide or Bhopal, for example, should take priority over strict equality of treatment. Finally, the rearrangement of a company's practices and procedures in order to ensure that it operates without causing harm is not open to the same moral objections as the coerced rearranging of a psyche.



Richardson here usefully summarises a number of strands in the debate about the regulation of business activities. However, how true is it that business crime is inherently distinguishable from the 'ordinary crime'? While the two 'types' of crime are certainly perceived differently, that is not quite the same as saying that they are different, and some people have argued that all crime at its margins closely resembles legitimate practice (see Box 1983).

#### VI.19.b.iii. Enforcement models

It is time to consider in more detail the different enforcement models which may be employed in responding to various kinds of offending conduct. In his case study of road safety regulation, Friedland identified two models of enforcement, one relying on prosecution, and the other on non-coercive methods for achieving compliance. The former, characterised by sanctioning and deterrence, has a clear symbolic role and he quotes Thurman Arnold's observation that: 'There are two very distinct problems of criminal administration: first, the keeping of order in the community; and, second, the dramatization of the moral notions of the community' (*The Symbols of Government* 1935 in Friedland 1990, p. 4).

While concern for safety is taken as axiomatic, it is clear that regulation through criminal law is often too blunt an instrument to achieve a reduction in accident levels. Yet its appeal as a mechanism of symbolic condemnation would seem to be on the increase, despite its demonstrable ineffectiveness and costliness as an instrument in reducing accident rates. In other words, it is important to distinguish between denunciation and instrumental purposes in criminal law.

It is particularly interesting to compare the regulatory solutions which have developed in various safety contexts. Health and safety at work, and environmental control, have tended to follow the compliance model. As Gunningham argues, this involves elements of negotiation rather than conflict or sanction.

#### Neil Gunningham 'Negotiated Non-Compliance: A Case Study of Regulatory Failure' (1987) 5 *Law and Policy* 69

In determining what approach to take in enforcing regulation, an agency must choose between (or incorporate some mixture of) two enforcement styles or strategies: those of deterrence and compliance. The deterrence strategy emphasizes a confrontational style of enforcement and the sanctioning of rule-breaking behaviour. It assumes that those regulated are rational actors capable of responding to incentives, and that if offenders are detected with sufficient frequency and punished with sufficient severity, then they and other potential violators will be deterred from violations in the future. The deterrence strategy is accusatory and adversarial. Energy is devoted to detecting violations, establishing guilt and penalizing violators for past wrongdoing.

In contrast, a compliance strategy emphasises co-operation rather than confrontation, conciliation rather than coercion. As described by Hawkins:

Compliance strategy seeks to prevent a harm rather than punish an evil. Its conception of enforcement centres upon the attainment of the broad aims of legislation, rather than sanctioning its breach. Recourse to the legal process here is rare, a matter of last resort, since compliance strategy is concerned with repair and results, not retribution. And for compliance to be effected, some positive accomplishment is often required, rather than simply refraining from an act. [1984: 4]

Bargaining and negotiation characterize a compliance strategy. The threat of enforcement remains, so far as possible, in the background. It is there to be employed mainly as a tactic, as a bluff, only to be actually invoked where all else fails, in extreme cases where the regulated remains uncooperative and intransigent.

These two enforcement strategies are ideal types, hypothetical constructs unlikely to be found in their pure form. They can best be regarded as polar extremes on a continuum. Any enforcement agency is likely to employ some mixture of both.

Not all work accidents involve breaches of health and safety duties, but taking health and safety offences as a whole, prosecution levels are low relative to the number of incidents reported. Recall that the number of *reported* work injuries runs at 136,000 a year and the number of deaths at about 300 (HSE 2008). Both the enforcement rate and the average fine imposed appear to have *decreased* over the last five years. While in 2003/4 the Health and Safety Executive (HSE) prosecuted 1,720 cases, in the next three years they only averaged 1,050 prosecutions. A conviction rate of 80 per cent led to an average of 850 convictions. Some exceptionally large fines tend to distort the average fine level. Excluding fines of £100,000 or more, the average fine was £9,011 in 2007/8. In the 81 prosecutions following fatalities in 2003/4, the average fine was £43,707 (HSC 2006, quoted in Almond 2009, n. 5).

In terms of notably large fines, Balfour Beatty was fined £1.7 million following the collapse of a tunnel they were building for the Heathrow express link (15 February 1999) and GWT was fined £1.5 million after the Southall rail crash in 1997. A record £15 million was imposed on Transco for causing four deaths in 2004. Although appellate courts have shown concern at the low level of fines imposed and described as 'derisory' the fine of £100 handed out to British Steel for a breach of safety regulations which led to a worker's death (*British Steel* (1995)), the sentencing guidance in health and safety offences provided by the Court of Appeal in *Howe* (1999) does not appear to have been successful in sustaining higher levels. The court outlined as aggravating features: causing death, failure to heed warnings and taking risks to maximise profits. Mitigating factors include prompt admission of responsibility, timely guilty plea, evidence of having taken steps to remedy the deficiency and a good safety record. Because the objective is to achieve a safe working environment, fines need to be large

enough, the court said, to bring home the message not only to managers but also to shareholders. The fine should not be so large as to imperil earnings of employees, but there may be cases where the offence was so serious that the defendant ought not to be in business. Mr Justice Scott Baker added (at page 42):

As to the level of fines imposed generally for offences of this nature, it is the view of each member of this court that they are too low and therefore not an appropriate yardstick for determining the level of fine in the present case.

Yet the overall picture confirms that health and safety offences are not treated with anything like the seriousness that attaches to other criminal offences that endanger life or cause serious injury. Even the exemplary fines often represent a tiny fraction of the company's turnover. It is estimated that most large companies convicted for health and safety offences involving death between 2006 and 2008 were fined at levels that were less than 1/700th (0.14 per cent) of their annual turnover and less than 1.4 per cent of their gross profits (Centre for Corporate Accountability 2008).

Before we turn to the broader role of criminal law in relation to corporations, we conclude this discussion of the use of regulatory strategies for health and safety offences with this summary of the enduring problems in health and safety enforcement:

*Steve Tombs and Dave Whyte (2007) Safety Crimes (Willan), pp. 113-4*

The process of differentiating law identifies an enduring paradox in the criminalisation of safety crimes. In the case of the Factory Acts, a new principle of liability that emerged after protracted struggles around the implementation and enforcement of the criminal law enabled a second class of crimes to be created which would never be able to attract the same level of moral opprobrium or condemnation attached to other crimes of violence. The effect of 'strict liability' in the case of the Factory Acts was not to make the criminalisation process any easier, but to differentiate safety offences as a distinct category of crimes. This process of *differentiation* is deepened by the creation of separate systems of policing and punishment that apply to safety crimes. Because strict liability offences are not regarded as 'real' crimes, the public relations consequences of regulatory offences and the relatively low-level sanctions imposed by the courts (if those cases actually reach courts) are absorbed rather more easily by convicted corporations and individuals.

There is a very crude principle of law reform in operation here: if you make the route to establishing liability easier, then it is the instinct of the court to interpret a lower degree of seriousness and therefore attach a less severe punishment to the offence. Lower thresholds of liability imply a relative ease with which prosecutions for safety crimes can be secured. However, this possibility of easier criminalisation is offset by the lack of resources that investigating and prosecuting authorities can draw upon, the resort to less punitive pre-court sanctions, and consequent low rates of prosecution for safety crimes. This effect highlights an inherent contradiction in the legal rules that have been developed to hold



corporations accountable. Put simply, a process of decriminalisation has occurred at the same times as the rules of prosecution being developed in a way that makes it easier to convict. If we are effectively to criminalise corporate crimes, then the most obvious conclusion to draw from this contradiction is that we should seek to assimilate safety crimes into the system of criminal law. Yet, developing the law in this direction has also been beset by a similarly perplexing contradiction: if we are to fully criminalise safety crimes, does this mean that we have to assimilate safety crimes into a system that has not been designed for the purpose?

### VI.19.c. Corporate liability for crime

For Carson (1982) there was little doubt that the lack of safety enforcement in the North Sea oilfields contributed to the high death and injury toll. By the middle of the 1970s the rate of accidental death in the oil industry was 11 times that for construction, nine times that for mining and six times that for quarrying. Carson's evidence suggests that the accidents arose not from the difficulties of working 'on the frontiers of technology', but from 'mundane design faults, human error and unsafe working conditions'. Not only were regulations often ignored but for five years the safety inspectors had no statutory regulations to enforce. Time and tide certainly waited for no law. The parallels with the development of factory legislation in the last century are close:

W. G. Sumner, 'White-collar crime and the enforcement of factory legislation' (1870) *19 British Journal of Criminology* 33

In that era, as in the present, there were immutable laws of capital which rendered it 'imperative' that regulation should be minimised. Then, as now, it was constantly threatened that capital would flee if subjected to any more constraints. In the nineteenth century too, it was held that those who had no practical acquaintance with the advanced technology of an industry upon which the nation's new-found wealth depended could not possibly purport to ordain how far its labour practices should be ordered.

The reduced reliance on labour-intensive heavy industry has not led to a concomitant reduction in accident levels. The ways in which business crimes are marginalised by the legal process have already been rehearsed. The use of separate regulatory agencies enforcing separate regulatory law allows the exclusion of conventional criminal labelling and processing. This encourages the dichotomy between 'real' crime and 'quasi' crime. Another mechanism in the legal construction of business crime is the frequent use of strict liability offences. We have noted that strict liability is also used in some offences enforced by the police, such as traffic offences. But wherever it is used, the real crime/quasi crime division can be seen as either its cause or effect. Imposition of strict liability in the first place is seen as justified because the prohibited activity is



not thought to be 'real crime'. At the same time, the fact that an offence has been interpreted as one of strict liability is used as evidence that the prohibited activity cannot be all that serious and therefore is not 'real crime'.

Laureen Sinder, 'Towards a Political Economy of Reform, Regulation and Corporate Crime' (1987) 9 *Law and Policy* 37

The older established view on the nature, form, and intention of government regulation is that advanced by the consensus/pluralist school. Its adherents argue that it is the role of the polity, those who are responsible for the decision-making in the public sector... to carry out the wishes of the majority in the electorate. Policies are formulated by governments to reconcile diverse interests and prevent conflict. This may mean interfering with the power and privileges of the rich and powerful to benefit the poor and the powerless. One version of this, the public interest model, asserts that a neutral state responds to problems in the interests of all. More sophisticated pluralists do not assume that all the diverse groups are equally effective in making their voices heard, or that some groups are not more powerful or 'strategic' than others, but in general they argue that any group of people, if they feel strongly enough about an issue and if there are enough of them, can be effective. For them, then, no one group dominates the political process in a fashion that is either permanent or overwhelming. Thus, they would expect governments, when properly alerted, to respond to the social wrongs caused by corporate crime...

The conflict/Marxist theorists see government regulation and law creation quite differently. The instrumentalist school starts from the premise that the state exists ultimately to defend and further the interests of the ruling class, and sees government regulation as a tool which serves to preserve the (very unequal) status quo... Laws which seem to benefit the working or lower classes, or which aim to restrict the power or privileges of the ruling class (such as those on corporate crime), will prescribe the minimum reform necessary to pacify the loudest and most disruptive interests, in order to reinforce the fiction that all citizens are protected by law from socially harmful acts (the universalistic myth)...

The initial stage of law creation is public agitation, often accompanied by a crisis in which large numbers of people are defrauded, injured or killed. The state has historically been very reluctant to get involved. For example, Paulus details the painful progress from 1851 to 1878, of securing effective laws to give the government in Britain the power to ensure that foodstuffs offered for sale were safe. It took several wholesale poisoning episodes (including one in 1858 in which 200 people were injured and 17 died from eating adulterated lozenges) and nearly forty years before effective controls were instituted. The progression went from unsuccessful attempts at control through adverse publicity (publishing the names of offenders), to allowing local authorities to issue summonses to sellers, but requiring them still to prove the adulteration was intended, to providing inspectors, public analysts, and strict liability legislation, the stage at which the legislation became effective.

Shover tells us how small eastern and large western mine operators hysterically opposed the efforts of environmentalists in the late 1960s to restrict strip mining. Heaping scorn on the claims of consumer/environmentalist groups and promoting local rather than federal laws

as adequate and desirable, they defeated initial attempts to ban strip mining, attributing environmental harm (which could not be denied) to small fly-by-night operators who had since left the business...

Carson [1970] reviews the history of British laws on the factory from 1819 to 1853, the period during which laws were passed to limit the length of the working day, the hours of women and children, the number of breaks workers had to have, rudimentary provisions for ventilation, etc. The resistance to all these provisions was massive, as the need for cheap labour in this stage of laissez-faire capitalism was extreme. The owners felt pressed to make an ever higher return on their investment, which meant that overworking their human capital was an economically rational thing to do. Such laws also were opposed because they interposed the power of the (still rudimentary) state between the worker and the factory owner, and necessitated much internal bureaucracy for record-keeping.

Nor is such resistance restricted to the 19th century. More recent studies showed a similar resistance to the passage of effective controls over... North Sea Oil rigs. A major disaster on December 27 1965 which killed 18 people was necessary before the state even examined the question of safety laws, and it took another six years before any were actually passed...

[I]f the pressure for reform continues (on policy-makers, in the media, among pressure groups, etc) this blind and total resistance changes. Typically, certain segments of the industry begin to define a limited and modified version of the legislation as being in their interests... Thus, Paulus says that by 1875, segments of the business community in Britain, particularly the more powerful businesses, were coming to see the pure food laws, in a limited form, as being in their own interests. They would increase public trust in their products, many of the increased inspection and production costs could ultimately be passed down to the consumer, and the higher costs of manufacturing might drive some of the smaller and weaker competitors out of business...

Thus the legislative initiative typically progresses from total resistance to partial sponsorship of the laws by the most powerful segment of the target industry or group. A law is passed, usually a weaker law than its proponents wished but a stronger law than its opponents originally envisaged. Sometimes the new law is totally without teeth (a fact which promotes a Marxist conspiracy view of the process), but is gradually made stronger over the years (a fact which fortifies the pluralists).

### VI.19.c.i. The rise of corporate manslaughter

Enforcement of health and safety offences is often taken against the corporate body, for the simple reason that the 1974 Act is addressed to 'employers' and many of those are companies. One argument that emerges from the ensuing discussion is whether the harms caused by health and safety breaches should not also be prosecuted under 'conventional' criminal laws, in particular, for manslaughter. Where death or injury is caused by corporate activity, the company itself is, in theory, vulnerable to prosecution for manslaughter or for an offence against the person. But far more likely would be a prosecution for a

regulatory offence. But, as we have seen, this is by no means the most likely outcome of a breach even where it has led to serious injury. A process of double marginalisation takes place, therefore. Industry crime is not brought within conventional definitions of crime (murder, manslaughter, etc.) and where specific offences are drawn, such as pollution and health and safety laws, they are policed separately and set apart from 'ordinary' crime by their own system of regulation.

The creation and enforcement of regulatory schemes tends to decriminalise the harmful activities of businesses and thus of corporations. It is not always easy to say which comes first – the reluctance to use criminal law leading to specific regulation, or the existence of special regulation diverting attention from the possibility of prosecution for offences such as manslaughter, murder or assault. Either way, there is no doubt that many deaths caused by corporations could be prosecuted as potential manslaughters but that few are. However, the debate about corporate criminality in general and corporate manslaughter in particular has become considerably more focussed over the last 20 years. As a result, the Health and Safety Executive belatedly published guidelines on corporate manslaughter for its inspectors (HSE Document OC 165/5, 1993). David Bergman explains:

David Bergman, 'Weak on Crime - Weak on the Causes of Crime' (1997)  
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[Until 1993, the] idea that companies could commit a crime other than a technical breach of health and safety law was just not within its legal vision. If the HSE ever referred a case to the police it was because it suspected 'horseplay' by workers or a road traffic offence. Investigations carried out by inspectors were therefore never concerned with finding evidence of gross negligence or, if they did, never resulted in anything other than a prosecution under health and safety law. [Since the guidelines were published] there have been 1452 workplace deaths but the HSE have only referred 48 of these to the police or the Crown Prosecution Service (CPS), that is a rate of 3 per cent.

The HSE argues that the low rate simply reflects the lack of culpability on the part of the companies. There was a time when the HSE could get away with this argument – but no longer. Three years ago the West Midlands Health and Safety Advice Centre undertook its own detailed investigations into the region's 28 workplace deaths occurring between 1988 and 1992. One of the country's most senior QCs looked at the evidence and concluded that four of the deaths should have resulted in manslaughter prosecutions and another seven should have been referred to the police... If these figures reflect what is happening in the rest of the country... in the last five years there should have been 217 manslaughter prosecutions...

Why do those empowered to enforce criminal law perceive it as concerned with individual actors rather than with corporations? Why are harms caused by corporate disregard for safety not conceived as criminal wrongs despite



their greater impact in terms of deaths and injuries? How are certain forms of behaviour perceived? How does crime come to be perceived as such? How seriously are crimes perceived relative to each other? These questions are of vital interest to those involved in the study of criminal law. People fear crime. Their fear is often quite disproportionate to their victimisation. But what is the process that leads some events to be seen as 'criminal' and others as 'accidents'?

The criminal offences of homicide and assault conjure up a three-dimensional image. The picture contains a particular kind of injury arising from a particular range of causes, committed by a particular type of offender, involving a particular type of victim: 'Crime is not inherent in behaviour but it is a judgment made by some about the actions and characteristics of others' (Quinney 1970, p. 16).

Generally, it seems that corporations have been immune from such judgment, but increasingly that immunity is under threat. The sinking of the *Herald of Free Enterprise* in 1987 focussed the debate in the UK. Although the prosecution of P&O for manslaughter was ultimately unsuccessful and few companies have been convicted of manslaughter, people are now familiar with the idea of corporate manslaughter: it has acquired a place in popular vocabulary; it has achieved cultural recognition.

Whatever the theoretical hurdles or practical difficulties in mounting such prosecutions, it is clear that events which earlier might have passed as ghastly accidents, or unavoidable misfortune, now attract a demand for blame, for a formal allocation of responsibility. In many cases, the focus of those campaigns is a business enterprise, and/or those in positions of managerial power within those organisations. To understand the background to this change, we need to pay attention to the cultural relativity of attitudes to risk. The cultural shift towards blaming corporations can be traced to a number of historical developments.

First, technological advance has meant greater mobility, and mass transport introduces an increased likelihood of collisions and explosions of near universal threat. The associated media transmission and publicity mean that we are more aware of the threat. A good example of this is the possibility of manslaughter charges being brought against airlines for failing adequately to warn of the risks of deep vein thrombosis (DVT) (*Independent*, 2 April 2003). Secondly, the way we go about attributing cause has changed. Previously, the causes and consequences of death were explained through the discourses of magic or religion. Now we are more likely to see the human hand in events. From these two major changes – different hazards, different cultural background – flow a number of connected points.

In late modern societies, more events are seen as having a human cause. This leads to the boundaries between natural and human causes being questioned. Not only are there more human-caused events as technology grows, but technology also affects the previously 'natural' – flooding is the best example here. What looks like a natural disaster is often attributable to some human industrial



or agricultural activity further upstream. Then there is the illusion of control – people will take and therefore accept greater risks if they believe they are in control and if they believe the activity is voluntary (e.g. skiing or roller-coastering). Advanced transport systems, and industrial development mean that more and more areas of life are perceived as not within individual control and therefore blaming others becomes necessary.

Finally, pre-existing hostility is relevant. Hostility can arise from the imposition of authority in the form of institutions of government, or reliance on the expertise of groups such as scientists, or industrialists. So what has changed is not the need to attribute responsibility but the form and focus of that attribution. The more that we believe a disaster is a result of human action the more likely we are to believe it is avoidable.

However, there is a terrible paradox in all this. While individuals seek to direct blame for untoward events on to outsiders, society is engaged in the opposite direction, making individuals responsible for their own misfortunes. They have had the risk information and they have made the choices. Anthony Giddens calls this the 'privatization of risk' (1991, p. 111). Whereas, in earlier ages, religion led to a degree of fatalism, contemporary understanding pulls paradoxically towards an acceptance of risk but away from a tolerance of results when they occur.

It would, however, be a mistake to think that turning to the possibility of a manslaughter charge is an exclusively modern phenomenon. Cory Brothers were prosecuted in 1927 following the electrocution of an unemployed miner on an electrified fence during the coal strike of 1926; the judge held that a corporation could not be indicted for an offence against the person (*R v. Cory Bros* (1927)). And, 75 years earlier, an inquest jury in Yorkshire expressed regret that a water board could not be prosecuted for manslaughter following 78 deaths when a reservoir burst (Simpson 1984, p. 221). Conditions were not yet in place to facilitate the translation of such expressions into a legal form. Gradually, over the course of this century, courts became more familiar with the concept of a corporate defendant. At first, this was manifested in regulatory schemes directly addressing business enterprises, such as those concerned with consumer protection, health and safety and environmental control. These introduced, as we have seen, mainly strict liability offences and companies were potentially liable whenever their employees committed the conduct element of the offence, whether it was the supply of adulterated milk, or the breach of the factories legislation. The development of liability for offences outside the regulatory sphere, and therefore for offences more likely to have a mental element, came later.

#### VI.19.c.ii. Vicarious and 'direct' liability

A dual system of liability has developed, and corporations can be liable for criminal offences either vicariously or 'directly'. Vicarious liability generally

depends on the relevant offence being construed as one of strict liability or with a reverse-onus defence. As we have seen, most regulatory schemes use such offences, rather than require proof of 'mens rea'. Vicarious liability means that the company is liable whenever any of its employees commits an offence in the course of their work. In doctrinal terms, it is thus relatively easy to pursue a prosecution against a corporation for a regulatory offence.

'Direct' liability applies to traditional, 'mens rea' offences. It renders the company liable only when a director or senior officer of the company has the appropriate knowledge to satisfy the mental element of the offence. In the case of manslaughter, gross negligence will satisfy the mental element.

The circumstances in which a corporation will be liable for 'mens rea' offences were spelled out in detail by the House of Lords in the case of *Tesco v. Natrass* (1972). Lord Reid pointed out (at 170) the difference between the two forms of liability when he said that a corporation:

must act through living persons, though not always one and the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate . . . if it is a guilty mind then that guilt is the guilt of the company.

In the first piece of litigation arising from the Herald disaster, when various rulings by the inquest coroner were challenged, Bingham LJ (at 16) explained the distinction in this way (*R v. HM Coroner for East Kent* (1987)):

A company may be vicariously liable for the negligent acts and omissions of its servants and agents, but for a company to be criminally liable for manslaughter . . . it is required that the mens rea and actus reus of manslaughter should be established not against those who acted for or in the name of the company but against those who were to be identified as the embodiment of the company itself.

Only a narrow group of persons within a corporation is recognised as being identified with the company in this philosophically challenging theory, which raises questions about how we appropriately conceive a collective group such as a company – is it an aggregation, is it more than the sum of its parts, and is it metaphysically separate? The controlling officers, those whose thoughts and actions are regarded as those of the company are 'the board of directors, the managing director and perhaps superior officers of a company [who] carry out the functions of the management and speak and act as the company' (Lord Reid in *Tesco v. Natrass* at 170).

In a series of cases since the 1990s, the House of Lords and the Privy Council began to move away from the narrowness of the *Tesco v. Natrass* conception of corporate liability and also applied vicarious liability to a wider range of offences (see *R v. Associated Octel* (1996); *Meridian Global Funds Management Asia Ltd v. Securities Commission* (1995)). However, in relation to liability for

an offence such as manslaughter, the underlying principle of direct liability, even in expanded form, has proved difficult to apply to large, diffusely managed companies. As the next two sections reveal, many people attribute the failure of the P&O prosecution to the unsuitability of the *Tesco* doctrine and as a result in 1996 the Law Commission proposed a completely separate offence of corporate killing. This was eventually enacted in a much amended form in the Corporate Manslaughter and Corporate Homicide Act 2007. Before analysing the Act in detail (in c.iv. below) it is useful to explain the significance of the P&O case.

#### VI.19.c.iii. The Herald of Free Enterprise story

The Herald story can be told through a series of cases, beginning with the challenge to the coroner's ruling:

*R v HM Coroner for East Kent (1989) 88 11 April Rep. 10 at 16*

[The applicants sought leave to move for judicial review by way of declaration as to the law, on the grounds that the coroner, at the inquest in October 1987, made an incorrect ruling, *inter alia*, that a company could not be indicted for manslaughter.]

**Bingham LJ:** The inquest arises from the capsizing of the vehicle ferry 'Herald of Free Enterprise' off Zeebrugge on March 6, 1987 and the huge loss of life, both of passengers and crew, to which that tragic disaster gave rise. Nearly 200 lives were lost, causing widespread grief, and the facts of the disaster are etched not only on the recollections of all who were involved, directly or indirectly, but on the consciousness of the nation as a whole.

Very shortly after the disaster the Secretary of State for Trade ordered a formal investigation under s. 55 of the Merchant Shipping Act 1970. Sheen J, sitting with assessors, was appointed to conduct it. There was a long, comprehensive and well publicized investigation culminating in a full report and recommendations published in July [1987].

The investigation found that the immediate cause of the vessel's loss was that she sailed with her bow doors open trimmed by the head, ie. with her nose down. The manoeuvre in which she engaged led to the entry of water into the vehicle deck, the heavy listing of the vessel and her speedy capsizing.

Sheen J criticised a number of the individuals who had failed to perform their duty, in particular those responsible for failing to close the bow doors, failing to see that the doors were closed and sailing without knowing that the doors were closed. He expressed his criticisms in strong terms. The vessel was owned and operated by Townsend Car Ferries Limited, and that company also was the subject of severe criticism.

In para 14.1 of his report [Sheen J] said this:

At first sight the faults which led to this disaster were the aforesaid errors of omission on the part of the Master, the Chief Officer and the assistant bosun, and also the failure by Captain Kirby to issue and enforce clear orders. But a full investigation into the

circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the company.

The Board of Directors did not appreciate their responsibility for the safe management of their ships. They did not apply their minds to the question: What orders should be given for the safety of our ships? The directors did not have any proper comprehension of what their duties were. There appears to have been a lack of thought about the way in which The Herald ought to have been organised for the Dover/Zeebrugge run. All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness... The failure on the part of shore management to give proper and clear directions was a contributory cause of the disaster...

The report then goes into very considerable detail and in the course of the present hearing three points are relied on as being particularly relevant. First, it is pointed out that the company and its representatives failed to give serious consideration to a proposal that lights should be fitted on the bridge of the vessel which would inform the Master whether the bow doors and, for that matter, the stern doors were closed or not...

Secondly, attention is drawn to the failure of the company and its representatives to report and collate information relating to previous incidents when vessels had sailed with their doors open. It appears that there were five such incidents between October of 1983 and February of 1987. Had knowledge of these repeated incidents been appreciated it should have alerted the officers of the company to the risk of disaster, but it appears that there was no person within the company who ever knew of all the incidents.

Thirdly, attention was drawn to the lack of any proper system within the company to ensure that the vessels were operated in accordance with the highest standards of safety. It is rightly urged upon us that where the result of an unsafe system is liable to be so grave, the onus on a company to ensure safe operation is correspondingly high.

At the very end of his report, Sheen J answered the questions posed for the investigation by the Secretary of State. Question 3 was in these terms: 'Was the capsizing of the "Herald of Free Enterprise" caused or contributed to by the fault of any person or persons and, if so, in what respect?'

The answer given to that question was: 'Yes, by the faults of the following', and three individuals are listed. Then:

4. Townsend Car Ferries Limited at all levels from the Board of Directors through the managers of the Marine Department down to the Junior Superintendents. As to the respects in which each of the above-named was guilty of causative fault, see report.

... [The coroner] said this:

Another potential verdict you will have to consider in due course, and perhaps most controversially, is the verdict of unlawful killing... [A]lthough it is possible for several persons to be guilty individually of manslaughter, it is not permissible to aggregate



several acts of neglect by different persons, so as to have gross negligence by a process of aggregation...

... The learned coroner reached four conclusions. First, he expressed his opinion that there was no arguable case of manslaughter against the five named individuals. Secondly, he expressed the opinion that a company cannot in law be indicted for manslaughter. Thirdly, he ruled that there was no evidence of conduct which would found a charge of manslaughter against the company even if such a crime could be committed by a company. Fourthly, he ruled that a charge of manslaughter cannot be founded on the aggregation of individual acts which do not individually constitute gross negligence.

The case [of *R v. Northern Strip Mining Company Ltd, Glamorgan Assizes, February 1965*] having been drawn to the coroner's attention... he replied:

I am very grateful to you for drawing my attention to the case... It is not clear whether the question of corporate liability was argued. However, as I said in my ruling... the acts of the company would have to be those of an individual (and I should have said an individual director) who was himself guilty of unlawful killing... Had the facts been, as in the Glamorgan Assizes case (where the instruction alleged, which had been given by the Managing Director, was to demolish a bridge starting in the middle), that the company brains had given instructions to go out to sea with the bow doors open, at full speed, when trimmed by the head, that would be a wholly different set of facts...

The first question is whether a corporation can be indicted for manslaughter... [W]e indicated at an early stage that we were prepared to assume for the purposes of this hearing that it could. As a result the question has not been fully argued and I have not found it necessary to reach a final conclusion. I am, however, tentatively of the opinion that on appropriate facts the mens rea required for manslaughter can be established against a corporation. I see no reason in principle why such a charge should not be established. I am therefore... of opinion that the coroner's original ruling was wrong, and indeed I would need considerable persuasion to reach the conclusion that it was correct.

... The coroner made it clear that he was of the opinion that the evidence... was not capable of supporting the conclusion that those who represented the directing mind and will of the company and controlled what it did had been guilty of conduct amounting to manslaughter.

I am not persuaded that this is a conclusion which is or may be wrong... It is important to bear in mind an important distinction. A company may be vicariously liable for the negligent acts and omissions of its servants and agents, but for a company to be criminally liable for manslaughter... requires that the mens rea and the actus reus of manslaughter should be established not against those who acted for or in the name of the company itself but against those who were to be identified as the embodiment of the company itself... I would add that I see no sustainable case in manslaughter against the Directors who are named either.

I do not think the aggregation argument assists the applicants... The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such. On the main substance of his ruling I am not persuaded that the coroner erred. [Mann and Kennedy JJ agreed.]

The jury, having been instructed that there were no grounds for basing their verdict on corporate manslaughter, nevertheless returned verdicts of unlawful death. Eighteen months after the inquest, and two-and-a-half years after the capsizing, P&O (which had taken over Townsend) was charged with manslaughter in respect of the deaths at Zeebrugge. Seven employees of the company, including the assistant bosun, the captain and directors, were also charged. The trials took place at the beginning of 1990. However, the trial judge concluded before the end of the prosecution evidence that there was insufficient basis for a jury to convict. Having heard evidence exclusively from employees and ex-employees of P&O, the judge was not convinced that one sufficiently senior member of the company's management could have been said to have been reckless as to the risk of the ferry's sailing with open doors.

The prosecution was nonetheless highly significant. It confirmed that a company could commit manslaughter. The judge's ruling on this point of law is found in *R v. P&O European Ferries (Dover) Ltd*:

*R v. P&O European Ferries (Dover) Ltd (1990) 93 Cr App R 372*

**Turner J:** ... Since the 19th century there has been a huge increase in the numbers and activities of corporations whether nationalised, municipal or commercial, which enter the private lives of all or most 'men and subjects' in a diversity of ways. A clear case can be made for imputing to such corporations social duties including the duty not to offend all relevant parts of the criminal law... [O]ver the period of the last 150 years it can be seen how, first tentatively and finally confidently, the courts have been able to ascribe to corporations a 'mind'... Once a state of mind could be effectively attributed to a corporation, all that remained was to determine the means by which that state of mind could be ascertained and imputed to a non-natural person. That done, the obstacle to the acceptance of general criminal liability of a corporation was overcome... I find unpersuasive the argument of the company that the old definitions of homicide positively exclude the liability of a non-natural person to conviction for an offence of manslaughter.

Converting this ruling into the first successful corporate manslaughter conviction in England and Wales in 1994 was made easier by a coincidental change in the law of manslaughter (see Chapter 21.c.iii). But OLL Ltd's conviction for the manslaughter of three children in a sea canoeing trip underlined the limitations of the *Tesco* doctrine of direct liability (*Kite and others* (1996)). Effectively a one-man company, it was not difficult to 'identify' the company with the actions or omissions of the managing director. The Southall rail crash in 1997 became the

next high-profile corporate manslaughter case. A Great Western train en route from Swansea to London ran through red lights and collided with a goods unit on the last leg of its journey, while the driver was allegedly packing his bag ready for arrival at Paddington. GWT's procedures had allowed a high-speed train with a malfunctioning Automatic Warning System to be driven by one person. The new Automatic Train Protection system was not in use because this particular driver had not been trained to operate it. Seven passengers were killed. The company pleaded guilty to a charge under section 3(1) of the Health and Safety at Work Act 1974. The evidence disclosed that the company encouraged drivers to depart on time even if safety devices were not working. The company was fined a record £1.5 million for what was described by the trial judge as 'a serious fault of senior management'. But the manslaughter prosecution proved to be much more difficult.

As described earlier the courts had begun to broaden its approach to corporate liability. The first stage was the sidelining of the *Tesco v. Nattrass* identification doctrine in relation to some regulatory offences. Secondly, the Privy Council laid the foundations for a broader conception of the 'directing mind' in offences still subject to the identification rules (*Meridian Global Management* (1995)). The prosecution sought to exploit these changes arguing that it was unnecessary to pursue an individual director of GWT. Instead, the company's liability should be established by proving that the company's management policies had resulted in the failure to have a proper warning system which led directly to the crash. This attempt to forge a route to liability independent of an individual director's negligence was rejected by the trial judge, who ruled that a non-human defendant could only be convicted via the guilt of a human being with whom it could be identified. It was a condition precedent to a conviction for manslaughter by gross negligence for a guilty (human) mind to be proved. The case therefore collapsed. The Attorney-General referred the question to the Court of Appeal for a ruling on whether this was correct. This would not have affected the outcome in this particular case but would have clarified the law.

*Attorney-General's Reference (No. 2 of 1997) [1998] 50 Cr App R 1*

**Rose LJ:** The court's opinion is sought in relation to two questions referred by the Attorney-General under section 36 of the Criminal Justice Act 1972. (1) Can a defendant be properly convicted of manslaughter by gross negligence in the absence of evidence as to that defendant's state of mind? (2) Can a non-human defendant be convicted of the crime of manslaughter by gross negligence in the absence of evidence establishing the guilt of an identified human individual for the same crime?

The case for the prosecution was that the cause of the collision was, first, the driver's failure to see or heed the double yellow and single yellow signals warning of impending red and, secondly, the defendant's manner of operating the HST. The case against the defendant was that it owed a duty to take reasonable care for the safety of its passengers, of which



it was in grossly negligent breach. Three signals were passed because the AWS and ATP were switched off and there was only one man in the cab. The defendant should not have permitted such a train to operate in such circumstances.

[Q]uestion 1 must be answered 'Yes.' Although there may be cases where the defendant's state of mind is relevant to the jury's consideration when assessing the grossness and criminality of his conduct, evidence of his state of mind is not a prerequisite to a conviction for manslaughter by gross negligence...

... There is, as it seems to us, no sound basis for suggesting that, by their recent decisions, the courts have started a process of moving from identification to personal liability as a basis for corporate liability for manslaughter... [C]orporate liability was not mentioned anywhere in the submissions of counsel or their Lordship's speeches [in *Adomako*]. In any event, the identification principle is in our judgment just as relevant to the *actus reus* as to *mens rea*. In *Tesco v. Natrass* Lord Reid said:

'the judge must direct the jury that if they find certain facts proved then as a matter of law they must find that the criminal act of the officer, servant or agent including his state of mind, intention, knowledge or belief is the act of the company.'

...  
In our judgment, unless an identified individual's conduct, characterisable as gross criminal negligence, can be attributed to the company, the company is not, in the present state of the common law, liable for manslaughter.

...  
This approach is entirely consonant with the Law Commission's analysis of the present state of the law and the terms of their proposals for reform in their report on Legislating the Criminal Code: Involuntary Manslaughter (Law Com No. 237)... We agree with the [trial] judge that the Law Commission have not missed the point and... the identification principle remains the only basis in common law for corporate liability for gross negligence manslaughter.

It follows that, in our opinion, the answer to question 2 is 'No.'

This case closed the door on any development of the identification principle and led effectively to the decisions not to proceed with manslaughter charges in relation to the Ladbroke Grove and Potters Bar rail crashes in 1999 and 2002 respectively. Charges were brought against Railtrack's successor, Network Rail, and Balfour Beatty for the Hatfield rail crash in which four people died in 2001 but the trial judge directed acquittals on the grounds that although there was evidence that a jury could have found 'an error of judgement, arguably a bad error of judgement' or that certain defendants 'acted as no reasonably competent and careful [postholder] should in those circumstances have acted... that level of want of care does not approach the necessary legal threshold for a manslaughter conviction' ([www.cps.gov.uk/news/press\\_releases/144\\_05/](http://www.cps.gov.uk/news/press_releases/144_05/)).

As we have seen, Balfour Beatty was fined a record penalty of £1.5 million for health and safety offences during construction of the Heathrow Express line in



1994. The prosecution in that case claimed that this 'raises many issues from which lessons need to be learned. The level of the fines sends a clear message to all in the industry, including clients, designers, consultants, contractors and subcontractors that they must ensure the safety of the public and workers'. But a month later the same company was fined £500,000 after a derailment of a goods train in 1997. At the time this was the highest ever for a railway accident and it was eclipsed only when GWT were fined £1.5 million after Southall (an accident that incidentally occurred a few days after the derailment). Whether any lessons were learned must remain a moot point. The question now is whether the new corporate manslaughter offence can bridge the gap whereby a company can at one and the same time be admonished for extremely serious breaches of health and safety duties but escape prosecution for homicide.

#### VI.19.c.iv. Corporate killing – the new offence

The Law Commission's Report on *Involuntary Manslaughter* recommended that a separate offence of corporate killing should be introduced, in addition to those offences committable by individuals (Report 237, 1996). Shortly after the Southall rail crash in 1997, in which seven passengers died, the government announced its intention to legislate the Law Commission's proposed offence. The consultation paper was not however published until May 2000; this coincided with the failure of the manslaughter charges against Great Western Trains (see above). The Paddington (Ladbroke Grove) crash in October 1999, in which 31 people died, served as an additional reminder that the promise to legislate had not been fulfilled. After numerous false starts, the government finally – yet half-heartedly – guided the Corporate Manslaughter and Corporate Homicide Act 2007 through Parliament. It creates the offence of corporate manslaughter for England, Wales and Northern Ireland and corporate homicide for Scotland. In theory, the new offence will overcome the difficulties of securing a conviction in cases similar to that of P&O. However, the final product is a somewhat pale imitation of the Law Commission's proposals, is unduly complex, and may ultimately fail to alter criminal law's ability effectively to prosecute and sanction large organisations for negligently caused deaths.

#### Corporate Manslaughter and Corporate Homicide Act 2007 Section 1

- (1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised –
  - (a) causes a person's death, and
  - (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

- (2) The organisations to which this section applies are –
  - (a) a corporation;
  - (b) a department or other body listed in Schedule 1;
  - (c) a police force;
  - (d) a partnership, or a trade union or employers' association, that is an employer.
- (3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).
- (4) (b) a breach of a duty of care by an organisation is a 'gross' breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances;
- (4) (c) 'senior management', in relation to an organisation, means the persons who play significant roles in –
  - (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
  - (ii) the actual managing or organising of the whole or a substantial part of those activities.

The Law Commission's proposals created a crime with mens rea based on management fault rather than the failings of individual directors. However, the narrower references in section 1(3) to 'senior' management and 'substantial' element will interest defence lawyers and are likely to limit the practical effect of the offence.

A departure from a standard of care is 'gross' under section 1(4) b) if the 'conduct... falls far below what can reasonably be expected of the organisation in the circumstances'. This builds on the *Adomako* common law definition of gross negligence (see Chapter 21.c.iii. below) but avoids the circularity of saying that the *criminal* standard for negligence is met when the jury thinks the breach was *criminal*. The Act also provides some factors for the jury to take into account, although these seem to complicate rather than clarify.

To begin with, the 'the jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach...' and if so how serious was the failure and how much of a risk it posed. Section 8 continues that a jury *may* also consider the extent to which the evidence shows that there were 'attitudes, policies, systems or accepted practices within the organisation' that were likely to have encouraged, or produced tolerance of, the failure to comply with such legislation. They may also have regard to any health and safety guidance relating to the breach. These are effectively instructions to the trial judge. She must instruct the jury to take into account breaches of health and safety legislation. But how that is taken into account will be left to the mysteries of the jury room. She must instruct the jury that they may take into account company culture, and/or breaches of guidance.

It is also explicitly stated that none of this prevents the jury from having regard to other matters they consider relevant.

A further question surrounds the relationship between the liability of organisations themselves and individuals within it. Should it be either, or both? The 2007 Act, although complex, opts to focus on organisations, and thus alters the application of the common law of homicide. Gross negligence manslaughter no longer applies to organisations to which the Act applies (s. 20), nor can individuals be charged as secondary parties to the offence of corporate manslaughter (s. 18). Whilst individual directors and officers could still be charged with common law manslaughter as principal offenders, shielding them from secondary liability for the new statutory corporate offence is a further example of the weakness of this legislation. The assumption that the liability of individuals would be more appropriately dealt with via the common law ignores the vagaries of prosecution policy. It does not seem very likely that a prosecutor will pursue, in relation to any one corporate incident, the corporation under one offence (the 2007 Act), and also proceed against individual directors or others under another. In other words, despite the potential areas of overlap, both individual directors and corporations may benefit as a result of the introduction of the separate corporate offence.

The Act extends beyond commercial corporations to 'organisations' which includes public authorities. But public authorities are exempt from liability in certain circumstances. Section 3(1) states that a 'duty of care' owed by a public authority in respect of a decision as to matters of public policy (including in particular the allocation of public resources or the weighing of competing public interests) is not a 'relevant duty of care'. Thus, a decision to allocate resources for healthcare treatment – for example whether to provide the anti-viral drug Tamiflu – would not give rise to liability should a death be caused by that decision.

Section 11 removes crown immunity thus allowing for prosecutions of government departments. Much of the debate at the business end of the Bill stage involved the government's attempt to exclude deaths in police or prison detention from the ambit of the offence. Although the government was defeated, this provision requires further parliamentary approval and has yet to come into force (s. 2(1)(d)). The latest indication is that the government is working to an implementation date of April 2011 (see [www.justice.gov.uk/publications/docs/corporate-manslaughter-custody-provisions-2009.pdf](http://www.justice.gov.uk/publications/docs/corporate-manslaughter-custody-provisions-2009.pdf)). It is somewhat worrying that it is felt necessary to give public authority custody providers five years in which to prepare for the possibility of prosecution for negligently causing the death of a person in their care.

There are some problems too in the Act's definition of causation. It requires proof that a death was caused 'by the way that an organisation managed or organised its activities'. Of course, organisations act through individuals, through frontline workers as well as through managers. In anticipation of the potential difficulties in proving that an organisation *causes* a result, the Law

Commission had included an explanatory provision that a management failure 'may be regarded as a cause of a person's death *notwithstanding that the immediate cause is the act of omission of an individual*' (emphasis added). In its wisdom, the government argued during the scrutiny of the draft Corporate Manslaughter Bill in 2005, that causation is no longer a difficult issue in criminal law. This was an extraordinary statement impossible to reconcile with the common law approach to causation. For example, in *R v. Kennedy* (2007) (see Chapter 20.d. below) the House of Lords, in quashing a conviction for manslaughter, commented that 'Causation is not a single unvarying concept to be mechanically applied without regard to the context in which the question arises.' The Act provides for three types of penalty: a fine, a publicity order and/or a remedial order.

How would this new test for corporate liability assist in a case such as that brought against P&O? The key difficulty in the P&O trial, states the report, was that:

There was insufficient prosecution evidence to justify a finding that the risk of the vessel putting to sea with her bow doors open was 'obvious' to a 'hypothetically prudent master or mariner or whosoever would have perceived it as obvious and serious'.

It would appear from this passage that the source of the difficulty was the culpability test for manslaughter as it applied to corporations rather than the identification rule of corporate liability itself. (It should be noted, incidentally, that the culpability test for manslaughter, based on the Caldwell/Lawrence definition of recklessness, which applied at the time of the trial was replaced by 'gross negligence': Adomako (1995), see Chapter 21.c.iii. below.)

The Law Commission Report quoted Turner J's reason for bringing the trial to a halt before the end of the prosecution's case. Evidence had been heard from P&O's own employees that no one had thought that there might be a risk of the ferry sailing with an open door. Discussing the yet-to-be-heard evidence from non-P&O mariners, the judge said this:

I do not understand that the statements of any of these witnesses condescend to criticism of the system employed by the defendants in this case as one which created an obvious and serious risk, *except to the extent that any legitimate deduction may be made from the fact that they took precautions other than those employed by any of these defendants* [Emphasis added].

The Law Commission accepted the conventional wisdom that this was a convincing reason for abandoning the trial and that a different route to corporate liability based on 'management failure' would overcome this. The report argued that, if the P&O case occurred again:



it would probably be open to a jury to conclude that, even if the immediate cause of the deaths was the conduct of the assistant bosun, the Chief Officer or both, another of the causes was the failure of the company to devise a safe system for the operation of the ferries; and that that failure fell far below what could reasonably have been expected.

Can that claim be reconciled, however, with the earlier assertion that the P&O trial was bound to fail because there was no obvious and serious risk perceptible to a prudent master that the ferry might sail with its doors open? Are these not two different ways of putting the same question? We can either say 'the company's failure to provide a safe system fell far below what was reasonably expected' or 'the company [i.e. the directors] failed to realise that there was an obvious risk that a ship might sail with its doors open'. If the risk were not obvious, as the judge concluded, why should we expect the company to devise a safe system to prevent it? It is the judge's conclusion which is perplexing: long before the trial, the *Sheen* inquiry had concluded that all concerned in the company's management shared responsibility for the failure in their safety system.

How do we reconcile these two arguments – that corporations should be pursued more often, and that, where they are prosecuted, the individual directors generally escape responsibility? The answer lies partly in the nature of the offences concerned and partly in differentiating between directors and more lowly employees. The relatives at Zeebrugge did not want ship-level operatives to take the blame for management failure, while the Health and Safety Executive is concerned that management does not hide behind the corporation which, as the 'employer', is the most obvious defendant in prosecutions under the 1974 Act. The niceties of corporate versus individual responsibility may not have mattered to the Zeebrugge relatives so long as the right individuals were pursued.

A strategy of extending corporate liability generally, by adding a third route based on an organisational or systems model, such as that contained in the Australian Criminal Code Act 1995 would overcome this particular objection. The Act legislates general principles of criminal responsibility and the section dealing with corporate liability provides that for offences of intention, knowledge or recklessness 'that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence' (Criminal Code Act 1995 (Cth), s. 12.3). Authorisation or permission can be shown in one of three ways – the first echoes the *Tesco v. Natrass* version of identification liability, and the second extends the net wider to 'high managerial agents'. It is the third which represents a clear endorsement of an organisational or systems model, based on the idea of 'corporate culture'. This is defined in much more detail than is the Commission's 'management failure' provision. 'Corporate culture' can be found in an attitude, policy, rule, course of conduct or practice within the corporate body generally or in the

part of the body corporate where the offence occurred. Evidence may be led that the company's unwritten rules tacitly authorised non-compliance or failed to create a culture of compliance. The President of the Australian Law Reform Commission summarises the proposals thus (Rose 1995):

This approach quite clearly seeks to address the significant criticisms of the 1972 *Tesco* decision, which restricted corporate criminal liability to the conduct or fault of high-level managers or a delegate with full discretion to act independently of in-house instructions, an approach ironically appropriate to the small and medium-sized business, with which large national and multi-national corporation [sic] have almost nothing in common.

It is important to realise, however, that this covers only Commonwealth (federal) offences. Homicide law is a matter for the individual states and they continue to follow the identification rule.

#### FURTHER READING

Paul Almond 'Understanding the Seriousness of Corporate Crime: Some Lessons for the New "Corporate Manslaughter" Offence' (2009) 9 *Criminology and Criminal Justice* 145.

Steven Box *Power, Crime and Mystification* (Tavistock 1983).

W. G. Carson 'The Conventionalization of Early Factory Crime' (1979) 1 *International Journal of Sociology of Law* 37–60.

Sally Cunningham *Driving Offences: Law Policy and Practice* (Ashgate 2008).

James Gobert 'The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen Years in the Making but was it Worth the Wait?' (2008) 71 *Modern Law Review* 413.

Keith Hawkins *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford University Press 2002).

Celia Wells *Corporations and Criminal Responsibility* (Clarendon Press 2001).

Celia Wells 'Corporate Criminal Liability in the UK' in M. Nihoul, N. Colette-Basecqz, S. Adam (eds.), *La responsabilité pénale des personnes morales en Europe. Corporate Criminal Liability in Europe* (Bruges, La Charte 2008).

# Homicide

## Boundary Issues

In the remainder of this section we concentrate on criminal laws which directly address those who cause death unlawfully. We have already examined many of the areas of legal regulation which touch upon and help to construct the broader social meaning of violence. In Section II we saw how public order laws invoke a wide conception of violence, and how they interact with non-fatal offences against the person. In Chapter 15 we looked at sexual violence in the context of personal autonomy. This section has built up a picture from many facets, ranging from domestic violence to safety on the roads and at work. In relation to each, what might otherwise be regarded as examples of unlawful violence are subjected to systems of enforcement and, in the case of road traffic and workplace deaths, a system of substantive law, which runs parallel with that of traditional homicide offences. Even when we turn to unlawful homicide, this process of construction continues, as can be seen when medical practitioners make decisions not to treat or to withdraw treatment. Before turning to the law of homicide, a basic question needs to be asked – is killing wrong?

### VI.20.a. Is killing wrong?

Many people would claim that the principle of sanctity of life is absolute. Sorell, below, gives a general introduction to some of the difficulties of holding such a position (cf. Dworkin 1993, quoted in Chapter 17.b.i.). The question of the morality of deliberate killing infuses all aspects of the law of homicide, although it is perhaps found in its starkest form in relation to capital punishment. Although this was restricted by the Homicide Act 1957 and abolished in 1965, and replaced by the mandatory life sentence, the desirability of its reintroduction is voiced regularly in political debate. Moral responses to killing clearly affect both the borderline between murder, which carries the mandatory penalty, and manslaughter, which does not, and help demarcate those killings which are regarded as unlawful and those which are not. Moral reactions also influence the different legal responses to what might be seen as similar phenomena. Why, for example, is poisoning someone by breaking a domestic gas pipe charged as homicide, while poisoning by the unlawful emission of industrial fumes is charged as a regulatory offence (see Chapter 19.b. above)? Why is killing a baby

sometimes seen as a particularly abhorrent murder and at other times as 'passive killing' and even good medical practice?

George Orwell, 1930 'Crime of the Violent Murder' in *The Collected Essays, Journalism and Letters of George Orwell Vol 19* (Penguin), p. 123

Our great period in murder, our Elizabethan period, so to speak, seems to have been roughly between 1850 and 1925... It is difficult to believe that any recent English crime will be remembered so long and so intimately [as the notorious murders of that period], and not only because the violence of external events has made murder seem unimportant, but because the prevalent type of crime seems to be changing... [O]ne can construct what would be, from a News of the World reader's point of view, the 'perfect' murder. The murderer would be a little man of the professional class – a solicitor or a dentist, say – living an intensely respectable life somewhere in the suburbs, and preferably in a semi-detached house, which will allow the neighbours to hear suspicious sounds through the wall. He should be either chairman of the local Conservative Party branch, or a leading Non-conformist and strong Temperance advocate. He should go astray through cherishing a guilty passion for his secretary or the wife of a rival professional man, and should only bring himself to the point of murder after long and terrible wrestles with his conscience. Having decided on murder, he should plan it all with the utmost cunning, and only slip up over some tiny, unforeseeable detail. The means chosen should, of course, be poison.

To contrast with the paradigm of murder so aptly captured by Orwell, the following extracts point to the difficulty of placing boundaries around 'right' and 'wrong' violence and killing:

John Rawls 1971 *Moral Theory and Digital Commitment* (Oxford), p. 72

If the loss of human life is always unfortunate, must it not be more than unfortunate – evil – for human life to be taken deliberately? It is often thought to be evil. Yet is it so evil that it must be avoided at all costs? If so, then suicide must be avoided at all costs. Euthanasia and capital punishment must be avoided at all costs. Abortion, war, and the assassination of a Hitler or an Amin must be avoided at all costs. The sweeping consequences of an absolute prohibition may make us think twice. Is it true that one must avoid taking human life no matter what? Or may there, in certain circumstances, be good reasons for killing that make it morally permissible in spite of what is otherwise wrong with taking human life?

These questions have more than theoretical interest, because many people have experience of situations in which taking life seems a real, even a reasonable, option. Unwanted pregnancies are not uncommon, and the fact that a pregnancy is unwanted gives a reason, though perhaps not a decisive reason, for having an abortion. Wars and military adventures are not uncommon. When they are in a cause people can agree to be good, the cause seems to justify the taking of life. People who lack direct experience of unwanted pregnancy or military service in wartime can often imagine themselves in such situations, and can confront



vicariously the questions they raise. And they can put themselves in other circumstances calling for life and death decisions as well. For example, many generally stable people suffer depressions that make suicide thinkable, however occasionally or fleetingly.

Again, many people have jobs that can lead them to consider either taking life or doing nothing to prevent it ending. Nurses, police officers, doctors, lawyers and judges may be attracted in theory to the idea that killing is never right and yet they may be faced with situations that seem to demand or permit the taking of human life, situations that require them to act. Since it is important for people to be able to justify to themselves and to other people what they are prepared to do, and since standards of justification are likely to be particularly exacting when lives are in the balance, it should matter particularly to people in law or medicine or allied fields whether taking life is always or only sometimes wrong. It should also matter to the rest of us who have to be able to justify to ourselves and to other people what we are prepared to stand back and see done. Everyone, it seems, has a stake in the question of whether killing people is always wrong. So much for the question. The answer appears to be that it is not always wrong, that the prohibition on killing people has exceptions. Take, for example, killing in self-defence, or killing in a case where not to do so would mean a lingering, painful death for someone whose life cannot be saved anyway. These cases seem to tell against an absolute prohibition. They seem to show that taking human life is not always but perhaps only usually wrong. But if killing people is permissible in some cases but not in others, which cases are which? Is it possible to qualify the principle that killing people is always wrong and still be left with a principle that tells us when it is wrong?

If we are looking for a single qualified principle to take the place of an absolute prohibition on killing, one that is merely the conjunction of a lot of different principles, then we are likely to be in for a disappointment. This is because different exceptions to the absolute prohibition recommend themselves for different reasons, which a revised principle cannot unify all at once. For example, killing a dying person who is in unrelievable agony may be permissible, because the quality of the rest of his life may be so bad as to make him better off dead. Killing in self-defence may be all right, because in doing so one is reacting against the evil of a life-threatening attack, not just saving one's own skin at the expense of someone else's. These grounds for allowable killing are not easy to put together. Consequently, it may be unreasonable to hope for a principle that says simply and directly when killing is permitted and when it is not. It may be that general moral guidance about allowable killing must take the form of a plurality of principles.

In 2000, the ethics of killing arose in the high-profile case of conjoined twins, Mary and Jodie. Mary lacked heart and lung function and relied on a common artery by which Jodie's heart and lungs were able to keep her alive. Without treatment both would die, whilst an operation to separate them would kill Mary but probably save Jodie. After the parents refused to 'choose' between the two and consent to separation, preferring instead to leave it to 'the will of God', the hospital sought a declaration that the procedure could be lawfully performed. The declaration was granted and the parents' appeal placed the court 'on the

horns of such a terrible dilemma', reflected by its decision to allow written submissions by the Archbishop of Westminster and the Pro-Life Alliance. The conclusion that separation amounted to the murder of Mary called for some creative analysis of defences to homicide, notably self-defence and necessity (see below at Chapter 21.d. and above at Chapter 12.f.). For now, it is worth reflecting on how the court confronted the conflict between its decision to allow separation and the sanctity of life.

*Re A (children) (conjoined twins: surgical separation) [2000] 3 All ER 961, 1016-17*

**Lord Justice Ward:** What are the doctors to do if the law imposes upon them a duty which they cannot perform without being in breach of Mary's right to life if at the same time the respecting of her right puts them in breach of the equally serious duty of respecting Jodie's right to life? A resort to a sanctity of life argument does not enable both rights to receive the equal protection the doctrine is supposed to provide each of them equally. In those circumstances it seems to me that the law must allow an escape through choosing the lesser of the two evils. The law cannot say, 'heads I win, tails you lose'. Faced as they are with an apparently irreconcilable conflict, the doctors should be in no different position from that in which the court itself was placed in the performance of its duty to give paramount consideration to the welfare of each child. The doctors must be given the same freedom of choice as the court has given itself and the doctors must make that choice along the same lines as the court has done, giving the sanctity of life principle its place in the balancing exercise that has to be undertaken. The respect the law must have for the right to life of each must go in the scales and weigh equally but other factors have to go in the scales as well. For the same reasons that led to my concluding that consent should be given to operate so the conclusion has to be that the carrying out of the operation will be justified as the lesser evil and no unlawful act would be committed.

I should emphasise that the doctors do not cease to owe Mary a duty of care; they must continue to furnish such treatment and nursing care as may be appropriate to ensure that she suffers the least pain and distress and retains the greatest dignity until her life comes to an end.

The second reason why the right of choice should be given to the doctors is that the proposed operation would not in any event offend the sanctity of life principle. That principle may be expressed in different ways but they all amount to the same thing. Some might say that it demands that each life is to be protected from unjust attack. Some might say as the joint statement by the Anglican and Roman Catholic bishops did in the aftermath of the Bland judgment that because human life is a gift from God to be preserved and cherished, the deliberate taking of human life is prohibited except in self-defence or the legitimate defence of others. The Archbishop defines it in terms that human life is sacred, that is inviolable, so that one should never aim to cause an innocent person's death by act or omission. I have added the emphases. The reality here – harsh as it is to state it, and unnatural as it is that it should be happening – is that Mary is killing Jodie. That is the effect

of the incontrovertible medical evidence and it is common ground in the case. Mary uses Jodie's heart and lungs to receive and use Jodie's oxygenated blood. This will cause Jodie's heart to fail and cause Jodie's death as surely as a slow drip of poison. How can it be just that Jodie should be required to tolerate that state of affairs? One does not need to label Mary with the American terminology which would paint her to be 'an unjust aggressor', which I feel is wholly inappropriate language for the sad and helpless position in which Mary finds herself. I have no difficulty in agreeing that this unique happening cannot be said to be unlawful.

The Court of Appeal concluded that separation represented the least detrimental option, and would be lawful. Although manoeuvring around homicide with reference to the different justifications of self-defence (Ward LJ), necessity (Brooke LJ) and to recourse to the doctrine of double effect and best interests (Walker LJ), the Court of Appeal were united in arriving at the conclusion that they were not setting any kind of precedent. However, to what extent is such a conclusion realistic?

Richard Huxtable, 'Logical Separation? Conjoined twins, Slippery Slopes and Resource Allocation' (2001) 21 *Journal of Social Welfare and Family Law* 459, at 460–1

Ward LJ is most emphatic... that *Re A* does not set a precedent. Formulating the 'unique circumstances' into a narrow ratio, he reiterates, 'this is a very unique case'. Quite simply, as law students are instructed early in their studies, English law apparently does not operate in the manner that Ward suggests. It is doubtful whether there can exist degrees of uniqueness. Certainly, the facts of the case were uncommon and unprecedented... however, having issued its ruling, the Court of Appeal must have set a precedent available to other judges in, for example, cases analogous to the present 'unique' case.

This contention is bolstered by mere reference to the declaratory nature of the proceedings. Legally problematic, the declaration purportedly involves a statement of the existing, applicable legal principles. We might, of course, question whether this in truth involves 'creating' rather than 'stating' law. But if we take the party line, the Court of Appeal ought to concede that the principles utilized were 'out there'... [and] must be available in other cases.

Medical lawyers are familiar with at least one other attempt at minimization, in *Airedale NHS Trust v. Bland* [1993] 2 WLR 316. But that case must have set a precedent: the court of appeal in *Re A* noted that *Bland* was 'binding on this court' and accordingly cited the Lords' opinion on, for example, the sanctity of life doctrine. Although the court might not like the fact, *Re A*, like *Bland*, must have set a precedent beyond its facts, on points of principle... Centrally, the reasoning relating to the sanctity of life, a patient's 'best interests' and the defences to murder might have potentially wide ramifications.

The status of *Re A* as a precedent has already been confirmed by the Supreme Court of Queensland in *Nolan* (2001) (see Grubb 2002). In authorising the



procedure, the court relied on the troubling minority reasoning of Walker LJ that separation would be in each of the twins' best interests, in not depriving the weaker twin of her bodily integrity. Huxtable further suggests that, in allowing the active and intentional killing of Mary, the decision is radically inconsistent with the sanctity principle. To what extent does it also logically point to the proposition that Y may be actively killed in order that X might benefit from resources devoted to Y? Similar trends evident in the 'passive killings' that follow from medical decisions not to treat may lend further support to this.

### VI.20.b. Medical non-treatment

Medical practices in relation to the non-treatment of neonates (i.e. newly born infants), and the extent to which doctors can use pain-killing drugs to hasten death, illustrate the general point that systems of control and regulation, even over matters as crucial as life and death, are determined by social and professional mores as much as by criminal law. In particular, they indicate the difficulties in perceiving questions of this kind pathologically either in terms of the 'actor' or in terms of the 'victim'. The fact that the decision to resuscitate a handicapped neonate is an individual one, for both the medical staff and the parents, involves a double delegation. It also signifies an unwillingness on the part of the legal system, here represented by criminal enforcement processes, to determine the legality of certain areas of medical management. The *Blund* case exposes the uneasy alliance between law and medicine (see below, and also Chapter 17.b.). The medical profession's traditional reluctance to give guidelines as to the appropriate criteria to apply tended to leave many of the questions to the individual practitioner. The 'doctor's dilemma' is gradually giving way to professional guidelines which reflect, but more often lead, the legal response in these areas. We take first the example of the non-treatment of neonates.

Medicalisation has taken over the sphere marked out as within the control of women as experts in managing pregnancy and childbirth: here we shift from the image of the woman in labour assisted by professional midwives, to the 'special baby care unit', to high technology 'saving' ever-more premature and low-birthweight babies. This has, in fact, been a two-stage process. Where once it was the woman herself to whom the medical profession needed to pay most attention, the significant reduction in the risks of dying in childbirth has led to more focus on the survival of low-birthweight or handicapped neonates. The development of infant paediatrics, exploiting the developments in life-saving and life-maintaining technologies, began to give rise to a number of troubling questions. Once kept alive, are there circumstances in which it is legitimate to let go of a low-birthweight baby, and if so, how does this affect the contours of unlawful homicide? These are debates at the edges of life, at the edges of ethics and at the edges of law.



Many people seem unaware of the extent to which non-treatment is, or has been until recently, practised in neonatal intensive-care units. It is only in the last 40 years that the implications of the increased production of damaged children for contemporary practices in neonatal care have begun to be discussed openly, even in medical journals. What has emerged since two paediatricians broke 'the public and professional silence on a major social taboo' (Duff and Campbell 1973) is much less diversity of approach between different hospitals or on international comparisons than might have been expected. There are dissentient voices, of course, both within and between hospitals, but the main impression is that the most forceful opposition to non-treatment comes from those who have the least contact with neonatal units. Two dilemmas face paediatricians in neonatal units: whether to use high-technology life-support machines to prolong the lives of infants with profound neurological or other physical abnormalities, and whether to resuscitate extremely low-birthweight babies. The search for consensus in such an ethically fraught field will always be elusive, not just in terms of what to do, but who should decide and how?

*Nuffield Council on Bioethics, Critical Care Decisions in Fetal and Neonatal Medicine: Ethical Issues (2006), pp. 71-73*

2.8 One important question that all those involved in critical care decision making need to address concerns the value of the life of a fetus or a newborn baby. Is it equal to that of an adult person with fully developed mental capacity? And if not, to what extent would this matter for critical care decisions? Two important distinctions are made in the discussion that follows. First we examine the view that all human life has absolute value and that everything possible must always be done to prolong life. We then examine arguments that support the view that humans have different value (or moral status) at different developmental stages.

2.9 According to the doctrine of the 'sanctity of life', taking human life is categorically wrong, as all humans are of equal intrinsic value and should be treated with the same respect. There are different interpretations that can be distinguished within the doctrine. Some people think that 'sanctity of life' means that although life is of exceptional value, there may be cases in which it can be permissible not to strive to keep a person alive. Others believe the doctrine to be sufficient to underpin an absolute right to life, in both moral and legal terms. We term this the absolutist position. Human life may be said to be sacrosanct for different reasons. Whatever interpretation is put on 'sanctity of life', the position is often defended in religious terms, although it can be held without referring to religion. One influential line of argument refers to the view that man is made in the image of God, and only God may take life. The sanctity of life view can be contrasted with a 'quality of life' view that does not recognise an absolute right to life nor a duty to preserve it, but rather judges whether a life is worth preserving (or having in the first place) in terms of its quality.

2.10 Both views face inherent difficulties. For those who would place great importance upon quality of life, and that includes many consequentialists, it is difficult to make decisions on this basis as the quality of life is 'hard to define and even harder to measure'. Judgements of what constitutes a life of sufficient quality are notoriously variable. Some people would view life with severe mental or physical impairments as not worth living. However, many severely disabled individuals report that they are content with their lives, which they do not regard as having less value than the lives of others. Thus judgements on the quality of life may reveal prejudices or conclusions based on anxieties or preconceptions. It should also be noted that disability is at least in part a socially created and conditioned state.

2.11 As we acknowledge above (paragraph 2.5), we should not expect complete unanimity on issues of fundamental moral concern and members of the Working Party hold differing personal and philosophical positions in relation to 'sanctity' or 'quality' of life. The Working Party, however, agreed that in relation to the newborn baby there are some circumstances in which imposing or continuing treatments to sustain a baby's life results in a level of irremediable suffering such that there is no ethical obligation to act in order to preserve that life. The Working Party struggled, as have others, to identify the criteria that should determine when the degree of suffering outweighs the baby's interest in continuing to live, and to find the appropriate language to describe the threshold at which any obligation to prolong life cedes to a duty to provide palliative care. Following deliberation, the Working Party adopted the concept of 'intolerability'. It would not be in the baby's best interests to insist on the imposition or continuance of treatment to prolong the life of the baby when doing so imposes an intolerable burden upon him or her.

2.12 In seeking to understand what may be meant by an intolerable burden the Working Party reviewed the guidance in the Framework of the Royal College of Paediatrics and Child Health (RCPCH) on withholding and withdrawing life-sustaining treatment. In considering what constitutes 'intolerability', we noted that the RCPCH distinguishes between three situations: 'no chance', 'no purpose' and 'unbearable'. Where treatment offers 'no chance' of survival other than for a short period of time, the best interests of the baby focus on the relief of any suffering and a peaceful death. We consider that to mandate distressing and futile interventions that can do no more than delay death would be a clear case of an intolerable burden.

2.13 Much more difficult are cases where evidence suggests that treatments to prolong life may have either 'no purpose' (as defined by the RCPCH) or result in 'unbearable' suffering. In those cases, establishing what constitutes a level of 'intolerability' is more complex and controversial. The concept of 'no purpose' is suggested by the RCPCH for cases in which treatment may secure the survival of a baby or child but only for him or her to endure such an 'impossibly poor' life that it would be unreasonable to expect him or her to bear it. For example, the clinical evidence may indicate that any future existence for the baby will be a life bereft of any of those features that give meaning and purpose to human life (for example, being aware of his or her surroundings or other people). Implementing burdensome treatments when faced with such a prospect may be seen as imposing an 'intolerable' existence, even in the absence of evidence of great pain or distress.

2.14 An 'unbearable situation' emphasises that there may be cases where treatment secures the survival of the baby but only for him or her to endure a life of great suffering and the family believes that further treatment is more than can be borne, irrespective of medical opinion that it may be of some benefit. While the RCPCH recommends that consensus should be sought, the 'unbearable' situation would appear to give more weight to the judgement of the parents in decision making. Unlike the 'no purpose' situation described above, babies in an 'unbearable' situation may have greater inherent awareness and potential capacities to relate to others, but suffer extreme and irremediable pain. An example of such a distressing condition might be the most severe form of the incurable inherited skin condition, junctional epidermolysis bullosa (discussed in Chapter 6, Case 8). The intractable pain and consequent disability imposed on a child with this extreme form of the condition could be said to make continuing life 'intolerable'. The Working Party concluded that in both 'no purpose' and 'unbearable' situations, continuing life-sustaining interventions could result in maintaining a life that imposed an 'intolerable' burden on the baby.

2.15 There are also a number of situations that are both 'no purpose' and 'unbearable'. For example, a baby may show indicators of severe and unrelievable pain that is likely to persist, and at the same time he or she may be incapable of sustaining any meaningful relations with other people and lack any potential for an independent existence. The baby's suffering is significant and there is no prospect of benefits to him or her in continuing life to offset that suffering. Cases in which the life of a baby in such a condition could continue only by means of intrusive and invasive treatments may be also described as 'intolerable'.

2.16 Our use of 'intolerability' embraces all three situations recognised by the RCPCH, as well as those that have features of more than one of these categories. We take 'intolerability' to encompass an extreme level of suffering or impairment which is either present in the baby or may develop in the future, and may be given more weight in the judgement of parents or doctors. In proposing 'intolerability' as a threshold to justify decisions not to insist on lifeprolonging treatments, the Working Party acknowledges the fallibility of language and the uncertainty of interpretation of evidence. Reasonable people may disagree both about what constitutes 'intolerability' and/or when a particular baby's condition meets that condition. In applying this concept, we acknowledge, however, that in each case an assessment must be made of the individual baby. The Working Party regards it as crucial that assessments both of what purpose a baby may find in his or her life and of the degree of suffering endured by a baby are made jointly by parents and healthcare professionals. We conclude at this stage that, although a presumption in favour of life is rightly at the root of all medical care, it cannot be absolute in situations where there are clear indications that the life to be experienced will be an intolerable burden on the child.

The non-treatment of neonates has infrequently attracted criminal law attention, although increasingly civil courts are asked to determine the lawfulness of proposed non-treatment decisions (Kennedy and Grubb 2000, p. 2155). The perceived moral distinction between killing and letting die was relied upon in



the trial of Dr Leonard Arthur, one of the few occasions when non-treatment has been considered a matter for criminal law:

Adam Murray, 'Subjective Treatment of Irremediably Impaired Infants: Doctor M. Arthur at the Threshold', *Journal of Law, Medicine & Ethics* 32 (2004), 5-7, 8-9

In 1981, the courts dealt with two cases concerning non-treatment of infants with Down's syndrome. First, in *Re B*, the Court of Appeal heard the case of 'baby Alexandra', whose parents were refusing consent to surgery, and then, in *R v. Arthur*, Dr Leonard Arthur was prosecuted for the attempted murder of baby John Pearson. Babies born with abnormalities or with injuries caused during childbirth are nothing new. It was suggested in 2004 that 'only twenty-five years ago it was common practice to bring about the deaths of some children with learning disabilities or physical impairments, particularly if their parents' social or personal situation was "unfavourable"'. In 1973, Duff and Campbell 'went public' with their review of deaths in a special-care nursery. They reported that 43 out of 299 deaths were related to withholding treatment. Earlier, in the 1950s and 1960s, there had been debate in the medical literature as to the utility or otherwise of the active treatment of spina bifida. It has been suggested that '[i]n many cases, midwives and family doctors made sure that babies did not survive; to save the mother difficulties, they were often described as "stillborn"'. While readers of medical journals may have been familiar both with the practices and with the debates, these were not questions which had been generally discussed. *Arthur* and *Re B* offered an insight into professional attitudes and focused attention, via the courts, on what had previously been the preserve of the medical profession.

Although *R v. Arthur* is of dubious utility as a precedent, it provides insights as to medical practice at the time and the reluctance of the court to challenge that. When John Pearson was born with Down's syndrome, Arthur noted that the parents did not want him to survive and directed 'nursing care only' together with dihydrocodeine to keep the baby sedated. The baby died three days later. The defence to the charge of attempted murder was, inter alia, that Dr Arthur's actions constituted acceptable medical practice. In his address to the jury, Farquharson J referred to the various expert witnesses who had given evidence in support of Arthur. These included Professor Campbell, who observed: 'You must remember that these decisions are not taken by doctors in the privacy of the home with the parents, as they once were'. Whatever the correctness of the decision on legal grounds, or indeed in its representation of contemporary medical practice, the case drew attention to the decisions being taken by doctors and parents. It did not, of course, have much to say about the rights or interests of the infants involved.

*Re B* arose from the refusal of parents of a baby with Down's syndrome to consent to surgery on a life-threatening intestinal blockage which would have been routinely operated on if the child were otherwise 'normal'. In his frequently quoted *ex tempore* judgment, Templeman LJ stated that it was 'certain that she will be very severely mentally and physically handicapped', but the court had to decide whether her life is demonstrably going to be so awful that in effect the child must be condemned to die, or whether the life of this



child is still so imponderable that it would be wrong for her to be condemned to die. The Court of Appeal found no evidence that B's life would be 'intolerable', and held, therefore, that it was in her interests that the operation should be carried out.

With these two cases, the law began to negotiate its sometimes uncomfortable relationship with medical practice as informed by the professional, and ethical codes of the profession and in doing so, judicial scrutiny focused attention on the role that the law should play in the regulation of clinical/ethical decision-making. Concern that the law leaves too much to the discretion of the medical profession in nonclinical matters has been a hallmark of medical law as it has developed over the last 25 years or so.

...

Whether they like it or not, legal issues raised by medical practice give judges an opportunity to address controversial – sometimes insoluble – problems where cases raise matters of profound ethical concern. Morgan and Lee coined the phrase 'stigmata cases' to describe those which, *inter alia*, 'require courts to develop a social, even a moral vision with which to respond to the dilemmas created by the social and cultural revolution of contemporary medicine'. In addressing the selective treatment of infants, the judges have, however, focused on the specific facts, with heavy reliance on clinical opinion and medical guidelines. They adopt the medico-ethical viewpoint while dissociating themselves from the ethical debate. One judge has said:

The ethical decision whether actually to withdraw or withhold [treatment] must be made by the doctors concerned. Judges are neither qualified to make, nor required, nor entitled to make ethical judgments or decisions.

Implicit in this abrogation is the assumption that doctors, unlike judges, are capable of and are expected to make such decisions. But even were it desirable to leave responsibility entirely in the hands of medical professionals, it is a false dichotomy: the law is underpinned by ethical values, including respect for the sanctity of life. Judges may apply a 'legal' test as laid down in earlier cases, but they are applying an ethical framework in doing so and it is essential that they articulate not only the legal rules but also the ethical principles underlying them, rather than delegating such judgments to doctors.

Arthur's acquittal may have been attributable to the conflict in evidence on whether 'nursing care only' would be interpreted as an instruction not to feed, or because of jury sympathy with a respected doctor as to whose motives no question was raised. The trial judge distinguished between murder and the 'setting of conditions' in which death is allowed to occur. The line between murder and the proper practice of medicine appeared to depend on something akin to the distinction between act and omission. The examples which the judge used in Arthur's case allowed that neither an omission to treat a Down's syndrome baby with an intestinal obstruction nor the failure to give antibiotics to a handicapped baby with pneumonia would be said by a jury to be murder. But to give pain-killing drugs to a baby who was not otherwise going to die might be so regarded.

Reliance on acts and omissions, as a moral determinant, was exposed as a 'distinction without a difference' in *Re A* (2000) (Ward LJ at 1015) and prior to this in the landmark case of *Airedale NHS Trust v. Bland* (1993), which took the debate beyond neonates to adults. Nor can the raw application of principles of legal causation and responsibility help in making the fine moral distinctions which medical treatment decisions demand. Thus, although legal texts expound the view that any acceleration of death is sufficient for causation in homicide, subject to a doctor's freedom to give pain-killing drugs where necessary, its application to medical treatment is of singularly little help. Nor is it only medical decisions involving painkillers for the terminally ill which challenge the capacity of the principles of the law of murder to make adequate moral differentiations. If that law does not protect a handicapped baby who 'providentially' develops pneumonia, then there is no reason why it should protect that same baby from being actively killed (painlessly). It makes little sense for a less handicapped baby to 'be allowed to die' while enforcing the continued existence of one with severe handicaps who fails to attract the intervention of providence. If the jury in Arthur's trial thought pain-killing drugs had been given in lethal amounts with intent to cause death, it was open to them to convict of attempted murder. **The moral distinction needs to be based on something less crude.**

One approach asks whether there are any relevant features distinguishing a new-born baby from other persons, such that conduct which would be regarded as unacceptable in relation to the latter is not so regarded in relation to the former. This involves rejecting the 'sanctity of life' doctrine as a reason for disapproving all non-treatment. The principle of absolute sanctity of life ignores the fact that the concept of life is a historical event, an object of economic and political decision-making. So, if all human life is not of equal worth, what criteria can be used to distinguish those lives which are deserving of the protection of life support (in its broadest sense) and those which are not?

The concept of personhood may be useful here. But at what stage does an embryo or foetus become a person? We have seen in Chapter 17.a.i. how law begins to answer this question in relation to abortion. Some writers suggest that personhood is arrived at after 12 weeks' gestation, others not until a baby is three months old. These are both based on physiological arguments about the acquisition of capacities such as the capacity to feel pain through to the capacity to have a knowledge of oneself. Aside from the physiological there is also the social concept of personhood – the point at which a neonate shifts from being of biological to social significance. It may be justifiable to distinguish in some circumstances between a being which has the capacity to be aware of self and one that does not. How does this avoid the legitimization of the indiscriminate killing of all neonates? The answer there is that the potential of a baby for reaching personhood should not be compromised unless there are other pressing reasons. One of those might be used in an argument for abortion, which is the right of the mother on whom the baby is dependent for existence. Another might be the desire to avoid pain and suffering – a quality of life

argument. This can be used to justify the practice of non-treatment. Neonates are non-autonomous beings. This both allows their killing but also introduces reasons for their greater protection. Their killing is justifiable because they do not have an awareness of self, but only where their prognosis is such that their lives are going to be severely restricted mentally or physically or through pain.

(Kuhse and Singer 1985, p. 172) argue that:

Decisions about severely handicapped infants should not be based on the idea that all life is of equal value, nor on any other version of the principle of the sanctity of human life . . . There is therefore no obligation to do everything possible to keep severely handicapped infants alive in all possible circumstances. Instead, decisions to keep them alive – or not to do so – should take account of the interests of the infant, the family, the ‘next child’, and the community as a whole.

An opinion poll at the time of the *Arthur* trial revealed that four-fifths of the respondents believed that doctors should not be guilty of murder in such circumstances, a view both reflected in the jury’s verdict and in the developing jurisprudence in relation to withdrawal of treatment in cases such as *Re J* (1993), *Re L* (2004) and *Re Wyatt* (2006). The passive killing of terminally ill children through withholding treatment has also been held to be compatible with the right to life under Article 2 of the European Convention on Human Rights (*A NHS Trust v. D* (2000)).

In the US, by contrast, these questions have been out in the open for much longer and the legislative tendency is towards accounting for decisions not to treat rather than setting out the circumstances when withdrawal or non-treatment is appropriate. Under amendments to the federal Child Abuse Prevention and Treatment Act, which came into force in 1984, states have been required to develop procedures for responding to reports of cases of ‘medically indicated treatment’ being withheld. Such treatment is indicated unless: (i) the infant is irreversibly comatose; or (ii) it would merely prolong dying; or (iii) where it would not be effective in correcting all of the infant’s life-threatening conditions.

The right-to-life tenor of these rules is qualified only by the final provision that treatment is not mandatory where it would be virtually futile in terms of the survival of the infant, and the treatment itself under such circumstances would be inhumane.

This brings us to the next question – how does criminal law mediate relations between terminally ill adults and their medical or other helpers? (This has been addressed as an issue relating to autonomy in Chapter 17.b. which dealt with the situation where the patient positively requests death-hastening treatment, or requests the withdrawal of treatment.)

In the same way that non-treatment of neonates is practised in a legal vacuum, so also the acceleration of death through the medical administration of



pain-killing drugs lies in something of a no-man's land. What happens where doctors take this decision themselves and administer pain-relieving drugs in doses which will surely kill? Dr Adams was tried on a specimen charge of murder in 1957 after, it was alleged, a number of his wealthy, elderly patients had died shortly after altering their wills in his favour. He was acquitted. There are both similarities and differences between the cases of Dr Arthur and Dr Adams. These cases are both unusual, in that prosecutions of doctors in relation to their medical practice are rare (although less so than they were). The reasons for the prosecutions were very different. That against Dr Arthur was brought because there was concern amongst members of the LIFE organisation about the general practice of non-treatment. Dr Adams, on the other hand, was suspected of hastening the deaths of his elderly patients through the administration of dependence-producing painkillers in order the sooner to relieve them of their money. Adams regarded what he was doing as 'easing the passing':

Easing the passing of a dying person is not all that wicked. She wanted to die. That cannot be murder. It is impossible to accuse a doctor [Dr Adams in 'conversation' with Detective-Superintendent Hannam, quoted by Devlin 1985, p. 7].

Adams was tried before Mr Justice (later Lord) Devlin, who later wrote about the trial:

*Fallon, Devlin 1981* *Testing the Passing* (Healey Road). Timidity and  
 Authority in the Twentieth C. 20: 171-2

[All punctuation in the original. The inverted commas surround direct quotations from the summing-up. The rest of the passage is Devlin's paraphrase.]

Murder is the cutting short of life, whether by years, months or weeks. It does not matter that Mrs Morrell's days were numbered. 'But that does not mean that a doctor who is aiding the sick and the dying has to calculate in minutes or even in hours, and perhaps not in days and weeks, the effect upon a patient's life of the medicines which he administers or else be in peril of a charge of murder. If the first purpose of medicine, the restoration of health, can no longer be achieved, there is still much for a doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering, even if the measure he takes may incidentally shorten life.' This is not because there is a special defence for medical men [sic] but because no act is murder which does not cause death. We are not dealing here with the philosophical or technical cause, but with the commonsense cause. The cause of death is the illness or the injury, 'and the proper medical treatment that is administered and that has an incidental effect on determining the exact moment of death is not the cause of death in any sensible use of the term. But . . . no doctor, nor any man, has the right deliberately to cut the thread of life.' It is not contended by the defence that Dr Adams had any right to make that determination.



As contemporary accounts of the trial indicate, the prosecution case was not very strongly presented. If Adams had been convicted it would have been because his motive rather than his deeds were doubted. Yet, as we show in the discussion of murder and manslaughter below, the significance of motive is consistently denied by criminal law. The *Adams* case therefore has dual interest. It confirms, by its very unusualness, the reluctance of the processes of criminal law to regulate the activities of doctors and it casts doubt on the irrelevance of motive asserted by criminal law doctrine.

The following is a case which straddles those of Arthur and Adams. Cox gave an admittedly lethal dose of a painkiller to his patient and was convicted of attempted murder. There had been a distinct shift in attitudes in the 30 years since Adams's trial: while doctors themselves were no longer practically immune from criticism, faith in modern medicine had probably increased.

***R v. Cox (1992) 12 BMLR 38, Winchester CC***

**Ognall J:** ... If it is proved that Dr Cox injected [the victim] with potassium chloride in circumstances which make you sure that by that act he intended to kill her, then he is guilty of the offence of attempted murder... [F]rom the earliest stage, it has been admitted that he did indeed inject her intravenously with two ampoules of undiluted potassium chloride... Is it proved that in giving that injection Dr Cox intended thereby to kill his patient?... We all appreciate... that some medical treatment, whether of a positive, therapeutic character or solely of an analgesic kind, by which I mean designed solely to alleviate pain and suffering, carries with it a serious risk to the health or even the life of the patient. Doctors... have to make up their minds as to whether the risk, even to the life of their patient... is or is not medically justified. Of course, if a doctor genuinely believes that a certain course is beneficial to his patient... even though he recognises that that course carries with it a risk to life, he is fully entitled, nonetheless, to pursue it. If sadly, and in those circumstances the patient dies, nobody could possibly suggest that... the doctor was guilty of murder or attempted murder... And the problem... is particularly acute in the case of those who are terminally ill and in considerable pain, if not agony. Such was the case [here]. It was plainly Dr Cox's duty to do all that was medically possible to alleviate her pain and suffering even if the course adopted carried with it an obvious risk that as a side effect... of that treatment her death would be rendered likely or even certain... what can never be lawful is the use of drugs with the primary purpose of hastening the moment of death.

This approach was confirmed when the House of Lords considered the case of Anthony Bland (*Airedale NHS Trust v. Bland* (1993) – see Chapter 17.b.). The case was different in a number of respects. It concerned a person who was neither competent nor were his prior wishes known. The question to be determined was the lawfulness of withdrawal of treatment in order to hasten

death, not with the giving of treatment for that purpose. It was an action for judicial review, not a trial. The case makes important statements about many issues connected with medical treatment but the core issue was the status of a person in persistent vegetative state (PVS). The procedure on withdrawal which the House of Lords approved applies only to a person in such a state and thus, on one analysis, their Lordships have redefined the 'person' to whom the protection of homicide laws apply. Although *Bland* deals only with the highly specific case of a person in PVS, it nonetheless represents a hugely significant step in the development of homicide law. Causing death in the circumstances specified in *Bland*, that is through withdrawal of treatment to a person in PVS, is rendered lawful.

This creates an exception or qualification to the law of murder. As we will see, the offence of murder is committed when a person (unlawfully) causes the death of another with intention to do so (or to cause grievous bodily harm). Doctors are under a duty to their patients such that, in the normal course of events, an omission to treat will be as culpable as a positive act to kill. In respect of a person satisfying the conditions laid down in *Bland*, that duty is removed. However, it would still be murder if the doctors actively killed him with an injection – see Cox, and Adams above. Other examples of lawful killing would be killing in self-defence, in the prevention of crime or under the principle of necessity. In *Re A (Conjoined Twins)* (2000) the Court of Appeal utilised these defences in creating another qualification to murder, albeit denying that they were setting any precedent (see below at Chapter 21.d. and above at Chapter 12.f.). *Bland* also acknowledges changes in the medical definition of death, to which we now turn.

## VI.20.c. Definitions of death

One of the questions which has to be confronted in homicide is when is a person to be regarded as dead: if a person is to be accused of causing the death of another, we have to know when life departed and death began. In the past, death was a simple state to identify – the person would stop breathing or her heart would stop beating. Advances in our understanding of biochemistry and physiology, and advances in medical techniques and technology have called these simple definitions into question. With developments in resuscitation and life support it is now possible to keep the heart and respiratory functions going even when there is little likelihood of an individual recovering consciousness. In open heart surgery, conversely, there is deliberate cardiac arrest. Resuscitation following spontaneous cardiac arrest is also commonplace.

In addition to the traditional acceptance of cardio-respiratory death, the medical profession agrees that 'brain stem death' (irreversible loss of brain function) constitutes an alternative criterion of the end of life. Brain stem death was endorsed by the House of Lords in *Bland*. In the words of Lord Keith ([1993] AC 789, at 856):

Anthony Bland has for over three years been in the condition known as persistent vegetative state... It arises from the destruction, through prolonged deprivation of oxygen, of the cerebral cortex, which has resolved into a watery mass. The cortex is that part of the brain which is the seat of cognitive function and sensory capacity. Anthony Bland cannot see, hear or feel anything. He cannot communicate in any way. The consciousness which is the central feature of individual personality has departed forever. On the other hand the brain stem, which controls the reflexive functions of the body, in particular heartbeat, breathing and digestion, continues to operate. In the eyes of the medical world and of the law a person is not clinically dead so long as the brain stem retains its function.

### VI.20.d. Causing death

Before a person can be found guilty of murder or manslaughter it must be shown that they caused the death of the victim. Many factors contribute to an event, and since death is inevitable for all of us, law has to decide which causal factors are of relevance. Generally, proof of factual causation is straightforward – the defendant need have done no more than contribute to the death by her actions (or omission where she is under a duty to act). Legal causation will not always follow from this. If the connection between the defendant's contribution and the death is in some way too remote, then causation may not be established. The old 'year and a day' rule was an example of a rigid, and therefore certain, cut-off point which provided that no prosecution for homicide could be brought if more than a year and a day elapsed between the injury causing the death and the death itself. The Law Reform (Year and a Day Rule) Act 1996 abolished the rule (s. 1). The Act also provides that proceedings brought more than three years after the initial injury or where a person has already been convicted of an offence committed in circumstances connected with the offence (for example, an offence of causing grievous bodily harm) can only be brought with the consent of the Attorney-General (s. 2). The rule had begun to make little sense in the face of modern medical techniques and knowledge. Victims of serious woundings might well be maintained for more than a year and tracing the cause of death to the original wounding might be less of a challenge.

James FitzJames Stephen 1973: *A History of the Criminal Law of England* (New Franklin NY: text reprint of 1833 edition). Ch. XXVI

In order that a man may be killed by an act the connection between the act and the death must be direct and distinct, and though not necessarily immediate it must not be too remote. These conditions are not fulfilled (1) if the nature of the connection between the act and the death is in itself obscure, or (2) if it is obscured by the action of concurrent causes, or (3) if the connection is broken by the intervention of subsequent causes, or (4) if the interval of time between the death and the act which causes it is too long. Whether in particular cases these conditions are or are not fulfilled is always a question of degree

dependent on the circumstances. The principle may be illustrated in a variety of ways but no precise and completely definite statement of it can be made.

Killing by an act which causes death in a common well recognised way either immediately or after an interval of time insufficient to disguise or complicate the connection between the cause and effect is the typical and normal case...

The wrongful intervention of a third party may break the chain of causation. Once again, medical practice dominates the development of legal doctrine. Medical treatment is not always competent. When should incompetent treatment be regarded as 'taking over' as the cause of death? One argument would be that a defendant who put the victim in need of medical treatment should be liable, however bad that treatment turned out to be. This would be consistent with the principle that 'you take your victim as you find her'. However, as the case below demonstrates, a less rigorous principle applies in relation to poor medical treatment, albeit one that gives little hope to defendants who have placed their victims at the peril of the medical profession.

#### *It's Beldam LJ v The Crown*

[The appellant was convicted of murder. During an altercation in a fish and chip shop, C fired at the deceased, wounding him in the leg and stomach. One bullet entered the deceased's thigh and a second entered his stomach. After about six weeks' hospital treatment he began to show improvement. However, during his time in intensive care the deceased suffered lung congestion problems.]

**Beldam LJ:** ... On 8 February he again complained of difficulty in breathing... Whilst in intensive care the deceased had on several occasions shown signs of anxiety and a tentative diagnosis was made that the intermittent problem with his breathing of which he complained after 8 February was due to attacks of anxiety. He was seen by several doctors of differing experience during the ensuing week. Later, on the evening of 14 February, he complained of farther difficulty with breathing and was attended by a house surgeon... She was worried about the deceased's condition... The deceased's condition deteriorated and the medical registrar was called. Urgent resuscitation, including cardiac massage, was given but the deceased died shortly after midnight.

At post-mortem it was found that the deceased's windpipe had become obstructed due to narrowing near the site of the tracheotomy scar. Such a condition is a rare but not unknown complication of intubation of the windpipe. The deceased's windpipe had become so narrowed that even a small amount of mucus could block it and cause asphyxiation.

The experienced pathologist who conducted the post-mortem gave evidence that the immediate cause of death was cardio-respiratory arrest - due to a condition which was produced as a result of treatment to provide an artificial airway in the treatment of gunshot wounds of the abdomen and leg. And he said:



In other words, I give as the cause of death cardio-respiratory arrest due to gunshot wounds of the abdomen and leg.

For the appellant it was conceded that the sequence of events which had led to the deceased's death was that described by the pathologist but a consultant surgeon, Mr. Eadie, gave it as his opinion that by 8 February 1988 the wounds of the thigh and the abdomen no longer threatened the life of the deceased and his chances of survival were good.

One question for the jury at trial therefore was whether the Crown had proved, so that they were sure, that the shots fired by the appellant had caused the deceased's death.

In this appeal it has been argued that the judge misdirected the jury on this issue. The appellant complains of a passage in which the judge said:

... [I]f the treatment could have been better, if it is no more than that, then the bullets caused the death, even if the treatment was incompetent, negligent. The bullets caused the death. For you to find that the chain was broken, the medical treatment or lack of medical treatment must be reckless... Mere carelessness or mere negligence are not recklessness. Reckless conduct is where somebody could not care less. He acts or he fails to act careless of the consequences, careless of the comfort and safety of another person... You are looking for recklessness.

In this paragraph it is said that the judge virtually withdrew from the jury consideration of the doctor's failure to diagnose the deceased's clinical condition as the cause of his death because no juror would be likely to accept that a doctor treating a patient was reckless in the sense that he could not care less whether the patient lived or died...

In the criminal law, and in particular in the law of homicide, whether the death of a deceased was the result of the accused's criminal act is a question of fact for the jury, but it is a question of fact to be decided in accordance with legal principles explained to the jury by the judge. We think the matter cannot be better put than it was by Robert Goff LJ in *R v. Pagett* (1983) Cr App R 279 at 288, where he said:

In cases of homicide, it is rarely necessary to give the jury any direction on causation as such. Of course, a necessary ingredient of the crimes of murder and manslaughter is that the accused has by his act caused the victim's death. But how the victim came by his death is usually not in dispute. What is in dispute is more likely to be some other matter: for example, the identity of the person who committed the act which indisputably caused the victim's death or whether the accused had the necessary intent; or whether the accused acted in self-defence, or was provoked. Even where it is necessary to direct the jury's minds to the question of causation, it is usually enough to direct them simply that in law the accused's act need not be the sole cause, or even the main cause, of the victim's death, it being enough that his act contributed significantly to that result. It is right to observe in passing, however, that even this simple direction is a direction of law relating to causation, on the basis of which the jury are bound to act in concluding whether the prosecution has established, as a matter of fact, that the accused's act did in this sense cause the victim's death. Occasionally, however, a specific issue of causation may arise. One such case is where, although an act of the accused constitutes a causa

sine qua non of (or necessary condition for) the death of the victim, nevertheless the intervention of a third person may be regarded as the sole cause of the victim's death, thereby relieving the accused of criminal responsibility. Such intervention, if it has an effect, has often been described by lawyers as a *novus actus interveniens*. We are aware that this time-honoured Latin term has been the subject of criticism. We are also aware that attempts have been made to translate it into English; though no simple translation has proved satisfactory, really because the Latin term has become a term of art which conveys to lawyers the crucial feature that there has not merely been an intervening act of another person, but that that act was so independent of the act of the accused that it should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused. At the risk of scholarly criticism, we shall for the purposes of this judgment continue to use the Latin term.

[There are] difficulties in formulating and explaining a general concept of causation but what we think does emerge from [the] cases is that when the victim of a criminal attack is treated for wounds or injuries by doctors or other medical staff attempting to repair the harm done, it will only be in the most extraordinary and unusual case that such treatment can be said to be so independent of the acts of the accused that it could be regarded in law as the cause of the victim's death to the exclusion of the accused's acts. Where the law requires proof of the relationship between an act and its consequences as an element of responsibility, a simple and sufficient explanation of the basis of such a relationship has proved notoriously elusive.

In a case in which the jury have to consider whether negligence in the treatment of injuries inflicted by the accused was the cause of death we think it is sufficient for the judge to tell the jury that they must be satisfied that the Crown have proved that the acts of the accused caused the death of the deceased, adding that the accused's acts need not be the sole cause or even the main cause of death, it being sufficient that his acts contributed significantly to that result. Even though negligence in the treatment of the victim was the immediate cause of his death, the jury should not regard it as excluding the responsibility of the accused unless the negligent treatment was so independent of his acts, and in itself so potent in causing death, that they regard the contribution made by his acts as insignificant.

It is not the function of the jury to evaluate competing causes or to choose which is dominant provided they are satisfied that the accused's acts can fairly be said to have made a significant contribution to the victim's death. We think the word 'significant' conveys the necessary substance of a contribution made to the death which is more than negligible.

Although for reasons we have stated we think that the judge erred when he invited the jury to consider the degree of fault in the medical treatment rather than its consequences, we consider that no miscarriage of justice has actually occurred. Even if more experienced doctors than those who attended the deceased would have recognised the rare complication in time to have prevented the deceased's death, that complication was a direct consequence of the appellant's acts, which remained a significant cause of his death. We cannot conceive that, on the evidence given, any jury would have found otherwise.

Accordingly, we dismiss the appeal.

*Cheshire* is consistent with the relatively tough stance taken when the victim contributes to her own demise. This can be at the time of the death-causing injury – for example, where the victim takes evasive action in fleeing from an attack and injures herself in the process. Only a ‘daft’ reaction – one beyond the foreseeable range of consequences – would break the chain of causation (*Corbett* (1996)). It is not clear how daftness is to be measured, whether in relation to the gravity of the actual attack, or in relation to the risks of the evasive action. Jumping out of a moving car to escape unwanted sexual attention was not regarded as daft or unforeseeable in *Roberts* (1971). Once the injury has been inflicted, it seems that the victim can act as ‘irrationally’ as she likes without the chain of causation being broken. Where the victim chooses to forgo treatment that would save her life (for example, a Jehovah’s Witness refusing a blood transfusion), the defendant has been held responsible for the death (*Blaue* (1975)); or where victims contribute in other ways to their failure to recover, this will not avail the defendant (*Dear* (1996)).

Questions of causation have proved problematic in the context of deaths following drug abuse. In *Cato* (1976), a conviction for unlawful act manslaughter was upheld after *Cato* had consensually injected the deceased with morphine. This was taken a stage further in *Kennedy* (1999) where the Court of Appeal held that the victim’s self-injection constituted an unlawful act, and the defendant’s assistance and encouragement amounted to aiding and abetting the offence. The criticism of *Kennedy* (Smith 1999) was taken on board in *Dias* (2001) where the Court of Appeal quashed a manslaughter conviction on the basis that since there was no offence of injecting oneself with a prohibited drug, there could be no secondary liability. This prompted the Criminal Cases Review Commission to refer *Kennedy*’s case back to the Court of Appeal on the basis that decisions such as *Dias* cast doubt upon its reasoning. The Court of Appeal dismissed the appeal on the basis that it was open for the jury to interpret that the appellant and the deceased had been performing a ‘combined operation’ in administering the heroin (*Kennedy* (2005)). The House of Lords disagreed and restored the conventional position.

*R v. Kennedy (No 2)* [2008] 1 AC 769

#### Lord Bingham of Cornhill

2 The question certified by the Court of Appeal (Criminal Division) for the opinion of the House neatly encapsulates the question raised by this appeal:

‘When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug, which is then freely and voluntarily self-administered by the person to whom it was supplied, and the administration of the drug then causes his death?’

3 The agreed facts are clear and simple. The appellant lived in a hostel in which Marco Bosque and Andrew Cody, who shared a room, also lived. On 10 September 1996 the appellant visited the room which Bosque and Cody shared. Bosque was drinking with Cody. According to Cody, Bosque told the appellant that he wanted 'a bit to make him sleep' and the appellant told Bosque to take care that he did not go to sleep permanently. The appellant prepared a dose of heroin for the deceased and gave him a syringe ready for injection. The deceased then injected himself and returned the empty syringe to the appellant, who left the room. Bosque then appeared to stop breathing. An ambulance was called and he was taken to hospital, where he was pronounced dead. The cause of death was inhalation of gastric contents while acutely intoxicated by opiates and alcohol...

14 The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another. There are many classic statements to this effect. In his article 'Finis for Novus Actus?' [1989] CLJ 391, 392, Professor Glanville Williams wrote:

'I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new "chain of causation" going, irrespective of what has happened before.'

In chapter XII of *Causation in the Law*, 2nd ed (1985), p 326, Hart & Honore wrote:

'The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.'

This statement was cited by the House with approval in *R v. Latif* [1996] 1 WLR 104, 115. The principle is fundamental and not controversial.

15 Questions of causation frequently arise in many areas of the law, but causation is not a single, unvarying concept to be mechanically applied without regard to the context in which the question arises. That was the point which Lord Hoffmann, with the express concurrence of three other members of the House, was at pains to make in *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22. The House was not in that decision purporting to lay down general rules governing causation in criminal law. It was construing, with reference to the facts of the case before it, a statutory provision imposing strict criminal liability on those who cause pollution of controlled waters. Lord Hoffmann made clear that (p 29 e-f) common sense answers to questions of causation will



differ according to the purpose for which the question is asked; that (p 31 e) one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule; that (p 32 b) strict liability was imposed in the interests of protecting controlled waters; and that (p 36 a) in the situation under consideration the act of the defendant could properly be held to have caused the pollution even though an ordinary act of a third party was the immediate cause of the diesel oil flowing into the river. It is worth underlining that the relevant question was the cause of the pollution, not the cause of the third party's act.

16 The committee would not wish to throw any doubt on the correctness of the *Empress Car* case. But the reasoning in that case cannot be applied to the wholly different context of causing a noxious thing to be administered to or taken by another person contrary to section 23 of the 1861 Act. In *R v. Finlay* [2003] EWCA Crim 3868 V was injected with heroin and died. D was tried on two counts of manslaughter, one on the basis that he had himself injected V, the second on the basis that he had prepared a syringe and handed it to V who had injected herself. The jury could not agree on the first count but convicted on the second. When rejecting an application to remove the second count from the indictment, the trial judge ruled, relying on the *Empress Car* case [1999] 2 AC 22, that D had produced a situation in which V could inject herself, in which her self-injection was entirely foreseeable and in which self-injection could not be regarded as something extraordinary. He directed the jury along those lines. The Court of Appeal upheld the judge's analysis and dismissed the appeal. It was wrong to do so. Its decision conflicted with the rules on personal autonomy and informed voluntary choice to which reference has been made above. In the decision under appeal the Court of Appeal did not follow *R v. Finlay* [2003] EWCA Crim 3868 in seeking to apply the *Empress Car* case [1999] 2 AC 22, and it was right not to do so.

17 In his article already cited Professor Glanville Williams pointed out, at p 398, that the doctrine of secondary liability was developed precisely because an informed voluntary choice was ordinarily regarded as a *novus actus interveniens* breaking the chain of causation:

'Principals cause, accomplices encourage (or otherwise influence) or help. If the instigator were regarded as causing the result he would be a principal, and the conceptual division between principals (or, as I prefer to call them, perpetrators) and accessories would vanish. Indeed, it was because the instigator was not regarded as causing the crime that the notion of accessories had to be developed. This is the irrefragable argument for recognising the *novus actus* principle as one of the bases of our criminal law. The final act is done by the perpetrator, and his guilt pushes the accessories, conceptually speaking, into the background. Accessorial liability is, in the traditional theory, "derivative" from that of the perpetrator.'

18 This is a matter of some significance since, contrary to the view of the Court of Appeal when dismissing the appellant's first appeal, the deceased committed no offence when injecting himself with the fatal dose of heroin. It was so held by the Court of Appeal in *R v. Dias* [2002] 2 Cr App R 96, paras 21–24, and in *R v. Rogers* [2003] 1 WLR 1374 and is now accepted. If the conduct of the deceased was not criminal he was not a principal offender,

and it of course follows that the appellant cannot be liable as a secondary party. It also follows that there is no meaningful legal sense in which the appellant can be said to have been a principal jointly with the deceased, or to have been acting in concert. The finding that the deceased freely and voluntarily administered the injection to himself, knowing what it was, is fatal to any contention that the appellant caused the heroin to be administered to the deceased or taken by him.

19 The sole argument open to the Crown was, therefore, that the appellant administered the injection to the deceased. It was argued that the term 'administer' should not be narrowly interpreted. Reliance was placed on the steps taken by the appellant to facilitate the injection and on the trial judge's direction to the jury that they had to be satisfied that the appellant handed the syringe to the deceased 'for immediate injection'. But section 23 draws a very clear contrast between a noxious thing administered to another person and a noxious thing taken by another person. It cannot ordinarily be both. In this case the heroin is described as 'freely and voluntarily self-administered' by the deceased. This, on the facts, is an inevitable finding. The appellant supplied the heroin and prepared the syringe. But the deceased had a choice whether to inject himself or not. He chose to do so, knowing what he was doing. It was his act.

20 In resisting this conclusion Mr Perry relied on *R v. Rogers* [2003] 1 WLR 1374. In that case the defendant pleaded guilty, following a legal ruling, to a count of administering poison contrary to section 23 of the 1861 Act and a count of manslaughter. The relevant finding was that the defendant physically assisted the deceased by holding his belt round the deceased's arm as a tourniquet, so as to raise a vein in which the deceased could insert a syringe, while the deceased injected himself. It was argued in support of his appeal to the Court of Appeal that the defendant had committed no unlawful act for purposes of either count. This contention was rejected. The court held (para 7) that it was unreal and artificial to separate the tourniquet from the injection. By applying and holding the tourniquet the defendant had played a part in the mechanics of the injection which had caused the death. There is, clearly, a difficult borderline between contributory acts which may properly be regarded as administering a noxious thing and acts which may not. But the crucial question is not whether the defendant facilitated or contributed to administration of the noxious thing but whether he went further and administered it. What matters, in a case such as *R v. Rogers* and the present, is whether the injection itself was the result of a voluntary and informed decision by the person injecting himself. In *R v. Rogers*, as in the present case, it was. That case was, therefore, wrongly decided.

21 It is unnecessary to review the case law on this subject in any detail. In *R v. Cato* [1976] 1 WLR 110 the defendant had injected the deceased with heroin and the present problem did not arise. In *R v. Dalby* [1982] 1 WLR 425 the deceased had died following the consumption of drugs which the defendant had supplied but the deceased had injected. There was apparently no discussion of section 23, but it was held that the supply could not support a conviction of manslaughter. At the trial of the present appellant there was no consideration of section 23 and the trial judge effectively stopped defence counsel submitting to the jury

that the appellant had not caused the death of the deceased. In dismissing his first appeal the Court of Appeal said:

'We can see no reason why, on the facts alleged by the Crown, the appellant in the instant case might not have been guilty of an offence under section 23 of the Offences against the Person Act 1861. Perhaps more relevantly, the injection of the heroin into himself by Bosque was itself an unlawful act, and if the appellant assisted in and wilfully encouraged that unlawful conduct, he would himself be acting unlawfully.'

But the court gave no detailed consideration to the terms of section 23, and it is now accepted that the deceased's injection of himself was not an unlawful act.

22 In *R v. Dias* [2002] 2 Cr App R 96 the defendant had been convicted of manslaughter. He had prepared a syringe charged with heroin which he had handed to the deceased, who had injected himself. The court recognised that the chain of causation had probably been broken by the free and informed decision of the deceased, and noted the error in the decision on the appellant's first appeal as to the unlawfulness of the deceased's injection of himself.

23 In rejecting the appellant's second appeal in the decision now challenged, the Court of Appeal reviewed the history of the case and the authorities in some detail. The court expressed its conclusion in these paras 51-54: '51. In view of the conclusions that we have come to as a result of our examination of the authorities, it appears to us that it was open to the jury to convict the appellant of manslaughter. To convict, the jury had to be satisfied that, when the heroin was handed to the deceased "for immediate injection", he and the deceased were both engaged in the one activity of administering the heroin. These were not necessarily to be regarded as two separate activities; and the question that remains is whether the jury were satisfied that this was the situation. If the jury were satisfied of this then the appellant was responsible for taking the action in concert with the deceased to enable the deceased to inject himself with the syringe of heroin which had been made ready for his immediate use.

52. In our view, the jury would have been entitled to find (and indeed it is an appropriate finding) that in these circumstances the appellant and the deceased were jointly engaged in administering the heroin. This was the conclusion of this court on the first appeal, as we understand Waller LJ's judgment, and we do not feel it necessary to take a different view, though we do accept that the issue could have been left by the trial judge to the jury in more clear terms than it was.

53. The point in this case is that the appellant and the deceased were carrying out a "combined operation" for which they were jointly responsible. Their actions were similar to what happens frequently when carrying out lawful injections: one nurse may carry out certain preparatory actions (including preparing the syringe) and hand it to a colleague who inserts the needle and administers the injection, after which the other nurse may apply a plaster. In such a situation, both nurses can be regarded as administering the drug. They are working as a team. Both their actions are necessary. They are interlinked but separate



parts in the overall process of administering the drug. In these circumstances, as Waller LJ stated on the first appeal, they “can be said to be jointly responsible for the carrying out of that act”.

54. Whether the necessary linkage existed between the actions of the appellant and the deceased was very much a matter for the jury to determine. The question then arises as to whether the trial judge in the summing up expressed the issue in sufficiently clear terms for the jury? As to this, we share similar reservations to those expressed by Waller LJ in his judgment on the first appeal. There was no need for the jury to find the encouragement that Waller LJ thought was necessary. However, the jury did have to find that the appellant and the deceased were acting in concert in administering the heroin.’

The court went on in the next paragraph to refer to the deceased and the appellant acting in concert in administering the heroin. Thus the essential ratio of the decision is that the administration of the injection was a joint activity of the appellant and the deceased acting together.

24 It is possible to imagine factual scenarios in which two people could properly be regarded as acting together to administer an injection. But nothing of the kind was the case here. As in *R v. Dalby* [1982] 1 WLR 425 and *R v. Dias* [2002] 2 Cr App R 96 the appellant supplied the drug to the deceased, who then had a choice, knowing the facts, whether to inject himself or not. The heroin was, as the certified question correctly recognises, self-administered, not jointly administered. The appellant did not administer the drug. Nor, for reasons already given, did the appellant cause the drug to be administered to or taken by the deceased.

25 The answer to the certified question is: ‘In the case of a fully-informed and responsible adult, never.’ The appeal must be allowed and the appellant’s conviction for manslaughter quashed.

The supplier of drugs may, however, be liable if she becomes aware that the person supplied requires medical treatment as a result of the drug (*Evans* 2009).

## VI.20.e. Who can be killed?

This Chapter has already shown that the edges of medical practice and criminal law are blurred or, to put it another way, that the determination of many critical questions about the definition of unlawful homicide is complicated and sometimes compromised by issues relating to contemporary medical practice. If we think about our stereotypes of murder or manslaughter, then these ‘edge’ issues do not concern us – we imagine a violent encounter between strangers, or perhaps a domestic argument taken too far. It is when law attempts to capture the huge variety of human behaviour in the fragility of definitions that those stereotypes are exposed. At the beginning of this chapter, we took the example of handicapped newborn babies and the decisions which are made in relation



to their survival as an example of how arguments might be framed to authorise practices which appear to contravene homicide laws. More immediately, we have been discussing the circumstances in which caring for patients and reducing their pain may be regarded as lawfully acceptable despite contravention of the prohibition against causing the death of another human being. This led to a consideration of when life ends. Now we turn to a related issue – when does criminal law regard life as beginning – when do we become a ‘person’ for the purposes of homicide law?

Homicide is the killing of another human being. When do we become a human being? And what are we before that in the eyes of the law? It is sometimes assumed that, because foetuses do not have legal personality, they do not have rights or interests which are recognised by law. This is a serious misstatement of their position in English law. Foetal interests are protected in many ways, whether from injury by the woman carrying them or from third parties. As we saw in Chapter 17.a.i, criminal laws regulate women who are pregnant, thus providing foetuses with some protection from conception to birth. The death of an unborn foetus cannot amount to homicide: the victim of homicide must be a human being, a person who has breathed independently of its mother. The relationship between the foetus and homicide offences can nonetheless give rise to difficulty. In *Tait* (1990) the Court of Appeal rejected an argument that a threat to kill a foetus was a threat to kill a person (under s. 16 of the Offences Against the Person Act 1861). Yet it is an offence to threaten to kill – should it perhaps also be an offence to threaten to kill a foetus? A different question is raised by pre-natal injury leading to post-natal death. In *A-G’s Reference (No. 3 of 1994)*, below, the House of Lords ruled that a pre-natal injury leading to post-natal death could amount to unlawful homicide. There is no requirement in homicide that the person who dies needs to be a person in being at the time the death-causing injury is inflicted.

This case ranges widely over the law of murder and manslaughter and we use the following extracts from Lord Mustill’s speech to introduce the core issues in relation to the culpability element which marks murder from manslaughter, in addition to the intrinsic question about when, as human beings, we come under the protection of the law.

*A-G’s Reference (No. 3 of 1994)* [1997] 3 All LR 936, HL

**Lord Mustill:** Murder is widely thought to be the gravest of crimes. One could expect a developed system to embody a law of murder clear enough to yield an unequivocal result on a given set of facts, a result which conforms with apparent justice and has a sound intellectual base. This is not so in England, where the law of homicide is permeated by anomaly, fiction, misnomer and obsolete reasoning. One conspicuous anomaly is the rule which identifies the malice aforethought (a doubly misleading expression); required for the crime of murder not only with a conscious intention to kill but also with an intention

to cause grievous bodily harm. It is, therefore, possible to commit a murder not only without wishing the death of the victim but without the least thought that this might be the result of the assault. Many would doubt the justice of this rule, which is not the popular conception of murder and (as I shall suggest) no longer rests on any intellectual foundation. The law of Scotland does very well without it, and England could perhaps do the same...

As will appear, the events which founder the appeal were never conclusively proved at the trial, but are assumed to have been as follows. At the time in question a young woman, M, was pregnant, with between 22 and 24 weeks of gestation. According to the present state of medical knowledge if her baby had been born after 22 weeks it would not have had any significant prospect of survival. Two further weeks would have increased the chance to about 10 per cent. The pregnancy was, however, proceeding normally, and the risk that it would fail to continue to full term and be followed by an uneventful birth was very small indeed. Sadly, however, the natural father B quarrelled with M and stabbed her in the face, back and abdomen with a long-bladed kitchen knife in circumstances raising a *prima facie* inference that he intended to do her grievous bodily harm. M was admitted to hospital for surgical treatment and was later discharged in an apparently satisfactory state, still carrying the baby. Unfortunately, some 17 days after the incident M went into premature labour. The baby, named S, was born alive. The birth was still grossly premature, although by that time the chance that the baby would survive had increased to 50 per cent. Thereafter S lived for 121 days, when she succumbed to bronchopulmonary dysplasia from the effects of premature birth. After her birth it was discovered that one of the knife cuts had penetrated her lower abdomen. The wound needed surgical repair, but it is agreed that this 'made no provable contribution to her death'.

The case for the Crown at the trial of B was that the wounding of M by B had set in train the events which caused the premature birth of S and hence her failure to achieve the normal prospect of survival which she would have had if the pregnancy had proceeded to full term. In this sense, therefore, we must assume that the wounding of M, at a time when S was a barely viable foetus, was the reason why she later died when she did.

Meanwhile, B had been prosecuted for an offence of wounding the mother with intent to cause her grievous bodily harm, had pleaded guilty and had been sentenced to a term of four years' imprisonment. After S died he was charged again, this time with the murder of S, to which he pleaded not guilty. At his trial a submission was advanced that on the evidence no criminal offence relating to S was proved. In a considered ruling the trial judge upheld that submission, as regards the offences of both murder and manslaughter... The gist of the ruling lay in the law, and was to the effect that both the physical and the mental elements of murder were absent. There was no relevant *actus reus*, for the foetus was not a live person; and the cause of the death was the wounding of the mother, not of S. As to *mens rea* again there was none. When B stabbed the mother he had no intent to kill or do serious harm to any live person other than the mother, or to do any harm at all to the foetus. The Crown could not make good this deficiency by reliance on the concept of transferred malice, for this operates only where the *mens rea* of one crime causes the *actus reus* of the same crime, albeit the result is in some respects unintended. Here, the intent to

stab the mother (a live person) could not be transferred to the foetus (not a live person), an organism which could not be the victim of a crime of murder.

As to the alternative verdict of manslaughter the judge was at first exercised by the possibility that since the stabbing of M was an unlawful and dangerous act which led to the death of S a conviction could be sustained even though the act was not aimed at the ultimate victim: see *R v. Mitchell* [1983] QB 741. In the end, however, he was persuaded that this approach could not be sustained where there was at the material time no victim capable of dying as a direct and immediate result.

Accordingly, the trial judge directed the jury to acquit the defendant.

Considering that this ruling should be reviewed the Attorney-General referred the matter to the opinion of the Court of Appeal under s 36 of the Criminal Justice Act 1972. The point of law referred was as follows:

1. Subject to the proof by the prosecution of the requisite intent in either case: whether the crimes of murder or manslaughter can be committed where unlawful injury is deliberately inflicted: (i) to a child in utero (ii) to a mother carrying a child in utero where the child is subsequently born alive, enjoys an existence independent of the mother, thereafter dies and the injuries inflicted while in utero either caused or made a substantial contribution to the death.
2. Whether the fact that the death of the child is caused solely as a consequence of injury to the mother rather than as a consequence of direct injury to the foetus can negative any liability for murder or manslaughter in the circumstances set out in question 1...

In the result, the court answered the first of the referred questions in the affirmative, adding...

the requisite intent to be proved in the case of murder is an intention to kill or cause really serious bodily injury to the mother, the foetus before birth being viewed as an integral part of the mother. Such intention is appropriately modified in the case of manslaughter.

The court answered the second question in the negative, provided the jury is satisfied that causation is proved. The accused person now brings the matter before this House, and maintains that the answers given to both questions were wrong, and that the ruling of the trial judge was right.

**1. Murder:** The first of the questions referred involves a number of alternative assumptions of fact concerning both the act of the defendant and the intent with which it was done... [0]n the hypothesis that the unlawful injury was directed to the mother alone, with the intention of hurting the mother alone... I will begin by considering the issue of murder...

I perceive the established rules to be as follows.

1. It is sufficient to raise a *prima facie* case of murder (subject to entire or partial excuses such as self-defence or provocation) for it to be proved that the defendant did the act which caused the death intending to kill the victim or to cause him at least grievous bodily harm...

2. If the defendant does an act with the intention of causing a particular kind of harm to B, and unintentionally does that kind of harm to V, then the intent to harm B may be added to the harm actually done to V in deciding whether the defendant has committed a crime towards V...
3. Except under statute an embryo or foetus in utero cannot be the victim of a crime of violence. In particular, violence to the foetus which causes its death in utero is not a murder...
4. The existence of an interval of time between the doing of an act by the defendant with the necessary wrongful intent and its impact on the victim in a manner which leads to death does not in itself prevent the intent, the act and the death from together amounting to murder, so long as there is an unbroken causal connection between the act and the death...
5. Violence towards a foetus which results in harm suffered after the baby has been born alive can give rise to criminal responsibility even if the harm would not have been criminal (apart from statute) if it had been suffered in utero...

### **Two arguments for the Crown**

#### **1. The first argument: the foetus identified with the mother**

The decision of the Court of Appeal founded on the proposition that the foetus is part of the mother, so that an intention to cause really serious bodily injury to the mother is equivalent to the same intent directed towards the foetus. This intent could be added to the *actus reus*... Obviously, nobody would assert that once the mother had been delivered of S, the baby and her mother were in any sense 'the same'. Not only were they physically separate, but they were each unique human beings, though no doubt with many features of resemblance. The reason for the uniqueness of S was that the development of her own special characteristics had been enabled and bounded by the collection of genes handed down not only by M but also by the natural father. This collection was different from the genes which had enabled and bounded the development of M, for these had been handed down by her own mother and natural father. S and her mother were closely related but, even apart from differing environmental influences, they were not, had not been, and in the future never would be 'the same'. There was, of course, an intimate bond between the foetus and the mother, created by the total dependence of the foetus on the protective physical environment furnished by the mother, and on the supply by the mother through the physical linkage between them of the nutriments, oxygen and other substances essential to foetal life and development. The emotional bond between the mother and her unborn child was also of a very special kind. But the relationship was one of bond, not of identity. The mother and the foetus were two distinct organisms, living symbiotically, not a single organism with two aspects. The mother's leg was part of the mother; the foetus was not...

#### **2. The second argument: the foetus as a separate organism**

I would, therefore, reject the reasoning which assumes that since (in the eyes of English law) the foetus does not have the attributes which make it a 'person' it must be an adjunct



of the mother. Eschewing all religious and political debate, I would say that the foetus is neither. It is a unique organism. To apply to such an organism, the principles of a law evolved in relation to autonomous beings is bound to mislead. I prefer, so far as binding authority permits, to start afresh, and to do so by reference to the second of the arguments advanced by the Attorney General. This builds on the rules stated above by the following stages. If D struck X intending to cause her serious harm, and the blow, in fact, caused her death, that would be murder (rule 1). If she had been nursing a baby Y which was accidentally struck by the blow and consequently died, that would also be murder (rules 1 and 2). So, also, if an evil-doer had intended to cause harm but not death to X by giving her a poisoned substance and the substance was, in fact, passed on by X to the baby, which consumed it and died as a result (rules, 1, 2 and 3). Again it would have been murder if the foetus had been injured in utero and had succumbed to the wound after being born alive (rules 1, 2, 4 and 5). It is only a short step to make a new rule, adding together the malice towards the mother, the contemporaneous starting of a train of events, and the coming to fruition of those events in the death of the baby after being born alive.

My Lords, the attractions of this argument are plain, not least its simplicity. But for my part I find it too dependent on the piling up of old fictions, and too little on the reasons why the law takes its present shape... [S]ince the original concepts are no longer available to explain why an intent to cause grievous bodily harm will found a conviction for murder, the reason must be sought elsewhere: for reason, in regard to such a grave crime, there must surely be. The obvious recourse is to ascribe this doctrine to the last vestiges of the murder/felony rule, and to see in it a strong example of that rule, for unlike the more extravagant early manifestations it offers at least some resemblance in nature and degree between the intended act and its unintended consequences. It would follow, therefore, that when the murder/felony rule was expressly abolished by s 1 of the 1957 Act the only surviving justification for the 'grievous harm' rule fell away, with nothing left. [A decisive answer was given by the House in *R v. Cunningham* [1981] 2 All ER 863.] The 'grievous harm' rule had survived the abolition of the murder/felony principle...

My Lords, in a system based on binding precedent there could be no ground for doubting a long course of existing law, and certainly none which could now permit this House even to contemplate such a fundamental change as to abolish the grievous harm rule: and counsel rightly hinted at no such idea. But when asked to strike out into new territory it is, I think, right to recognise that the grievous harm rule is an outcropping of old law from which the surrounding strata of rationalisations have weathered away. It survives but exemplifies no principle which can be applied to a new situation...

To make any sense of [transferred malice] there must, as it seems to me, be some compatibility between the original intention and the actual occurrence, and this is, indeed, what one finds in the cases. There is no such compatibility here. The defendant intended to commit and did commit an immediate crime of violence to the mother. He committed no relevant violence to the foetus, which was not a person, either at the time or in the future, and intended no harm to the foetus or to the human person which it would become. If fictions are useful, as they can be, they are only damaged by straining them beyond their

limits. I would not overstrain the idea of transferred malice by trying to make it fit the present case...

All that is needed, once causation is established, is an act creating a risk to anyone; and such a risk is obviously established in the case of any violent assault by the risk to the person of the victim herself (or himself). In a case such as the present, therefore, responsibility for manslaughter would automatically be established even if (which cannot have been the case here) the attacker had no idea that the woman was pregnant. On a broader canvas, the proposition involves that manslaughter can be established against someone who does any wrongful act leading to death, in circumstances where it was foreseeable that it might hurt anyone at all; and that this is so even if the victim does not fall into any category of persons whom a reasonable person in the position of the defendant might have envisaged as being within the area of potential risk. This is strong doctrine, the more so since it might be said with some force that it recognises a concept of general malice (that those who do wrong must suffer the consequences of a resulting death, whether or not the death was intended or could have been foreseen) uncomfortably similar to the one rejected more than 150 years ago by the courts and commentators in the context of murder; and one which, it is proper to add, I have proposed in the first part of this speech, should be rejected once again in that context.

It is this feature which has caused me to hesitate long in joining the remainder of your Lordships to hold that a verdict of manslaughter can be available in circumstances as broad as this. I am, however, entirely convinced by the speech of Lord Hope that this is the present state of English law. To look for consistency between and within the very different crimes of murder and manslaughter is, I believe, hoping for too much. One can, however, look for a result which does substantial justice, and this is what I believe verdicts that B was not guilty of murder and guilty of manslaughter would have achieved.

Lord Mustill's speech is explicitly an exercise in damage limitation thought necessary because murder can be based on an intention to cause grievous bodily harm and is not limited to intention to kill. Not only is this seen as unacceptably broad but also as a 'fiction'. In the same way, 'transferred malice' is regarded as a route to constructive crime. This is puzzling. Why should a defendant's culpability vary according to whether her victim is the intended Mr X, or the unfortunate Ms Y? Why should an 'intention' (in the sense in which the term is used in criminal law, see below) to cause injury to a person need to be specific in relation to the victim's identity? Furthermore, if transferred malice does involve a fiction, is it not somewhat arbitrary to resurrect the fiction again so that a manslaughter charge could be supported in these circumstances? As a result of Lord Mustill's preoccupation with the house of murder, the opportunity to consider the criminal law's response to a pregnant woman's interest in her foetus, has been lost (see Wells and Morgan 1991). Similarly, in the case of *Vö v. France* (2005) the majority of the European Court of Human Rights side-stepped the question of when life begins, preferring to adopt a neutral stance

and deferring to different domestic positions under the margin of appreciation doctrine (see Chapter 17.a.i.)

#### FURTHER READING

Richard Huxtable 'Separation of Conjoined Twins: Where Next for English Law?' (2002) *Criminal Law Review* 459.

Richard Huxtable 'Medical Law Review Special Edition: The Conjoined Twins Case' (2002) 9 *Medical Law Review* 201–98.

## Murder and Manslaughter

The offences of murder and manslaughter are built on the moral and conceptual foundations discussed in the previous chapter. We have seen that, in terms of the conduct elements, for murder and manslaughter the prosecution has to prove that the defendant unlawfully caused the death of a person. For murder, the prosecution must also prove that the defendant intended to kill or to cause grievous bodily harm. Absent this, a homicide may still be regarded as unlawful if it comes within the recognised categories of 'involuntary manslaughter', that is, unlawful act and gross negligence manslaughter. Even where there is the appropriate intention, murder may be reduced to manslaughter on account of diminished responsibility or provocation. Both murder and manslaughter may be regarded as 'lawful' if committed in self-defence or the prevention of crime. Gender is an ever-present, though often hidden, element in constructions of murder and manslaughter. In the last 25 years, the relevance of the history of violence in a relationship has featured more overtly, both in scholarly discussions and in judicial explorations of the partial defences of diminished responsibility and provocation and in self-defence.

Linking this basic account with the discussion in the last chapter, we can summarise in the following way: a person who causes the death of another with intention to kill or with intention to cause grievous bodily harm commits murder unless:

- (a) the person is in persistent vegetative state (PVS) and satisfies the *Bland* criteria and death is brought about through withdrawal of treatment; or
- (b) the defendant is acting in self-defence or prevention of crime; or
- (c) the act was justified on the basis of necessity (see discussion of *Re A* (Conjoined twins) (2000) in section 21.d. and above at Chapter 12.f. and Chapter 20.a.).

In these circumstances the homicide is lawful.

Or unless:

- (d) the defendant was provoked; or
- (e) the defendant was suffering from diminished responsibility.

In these last two cases the offence will be one of ('voluntary') manslaughter.



There are also two specific forms of homicide which are treated as neither murder nor manslaughter, although the deaths occur in circumstances which would otherwise indicate a finding of murder or manslaughter: these are infanticide and killing in pursuance of a suicide pact (see section 21.c.ii.).

### VI.21.a. The penalty for murder

The punishment for murder has had a significant impact on the delineation between murder and manslaughter.

#### *Murder (Abolition of Death Penalty) Act 1965, s 1*

- (1) No person shall suffer death for murder, and a person convicted of murder shall . . . be sentenced to imprisonment for life.
- (2) On sentencing any person convicted of murder to imprisonment for life the Court may at the same time declare the period which it recommends to the Secretary of State as a minimum period which in its view should elapse before the Secretary of State orders the release of that person on licence under section 27 of the Prison Act 1952 or section 21 of the Prisons (Scotland) Act 1952.

Capital punishment remains a matter of contemporary political debate, although the European Court of Human Rights ruling in *Ocalan* (2003) sends a clear message that the death penalty cannot be accommodated as an exception to Article 2. The Court said that:

[C]apital punishment in peacetime has come to be regarded as an unacceptable, if not inhuman, form of punishment, which is no longer permissible under Art 2.

Turkey has followed many other signatory states in abolishing the death penalty in peacetime under the Protocol 6 procedure. By 2003, all European states had signed the protocol, with only Turkey, Armenia and Russia yet to ratify it (see Gray NLJ 2003, 620; and Hood 2002).

#### *Tom Sorell 1987 Moral Theory and Capital Punishment (Blackwells), pp 52ff.*

On 11 May 1982, the British House of Commons debated clauses in the Criminal Justice Bill that, if approved, would have reintroduced the death penalty for certain categories of crime in England and Wales . . . Vivian Bendall . . . opened the debate. Speaking first to the catch-all clause concerning murder, he said that the death penalty would act as a deterrent.

A would-be murderer will think twice before taking a life if he knows that he may well forfeit his own ... If one examines the homicides that have been reported to the police since 1964, the year the death penalty was done away with on a trial basis, one sees that the figure for murders in 1964 was 296. In 1980, the figure was 620. The number has more than doubled. [23 Official Report (Hansard) (5th series) col 610.]

Later in his speech Bendall gave statistics for murders of police officers. 'In the seventeen years prior to the death penalty being abolished', he said, 'eleven police officers were murdered. In the seventeen years since the death penalty was abolished, twenty-seven have been murdered. That is another doubling of the figure. The figures speak for themselves' [col 612].

Do the figures speak for themselves? The fact that murders increased after the abolition of the death penalty does not show that murders increased because of the abolition of the death penalty. But unless this causal claim is demonstrated, it is hard to show that the death penalty would prevent or reduce the numbers of murders ...

The increase in the number of murders was evidence for Bendall's claim that the abolition of the death penalty encouraged an increase in the rate of homicide. The point is, it was weak evidence: other things besides the abolition of the death penalty could have led to more murders, for example a growing belief, independent of the penalty, that the rate of successful detection of murder was going down. Or, to cite a very different possibility, if many murders were due to tensions within families, then an increase in factors creating such tensions, factors as diverse as adultery and unemployment could have increased the murder rate ...

The deterrent effect of capital punishment was not the only ground offered for its reintroduction in the new clauses of the Criminal Justice Bill. Vivian Bendall ... cited then recent soundings of public opinion ... He went on to suggest that a vote for the return of capital punishment was 'needed if democracy was to be upheld'.

Suppose the opinion polls that Bendall cited were accurate and three-quarters of the British people were in favour of capital punishment. Does the fact that a majority supports it make the death penalty right? Does the fact that a majority supports it mean that a vote by an MP against capital punishment is anti-democratic? Several speakers gave reasons for answering 'No' to the second question. One of these was Edward Heath, who quoted Edmund Bruce on the duty of a representative of the people: 'Your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you if he sacrifices it to your opinion.' ...

It is possible to hold that in a democracy the laws should reflect the views of the majority right or wrong. But it seems to me that whether this position is reasonable depends on what the views of the majority are about, and also on the purpose of a liberal democracy. If a liberal democracy exists to enable each of the many to pursue his own ends, and exists also to promote positively the ends most of the many share, then the fact that many people in a democracy want a particular thing is by itself a strong argument for legislating in favour of it ...

But at this point it is important to distinguish between ways in which something can be wanted. It is possible to want capital punishment for murder as a means of getting

something else that is desirable, say a situation in which there are fewer murders. It is also possible to want capital punishment for murder and want it for its own sake, for example in the belief that that crime and that punishment are made for one another. Now if capital punishment for murder were wanted for its own sake by many people in a democracy, a good case would exist for making it legal... On the other hand, if capital punishment for murder were desired for its supposed power of reducing the number of murders, and it actually had no such effect, or it was doubtful that it had such an effect, then the argument in favour of capital punishment legislation would be weak. Similarly if capital punishment did have the desired effect but the means of inflicting the death penalty were found extremely repellent by most people. At best there would be an argument for legislating in favour of whatever palatable measures in fact reduced the rate of murder...

R. Hood 2002 *The Death Penalty: A Worldwide Perspective* (Clarendon Press), pp. 181–90. Reprinted by permission of Oxford University Press

Even though some states may justify their use of the death penalty on simple retributive grounds, the most common political justification is the belief that it has a unique general deterrent capacity to save further innocent lives or reduce significantly other capital offences. If it does not have such a utility – or if it does not control crime through incapacitation of the criminal – beyond what can be achieved by life imprisonment, it would be, in the words of the United States Supreme Court in *Coker v. Georgia*, ‘nothing more than the purposeless and needless imposition of pain and suffering’ – and thus, in that Court’s view, an unconstitutional punishment.

The deterrent justification has been voiced by many retentionist countries – by China, Japan, Singapore, by most of the countries of the former USSR, by many nations in the Middle East and by some in Africa, and by the Justice Department and Supreme Court of the United States of America...

The argument that the threat of death must deter more than any other punishment has been based on what appears to be the self-evident intuition that people would find the prospect of death more painful than life imprisonment. Yet intuition also suggests that the policy of deterrence is only likely to have any impact if it is enforced with a high degree of certainty against a group of persons for which the punishment of death is both morally and politically acceptable and who, in the course of their conduct, correctly calculate the probable penal consequences. It has for example, frequently been pointed out that these consequences are often far more remote than being killed by a victim or by the police. The assumption upon which guided discretionary statutes rest is that the death sentence will be applied to those from whom society needs the greatest protection. Thus, the prime aggravating circumstance which leads to a death sentence is that the murder was committed during the commission of another felony, the assumption being that these are the actions of rational ‘calculating criminals’, not those which have arisen from emotional outbursts amongst the ordinary population. Any study of deterrence should seek to test this specific hypothesis because the threat of death is not made to the generality of potential murderers.

Furthermore, several of the aggravating circumstances, which make a person liable for the death penalty in many jurisdictions relate to crimes which intuitively do not seem likely to be affected by rational calculation of the marginally increased probability of execution. The murders which are described as 'especially heinous, atrocious or cruel' are likely to be carried out by psychopathic personalities or persons who have lost control of their normal inhibitions . . .

It is obvious that any change in the use of the death penalty may itself be associated with social changes and changes in penal practice which affect the rate of crime . . . Nevertheless, the fact that all the evidence continues to point in the same direction is persuasive a priori evidence that countries need not fear sudden and serious changes in the curve of crime if they reduce their reliance on the death penalty. In Australia, for example, where the last executions took place in the mid-1960s, the reported homicide rate . . . has fallen, and the murder rate has changed very little . . .

The number of homicides has risen in the United Kingdom since the abolition of the death penalty – the recorded homicides being 60 per cent higher in the twenty years 1966 to 1985 than in the twenty years 1946 to 1965. But the increase has been far less than in serious violent offences, which over the same two periods rose by over 160 per cent. Furthermore, while the number of recorded homicides was lower in 1993 than in 1986, the number of recorded serious woundings was over 60 per cent higher. In other abolitionist countries which have been experiencing a rise in crime, homicide rates have also lagged a long way behind increases in violent offences in general.

By retaining a mandatory penalty for murder but replacing the death penalty with imprisonment for life, it is argued that the symbolic denunciation of murder is preserved. Life imprisonment is itself a subject which generates much controversy because of its indeterminacy. What we therefore have is the certainty of a mandatory sentence combined with the executive discretion attaching to the decision as to release from life imprisonment. Life imprisonment is also a discretionary sentence for, amongst other offences, manslaughter. The following case discusses the roles of the Home Secretary and the trial judge in determining the decision to release on licence:

*Attorney General v. Mubareka* [1991] 1 All ER 911 (Q.B.)

[The four appellants had all been convicted of murder and applied for judicial review of the Home Office procedure for the release of mandatory life prisoners on licence. The Divisional Court refused the application. The Court of Appeal allowed the appeal in part, endorsing the Home Secretary's right to set the 'penal' element of the sentence, but confirming a prisoner's right to make representations in respect of the timing of the first review by the Parole Board. The Home Secretary appealed and the appellants cross-appealed.]



**Lord Mustill:** [T]he sentencing of a convicted murderer according to English law is a unique formality . . . in this sense, that the task of the judge is entirely mechanical. Once a verdict of guilty is returned the outcome is preordained . . .

. . . The sentence of life imprisonment is also unique in that the words which the judge is required to pronounce do not mean what they say . . . Whilst in a very small minority of cases the prisoner is in the event confined for the rest of his natural life, this is not the usual nor the intended effect of a sentence of life imprisonment . . . [A]lthough everyone knows what the words do not mean, nobody knows what they do mean, since the duration of the prisoner's detention depends on a series of recommendations to, and executive decisions by, the Home Secretary, some made at an early stage and others much later, none of which can be accurately forecast at the time when the offender is sent to prison.

There is, however, another form of life sentence, of which the philosophy, statutory framework and executive practice are quite different even though the words pronounced by the judge are the same. This is the discretionary life sentence . . . Where the criteria [for imposing the sentence] . . . are satisfied the judge has a choice between two very different procedures. He may decide to focus on the offence, passing a sentence appropriate to its gravity by the familiar process of identifying the range of sentences established through decisions of the Court of Appeal as being in general apposite to an offence of the kind in question, and then placing the individual offence within (or exceptionally, outside) the range by reference to circumstances of mitigation or aggravation. The judge may however think it right to adopt a different approach, and to concentrate on the offender rather than the offence, imposing a sentence of life imprisonment to reflect his appraisal that even a long fixed term of years may not adequately protect the public against the risk that when the term has been served the prisoner will continue to be a danger to the public. Such a sentence ensures that the prisoner will be kept in custody until it is thought safe to release him.

The discretionary life sentence may thus be regarded as the sum of two sentences, to be served consecutively. First, a determinate number of years appropriate to the nature and gravity of the offence. This is often called the 'tariff element' of the sentence. For my part, although I recognise that this is not inappropriate in the context of a discretionary life sentence, I consider that for reasons which I will later develop it is illogical and misleading when the usage is transferred to a mandatory sentence. I therefore prefer to avoid this terminology and will instead call the first component of the life sentence the 'penal element'. The second component is an indeterminate period, which the offender begins to serve when the penal element is exhausted. I will call this the 'risk element' [discretionary life sentences are governed by the Crime (Sentences) Act 1997, s. 28].

In the past there was no need for the sentencer to give separate attention to these two components. Having once decided that a determinate sentence at the general level suggested by the nature of the offence would not adequately reflect the degree of risk, he would proceed directly to the imposition of a life sentence, and would have no reason to identify with precision, or to publish, the fixed term which he would have passed if he had chosen the alternative course. As will appear, the law and practice have more recently developed in a way which attaches great importance to the composite nature

of the discretionary life sentence, and now requires that in the great majority of cases the judge will quantify and announce the penal element and will thereby fix directly the minimum period in custody which the offender must serve, before the question whether it is safe to release him becomes decisive. Although it is a comparative novelty this regime conforms very well with the rationale of the discretionary life sentence and, as it appears to me, is fair, practical in operation and easy to comprehend.

The same cannot I believe be said of the situation created by the ministerial decision, some ten years ago, to import the concept of a penal element into the theory and practice governing the release on licence of prisoners serving mandatory life sentences for murder... [T]he current practice, established by executive changes of policy rather than by Act of Parliament, now requires the division of the sentence into penal and risk elements, and entails that the ascertainment by the Home Secretary of the penal element fixes, at one remove, the minimum period for which the convicted murderer will be detained. It is to this element that the present appeal is directed.

The respondents to the appeal... were each convicted of murder and sentenced to life imprisonment on various occasions between 1985 and 1987. It is possible to deduce from the dates fixed by the Home Secretary for the first review of their cases by the Parole Board (and in the case of Pierson from correspondence with the Home Office) that the penal elements of these life sentences fixed by the Home Secretary were respectively 15 years, not more than 20 years, 12 years and 11 years. So much each prisoner knows, but what he does not know is why the particular term was selected, and he is now trying to find out, partly from an obvious human desire to be told the reason for a decision so gravely affecting his future and partly because he hopes that once the information is obtained he may be able to point out errors of fact or reasoning and thereby persuade the Home Secretary to change his mind, or if he fails in this to challenge the decision in the courts. Since the Home Secretary has declined to furnish the information the respondents have set out to obtain it by applications for judicial review.

- (1) Until the enactment of the Homicide Act 1957 the mandatory sentence for murder was death. This was mitigated by an executive power to commute the sentence to one of penal servitude (later imprisonment) for life, which in turn was subject to an executive power to release the prisoner on licence. There was a long-established practice whereby the trial judge wrote privately to the Home Secretary drawing attention to any features of the case which he considered relevant to the anxious decision on whether or not to commute.
- (2) When the 1957 Act created the category of non-capital murder it prescribed a mandatory sentence of imprisonment for life. Eight years later, at the time when the abolition of the death penalty for murder was before Parliament it was proposed that the previous mandatory sentences of death and life imprisonment should be replaced by a discretionary sentence of life imprisonment, but Parliament did not agree and a sentence of life imprisonment was made mandatory for all murders; see the Murder (Abolition of Death Penalty) Act 1965, s 1(1). At the same time two statutory concessions were made to those who feared excessive leniency by the Executive in the treatment

of convicted murderers. First, by s 1(2) the trial judge was given power to recommend to the Home Secretary the minimum period which should elapse before the release of the prisoner under the statutory power to release on licence which had been created by the Prison Act 1952. Second, it was stipulated that no person convicted of murder would be released on licence unless the Home Secretary had previously consulted the Lord Chief Justice and the trial judge, if available: s 2.

[In 1983] in response to pressure of public opinion the Home Secretary (the Rt Hon Leon Brittan QC) announced a series of radical changes in the existing policies relating to the release of prisoners on parole and licence... [including] the creation of a completely new philosophy and practice for the release of life prisoners on licence... This practice was to have the following features: (i) the joint Home Office/Parole Board committee, which had been established to recommend the date for the first review by the Parole Board was disbanded; (ii) instead, the Home Secretary would himself, after consulting the judges 'on the requirements of retribution and deterrence', fix the date for the first review; (iii) the review would normally take place three years before the expiry of the 'period necessary to meet the requirements of retribution and deterrence'. This would give sufficient time for preparations for release, if the Parole Board were to recommend it; (iv) subject to exceptional circumstances the first review would in fact take place on the date so fixed; (v) meanwhile the progress of the prisoner would be kept under regular review by the Home Office; (vi) the consultation with the judges required by s 61 of the Criminal Justice Act 1967 would take place when release was an actual possibility; (vii) in the case of certain types of murder the prisoner would not normally be released until 20 years or even longer had been served.

Equally important were the changes in philosophy underlying the new practice. The first was tacit, but obvious. Whereas at the outset the power of the trial judge to recommend a minimum term, and the duty of the Home Secretary to consult the judges before release had been a protection against a foreseen risk of excessive leniency by the Executive, the new regime was intended to forestall risk of excessive leniency by the judges, or the Parole Board, or both.

My Lords, I believe that this summary has shown how, in contrast with the position as regards discretionary life sentences, the theory and the practice for convicted murderers are out of tune. The theory... [is] that murder is an offence so grave that the proper 'tariff' sentence is invariably detention for life, although as a measure of leniency it may be mitigated by release on licence. Yet the practice established by Mr Brittan in 1983 and still in force founds on the proposition that there is concealed within the life term a fixed period of years, apt to reflect not only the requirements of deterrence, but also the moral quality of the individual act (retribution). These two philosophies of sentencing are inconsistent. Either may be defensible, but they cannot both be applied at the same time.

As it seems to me, the only possible choice is the regime installed by Mr Brittan, as later modified. This is the regime by which successive Home Secretaries have chosen to exercise the wide powers conferred by Parliament, and the arguments have throughout



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Whilst there is an important grain of truth in this argument, I believe it to be overstated. The discretionary and mandatory life sentences, having in the past grown apart, may now be converging. Nevertheless, on the statutory framework, the underlying theory and the current practice there remains a substantial gap between them. It may be – I express no opinion – that the time is approaching when the effect of the two types of life sentence should be further assimilated. But this is a task for Parliament, and I think it quite impossible for the courts to introduce a fundamental change in the relationship between the convicted murderer and the state, through the medium of judicial review.

There seems little doubt that one result of the abolition of the death penalty has been an increase in the amount of time spent in prison by all convicted murderers, including those who would not have been hanged.

Those convicted of capital offences were sentenced to death and the Home Secretary then considered all such cases to see if there were grounds for granting a reprieve. [On



average 45 per cent were reprieved.] The penalty for non-capital murder under the Homicide Act 1957 was a mandatory life sentence. Reprieved capital murderers were made to serve life sentences... [T]he Murder (Abolition of Death Penalty) Act 1965... removed the earlier distinctions drawn by the Homicide Act... Parliament intended that this power [to make a minimum recommendation] could be used by judges to make 'low tariff' minimum recommendations (for example in mercy killing cases) but this has not happened. Indeed, judges have limited the use of this power to making recommendations of twelve years or longer... Furthermore the range of cases in which the power has been used includes a considerable number which, under the Homicide Act 1957 criteria, would have been non-capital. The result has been that among the life-prisoner population during the last seventeen years are persons variously convicted of capital - and non-capital - murder offences as well as others, convicted after the 1965 Act, who have received 'minimum recommendations' for offences which would previously have been capital and non-capital...

A Select Committee of the House of Lords (1989) has recommended that the mandatory penalty should be replaced, but governments have shown little inclination to introduce any changes. Some experience with a discretionary sentence for murder has been gained in New South Wales, where the mandatory penalty was abolished in 1982. The amendment to the Crimes Act 1900 (NSW) has the effect of retaining life as the penalty 'unless it appears to the Judge that the person's culpability for the crime is significantly diminished by mitigating circumstances, whether disclosed by the evidence in the trial or otherwise' (s. 19) (see Yeo (1987)).

Recently, in a number of high-profile cases, convicted killers have sought to challenge the Home Secretary's role in the tariff system. The first of these involved an appeal brought by Robert Thompson and John Venables, two 10-year-old boys convicted of killing two-year-old James Bulger by repeated acts of violence in 1993.

*R v. Secretary of State for the Home Department ex p Venables, ex p Thompson* [1997] 3 All ER 97

[The trial judge imposed the mandatory sentence of detention during Her Majesty's pleasure provided for by s. 53(1) of the Children and Young Persons Act 1933 and in his report to the Home Secretary recommended that the 'tariff' period of their sentence be eight years' detention. The tariff was increased to 10 years, on the advice of the Lord Chief Justice, and to 15 years by a Home Secretary swayed by a public petition containing some 278,300 signatures, a high-profile newspaper campaign, and over 5,000 letters, all demanding that the applicants should remain in detention for life. This was an exercise of his discretion under s. 35 of the Criminal Justice Act 1991. The applicants succeeded in their judicial review proceedings at the Divisional Court, which quashed the Home

Secretary's decision. The Home Secretary appealed to the Court of Appeal, which accepted his argument that he was entitled to set a tariff but dismissed his appeal on the grounds, *inter alia*, that he had wrongly taken into account the public petition and media campaign in setting the tariff and therefore there had been procedural unfairness in reaching the decision. The Home Secretary appealed to the House of Lords. The applicants cross-appealed against the Court of Appeal's decision that the Home Secretary was entitled to impose the tariff.]

**Lord Steyn:** The Home Secretary treated two sentences for murder as exactly alike, namely (1) a mandatory sentence of life imprisonment passed on an adult convicted of murder and (2) a mandatory sentence of detention during Her Majesty's pleasure passed on a child or young person convicted of murder. He emphasised that in a policy statement to the House of Commons of 27 July 1993 (229 HC Official Report (6th series) written answers cols 861-864) in the following words:

'Everything that I have said about the practice of the Secretary of State in relation to mandatory life sentence prisoners applies equally to persons who are, or will be, detained during Her Majesty's Pleasure under s 53(1) ...'

In the same policy statement he contrasted the position of a prisoner subject to a mandatory life sentence with that of a prisoner subject to a discretionary life sentence. Once the minimum period fixed for retribution and deterrence has been satisfied, and provided that he is no longer a risk, a prisoner serving a discretionary life sentence is entitled to be released: s 34 of the Criminal Justice Act 1991. But a more severe regime applies to prisoners convicted of murder who are subject to mandatory life sentences. The Home Secretary indorsed the 'practice' that an adult prisoner subject to mandatory life sentence has forfeited his liberty to the state for the rest of his days. He said that the 'presumption' is that such a prisoner should remain in custody until the Home Secretary concludes that the public interest would be better served by the prisoner's release than by his continued detention. This is how the Home Secretary also viewed the nature of a sentence of detention during Her Majesty's pleasure under s 53(1).

It is now necessary to examine the correctness of the Home Secretary's view of a s 53(1) sentence. In order to understand the nature of a sentence of detention during Her Majesty's pleasure it is necessary to start with the position before the 1908 Act was enacted. For this purpose I gratefully draw on a report prepared by Professor A W B Simpson, the distinguished legal historian, and submitted to the European Court of Human Rights in *Singh v. UK* (1996) 1 BHRC 119. Until the 1908 Act the formal law (as opposed to Home Office practice) made no special provision for children or young persons convicted of murder. In strict law youthful convicted murderers could be executed. But it became the practice not to execute murderers who were under the age of 18 years. It is probable that whenever a convicted murderer was reprieved on account of youth, a life sentence of penal servitude would have been imposed, and the individual would only have been released after serving a conventional period of 20 years unless he was then thought to be still dangerous. This practice was consistent with the notion that if children were criminally responsible they

were amenable to exactly the same punishments as adults. Gradually, that policy fell into disfavour: the view gained ground that all juvenile offenders formed a distinct category of offenders for whom special arrangements for disposal should be made. The 1908 Act was a reforming measure which throughout reflected this change in attitude to young offenders. Thus it abolished the use of prisons for offenders under 14; it abolished penal servitude for those under it; and it permitted imprisonment for those between 14 and 16 only exceptionally. Section 103 formally abolished a sentence of death against a child or young person. That left the important question of the substitute penalty. Following previous practice regarding the punishment of children convicted of murder Parliament could have provided for a sentence of life imprisonment, or for detention for life. But Parliament chose not to do so. Instead, the 1908 Act provided that the new sentence to be imposed on children (those between 8 and 14) and young persons (those between 14 and 16) would be detention during His Majesty's pleasure. And the statute provided that, if so sentenced, the child or young person would be liable to be detained in such place and under such conditions as the Secretary of State directed.

...

Subsequently, Parliament revisited this subject. Section 53(1) of the 1933 Act re-enacted s 103 in respect of persons under 18 convicted of murder.

...

It was, of course, possible for Parliament subsequently to reverse the policy adopted in 1908 and repeatedly reaffirmed. Counsel for the Home Secretary said that Parliament did so by provisions in the 1991 Act. Carefully distancing himself from the view that a s 53(1) sentence 'is the same' as a sentence of life imprisonment, counsel for the Home Secretary said that the 1991 Act shows that Parliament was satisfied that a s 53(1) sentence had sufficient similarities to a mandatory life sentence imposed on an adult murderer to make it appropriate to deal with the question of release on life licence of prisoners in both categories under the same provisions. As I understood the argument it involves saying that Parliament in effect assimilated the two sentences and that in fixing a tariff for Venables and Thompson the Home Secretary was entitled to proceed on the basis that, like adults serving mandatory life sentences, they had forfeited the rest of their lives to the state. This argument crucially depends on two sections in the 1991 Act. Section 43(2) of the 1991 Act provides that the provisions for release apply to s 53(1) sentences. This is a reference to s 35(2) which provides that if the Parole Board so recommends, the Home Secretary may, after consulting the Lord Chief Justice and the trial judge, release on life licence a life prisoner who is not a discretionary life prisoner. By s 35(2) 'life prisoner' includes a child or young person sentenced under s 53(1). These provisions are perfectly consistent with the policy that a sentence of detention during Her Majesty's pleasure is a sentence different in conception from a sentence of mandatory life imprisonment. These are procedural provisions which do not alter the nature of the s 53(1) sentence. It is true that there is similarity between a s 53(1) sentence and a sentence of life imprisonment in the sense that all persons released on licence shall remain in force until their death: s 37(3) of the 1991 Act. That is unremarkable. It tells us nothing about the nature of a s 53(1) sentence.



It is necessary to put counsel's arguments in context. It postulates that in 1991 Parliament reversed the policy it had adopted in 1908, and reaffirmed subsequently, by assimilating the sentences of children and young persons convicted of murder with adults convicted of murder. Given that no dissatisfaction with the conception of a sentence of detention during Her Majesty's pleasure ever became public such a change of direction would have been surprising. The merits of such a radical change, contrary to the long standing policy of differentiating between the sentences of adults and children, were never debated in public or in Parliament.

...

If his argument were to be accepted it would amount to legislation by stealth. But the truth is that the argument that in 1991 Parliament intended to assimilate s 53(1) sentences and mandatory life sentences is misconceived.

It follows that in making his decisions the Home Secretary wrongly equated the sentences of Venables and Thompson with that applicable to adults convicted of murder. I will assume that the Home Secretary was entitled to apply a 'practice' that a prisoner serving a mandatory life sentence has forfeited his life to the state and that the 'presumption' must be that the prisoner will spend the rest of his days in prison. But in my judgment this practice is plainly not legitimate in respect of the different sentence of detention during Her Majesty's pleasure. Section 53(1) is based on the premise that, to some extent, children are less accountable for their actions than adults. Subject to continued detention for reasons of risk, s 53(1) was intended to be a more merciful punishment than life imprisonment... The Home Secretary misunderstood the legal nature of the sentence in respect of which he was called upon to exercise a discretion. He did take the ages of Venables and Thompson into account. But he misinterpreted the sentence prescribed by law for children convicted of murder. He did so to the detriment of Venables and Thompson. The Home Secretary's decisions were therefore unlawful. For the same reasons his policy statement of 27 July 1993 to the House of Commons was unlawful so far as it related to s 53(1) sentences.

[Lord Steyn proceeded to consider the legality of increasing the tariff by the Home Secretary, particularly in view of the public clamour in the form of a petition and a tabloid newspaper campaign.]

The Home Secretary regarded 'the public concern about this case' as evidenced by the 'petitions and other correspondence' as evidence in favour of increasing the tariff... The Home Secretary in fixing a tariff may, like a sentencing judge, take into account the general consideration of public confidence in the criminal justice system. He may also take into account a more specific feature such as public concern about the severity, or lack of severity, of sentences imposed on children for crimes of violence. But may the Home Secretary take into account public clamour about the tariff to be fixed in a particular case? May he treat as relevant a newspaper campaign to obtain an increase in the tariff? May he take into account a demonstration in Queen Anne's Gate to protest about the tariff to be imposed?

For my part the matter can be decided on a twofold basis. First, the material in fact taken into account by the Home Secretary was worthless and incapable of informing him in a meaningful way of the true state of informed public opinion in respect of the tariff to be set in the cases of Venables and Thompson. By 'informed public opinion' I mean



public opinion formed in the knowledge of all the material facts of the case. Plainly, the 'evidence' to which the Home Secretary referred did not measure up to his standard. It was therefore irrelevant. But the Home Secretary was influenced by it. He gave weight to it. On this ground his decision is unlawful. But the objection to the course adopted by the Home Secretary is more fundamental. The starting-point must be to inquire into the nature of the power to fix a tariff which the Home Secretary exercised. Writing on behalf of the Home Secretary the Home Office explained in correspondence placed before us that: '[The Home Secretary] must ensure that, at all times, he acts with the same dispassionate sense of fairness as a sentencing judge.'

The comparison between the position of the Home Secretary, when he fixes a tariff representing the punitive element of the sentence, and the position of a sentencing judge is correct. In fixing a tariff the Home Secretary is carrying out, contrary to the constitutional principle of separation of powers, a classic judicial function... Parliament entrusted the underlying statutory power, which entailed a discretion to adopt a policy of fixing a tariff, to the Home Secretary. But the power to fix a tariff is nevertheless equivalent to a judge's sentencing power. Parliament must be assumed to have entrusted the power to the Home Secretary on the supposition that, like a sentencing judge, the Home Secretary would not act contrary to fundamental principles governing the administration of justice. Plainly a sentencing judge must ignore a newspaper campaign designed to encourage him to increase a particular sentence. It would be an abdication of the rule of law for a judge to take into account such matters. The same reasoning must apply to the Home Secretary when he is exercising a sentencing function. He ought to concentrate on the facts of the case and balance considerations of public interest against the dictates of justice. Like a judge the Home Secretary ought not to be guided by a disposition to consult how popular a particular decision might be. He ought to ignore the high-voltage atmosphere of a newspaper campaign. The power given to him requires, above all, a detached approach. I would therefore hold that public protests about the level of a tariff to be fixed in a particular case are legally irrelevant and may not be taken into account by the Home Secretary in fixing the tariff. I conclude that the Home Secretary misdirected himself in giving weight to irrelevant considerations. It influenced his decisions. And it did so to the detriment of Venables and Thompson.

For this further reason I conclude that his decisions were unlawful.

A majority of the House of Lords held that the decision of the Home Secretary was unlawful for two reasons: first, for failing to distinguish between mandatory sentences for adults and the detention imposed here on children, and second, because tariff fixing was a power equivalent to a judge's sentencing power, it ought to have remained detached from the pressure of public opinion. The applicants also successfully persuaded the European Court of Human Rights that the Home Secretary's role in tariff setting represented a violation of Article 6 (*V v. UK* (2000)).

In *Anderson* (2002), a seven-panel House of Lords confidently declared that the Home Secretary should play no part in fixing the tariff of a convicted

murderer. In a powerful rejection of this 'striking anomaly' (Lord Steyn at para. 51), the House was helped by two recent decisions of the European Court of Human Rights (*Stafford v. UK* and *Benjamin v. UK* (2002)). The decision in *Anderson* both confirms and rejects predictions made by Lord Mustill in *Doody* (1993). It confirms the suggested assimilated approach towards discretionary and mandatory life sentences. However, it also rejects the proposition that the courts cannot alter the relationship between the convicted murderer and the state. In this context, Article 6 of the ECHR has emerged as a powerful tool for the judiciary to chip away at executive discretion in relation to tariff setting.

*A question of application of Anderson v Secretary of State for the Home Dept [2002] 4 All ER 1089*

**Lord Steyn:** My Lords, the question is whether decisions about the term of imprisonment to be served by convicted murderers, sentenced to mandatory life imprisonment, should be made by the Secretary of State for the Home Department, a member of the executive, or by independent courts or tribunals.

The Home Secretary's power to control the release of mandatory life sentence prisoners derives from s 29 of the Crime (Sentences) Act 1997. It reads:

- '(1) If recommended to do so by the Parole Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a life prisoner who is not one to whom section 28 above applies.
- (2) The Parole Board shall not make a recommendation under subsection (1) above unless the Secretary of State has referred the particular case, or the class of case to which that case belongs, to the Board for its advice.'

Given that the primary focus of this case is the Home Secretary's power of fixing the tariff, it is of some relevance to set out how the system worked and still works. On 17 July 1995 the Home Secretary explained the position to the House of Commons. He said (263 HC Official Report 6th series col 1353):

'In every case where an offender is convicted of murder, the trial judge completes a detailed report on the background to the case. Whether or not he has made a formal recommendation in open court, the judge sets out his advice on the minimum period that should be served for retribution and deterrence. This report goes first to the Lord Chief Justice, who adds his own comments and then forwards the report to me. All this normally happens within two or three weeks of the conviction. The whole of the report, apart from opinions about future risk, is disclosed to the prisoner, together with any other relevant papers, such as details of previous convictions, which will be put to Ministers in due course. This means that in practice, the prisoner sees everything that is relevant to the setting of the tariff. The prisoner is given the opportunity to make any representations he wishes on the judicial recommendations and the other contents of the report. It is, however, made clear to him that the judicial views are advisory and that the tariff will be set by the Secretary of State. The prisoner's representations, along with

the judicial report, are then submitted to Ministers, who make the decision on tariff. This is communicated to the prisoner. If, after considering the judicial advice and the prisoner's representations, I decide that a tariff higher than that recommended by the trial judge is required for deterrence and retribution, the prisoner is given detailed reasons for that decision and these reasons are, of course, open to scrutiny by the courts by way of judicial review. To summarise, the prisoner is aware of the judicial view and has the opportunity to make representations. He is then told of the tariff set. If there is any departure from the judicial advice, he is given detailed reasons. Once the prisoner has been informed of the tariff, we are prepared to disclose both the tariff and the judicial recommendation in individual cases to anyone who asks. The process cannot therefore be described as secretive – it could hardly be more open.'

There have been subsequent ministerial statements on this subject but as far as the executive is concerned the 1995 statement is still controlling. It is to be noted that within the institutional constraints of a decision taken by a member of the executive, a concerted attempt was made to model the fixing of the tariff on a quasi-judicial procedure. The procedure highlights the analogy between the role of the Home Secretary, when he fixes a tariff representing the punitive element of the sentence, and the role of a sentencing judge.

In a series of decisions since *Doody's* case . . . the House of Lords has described the Home Secretary's role in determining the tariff period to be served by a convicted murderer as punishment akin to a sentencing exercise . . . While a series of House of Lords decisions have revealed concerns about the compatibility of the operation of the system with the rule of law, the lawfulness in principle of the Home Secretary's role was not in doubt.

The question is now whether the Home Secretary's decision-making power over the terms to be served by mandatory life sentence prisoners is compatible with a later statute enacted by Parliament, namely that by which Parliament incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 into the law of the United Kingdom. Article 6(1) of the convention, so far as it is material, provides:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

Article 6(1) requires effective separation between the courts and the executive, and further requires that what can, in shorthand, be called judicial functions may only be discharged by the courts . . .

The relevant developments for present purposes include the following. First, as a result of a decision of the European Court of Human Rights in *Thynne v. UK* (1991) 13 EHRR 666, Parliament made the judiciary and the Parole Board alone responsible for decisions about the release of discretionary life sentence prisoners. The Home Secretary was not perceived to be independent. Parliament reformed the law by enacting s 34 of the Criminal Justice Act 1991. In the result, the Home Secretary no longer controls release of a category of life-sentence prisoners which includes some of the most dangerous prisoners in our prisons. Secondly, a

parallel development followed in respect of young persons sentenced to detention during Her Majesty's pleasure. As a result of the decision of the European Court in *V v. UK* (2000) 30 EHRR 121, the tariff system in respect of juveniles had to be reorganised. Ministers lost their power to set the tariff. [He referred to Practice Statements 2000 and 2002.] Again, the reason for this development was that the Home Secretary could no longer be regarded as independent for the purposes of performing this function.

Thirdly, the coming into force in 1999 of the Scotland Act 1998 to which was scheduled the Human Rights Act 1998 led to legislation by the Scottish Parliament effectively to eliminate the role of the executive in Scotland in fixing terms to be served by mandatory life sentence prisoners: Convention Rights (Compliance) (Scotland) Act 2001. The reason for this legislation was the apprehension that the executive's role would be in conflict with art 6(1) . . . For the same reason the role of the executive in controlling the periods to be served by mandatory life-sentence prisoners in Northern Ireland was brought to an end . . . These developments have increased the doubts about the Home Secretary's remaining role in England and Wales about the one class of life-sentence prisoners over whom he still exercises control.

Until recently, however, there was a justification in European jurisprudence for the Home Secretary's retention of the power to fix the tariff in respect of mandatory life sentence prisoners. It derived from the ruling in *Wynne v. UK* (1995) . . . As a result of two recent decisions of the European Court this prop of the Home Secretary's position has now, in terms of European jurisprudence, been knocked out.

In *Stafford v. UK* (2002) 13 BHRC 260 at 279 (para 78), the Grand Chamber of the European Court reviewed developments which in its view led to the conclusion that –

'the continuing role of the Secretary of State in fixing the tariff and in deciding on a prisoner's release following its expiry, has become increasingly difficult to reconcile with the notion of separation of powers between the executive and the judiciary, a notion which has assumed growing importance in the case law of the Court . . .'

Referring to the judgment in *Wynne v. UK* the court observed ((2002) 13 BHRC 260 at 279):

'The court considers that it may now be regarded as established in domestic law that there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise. The mandatory life sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and the offender, represents the element of punishment. The court concludes that the finding in *Wynne v. UK* [(1995) 19 EHRR 333] that the mandatory life sentence constituted punishment for life can no longer be regarded as reflecting the real position in the domestic criminal justice system of the mandatory life prisoner.' . . .

The House of Lords concluded that section 29 of the 1997 Act and the Home Secretary's tariff-setting practice were incompatible with Article 6(1), and issued a declaration of incompatibility pursuant to section 4 of the 1998 Act. This was in line with reforms introduced in Scotland and Northern Ireland. The UK



government responded by amending the Criminal Justice Act 2003 during its passage through Parliament. This introduces a three-tier classification for murder sentencing. A 15-year starting point will be doubled to 30 for the murder of police or prison officers, witnesses and for sadistic and sexual murders. This higher sentence also forms the starting point for murders committed for gain, such as robbery, and for those involving guns or explosives. Most controversial is the direction for 'whole life tariffs' for premeditated multiple murder and child murder following abduction or sadistic or sexual conduct, terrorist murders and for repeat offenders (Sch. 21). A whole life tariff satisfies the oft-voiced call that 'life should mean life', that is, incarceration for the whole of the prisoner's natural life. In allowing for judges to vary such starting points with reference to mitigating factors, it remains to be seen whether these proposals allow sufficient room for manoeuvre in terms of their compatibility with Article 6.

Somewhat ironic (and fortunate for the Home Secretary) was the death of Myra Hindley, serving her 37th year in prison following her role in the notorious Moors Murders, a few days before the ruling in *Anderson* (2002). She was convicted in 1966 along with Ian Brady for the sadistic killing of three children. The Lord Chief Justice recommended a tariff of 25 years, but after she had admitted to a further two killings, successive Home Secretaries confirmed a 'whole life' tariff. In 2000, the House of Lords dismissed Hindley's appeal against her tariff (*R v. Secretary of State for the Home Dept ex p Hindley* (2000)). Although the decision in *Anderson* might have opened the door for Hindley's release, as the extract from Lord Steyn below makes clear, the capacity to ensure that 'life means life' remains:

*R (on the application of Anderson) v. Secretary of State for the Home Dept* [2002] 4 All ER 1029

**Lord Steyn:** This appeal raises the question whether the period of imprisonment to be served by a mandatory life sentence prisoner as punishment should be determined by the executive or the judiciary. It does not concern the question how individual cases should be approached. On the hypothesis, however, that the appeal in this case succeeds, it is important to guard against misunderstanding in one respect. If the role of the executive in setting the tariff should cease it does not follow that life imprisonment for murder may never, even in the worst cases imaginable, literally mean detention for life. In the Divisional Court in *R v. Secretary of State for the Home Dept, ex p Hindley*... Lord Bingham of Cornhill CJ observed that he could –

'see no reason, in principle, why a crime or crimes, if sufficiently heinous, should not be regarded as deserving lifelong incarceration for purposes of pure punishment.'

On appeal to the House of Lords... I expressed myself in similar terms: The following passage is part of the ratio of that case:

'The last submission is that the policy of imposing whole life tariffs is inconsistent with the notion of a tariff which requires expression in a term of years. This is an appeal to legal logic. But there is nothing logically inconsistent with the concept of a tariff by saying that there are cases where the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence.'

In *Stafford v. UK* (2002) 13 BHRC 260 at 279-280 (para 79) the European Court observed 'that a whole life tariff may, in exceptional cases, be imposed where justified by the gravity of the particular offence'. If in future the judiciary and the Parole Board are given the sole responsibility for the system there may still be cases where the requirements of retribution and deterrence will require lifelong detention.

The crimes of other infamous lifers such as Rosemary West and Harold Shipman would presumably represent such 'exceptional cases'. In two other appeals heard alongside *Anderson*, section 1(1) of the 1965 Act survived a challenge that it was arbitrary and disproportionate in requiring the same life sentence to be passed on all murderers. In *Lichniak, Pyrah* (2002), the House of Lords dismissed the claim that it was incompatible with Articles 3 and 5 of the Convention (prohibition on inhuman and degrading treatment and the right to liberty, respectively).

The mandatory penalty contributes to, although does not completely account for, the need to make a distinction between murder and manslaughter. The differentiation between the two types of homicide emerged in the early sixteenth century in statutes and legal writings and remained of fundamental importance in the eighteenth century because manslaughter was clergyable, and thus non-capital. Before that, juries achieved a rough-and-ready distinction by distorting the law:

Thomas de Aquinas (c.1225) *Verdict According to Conscience* (University of London Press, 1951), pp. 10-1

[The extension of royal jurisdiction in the twelfth century to encompass the entire area of homicide had two revolutionary effects: many homicides that formerly had not resulted in capital punishment were now made capital under the law; and strict and largely unenforceable requirements were introduced into a law of self-defence.] The following study attempts to demonstrate that from late Anglo-Saxon times to the end of the Middle Ages there existed a widespread societal distinction between 'murder', i.e., homicide perpetrated through stealth, and 'simple' homicide, roughly what a later legal age termed manslaughter. This distinction, which was imposed upon the courts through the instrument of the trial jury, was fundamentally at odds with the letter of the law.

In the early twelfth century, the Crown took exclusive jurisdiction over all homicides and defined them as (1) culpable and thereby capital, (2) excusable and thereby pardonable,

(3) justifiable and thereby deserving of acquittal. The last class at first incorporated the slaying of manifest felons (e.g., 'hand-having thieves') and outlaws who resisted capture. By the middle of the fourteenth century it came to include the killing of housebreakers and robbers caught in the act, though it was not until the sixteenth century that a statute turned this policy into firm law. Pardonable homicides were those committed by the insane, those committed in self-defense, and those committed unintentionally. The rules of self-defense were rigorous throughout the entire medieval period. The slayer had to have made every possible attempt to escape his attacker, must have reached a point beyond which he could not retreat, and must have retaliated out of literally vital necessity. All other intentional homicides, those deliberate but of a sudden, as well as those planned and stealthily perpetrated, fell into the large category of culpable homicide. According to the rules of the law, there were to be no distinctions made among them. The classification remained intact until the late sixteenth century, when the judicial distinction between murder and manslaughter finally emerged...

[T]he early history of criminal liability, especially for the period just preceding the imposition of royal jurisdiction in all homicides, suggests that from their very inception the official rules ran counter to and never really became a part of social practice. This argument, admittedly speculative, takes the following form. During the Anglo-Saxon period only those who committed homicide through secrecy or stealth – murder – had to pay for their act with their life. The new, twelfth-century practice subjected to the death penalty not only 'murderers' but the large class of open slayers formerly allowed to compensate for their act by payment of the wergild. The community resisted this harsh extension of capital punishment and subsequently found means – acquittals and verdicts of self-defense – to impose upon the courts their long-held notions of justice, a process that becomes visible to us only in the fourteenth century. Thus the societal distinction between murder and simple homicide had its source deep in the English past. The introduction of novel and strict official rules of liability did away with the traditional means of dispute settlement in simple homicide, but it did not erase traditional social attitudes about liability. Nor did the imposition of a new scheme of criminal administration prevent society from acting, within the context of that scheme, in accordance with its traditional attitudes.

Throughout the medieval period for which written records are extant, the great majority of defendants who stood trial for homicide were acquitted. While today many are acquitted, one must take into account the fact that most suspects do not now stand trial; the vast majority of them plead guilty. In the Middle Ages few pleaded guilty to any felony since the penalty was invariably capital... Though malicious prosecution and honestly moved but mistaken indictments may account in part for the high rate of acquittals, other factors must also have been at work. It is contended here that, for the most part, those few who were condemned had especially offended against the standards of the community. By discriminating between them and the many who committed homicides of a less serious nature, the jurors were creating a *de facto* classification roughly similar to the later legal distinction between murder and manslaughter...

The evidence as to jury attitudes in the fourteenth century may aid in understanding social attitudes towards criminal liability in the entire period from late Anglo-Saxon times



to the end of the Middle Ages. If so, the argument would run as follows. Originally, the Anglo-Saxons practised the feud in homicide cases. The kin of the slain took vengeance upon the slayer or one of his kin, who were jointly liable for their kinsman's act. Whether the mental element was taken into account is unknown. Secret homicide was a matter for the king, but all other homicides were emendable; failure to pay the wergild rendered the slayer and his kin liable to vendetta, though reduction of the amount of compensation by agreement was probably common. By the tenth century, the laws restricted liability to vendetta to the actual slayer. They also mandated a reduction of wergild compensation where there had been mitigating circumstances. In such cases, where the slayer had acted in self-defense or through accident, the king relinquished the writ. While the kin of the slain might have taken a narrow view of such mitigating circumstances, society at large took a broader view of the matter, having nothing to gain from feud or compensation, and in a day when fights began easily and led often to death or sepsis or other results of poor medical techniques. In its eyes, secret homicide or especially malicious attacks justified punishment by death. Simple homicides were seen as requiring compensation, with mitigation if the act was unintentional or to some extent provoked. When all homicides were drawn within the sphere of royal jurisdiction and made, unless excusable, punishable by death, the community was forced to choose between presentment of the slayer and payment of the murdrum, a fine imposed for an unexplained homicide. Before 1215, persons presented for homicide were forced to undergo the ordeal, so that if the community desired to absolve a slayer it had to fail to present him in the first place . . . By the third decade of the thirteenth century, however, this tension had been relieved: once the slayer had been presented, it was left to the trial jury to state whether he was guilty or not.

This provided them with an opportunity to acquit or adduce circumstances of pardonable homicide.

Clear modern examples of juries attempting in their decision-making to assert attitudes running counter to the law can be seen in the discussion of the Herald of Free Enterprise disaster (see Chapter 19.c.iii.), in the acquittals of doctors Arthur and Adams (see Chapter 20.b.), and in the *Sutcliffe* case below.

In the same way that in earlier periods juries were influenced by the capital consequences of some of their decisions, in modern times the existence of the mandatory life sentence for murder has helped to sustain the distinction between the two offences. This has been institutionalised through the manipulation of the mental element in murder, as well as through a number of excuse devices, for example provocation and diminished responsibility. But the distinction was and is more than procedure – or sentence-orientated. Although often obscured by the conceptual apparatus of the law with its use of mental elements as a means of delineation, a moral judgment is also being made. As can be seen in the extracts from the series of cases below, *DPP v. Smith* (1961) to *Moloney* (1985), *Hancock* (1986), *Nedrick* (1986) *Woollin* (1998) and *Matthews and Alleyne* (2003) there is an ever-more desperate search for a magic formula whereby the murderer can be distinguished from the manslaughterer through



using the notion of intention. Lord Goff's suggestion (see below) is that the concept of wicked recklessness used in Scotland might be of assistance in making the distinction. The moral factor becomes clearer when provocation and diminished responsibility are examined. They are fascinating examples of the way law denies the relevance of factors beyond the cognitive mental elements, and provide a mechanism through which motive and other legally 'irrelevant' considerations can be reflected (Norrie 2000).

### VI.21.b. The mental element in murder

Murder requires proof of intention to kill or to cause grievous bodily harm. The interaction of the two sides of this requirement – the meaning of 'intention' and its extension to grievous bodily harm – causes much judicial angst. On the second there has been more certainty than the first. Courts have been consistent in upholding this aspect of the law of murder (*Cunningham* (1982)). Law reform bodies and commentators have been less sure about the appropriateness of the grievous bodily harm rule and, as we have seen, Lord Mustill was strongly critical of it in *A-G's Reference (No 3 of 1994)* when he endorsed the following comments by Lord Steyn in *Powell/English* (1997):

#### *R v. Powell, R v. English* [1997] 4 All ER 545

**Lord Steyn:** ... That brings me to the qualification which I have foreshadowed. In English law a defendant may be convicted of murder who is in no ordinary sense a murderer. It is sufficient if it is established that the defendant had an intent to cause really serious bodily injury. This rule turns murder into a constructive crime. The fault element does not correspond to the conduct leading to the charge, ie the causing of death. A person is liable to conviction for a more serious crime than he foresaw or contemplated... This is a point of considerable importance. The Home Office records show that in the last three years for which statistics are available mandatory life sentences for murder were imposed in 192 cases in 1994; in 214 cases in 1995; and in 257 cases in 1996. Lord Windlesham, writing with great Home Office experience, has said that a minority of defendants convicted of murder have been convicted on the basis that they had an intent to kill: *Responses to Crime* vol 3 (1996) at 342, ¶ 29. That assessment does not surprise me. What is the justification for this position? There is an argument that, given the unpredictability whether a serious injury will result in death, an offender who intended to cause serious bodily injury cannot complain of a conviction of murder in the event of a death. But this argument is outweighed by the practical consideration that immediately below murder there is the crime of manslaughter for which the court may impose a discretionary life sentence or a very long period of imprisonment. Accepting the need for a mandatory life sentence for murder, the problem is one of classification. The present definition of the mental element of murder results in defendants being classified as murderers who are not in truth murderers. It happens both in cases where only one offender is involved and in cases resulting from joint criminal

enterprises. It results in the imposition of mandatory life sentences when neither justice nor the needs of society require the classification of the case as murder and the imposition of a mandatory life sentence.

The observations which I have made about the mental element required for murder were not directly in issue in the appeals under consideration. But in the context of murder the application of the accessory principle, and the definition of murder, are inextricably linked. For that reason I have felt at liberty to mention a problem which was not addressed in argument. That counsel did not embark on such an argument is not altogether surprising. After all, in *R v. Cunningham* [1982] AC 566 the House of Lords declined to rationalise and modernise the law on this point. Only Lord Edmund-Davies expressed the hope that the legislature would undertake reform (at 583). In my view the problem ought to be addressed. There is available a precise and sensible solution, namely, that a killing should be classified as murder if there is an intention to kill or an intention to cause really serious bodily harm coupled with awareness of the risk of death: 14th Report of the Law Revision Committee, (1980) para 31, adopted in the Criminal Code, for England and Wales (Law Com No 177) (1986) cl 54(1). This solution was supported by the House of Lords Select Committee on Murder and Life Imprisonment, HL Paper 78-1, 1989, para 68.

In July 2005 the government signalled its intent to reform when it referred the law of murder to the Law Commission. The Commission's detailed draft report included recommendations for a new three-tiered approach to homicide, in addition to proposals for defences and partial defences. The government opted to prioritise the latter culminating in sections 52–56 of the Coroners and Justice Act 2009, which we discuss below in this chapter at 21.c.iii. It is hoped that the rest of the Commission's work does not go to waste. First though, the following extracts consider whether intention should be subjectively determined and what it might mean to 'intend' a result:

### *DPP v. Smith* [1961] AC 290

[The appellant was driving a car containing some stolen property when a policeman told him to draw into the kerb. Instead, he accelerated and the constable clung on to the side of the car. The policeman fell off in front of another car and was killed. At trial Donovan J directed the jury: 'if you are satisfied that . . . he must, as a reasonable man, have contemplated that grievous bodily harm was likely to result to that officer . . . and that such harm did happen and the officer died in consequence, then the accused is guilty of capital murder.' The jury convicted. The Court of Criminal Appeal quashed the conviction. The House of Lords restored it.]

**Viscount Kilmuir LC:** . . . The main complaint is that the learned judge was there applying what is referred to as an objective test, namely the test of what a reasonable man would contemplate as the probable result of his acts, and, therefore, would intend, whereas the question for the jury, it is said, was what the respondent himself intended . . .

The jury must of course in such a case as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone. The unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence or of careless or dangerous driving. Once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result, or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, ie was a man capable of forming an intent, not insane within the M'Naghten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result...

[T]here seems to be no ground on which the approach by the trial judge in the present case can be criticised... My only doubt concerns the use of the expression 'a reasonable man', since this to lawyers connotes the man on the Clapham omnibus by reference to whom a standard of care in civil cases is ascertained. In judging of intent, however, it really denotes an ordinary man capable of reasoning who is responsible and accountable for his actions, and this would be the sense in which it would be understood by a jury.

Another criticism of the summing-up and one which found favour in the Court of Criminal Appeal concerned the manner in which the trial judge dealt with the presumption that a man intends the natural and probable consequences of his acts. I will cite the passage again:

The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequences of his acts.

It is said that the reference to this being a presumption of law without explaining that it was rebuttable amounted to a misdirection. Whether the presumption is one of law or of fact or, as has been said, of common sense, matters not for this purpose.

The real question is whether the jury should have been told that it was rebuttable. In truth, however, as I see it, this is merely another way of applying the test of the reasonable man. Provided that the presumption is applied, once the accused's knowledge of the circumstances and the nature of his acts have been ascertained, the only thing that could rebut the presumption would be proof of incapacity to form an intent, insanity or diminished responsibility. In the present case, therefore, there was no need to explain that the presumption was rebuttable...

The objective test endorsed in *Smith* was effectively abolished by section 8 of the Criminal Justice Act 1967. Although the appellate courts have found great difficulty in finding a universal formula for the 'mens rea' of murder, there has been no sign of a move to depart from a 'subjective' test. The subjective test itself has, however, been subjected to both stretching and contraction. There has been considerable judicial wavering on the question of what is meant by

intention itself, or whether indeed intention is what is needed. In *Hyam v. DPP* (1975) the House of Lords considered the correctness of a jury direction in terms of foresight of death or grievous bodily harm as highly probable. The defendant, who was jealous of another woman, had poured petrol through the rival's letterbox followed by newspaper which she lit. She did not know whether the house was occupied but she had checked that her lover was not there. Two children died. Although the case is notoriously unclear, her conviction for murder was upheld on a 3:2 majority. Eleven years later, an appeal against conviction for murder was allowed in an almost identical case. The same direction to the jury in *Nedrick* (1986) in terms of foresight of death or grievous bodily harm as highly probable was held by the Court of Appeal to be wrong and the conviction was quashed. Those impressed by the doctrine of a strict adherence to precedent will wonder how this could occur. The clue(s) lie in two intervening House of Lords' cases, *Moloney* (1985) and *Hancock* (1986), extracts from which are given below:

*The Moloney Case* | 1985 | M.C.

[Moloney was convicted of the murder of his stepfather, whom he shot at close range as the result of a drunken contest as to which of them could load and draw a shotgun the fastest. The Crown had refused a plea of guilty to a charge of manslaughter. The Court of Appeal dismissed his appeal but certified the following point of general public importance: Is malice a forethought in the crime of murder established by proof that when doing the act which causes the death of another the accused either: (a) intends to kill or do serious harm; or (b) foresees that death or serious harm will probably occur, whether or not he desires either of those consequences?]

**Lord Bridge:** The true and only basis of the appellant's defence that he was guilty not of murder but of manslaughter was encapsulated in the two sentences in his statement: 'I didn't aim the gun. I just pulled the trigger and he was dead.' The appellant amplified this defence in two crucial passages in his evidence. He said: 'I never deliberately aimed at him and fired at him intending to hurt him or to aim close to him intending to frighten him.' A little later he said he had no idea in discharging the gun that it would injure his father: 'In my state of mind I never considered that the probable consequence of what I might do might result in injury to my father. I never conceived that what I was doing might cause injury to anybody. It was just a lark.'

This being the evidence, the issue for the jury was a short and simple one. If they were sure that, at the moment of pulling the trigger which discharged the live cartridge, the appellant realised that the gun was pointing straight at his stepfather's head, they were bound to convict him of murder. If, on the other hand, they thought it might be true that, in the appellant's drunken condition and in the context of this ridiculous challenge, it never entered the appellant's head when he pulled the trigger that the gun was pointing at his father, he should have been acquitted of murder and convicted of manslaughter.



The judge correctly directed the jury that, in order to prove the appellant guilty of murder, 'the prosecution have to prove that he intended either to kill his stepfather or to cause him some really serious bodily injury'. But he had earlier given the following direction on intent:

When the law requires that something must be proved to have been done with a particular intent, it means this: a man intends the consequences of his voluntary act (a) when he desires it to happen, whether or not he foresees that it probably will happen, and (b) when he foresees that it will probably happen, whether he desires it or not.

[I]t is necessary to examine two later passages in the summing up and a supplementary direction given to the jury in answer to a question which they asked. The judge, when he came to set out the case for the defence, quoted what I have described above as the two crucial passages in the appellant's evidence amplifying the sentence in his statement: 'I didn't aim the gun.' The judge did not relate these passages to his direction on intent, as many judges, I think, might have done, by saying to the jury: 'Members of the jury, if you believe that may be true, you should acquit of murder and convict of manslaughter.' Moreover, only a few sentences further on he quoted an answer given by the appellant under cross-examination as follows:

There is no doubt that when I fired that gun it was pointing at my father's head at a distance of about six feet, and at this distance there is no doubt it would cause death. It is a lethal weapon.

It is clear that this answer must have been intended to acknowledge what the appellant recognised to be the fact with hindsight; it cannot have been intended as an admission of his state of mind at the time of the shooting...

... The fact that, when the appellant fired the gun, the gun was pointing directly at his stepfather's head at a range of about six feet was not, and could not be, disputed. The sole issue was whether, when he pressed the trigger, this fact and its inevitable consequences were present to the appellant's mind. If they were, the inference was inescapable, using words in their ordinary, everyday meaning, that he intended to kill his stepfather. The undisputed facts that the appellant loved his stepfather and that there was no premeditation or rational motivation could not, as any reasonable juror would understand, rebut this inference. If, on the other hand, as the appellant was in substance asserting, it never crossed his mind, in his more or less intoxicated condition and when suddenly confronted by his stepfather's absurd challenge, that by pulling the trigger he might injure, let alone kill, his stepfather, no question of foresight of consequence arose for consideration. Whatever his state of mind, the appellant was undoubtedly guilty of a high degree of recklessness. But, so far as I know, no one has yet suggested that recklessness can furnish the necessary element in the crime of murder.

... If the jury had not demonstrated, by the question they asked after four hours of deliberation, that the issue of intent was one they did not understand, there might be room for further argument as to the outcome of this appeal. As it is, the jury's question, the terms of the judge's further direction and the jury's decision, just over an hour later, to return a

unanimous verdict of guilty of murder leave me in no doubt, with every respect to the trial judge, and the Court of Appeal, that this was an unsafe and unsatisfactory verdict . . .

. . . I am firmly of opinion that foresight of consequences, as an element bearing on the issue of intention in murder, or indeed any other crime of specific intent, belongs not to the substantive law but to the law of evidence. Here again I am happy to find myself aligned with Lord Hailsham in *Hyam v. DPP* [1974] 2 All ER 41 at 43; where he said: 'Knowledge or foresight is at the best material which entitles or compels a jury to draw the necessary inference as to intention.' A rule of evidence which judges for more than a century found of the utmost utility in directing juries was expressed in the maxim, 'A man is presumed to intend the natural and probable consequences of his acts.' In *DPP v. Smith* (1961) your Lordships' House, by treating this rule of evidence as creating an irrebuttable presumption and thus elevating it, in effect, to the status of a rule of substantive law, predictably provoked the intervention of Parliament by s 8 of the Criminal Justice Act 1967 to put the issue of intention back where it belonged, viz in the hands of the jury, 'drawing such inferences from the evidence as appear proper in the circumstances'. I do not by any means take the conjunction of the verbs 'intended or foresaw' and 'intend or foresee' in that section as an indication that Parliament treated them as synonymous; on the contrary, two verbs were needed to connote two different states of mind.

I think we should now no longer speak of presumptions in this context but rather of inferences. In the old presumption that a man intends the natural and probable consequences of his acts the important word is 'natural'. This word conveys the idea that in the ordinary course of events a certain act will lead to a certain consequence unless something unexpected supervenes to prevent it. One might almost say that, if a consequence is natural, it is really otiose to speak of it as also being probable.

. . . In the rare cases in which it is necessary to direct a jury by reference to foresight of consequences, I do not believe it is necessary for the judge to do more than invite the jury to consider two questions. First, was death or really serious injury in a murder case (or whatever relevant consequence must be proved to have been intended in any other case) a natural consequence of the defendant's voluntary act? Second, did the defendant foresee that consequence as being a natural consequence of his act? The jury should then be told that if they answer Yes to both questions it is a proper inference for them to draw that he intended that consequence. [Lord Hailsham, Lord Fraser, Lord Edmund-Davies and Lord Keith concurred.]

The last paragraph contains the (in)famous 'Moloney' guidelines which were soon reconsidered by the House of Lords:

### *R v. Hancock* [1986] 2 WLR 357

[The two defendants caused the death of a taxi driver when they pushed two concrete slabs from a bridge which crossed the road on which the taxi was travelling. The deaths occurred during the 1984-1985 miners' strike. The defendants were on strike; the taxi was carrying a non-striking miner to work. Both denied intending death or serious bodily harm. Although

the Court of Appeal allowed their appeals against convictions for murder, the prosecution, unusually and unsuccessfully, appealed to the House of Lords. Lord Lane CJ, in the Court of Appeal, had suggested that the following guidelines be substituted for those of Lord Bridge in *Moloney*:

In cases in which the defendant's motive or purpose was not primarily to kill or injure, the judge should ask the jury to consider some such questions as these, (a) Are you sure that the defendant did the act which caused death, knowing what he was doing and intending to do it? If No, you must find him not guilty of both murder and manslaughter. If Yes, go on to consider the next question, (b) Are you sure that the defendant's act was of a kind which was highly likely to cause death or really serious bodily injury? If No, you must find him not guilty of murder, but he may be guilty of manslaughter. If Yes, go on to consider the next question, (c) On the evidence considered as a whole, which will of course include the defendant's evidence and that of his witnesses, are you sure that the defendant appreciated that what he did was highly likely to cause death or really serious bodily injury? If your answer is No, you must not find him guilty of murder, but he may be guilty of manslaughter. If your answer is Yes, there is evidence before you from which you can infer that the defendant intended to cause death or really serious bodily injury, but you must not find him guilty of murder unless you feel sure that he so intended. If however you are sure, the fact that he may not have desired that result is irrelevant. Desire and intent are two different things.]

**Lord Scarman:** The appeal is brought to secure a ruling from the House on the refusal of the Court of Appeal to accept as sound the guidelines formulated by this House in . . . *R v. Moloney*. . . The Court of Appeal quashed the convictions on the ground that the judge's guidance [which was based on the *Moloney* guidelines] may well have misled the jury. The court refused leave to appeal but certified the following point of general public importance:

'Do the questions to be considered by a jury set out in the speech of Lord Bridge in *R v. Moloney* as a model direction require amplification?'

It will be observed that the questions which it was suggested in *Moloney's* case that the jury should ask themselves refer to a 'natural' consequence, not a 'natural and probable' consequence. The Crown now appeals with the leave of the House.

The appeal is of importance for two reasons. First, of course, there is the need to settle a point of difference between this House and the Court of Appeal. The *Moloney* guidance was intended to be authoritative in the sense that it was given to be followed by judges in appropriate cases, ie those 'exceptional' cases, as the House thought, where the foreseeability of death or serious bodily harm may be relevant to a decision as to the intent underlying the act of violence. The House realised and declared, however, that the guidance was no part of the ratio decidendi in the case . . . The guidance was offered as an attempt in a practical way to clarify and simplify the task of the jury. It was not intended to prevent judges from expressing in other language, if they should deem it wise in a particular case, guidance designed to assist the jury to reach a conclusion on the facts in evidence.



The dangers inherent in general guidance for the assistance of juries in determining a question of fact lead me to the second reason for the importance of the appeal, namely that the cases to which the guidance was expressly limited by the House in *Moloney's* case, i.e. the 'rare cases' in which it is necessary to direct a jury by reference to foresight of consequences, are unlikely to be so rare or so exceptional as the House believed. As the House then recognised, the guidelines as formulated are applicable to cases of any crime of specific intent, and not merely murder. But further and disturbingly crimes of violence where the purpose is by open violence to protest, demonstrate, obstruct or frighten are on the increase. Violence is used by some as a means of public communication. Inevitably there will be casualties; and inevitably death will on occasions result. If death results, is the perpetrator of the violent act guilty of murder? It will depend on his intent. How is the specific intent to kill or to inflict serious harm proved? Did he foresee the result of his action? Did he foresee it as probable? Did he foresee it as highly probable? If he did, is he guilty of murder? How is a jury to weigh up the evidence and reach a proper conclusion amidst these perplexities? The best guidance that can be given to a trial judge is to stick to his traditional function, i.e. to limit his direction to the applicable rule (or rules) of law, to emphasise the incidence and burden of proof, to remind the jury that they are the judges of fact and against that background of law to discuss the particular questions of fact which the jury have to decide, indicating the inferences which they may draw if they think it proper from the facts which they find established. Should not appellate guidance emphasise the importance of particular facts and avoid generalisation? This is a question to be considered. The facts of this case would appear to indicate an affirmative answer.

. . . Lord Bridge . . . omitted any reference in his guidelines to probability. He did so because he included probability in the meaning which he attributed to 'natural'. My Lords, I very much doubt whether a jury without further explanation would think that 'probable' added nothing to 'natural'. I agree with the Court of Appeal that the probability of a consequence is a factor of sufficient importance to be drawn specifically to the attention of the jury and to be explained. In a murder case where it is necessary to direct a jury on the issue of intent by reference to foresight of consequences the probability of death or serious injury resulting from the act done may be critically important. Its importance will depend on the degree of probability: if the likelihood that death or serious injury will result is high, the probability of that result may, as Lord Bridge noted and Lord Lane CJ emphasised, be seen as overwhelming evidence of the existence of the intent to kill or injure. Failure to explain the relevance of probability may, therefore, mislead a jury into thinking that it is of little or no importance and into concentrating exclusively on the causal link between the act and its consequence. In framing his guidelines Lord Bridge emphasised that he did not believe it necessary to do more than to invite the jury to consider his two questions [see [1985] AC 905 at 929]. Neither question makes any reference (beyond the use of the word 'natural') to probability. I am not surprised that when in this case the judge faithfully followed this guidance the jury found themselves perplexed and unsure. In my judgment, therefore, the *Moloney* guidelines as they stand are unsafe and misleading. They require a reference to probability. They also require an explanation that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that



consequence was foreseen the greater the probability is that that consequence was also intended. But juries also require to be reminded that the decision is theirs to be reached on a consideration of all the evidence.

Accordingly, I accept the view of the Court of Appeal that the *Moloney* guidelines are defective. I am, however, not persuaded that guidelines of general application, albeit within a limited class of case, are wise or desirable. Lord Lane CJ formulated in this case guidelines for the assistance of juries but, for the reason which follows, I would not advise their use by trial judges when summing up to a jury.

I fear that their elaborate structure may well create difficulty. Juries are not chosen for their understanding of a logical and phased process leading by question and answer to a conclusion but are expected to exercise practical common sense. They want help on the practical problems encountered in evaluating the evidence of a particular case and reaching a conclusion. It is better, I suggest, notwithstanding my respect for the comprehensive formulation of the Court of Appeal's guidelines, that the trial judge should follow the traditional course of a summing up. [The judge]... should make certain that the jury understand that whereas the law is for him the facts are for them to decide. Guidelines, if given, are not to be treated as rules of law but as a guide indicating the sort of approach the jury may properly adopt to the evidence when coming to their decision on the facts.

In a case where foresight of a consequence is part of the evidence supporting a prosecution submission that the accused intended the consequence, the judge, if he thinks some general observations would help the jury, could well, having in mind s 8 of the Criminal Justice Act 1967, emphasise that the probability, however high, of a consequence is only a factor, though it may in some cases be a very significant factor, to be considered with all the other evidence in determining whether the accused intended to bring it about. The distinction between the offence and the evidence relied on to prove it is vital. Lord Bridge's speech in *Moloney's* case made the distinction crystal clear; it would be a disservice to the law to allow his guidelines to mislead a jury into overlooking it. [Lord Keith, Lord Roskill, Lord Brightman and Lord Griffiths concurred.]

### *R v Nedrick* [1986] 1 WLR 1025, Court of Appeal

[The appellant poured paraffin through the letterbox of a woman against whom he bore a grudge and set it alight. The woman's child died. He claimed that he merely wanted to frighten the woman. He was convicted after a *Hyam* direction that the appellant was guilty of murder if he knew that it was highly probable that his act would result in death or serious bodily injury. Lord Lane delivered the judgment of the court, allowing the appeal and substituting a conviction of manslaughter:]

What then do a jury have to decide so far as the mental element in murder is concerned? They simply have to decide whether the defendant intended to kill or do serious bodily harm. In order to reach that decision the jury must pay regard to all the relevant circumstances, including what the defendant himself said and did.

In the great majority of cases a direction to that effect will be enough, particularly where the defendant's actions amounted to a direct attack on his victim, because in such cases

the evidence relating to the defendant's desire or motive will be clear and his intent will have been the same as his desire or motive. But in some cases, of which this is one, the defendant does an act which is manifestly dangerous and as a result someone dies. The primary desire or motive of the defendant may not have been to harm that person, or indeed anyone. In that situation what further directions should a jury be given as to the mental state which they must find to exist in the defendant if murder is to be proved?

We have endeavoured to crystallise the effect of their Lordships' speeches in *R v. Moloney* and *R v. Hancock* in a way which we hope may be helpful to judges who have to handle this type of case. It may be advisable first of all to explain to the jury that a man may intend to achieve a certain result whilst at the same time not desiring it to come about. In *R v. Moloney* [1985] AC 905 at 926 Lord Bridge gave an illustration of the distinction:

A man who, at London Airport, boards a plane which he knows to be bound for Manchester, clearly intends to travel to Manchester, even though Manchester is the last place he wants to be and his motive for boarding the plane is simply to escape pursuit.

The man who knowingly boards the Manchester aircraft wants to go there in the sense that boarding it is a voluntary act. His desire to leave London predominates over his desire not to go to Manchester. When he decides to board the aircraft, if not before, he forms the intention to travel to Manchester.

In *R v. Hancock* the House decided that the *R v. Moloney* guidelines require a reference to probability. Lord Scarman said ([1986] AC 455 at 473):

They also require an explanation that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that that consequence was also intended.

When determining whether the defendant had the necessary intent, it may therefore be helpful for a jury to ask themselves two questions. (1) How probable was the consequence which resulted from the defendant's voluntary act? (2) Did he foresee that consequence?

If he did not appreciate that death or serious harm was likely to result from his act, he cannot have intended to bring it about. If he did, but thought that the risk to which he was exposing the person killed was only slight, then it may be easy for the jury to conclude that he did not intend to bring about that result. On the other hand, if the jury are satisfied that at the material time the defendant recognised that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result.

As Lord Bridge said in *R v. Moloney* [1985] AC 905 at 925: '... the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent.'

Later he uses the expression 'moral certainty' ([1985] AC 905 at 926) and says, 'will lead to a certain consequence unless something unexpected supervenes to prevent it' (at 929).

Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary

intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case. Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen. The decision is one for the jury to be reached on a consideration of all the evidence.

*Nedrick* left unclear what it is that the jury should be looking for in inferring intention. *Woollin* (1998) afforded yet another opportunity for the House of Lords to pin down intention. *Woollin* was convicted of murdering his three-month-old son after losing his temper and throwing him onto a hard surface. It was accepted that he had no direct intention to kill his son, but the prosecution alleged that he indirectly intended to cause him grievous bodily harm. He appealed against the trial judge's use in his summing up of the phrase 'substantial risk that he would cause serious injury', arguing that this unacceptably broadened the boundaries of murder. In allowing his appeal, and substituting a verdict of manslaughter, the House of Lords approved the *Nedrick* direction, albeit with three minor 'jury friendly' modifications:

Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to find the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case. The decision is one for the jury to be reached on a consideration of all the evidence.

First, Lord Steyn and Lord Hope dispensed with the two questions posed in the first part of the *Nedrick* direction ('How probable was the consequence which resulted from the defendant's voluntary act? Did he foresee that consequence?'). Second, they substituted the words 'to infer' intention with 'to find', and thirdly they tidied up the final part of the direction. However, this gives little assistance on what 'intention' might connote, a question which the judgment in *Nedrick* also skilfully avoided answering. The reluctance to define oblique intention is also reflected in the Court of Appeal's judgment in *Matthews and Alleyne* (2003). The facts were that two young men had attacked and robbed their victim before throwing him off a bridge into the river where he drowned. One of the grounds for appeal was that the trial judge had presented the option of oblique intention from *Nedrick*/*Woollin* as a substantive rule of law rather than one of evidence. Although accepting that the trial judge had overstepped the mark in presenting it as the former – i.e. by directing the jury to find intention where they were satisfied that the defendants appreciated the virtual certainty of death – the



Court of Appeal (in dismissing the appeal) questioned the practical relevance of such a distinction.

*R v Matthews and Alleyne* (2003) 1 Cr App R 10

43 In our judgment, however, the law has not yet reached a *definition* of intent in murder in terms of appreciation of a virtual certainty. Lord Lane was speaking not of what was decided in *Nedrick* (or in the other cases which preceded it) nor of what was thereafter to be decided in *Woollin*, but of what the law in his opinion should be, as represented by the cl. 18(b) definition. Similarly, although the law has progressively moved closer to what Professor Smith has been advocating (see his commentaries in the *Criminal Law Review* on the various cases discussed above), we do not regard *Woollin* as yet reaching or laying down a substantive rule of law. On the contrary, it is clear from the discussion in *Woollin* as a whole that *Nedrick* was derived from the existing law, at that time ending in *Moloney* and *Hancock*, and that the critical direction in *Nedrick* was approved, subject to the change of one word.

44 In these circumstances we think that the judge did go further than the law as it stands at present permitted him to go in redrafting the *Nedrick*/*Woollin* direction into a form where, as Mr Coker accepts (although we have some doubt about this), the jury were directed to find the necessary intent proved provided they were satisfied in the case of any defendant that there was appreciation of the virtual certainty of death. This is to be contrasted with the form of the approved direction which is in terms of 'not entitled to find the necessary intention, unless ...'

45 Having said that, however, we think that, once what is required is an appreciation of virtual certainty of death, and not some lesser foresight of merely probable consequences, there is very little to choose between a rule of evidence and one of substantive law. It is probably this thought that led Lord Steyn to say that a result foreseen as virtually certain is an intended result. Lord Bridge had reflected the same thought when he had said, in *R v. Moloney* (1985) 81 Cr App R 93, 101, [1985] AC 905, 920C, that if the defendant there had had present to his mind, when he pulled the trigger, that his gun was pointing at his stepfather's head at a distance of six feet and 'its inevitable consequence', then

'the inference was inescapable, using words in their ordinary, everyday meaning, that he intended to kill his stepfather.'

Lord Lane had also spoken in *Nedrick* of an irresistible inference.

46 We also think that on the particular facts of this case, reflected in the judge's directions, the question of the appellants' intentions to save Jonathan from drowning highlight the irresistible nature of the inference or finding of intent to kill, once the jury were sure both that the defendants appreciated the virtual certainty of death '(barring some attempt to save him)' and that at the time of throwing Jonathan from the bridge they then 'had no intentions of saving him'. If the jury were sure that the appellants appreciated the virtual certainty of Jonathan's death when they threw him from the bridge and also that they then



had no intention of saving him from such death, it is impossible to see how the jury could not have found that the appellants intended Jonathan to die.

The extract below reflects on the underlying assumptions which inform the debates about intention:

Nicola Lacey, 'A Clear Concept of Intention: Elusive or Illusory?' (1993)  
56 *Modern Law Review* 621, 623

In considering recent discussions of the concept of intention in criminal law, it will be useful to distinguish between those which emphasise the importance of conceptual analysis, and those which give greater emphasis to the claims of 'ordinary usage'.

... The role of conceptual analysis in debates about the meanings of legal terms such as 'intention' is widely regarded as simply inevitable: since concepts are the basic currency of the intellect, human practices are constructed and carried on in terms of conceptual frameworks which it is incumbent upon us to analyse. Yet conceptual analysis is further motivated by some very familiar and widely held political commitments. These are beliefs associated with the rule of law and indeed the 'principle of mens rea' which forms a central part of criminal law doctrine. Most importantly, they include the idea that criminal law, which imposes significant burdens and risks on citizens, should be as clear, certain, consistent and coherent as possible, so as to enable us to plan our lives around its proscriptions (an idea which depends upon the assumption of a rationalist, anti-determinist conception of human behaviour). Conceptual analysis can contribute to this ideal, so the argument goes, by fixing or explicating our legal concepts as clearly as possible and hence by promoting certainty and predictability.

... At the other end of the spectrum, we have the resort in the face of difficulties of definition to 'ordinary usage'. It should be noted that ordinary usage is itself something of a chimera. For just as 'legal usage' is arguably a relatively specific and autonomous area of discourse, many other areas of linguistic usage develop particular, local and technical meanings for 'ordinary words'. And even within these local areas, usage is fluid and often contested. This notwithstanding, the report to the 'common usage' or the 'ordinary person's understanding' of a particular term is a familiar technique in criminal law – perhaps most famously debated in recent years in the context of the concept of dishonesty under the Theft Act 1968. On the view which appeals to 'ordinary usage', the attempt to articulate and fix particular conceptual analyses in legislative or judicial form is both unnecessary and misguided. It is unnecessary because, in the case of concepts such as intention, dishonesty, violence and so on, 'ordinary people' have a clear if unarticulated sense of what these terms mean. So it can simply be left to the jury or the lay magistrate to apply those ordinary understandings to the case at hand. And it is misguided, because part of the function of criminal laws which employ those terms is precisely to bring to bear on the alleged offender the standards of judgment thought to be buried within and reflected by 'ordinary usage': the thought behind the legal proscription in question is the application of a general rather than a technical standard in this respect. The 'ordinary language' view is therefore motivated by

at least two concerns: the investment of mens rea terms with 'ordinary' or 'common sense' meanings, and the delegation of decision-making power in Crown Court cases to jury rather than to judge.

In the cases of *Moloney*, *Hancock*, *Shankland* and *Nedrick*, the Court of Appeal and the House of Lords engaged in an extended and somewhat tortuous analysis of the idea of intention in the context of murder: their reasoning expressly applies, however, to intention generally in criminal law. Because of the facts of these particular cases, and because of the last major House of Lords decision in the area – the case of *Hyam* – the main practical and conceptual question which arose was how the concept of intention related to that of foresight. In particular, the cases concern whether foresight of consequences as virtually or 'morally' certain constitutes an intent to bring those consequences about. On this basic conceptual issue, as is well known, the three successive cases of *Moloney*, *Hancock* and *Nedrick* failed to take up a clear stance, judicial analysis veering between implicit inclusions and exclusions of 'oblique intent' as a species of intention, often in the space of as little as a few phrases. The really important and interesting feature of the cases from my point of view is, however, not their resounding failure in this respect. It is rather the source of that failure and, more generally, the judicial methodology which led to what I have called the compromise strategy.

Whilst the combined strategy of partial conceptual stipulation and appeal to ordinary usage is on one level confused and contradictory, on another it can be seen as logical and effective. To put it colloquially, it is part of a complex strategy which allows criminal law to keep various balls of different shapes and colours in the air at once: to be a system of imposed social control; a system based on reciprocity of obligations and the recognition of certain universally held rights and interests; a system which reproduces and reinforces certain shared meanings; a system which manages or suppresses certain kinds of social conflict; and many other things besides. Thus, what from one point of view looks like judicial contradictoriness from another looks both astute and highly ideologically effective.

Let us now pursue the implications of this argument for the issue of how we should approach the study of criminal law, and relate the approach implicit in the analysis so far and approaches sometimes labelled 'critical legal studies' and represented by the work of, among others, Mark Kelman, David Nelken and Alan Norrie. The particular debate over appeals to ordinary usage versus conceptual stipulation provides a promising area in which to consider some of the questions raised by critical approaches to criminal law. Typically such approaches reject the claim that criminal law is characterised by some fundamental coherent, if inchoately realised, set of rationalising principles. They thus reject what I take to be the orthodox approach to criminal law scholarship: that is, to see it as the enterprise of eliciting, articulating and, where necessary, prescribing the proper principles informing criminal law, ironing out and rationalising apparent contradictions and exceptions, and paving the way for a clear, consistent and coherent theory and practice of criminal law on the basis of a loosely speaking liberal set of principles. The critical scholar sees this approach as both limited and ultimately distorting in terms of the image of criminal justice which it purveys. In particular, a certain degree of conceptual incoherence and

contradiction is argued to be endemic to criminal law and criminal justice, and part of the role of the criminal law scholar is to confront and attempt to come to grips with this apparent incoherence. Secondly, the conflicts and inconsistencies which arise at the level of criminal law practice and doctrine are seen as symptomatic of deeper, substantive political questions which cannot be effectively submerged by doctrinal rationalisation or by formal conceptual analysis – that which focuses on the clear definition or delineation of terms without addressing itself to underlying political questions. If we are to confront apparent incoherence adequately, we have to go beyond not just the enterprise of the stipulative analyst but also that of the moral analyst; for we cannot assume that all the political issues relevant to an understanding of how criminal law definitions are applied in practice can be explicated in terms of an analysis of the substantive values underlying the concepts in terms of which those definitions are constructed. This means, thirdly, as at least some critical scholars acknowledge, that we have to come to terms with the diversity of roles and meanings which criminal justice has in our society if we are to come anywhere near understanding the significance of a whole range of practical problems which it throws up. These problems range from inconsistencies of enforcement through to what seem on the surface to be conceptual arguments at the level of criminal law doctrine. Not least, we have to come to terms with the ideological and symbolic aspects of criminal law as well as its instrumental functions as one powerful system of social ordering if we are to appreciate both the real significance of these various criminal justice issues and how they relate to one another.

... In analysing the recent cases, my main emphasis was on an interesting and logically problematic combination of appeals to conceptual stipulation and ordinary usage. The argument was that problems with either approach constantly pushed judges back towards the other, in a kind of endless dialectic. At the doctrinal level, this looks incoherent. But once we step back and think about the broader context within which criminal law operates, it begins to look like a rather meaningful strategy which contributes quite directly and comprehensibly to the perceived legitimacy of criminal law. The judges are seen to desist from behaving like legislators; they appeal to common usage in a way which suppresses the extent to which criminal laws are imposed by an exercise of power, emphasising the reciprocity of the system.

The passage below shows the (unconscious) slippage between conceptual and 'ordinary meaning' analysis:

*Lord Goff, "The Mental Element in the Crime of Murder" (1983)*  
104 LQR 30, 43

[I]t is plain that, just as intention can exist without desire, although they frequently coincide, so also intention can exist without foresight of the relevant consequence, although again they frequently coincide. Let us not forget that there can be intention to achieve the relevant result even though that is most unlikely to occur and so cannot be said to



have been foreseen... The idea that intention and foresight of consequences, or probability, necessarily coexist was, if not hit for six, at least hit into the rough by Lord Reid...

In fact people often intend something quite different from what they know to be the natural and probable result of what they are doing. To take a trivial example, if I say I intend to reach the green, people will believe me although we all know that the odds are ten to one against my succeeding; and no one but a lawyer would say that I must be presumed to have intended to put my ball in the bunker because that was the natural and probable result of my shot.

So there can be intention without foresight that the relevant consequence was likely to occur. Conversely, there can be foresight of consequences without intention. To take an example given to me by a friend: when Field Marshal Montgomery invaded France on D-Day, he foresaw that many of the troops under his command would be killed on that very day. Obviously, however, he did not intend that any of them should be killed. But, of course, frequently intention to kill and foresight of consequences do go hand-in-hand...

The narrowing down of the mental element in murder to the concept of 'intention' has generally been welcomed by jurists. But they are discovering that some cases, which they feel ought to be embraced within the crime of murder, do not quite fit within the concept of intention; and so they are embarking on the enterprise of illegitimately expanding the concept of intention to include these cases. The classic example of this technique is to be found in the idea of 'oblique' intention as expounded by Professor Glanville Williams in his textbook of Criminal Law...

... To take a hypothetical case: suppose that a villain... sends an insured parcel on an aircraft, and includes in it a time-bomb by which he intends to bring down the plane and consequently to destroy the parcel. His immediate intention is merely to collect on the insurance. He does not care whether the people on board live or die, but he knows that success in his scheme will inevitably involve their deaths as a side-effect. On the theoretical point, common sense suggests that the notion of intention should be extended to this situation; it should not merely be regarded as a case of recklessness. A consequence should normally be taken as intended although it was not desired, if it was foreseen by the actor as the virtually certain accompaniment of what he intended. This is not the same as saying that any consequence foreseen as probable is intended.

... [T]he trouble with this kind of approach is that it has distorted the plain meaning of the word. To the question - did the defendant mean to destroy the parcel? The answer is, of course, yes, he did. But to the question - did the defendant mean to kill the pilot? The answer is, no, he didn't. Indeed, if he saw the pilot land safely by parachute, he would no doubt be delighted; and so it is absurd to say that he meant to kill him.

The question of intention also arose in the context of the legality of separating conjoined twins Mary and Jodie (*Re A (Conjoined Twins)* (2000): see Section 21.d. and above at Chapter 12.f. and Chapter 20.a.). As Norrie explains, the Court of Appeal's approach offers a good example of orthodox subjectivism being manipulated to satisfy the moral context of the case.



Alan Hurrell, 'From Criminal to Legal Theory: The Mysterious Case of the Reasonable Glue Sniffer' (2002) 63 *Modern Law Review* 538

This narrowing of the law of intention to exclude its indirect form (foresight of the criminal result as a virtual certainty) was recently rejected in a case involving conjoined twins. There it was held that doctors separating Mary and Jodie knowing that Mary would die would intend to kill Mary, their only refuge against a charge of murder being a defence of necessity, or perhaps self defence. Yet necessity, their favoured solution, had not been available on a murder charge for over a hundred years. When, however, it came to dealing with the Human Rights Act 1998, under which everyone has the right not to be intentionally deprived of a right to life [Article 2], the judges held that no doctor could be said to kill intentionally... Intention under the Human Rights Act was given precisely the meaning they had rejected when considering intention under the law of murder. In this case, one can say that the judges first reject, then accept, the existence of a contextual moral threshold concerning how intention is to be judged. They alternate their definition of intention to achieve the desired moral result, that the doctors can operate to save Jodie. The underlying problem is that the legal concept of intention is really out of phase with the intuited moral result. One might say here, rephrasing the old saw, that truly the road to legal hell is paved with good intentions.

In its review of murder, the Law Commission settled for the status quo in terms of interpreting the meaning of intention in criminal law:

The Law Commission (2006) *Murder, Manslaughter and Infanticide* (Law Com No 304), pp. 55–9

3.10 The existing law gives a partial definition of intention. A jury is obliged to follow that definition when it applies. The law also gives guidance on when a jury has the power – or discretion – to find that a result was brought about intentionally, even when the case falls outside the partial definition. It is important, however, to note that juries are not thought to need to have 'intention' explained to them in the trial judge's directions, even though it is an essential element of the crime of murder. Lord Bridge has indicated that:

When directing a jury on the mental element necessary in a crime of specific intent, the judge should avoid any elaboration or paraphrase of what is meant by intent and leave it to the jury's good sense to decide whether the accused acted with the necessary intent.

3.12 At common law, someone must be taken to have intended something if they acted in order to bring it about. In that respect, 'intention' is partly defined by the common law. However, in unusual cases, typically murder cases, that definition has proven to be too narrow. It excludes from murder those cases that should be murder given D's especially high level of culpability.

3.13 Accordingly, the following rule has been developed at common law. The jury *may* – but not *must* – find that the defendant ('D') intended the result if D thought it would be a certain

consequence (barring some extraordinary intervention) of his or her actions, whether he or she desired it or not. Take the following examples:

D is in the process of stealing V's car. V leaps onto the car bonnet to deter D from driving off. D accelerates to 100 miles per hour and continues at that speed. Eventually V's grip loosens and V falls off the car. The fall kills V. D claims he did not intend to kill V or to cause V serious injury but was simply determined to escape come what may.

D is jogging along a narrow path that follows a cliff edge. V is walking slowly ahead of him. D wantonly barges V over the cliff rather than slowing down and asking V to step aside so that D can pass. V is killed by the fall. D says that his intention was to keep running at the same speed at all costs, and he was not concerned with whether V lived or died.

3.14 In both these examples, the jury should be directed that they may find that D intended to kill V or to cause V serious injury, if they are sure that D realised that V was certain (barring an extraordinary intervention) to die or suffer serious injury, if D did what he or she was set upon doing. We would expect the jury to find an intention to kill or cause serious harm in both cases.

3.16 In the Consultation Paper, we offered consultees two choices: effective codification of the existing law or a fuller statutory definition of intention that sought to address a range of problems that might arise in difficult cases.

3.17 Most academic consultees, and some practitioners (such as the Law Society), favoured the fuller statutory definition. By way of contrast, the approach of the existing law was favoured by most judges in the higher courts who responded (including a former Director of Public Prosecutions); the Criminal Bar Association; the London Criminal Courts Solicitors' Association; the Police Federation; Justice; and Liberty. The latter group of consultees did not favour a statutory definition of intention that sought to tackle all foreseeable difficult cases because they thought it would complicate the law and confuse juries.

3.18 We have been persuaded that when dealing with a term of ordinary language, like intention, the latter approach is the right one.

3.19 Someone should be taken to 'intend' a result if they act in order to bring it about. That is the basic definition of intention. It does not demand too much of the prosecution because, as Lord Bingham has put it:

There is no reason to doubt the common sense which tribunals of fact bring to their task. In a contested case based on intention, the defendant rarely admits intending the injurious result in question, but the tribunal of fact will readily infer such an intention, in a proper case, from all the circumstances and probabilities and evidence of what the defendant did and said at the time.

3.20 Very occasionally, there will be cases where the judge believes that justice may not be done unless an expanded understanding of intention is given (two examples were given in paragraph 3.13 above). In such cases, the judge should direct the jury that they may find

intention to kill if D thought that his or her action would certainly (barring an extraordinary intervention) kill, even if the death was undesired.

3.21 We acknowledge that this approach gives the jury an element of discretion in deciding whether, in cases such as those within the examples in paragraph 3.13 above, a verdict of (first degree) murder can and should be returned. The result in such cases will not be wholly determined by legal rules governing the meaning of intention. We believe that it is sometimes necessary and desirable that juries should have that element of discretion if the alternative is a more complex set of legal rules that they must apply. It is the price of avoiding complexity. Complexity must be kept to a minimum if the new structure of homicide offences is to be acceptable to Parliament, the public and the legal profession . . .

3.26 Giving the jury the power to find intention when they find that D foresaw the result as virtually certain widens the fault element in the law of homicide. However, it does this whilst avoiding the much greater uncertainty involved in the use of evaluative terms such as 'recklessness' or 'extreme indifference'. That the law expands the fault element through letting the jury decide when intention should be found, rather than through requiring the jury to apply yet further legal rules governing inference-drawing, can thus be regarded as a strength and not a weakness.

3.27 We recommend that the existing law governing the meaning of intention is codified as follows:

- (1) A person should be taken to intend a result if he or she acts in order to bring it about.
- (2) In cases where the judge believes that justice may not be done unless an expanded understanding of intention is given, the jury should be directed as follows: an intention to bring about a result may be found if it is shown that the defendant thought that the result was a virtually certain consequence of his or her action.

The Commission's decision to leave juries with discretion whether or not to find (oblique) intention has been criticised (Tadros 2006; Ashworth 2007):

Andrew Ashworth, 'Principles, Pragmatism and the Law Commission's Recommendations on Homicide Law Reform' [2007] *Criminal Law Review* 333

Whatever position one holds on whether this extended definition should be regarded as a species of intention or as a separate culpability requirement, it is unfortunate that the Commission leaves open the possibility that a jury may decide that D thought the act was virtually certain to cause death and then go on to decide – for some unarticulated reason – that this does not amount to intention and therefore not to murder 1. In other words, D's foresight that the consequence is virtually certain allows the jury to 'infer intention' or to 'find intention' but does not *require* them to do so. The Commission defends giving this latitude to juries as 'the price of avoiding complexity'. The implication is that leaving juries with this 'moral elbow-room' removes the need to make specific provision for possible

scenarios such as Lord Goff's example of the man who throws his children from a burning building, believing it is virtually certain that they will die or suffer serious injury as a result but also believing that they are virtually certain to die if they remain in the building. However, for an offence as serious as murder, the aim should be to produce a tighter definition that *requires* juries to bracket foresight of virtual certainty with intention proper, leaving these unusual cases to be dealt with by (partial) defences or otherwise.

We now turn to consider the Law Commission's proposed new three tier structure for the law of homicide.

### VI.21.c. Reform: three tiers for homicide?

Nearly all jurisdictions have a ladder of homicide offences. The debate about intention is largely a debate about which culpable killings should be at the most serious end of that ladder. Many civil law jurisdictions, as well as those derived from the common law, rely on more rungs than the two (murder and manslaughter) surviving in England and Wales. However, the Law Commission has set out its preference for a new three-tier structure for homicide law.

#### VI.21.c.i. Murder – one and two?

*The Law Commission (2003) Murder, Manslaughter and Infanticide*  
(Law Commission, 2003, pp. 19–25)

2.1 We recommend the adoption of a three-tier structure of general homicide offences to replace the current two-tier structure of 'murder' and 'manslaughter'. In descending order of seriousness, the offences should be 'first degree murder', 'second degree murder' and 'manslaughter'.

Why a further tier is necessary

2.3 In Part 1 we explained that the law of murder has not developed systematically. Whether or not a killer falls to be labelled as guilty of murder or of manslaughter reflects historical accident more than it does rational principles. Past attempts to introduce greater order, fairness and clarity to the law through statutory reform and codification have failed because Parliament has been faced with more pressing business at the time. Twentieth century reforms, whilst valuable, have been piecemeal. Many of these reforms might have awaited more wide-ranging and integrated law reform were it not for the existence of the death penalty for murder until 1965.

2.4 To bring greater order, fairness and clarity to the law of homicide, the scope of and distinctions between individual homicide offences must be made clearer and more intelligible, as well as being morally more defensible. Achieving this goal has not proved possible within a two-tier structure of general homicide offences. As we have seen, the



constraining effect of the two-tier structure gives rise to a definition of murder that leaves it in one respect too broad and in another respect too narrow.

2.5 The definition is too broad in so far as it encompasses killings committed through an intention to do harm the jury judges to be serious, even if the defendant ('D') had no intention to endanger life and did not imagine that his or her acts might lead to the victim's ('V') death.

2.6 The definition is too narrow in that it excludes cases where D, without intending to kill or to cause serious injury, nonetheless realised that his or her conduct posed a serious risk of causing death and went ahead regardless.

2.7 The over and under-inclusiveness of murder's current definition inevitably has the undesirable consequence of making it unduly difficult to devise a fair sentencing structure for both murder and manslaughter. We believe that the introduction of a further tier into the general law of homicide will do a great deal to resolve this problem.

The Commission proceeds to set out its recommendations for the first two tiers (we return to involuntary manslaughter below).

### P. 30

2.69 We recommend that first degree murder should encompass:

- (1) intentional killings, *and*
- (2) killings with the intent to cause serious injury where the killer was aware that his or her conduct involved a serious risk of causing death.

### SECOND DEGREE MURDER

2.70 We recommend that second degree murder should encompass:

- (1) killings intended to cause serious injury; or
- (2) killings intended to cause injury or fear or risk of injury where the killer was aware that his or her conduct involved a serious risk of causing death; or
- (3) killings intended to kill or to cause serious injury where the killer was aware that his or her conduct involved a serious risk of causing death but successfully pleads provocation, diminished responsibility or that he or she killed pursuant to a suicide pact.

There is much to note here. First is the decision to stick with the current and much criticised 'gbh rule' for first degree murder, which signals a reversal of the commission's earlier position in its consultation paper. The commission is now persuaded by the moral equivalence of killings where death is intended and those where (an undefined) serious injury is intended coupled with an awareness of the serious risk of causing death (para. 2.57). Whilst this would tighten up the current position, whereby intent to cause serious (but not normally fatal) harm such as a broken limb, would suffice for murder, it remains vulnerable to the criticisms set out by Lords Steyn and Goff extracted above in part b. of this

chapter. Are both types of fault truly befitting of the mandatory life sentence? Second is the extremely broad category of second degree murder which is made up of five separate heads of liability. This extends the powerful label of murder to cases of individuals intending to cause 'fear or risk of injury' coupled with an awareness of a serious risk of causing death. This must be fairly commonplace when applied to most deaths caused by medical error, for example, which surely the commission would not want to upgrade from their current (controversial) position within involuntary manslaughter. Similarly, with cases of successful pleas of partial defences and suicide pacts, does the label murder, albeit in the second degree, fit the bill?

This chapter will now move on to consider partial defences to murder which lead to a verdict of manslaughter. Defences usefully illustrate a number of the questions and issues we have sought to raise throughout the book. The contextual reality of criminal law, often contingent as it is on circumstance and chance, is played out in the operation of defences. This includes the curiously hidden yet obvious issues of plea at trial, interpretation of evidence, and the (prejudiced?) perception of particular roles. Stories emerge as cases unfold and 'legal lines' prompt as well as dictate such stories. Even this brief insight into the reality of defences exposes the common call for a coherence or rationalisation of defences as somewhat unrealistic.

#### VI.21.c.ii. Partial defences to murder (one?)

Sometimes a homicide has the hallmark of murder as far as the mental element goes but is regarded as mitigated in some way. With most other offences there is, at least on the surface, a strict division between factors which are taken as affecting the category of offence in which to place the defendant's conduct, and circumstances of mitigation which affect sentence. Sometimes the relevant factor is gravity of harm. For example, assault occasioning actual bodily harm is less serious than assault causing grievous bodily harm. Or mental states may reflect degrees of culpability, as in, for example, the two offences of maliciously inflicting grievous bodily harm and causing grievous bodily harm with intent.

Since any distinction between murder and manslaughter cannot depend on gravity of harm (death is death), and since post-conviction mitigation is ruled out by the mandatory penalty, two partial defences have developed to circumvent the rigidity which dependence on the mental element imposes: these are (i) diminished responsibility and (ii) provocation. They reduce what would otherwise be murder to manslaughter.

In their review of homicide, the Law Commission proposed to upgrade partial defence killings so that they only applied to murder one, and thus if successful, end up in the murder two category. This would have located them in the same category as killings accompanied by either intention to cause serious injury or an intention to cause injury coupled with a serious risk of causing death, which raised obvious issues of unfair labelling. The government's

decision to fast track reform of partial defences (and not homicide) in the Coroners and Justice Act 2009 has rendered this proposed upgrade redundant. The reform process began with the Law Commission's 2004 report on *Partial Defences to Murder*, which was largely a response to the realisation that provocation did not easily accommodate the circumstances of domestic abuse. It was accepted that diminished responsibility functioned relatively well in comparison. Of course, as we have seen, the Commission's brief was broadened in 2005 to rethink the structure of homicide, and to reconsider the place of partial defences within the three-tiered approach. This back-to-front process was hardly ideal, especially when the Commission continued to have their hands tied behind their back in relation to the retention of the mandatory penalty. We will begin here by setting out the history of these partial defences before turning to examine the content of the proposed changes and considering their likely consequences.

### Diminished responsibility

We will outline the history of this partial defence before discussing the changes made in the Coroners and Justice Act 2009.

Until 1957, mentally disordered persons charged with murder had to rely on the general defence of insanity. This was not an attractive option, since it carried with it mandatory admission to a Special Hospital. Disposal is now discretionary under the Insanity (Criminal Procedure) Act 1964, as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991. The insanity defence is also unduly restrictive, given its emphasis on defects in cognitive abilities such as reasoning and knowledge. The M'Naghten Rules require a defendant to have been suffering from a 'defect of reason from disease of the mind' resulting in her not realising the nature and quality of her act or in her failure to realise that it was wrong. This does not allow for the psychiatrically recognised emotive disorders, nor those involving lack of self-control. The vast majority of mentally disordered persons accused of murder will continue to rely on diminished responsibility.

### Homicide Act 1957 s. 2

(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

(2) On a charge of murder it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

The number of annual convictions for manslaughter by reason of diminished responsibility has decreased in recent years to around 20 (see discussion in Appendix B of Law Commission 2006). In practice, most successful pleas of

diminished responsibility succeed as a result of prosecutorial acceptance. However, notions of 'abnormality of mind' and 'substantially impaired' invite discretion and disagreement, represent sites for strategic decision-making, and revolve around the presentation and interpretation of expert evidence. In practice, the definition of the defence is in the hands of expert witnesses, whose sympathies understandably rest with defendants struggling with various mental states and the spectre of the mandatory life sentence for murder.

Although the Home Office's general policy is to encourage diversion of mentally disordered offenders from the criminal justice system (Home Office Circular 66/90), those who commit homicide are unlikely to benefit from this. The introduction of a mandatory life sentence for a second serious offence in section 2 of the Crime (Sentences) Act 1997 sits awkwardly with this policy (see now the Powers of Criminal Courts (Sentencing) Act 2000, s. 109). The 1997 Act also contains a provision to allow courts to combine a prison sentence with an immediate direction that the offender be detained in hospital and thus subject to Mental Health Act restrictions (s. 46, inserting s. 45A in the Mental Health Act 1983). The Criminal Justice Act 1991 imposes a duty on a court to obtain and consider a medical report before passing any custodial sentence on a person who appears to be mentally disordered (s. 4). Despite this, a large proportion of the prison population suffers from mental disturbance. In relation to sentencing in diminished responsibility cases there is, as Ashworth points out, 'a clear compromise between punishment and treatment' with the sentence reflecting the responsibility element once the mental abnormality is discounted (Ashworth 2000, p. 110).

Even where the prosecution accepts the defence of diminished responsibility, the trial judge may insist on the pursuit of the murder charge, as occurred in the trial of Peter Sutcliffe. Shortly after his conviction for murder he was transferred to a Special Hospital because of his mental disorder.

*The case was set up in terms of whether Peter Sutcliffe was a lunatic or a liar; whether the doctors were correct in believing that he was a paranoid schizophrenic who felt he had a 'divine mission' to kill prostitutes, or whether he 'was a clever, callous murderer who had tried to feign insanity'.*

The case was set up in terms of whether Peter Sutcliffe was a lunatic or a liar; whether the doctors were correct in believing that he was a paranoid schizophrenic who felt he had a 'divine mission' to kill prostitutes, or whether he 'was a clever, callous murderer who had tried to feign insanity'.

To back his argument that he was a liar... [the prosecution] initially pointed to three different kinds of evidence: first, that Sutcliffe had never mentioned the 'divine mission' during his hours of police interrogation; second, that while in custody, one prison officer had heard Sutcliffe plan to feign madness, while Sutcliffe had told another prison officer how amusing it was that the doctors thought him mad; third, that the last six women killed by Sutcliffe were not prostitutes but 'absolutely respectable' women, thus refuting Sutcliffe's claim of a 'divine mission'...



The prosecution... developed two further arguments to substantiate its claim that Sutcliffe was not suffering from diminished responsibility: first, that Sutcliffe's killings were 'understandable' in terms of rational, reasonable motives; second, that there was a sexual component to six of the attacks. The latter contradicted the divine-mission argument... and offered a reason for the attacks (sexual provocation)...

One disturbing aspect of the trial was the way in which the prosecution developed its argument that Sutcliffe's killings were 'understandable' in terms of rational motive and motivation... in the case of Sutcliffe, as in many other cases of male violence against women, the language of law and psychiatry met in a common 'understanding' of Sutcliffe's acts, in terms of female precipitation.

Both the prosecution and the defence, despite different objectives (the one to establish Sutcliffe's 'reason', the other to establish his 'diminished responsibility'), took the actions of certain women in Sutcliffe's life as the key to understanding and explaining his behaviour... For the prosecution, Sutcliffe was responsible for his actions in the sense of having rationally responded to the behaviour of... a prostitute who 'cheated' him of £5, his wife... and, to a certain extent, his mother. The fact that these women had acted to precipitate his behaviour, however, effectively removed his responsibility. For the defence, Sutcliffe was not responsible for his actions because he was acting under a 'divine mission'. To the psychiatrists, this mission was 'understandable' in terms of the behaviour of certain women (again the cheating prostitute, [his wife] and his mother)...

Given that the trial of Sutcliffe turned out to be more a trial of prostitutes... and of psychiatry, would it have been better if Judge Boreham had accepted a plea of diminished responsibility, thereby curtailing the length of the trial? Sutcliffe may or may not be a paranoid schizophrenic; I do not and cannot know. I would argue, however, that the greatest cause for concern in the conduct of the trial was not the ultimate verdict, but the means by which that verdict was arrived at.

Assumptions about gender differences infuse the conduct and outcome of trials in which diminished responsibility is raised, as discussed in depth by Hilary Allen (1987). She argues broadly that while mental disorder is seen as abnormal in men, it is assumed to underlie the criminal (and other) behaviour of women, who are thought 'by nature' not to be rational. She concludes that this is unfair to both: women are unduly pathologised, while men are treated punitively when they are genuinely mentally ill.

Criminal trials involve a construction of fact and law which may not accord at all with other readings. *Tandy* (1989) is a good example. The defendant appealed unsuccessfully against her conviction for murder, arguing that she should have been allowed a defence of diminished responsibility. The 'legal' significance of the case is that alcoholism cannot amount to diminished responsibility unless the first drink of the day was involuntary (but see the discussion of *Wood* (2008) below). The report of the *Tandy* case tells us something of the social context of the murder, but the legal construction ignores this. The victim was the defendant's 11-year-old daughter. Shortly before she was killed, the daughter

*Tandy* shows how the partial defences to murder are of limited assistance to women who act in response to male violence. It would be interesting to compare the legally constructed 'biographies' of *Moloney* (see Section VI.21.b. above) and *Tandy*. The House of Lords was clearly able to identify with the mess which *Moloney*, a soldier, had got himself into while drunk, while the Court of Appeal shows no understanding of the emotional trauma *Tandy* must have experienced when she discovered her husband had abused her daughter.

Confusion arises when abnormal behaviour may be caused by a combination of diminished responsibility and intoxication. In *Dietschmann* (2003) the House of Lords sought to clarify the appropriate jury direction. Here the defendant killed a man whilst suffering from a mental abnormality, namely depressed grief reaction to a bereavement. He was also at the time heavily intoxicated. The trial judge directed the jury that such a defence could only succeed if the defendant could establish, on a balance of probabilities, two things: first, that he would have killed even if he was not intoxicated, and secondly that he would have been under diminished responsibility when doing so. The jury convicted and this was upheld by the Court of Appeal. In holding that there was no requirement to satisfy the first issue, this amounts to a widening of the scope of diminished responsibility.

[pp. 1216-17]

**Lord Hutton:** In a case where the defendant suffered from an abnormality of mind of the nature described in s 2(1) and had also taken alcohol before the killing and where (as the Court of Appeal held in this case) there was no evidence capable of establishing alcohol dependence syndrome as being an abnormality of mind within the subsection, the

meaning to be given to the subsection would appear on first consideration to be reasonably clear. I would read the subsection to mean that if the defendant satisfies the jury that, notwithstanding the alcohol he had consumed and its effect on him, his abnormality of mind substantially impaired his mental responsibility for his acts in doing the killing, the jury should find him not guilty of murder but (under sub-s 3) guilty of manslaughter. I take this view because I think that in referring to substantial impairment of mental responsibility the subsection does not require the abnormality of mind to be the sole cause of the defendant's acts in doing the killing. In my opinion, even if the defendant would not have killed if he had not taken drink, the causative effect of the drink does not necessarily prevent an abnormality of mind suffered by the defendant from substantially impairing his mental responsibility for his fatal acts.

[pp. 1221-2]

(i) Where a defendant suffers from an abnormality of mind arising from arrested or retarded development of mind or inherent causes or induced by disease or injury and has also taken drink before the killing, the abnormality of mind and the effect of the drink may each play a part in impairing the defendant's mental responsibility for the killing, (ii) Therefore the task for the jury is to decide whether, despite the disinhibiting effect of the drink on the defendant's mind, the abnormality of mind arising from a cause specified in sub-s 2(1) nevertheless substantially impaired his mental responsibility for his fatal acts, (iii) Accordingly it is not correct for the judge to direct the jury that unless they are satisfied that if the defendant had not taken drink he would have killed, the defence of diminished responsibility must fail. Such a direction is incorrect because it fails to recognise that the abnormality of mind arising from a cause specified in the subsection and the effect of the drink may each play a part in impairing the defendant's mental responsibility for the killing...

[pp. 1226-7]

In his submissions on behalf of the Crown Mr Perry submitted that it was the policy of the criminal law that self-induced intoxication did not constitute a defence to a criminal charge, and that if the appellant's submissions were correct an intoxicated disinhibited killer would be excused. I am unable to accept this argument. The policy of the criminal law in respect of persons suffering from mental abnormality is to be found in the words of s 2, and the section provides that if a person suffers from such abnormality of mind as substantially impairs his mental responsibility, he should not be convicted of murder but of manslaughter. As my noble and learned friend, Lord Rodger of Earlsferry, observed in the course of Mr Perry's submissions, a brain-damaged person who is intoxicated and who commits a killing is not in the same position as a person who is intoxicated, but not brain-damaged, and who commits a killing.

Therefore I would answer the first part of the certified question in the negative. As regards the second part of the question, without attempting to lay down a precise form of words as the judge's directions are bound to depend to some extent on the facts of the case before him, I consider that the jury should be directed along the following lines:



'Assuming that the defence have established that the defendant was suffering from mental abnormality as described in s 2, the important question is: did that abnormality substantially impair his mental responsibility for his acts in doing the killing? You know that before he carried out the killing the defendant had had a lot to drink. Drink cannot be taken into account as something which contributed to his mental abnormality and to any impairment of mental responsibility arising from that abnormality. But you may take the view that both the defendant's mental abnormality and drink played a part in impairing his mental responsibility for the killing and that he might not have killed if he had not taken drink. If you take that view, then the question for you to decide is this: has the defendant satisfied you that, despite the drink, his mental abnormality substantially impaired his mental responsibility for his fatal acts, or has he failed to satisfy you of that? If he has satisfied you of that, you will find him not guilty of murder but you may find him guilty of manslaughter. If he has not satisfied you of that, the defence of diminished responsibility is not available to him.'

The House remitted the case to the Court of Appeal for it to decide whether to allow the appeal, quash the conviction and order new trial, or substitute a verdict of manslaughter. This more generous view of the defence echoes the similarly expansive approach to provocation (see below). The decision in *Dietschmann* also called into question the strict approach to 'voluntary' consumption of alcohol by those suffering with alcohol dependency syndrome which underpinned the decision in *Tandy* above.

### *R v Dietschmann* [2010] 1 Cr App R 14

The appellant was an alcoholic who drank on average four to five one-litre bottles of strong cider daily. After a day when he had consumed two to three litres of cider, several cans of lager, brandy and vodka the appellant stayed at the deceased's home. During the night he woke up to find the deceased making unwanted sexual advances towards him. The appellant lost his self-control and struck the deceased repeatedly with a meat cleaver, killing him. At his trial for murder the appellant relied on the defence of diminished responsibility. Four expert witnesses all agreed that the appellant was suffering from alcohol dependency syndrome although they were divided as to whether the appellant had suffered brain damage as a result. The judge directed the jury that the defence of diminished responsibility was only available to the appellant if his consumption of alcohol was truly involuntary, i.e. if he could not have acted otherwise. Giving in to a craving, the judge said, was not an involuntary act, even if it was difficult to do otherwise. An alcoholic who accepted a drink after he had reached his normal quota was not drinking involuntarily. The appellant was convicted of murder. He appealed on the ground that the judge had been wrong to direct the jury that an appellant who succumbed to a craving was, by that fact alone, acting voluntarily.



**Sir Igor Judge P:** 41 In our judgment *Dietschmann* requires a re-assessment of the way in which *Tandy* is applied in the context of alcohol dependency syndrome where observable brain damage has not occurred. The sharp effect of the distinction drawn in *Tandy* between cases where brain damage has occurred as a result of alcohol dependency syndrome and those where it has not is no longer appropriate. Naturally, where brain damage has occurred the jury may be more likely to conclude that the defendant suffers from an abnormality of mind induced by disease or illness, but whether it has occurred or not, logically consistent with *Dietschmann*, the same question (i.e. whether it has been established that the defendant's syndrome is of such an extent and nature that it constitutes an abnormality of mind induced by disease or illness) arises for decision. That is for the jury. If the syndrome does not constitute such an abnormality of mind, diminished responsibility based on the consumption of alcohol will fail. If, on the other hand, it does, the jury must then be directed to address the question whether the defendant's mental responsibility for his actions at the time of the killing was substantially impaired as a result of the syndrome. In deciding that question the jury should focus exclusively on the effect of alcohol consumed by the defendant as a direct result of his illness or disease and ignore the effect of any alcohol consumed voluntarily. Assuming that the jury has decided that the syndrome constitutes an abnormality of mind induced by disease or illness, its possible impact and significance in the individual case must be addressed. The resolution of this issue embraces questions such as whether the defendant's craving for alcohol was or was not irresistible, and whether his consumption of alcohol in the period leading up to the killing was voluntary (and if so, to what extent) or was not voluntary, and leads to the ultimate decision, which is whether the defendant's mental responsibility for his actions when killing the deceased was substantially impaired as a result of the alcohol consumed under the baneful influence of the syndrome.

42 The problem with Mitting J's second limb direction is that whether the appellant was suffering from alcohol-induced brain damage or not, the experts agreed that the alcohol was consumed by a man suffering from alcohol dependency syndrome. When he directed the jury that 'giving in to a craving is not an involuntary act, even if it is very difficult to do otherwise', he was implying that there was no such thing as an irresistible craving and the observation might well have been regarded as a direction to conclude that any consumption of alcohol by the appellant as a result of a craving did not, or could not, give rise to the defence. When Mitting J added that a defendant 'later choosing to accept a drink after he has reached his normal quota, is not drinking involuntarily' he was in effect directing the jury to accept that such a choice was voluntary even when made by an alcoholic. Taken together, these observations implied that unless every drink consumed that day by the appellant was involuntary, his alcohol dependency syndrome was to be disregarded. In our judgment they are inconsistent with the analysis of the relevant principles consequent on the decision of the House of Lords in *Dietschmann* as we have endeavoured to explain them.

43 In our judgment this appeal must be allowed and the conviction for murder quashed.

The legal categorisation of defences to murder fails in a number of ways to accommodate women defendants. Or, to put it another way, in so far as they cater for anyone they cater for men. One difficult dilemma has been the extent to which women should argue that pre-menstrual tension (PMT), usually known as pre-menstrual syndrome (PMS), should be pursued as an excusing factor. The only legal category of defence into which it can be fitted is diminished responsibility, but this has unfortunate overtones in relation to the way women offenders may be too readily seen as psychiatric cases (see *Ahluwalia* (1992) below).

Provocation more closely resembles the nature of a PMS defence but, as we see below, the reference to the reasonable man is not very helpful. A successful defence of diminished responsibility stemming from PMS was pleaded in *Smith* (1982). Smith had been sentenced 30 times before for criminal activity, ranging from theft to trespass to arson and assault. She was sentenced to probation after she persuaded the court that PMS turned her into a 'raging animal each month and forced her to act out of character'. A year later she was charged with threatening to kill a police officer, for which a defence of diminished responsibility is not of course available. Evidence of PMS led to a mitigation of her sentence to one of probation.

The attempt to define PMS in medical terms began in 1931 when Frank (1931, pp. 1053–7) described 15 cases of the syndrome. The primary symptom was described as 'a feeling of indescribable tension from seven to ten days preceding menstruation which in most instances continues until the menstrual flow occurs'. Since then the medical profession has been divided on whether the syndrome is a psychiatric disorder. The syndrome does appear to be separate from other forms of psycho-pathologies. In terms of its use as a criminal defence it may be better to view it as a category of its own rather than as a form of diminished responsibility or a type of provocation. But this would have its own dangers – rather like the offence of infanticide, it would over-pathologise and obscure the effects of socio-economic and structural difference between men and women.

Despite often being pleaded together, and the common law blurring of the boundaries between them (see *R v. Smith* (2000) below) there are good reasons why diminished responsibility should be seen as less culpable and thus excused to a greater degree than provocation. The option of creating an offence of 'diminished responsibility killing' was rejected by the Law Commission largely on the basis of its perceived illogicality for juries having to choose between two different outcomes (2006, para. 5.104). This rather rests on a lack of faith in juries, when it is neither obvious nor evidenced that separate treatment for diminished responsibility would be beyond the wit of juries to understand. The Commission favoured minor modifications rather than a major redesign by replacing 'abnormality of mind' with 'abnormality of mental functioning'. The Commission's proposal to extend this further to include 'developmental immaturity' in order to accommodate disordered children who kill has not

been taken forward. We can note that this would have risked pathologising young people and potentially unfairly labelling them as mentally abnormal. Reference to the stipulated conditions in section 2 of the Homicide Act has been replaced by the broader notion of 'recognised medical condition'.

*Coroners and Justice Act 2009, s. 52 Persons suffering from diminished responsibility (England and Wales)*

- (1) A person ('D') who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which –
- (a) arose from a recognised medical condition,
  - (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
  - (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
- (1A) Those things are –
- (a) to understand the nature of D's conduct;
  - (b) to form a rational judgment;
  - (c) to exercise self-control.
- (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.

The burden of proof remains with defendants, which according to the Law Commission's report is largely based on the practical reality whereby such pleas are commonly accepted by the prosecution. Of course, not all such pleas are accepted, so this still leaves us with a group of cases where the defendant shoulders the burden. It is not clear why the mentally-disordered (as opposed to the provoked) defendant should shoulder this burden, and also whether it remains vulnerable to challenge under Article 6 of the ECHR.

### Infanticide

The creation of the offence/defence of infanticide provides a good example of the construction of a legal category from a socially created expectation about women's role as carers of babies:

*Infanticide Act 1938, s. 1 (as amended by section 57 of the Coroners and Justice Act 2009. Changes in square brackets)*

- (1) Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the

child, then, [if] the circumstances were such that but for this Act the offence would have amounted to murder [or manslaughter], she shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

In any year, there are rarely more than half a dozen convictions for this offence. For Allen, infanticide reflects the legal endorsement of preconceptions of sexual differences and serves to pathologise women:

*Hilary Allen 1987 Justice Imbalanced: Gender, Psychiatry and Judicial Decisions* (Open University Press), pp. 27–8

As a chargeable offence, infanticide is unique in several ways. First, it is the only offence in which mental abnormality is a positive precondition for conviction . . . and not, as elsewhere, a defence or partial defence against conviction. Infanticide is thus an offence that can only be committed by an abnormal subject. Second, the exemption from full responsibility is unique in that it does not seem to depend on the usual logic of criminal responsibility. As the wording stands, the reduction of the offence does not require that killing of the child is actually related to the imbalance of mind. Finally this legislation is unique in the very obvious links that it makes between female biology and legal pathology. It implies that the normal conditions of childbirth and lactation are inherently disruptive of the rational subjectivity that the law requires . . .

It is tempting, of course, to make much of the infanticide provisions. Their interlinking of femininity and psychopathology is so transparent and their presentation of female pathology as essentially debilitating to legal subjectivity so accessible. They seem to promise an illustration par excellence of the psychiatrisation of female crime . . .

The criminal law is quite capable of generating discrepancies of gender without recourse to any 'special provisions' . . . The analysis of those cases leaves the important question unanswered: how is it that legal discourse allows sexual divisions to arise so pervasively within the law despite the stated neutrality of the legal subject, and the legislation's declared indifference to the gender of legal subjects?

The answer is, in one sense, perfectly simple. The normal centrality of mens rea as a necessary component of any offence requires the agents of the law to 'look into the mind' of the defendants whom they judge, and to make their own assessment of what mental state must have accompanied the alleged offence . . . [I]n looking into the mind of the defendant, the agents of the law quite routinely – one might almost say inevitably – make commonsense assumptions about human nature and motivation which are powerfully influenced by preconceptions of sexual differences. Commonsense tells us that there are no ungendered neutral subjects . . . Yet this is not the whole of the story. In addition to underlining the ways in which legal agents do in fact take gender considerations into account when making decisions about legal culpability, I want to make a rather stronger point: that despite its claims to the contrary, judicial discourse actually requires them to do so.



The Law Commission considered infanticide as part of its review of homicide (2006). It decided that evidence still supported the lactation theory (the possible link between lactation and psychiatric disorder) and that the 12 months age limit remained appropriate. They also discussed (and dismissed) the possibility of merging infanticide into diminished responsibility:

*The Law Commission (2006) Murder, Manslaughter and Infanticide (Law Com No 304), pp. 164-5*

8.35 Some consultees, notably the Royal College of Psychiatrists, argued that infanticide should be subsumed within diminished responsibility on the basis that postpartum psychiatric disorders should not in principle be distinguished from other disorders when determining criminal liability. Others argued that singling out mental disorders in biological mothers for special treatment tended to 'pathologise' motherhood, and reflected a broader tendency by lay and medical discourse 'to represent women – especially in activities connected with reproduction – as lacking in responsibility'.

8.36 We do not consider that infanticide should be subsumed within diminished responsibility. Infanticide cases are unique given the status of the perpetrator and victim, and the link between childbirth and some kinds of psychiatric disorder. We consider that the lesser category of offence, and consequently the more lenient sentences that are customary, are warranted. If infanticide were merged with diminished responsibility, it would be classed as 'second degree murder' under our proposals. We do not believe that such a serious offence label (and possibly less lenient sentence) is appropriate.

8.37 Further, merger of infanticide with diminished responsibility presents procedural problems concerning the burden of proof. The burden on the defendant to prove psychiatric disorder in order to successfully plead diminished responsibility may be impossible to discharge in neonaticide cases (the killing of a baby within 24 hours of his or her birth). In such cases, the mother may give birth alone and suffer from a transient disorder. At our meeting on infanticide Professor Brockington, Dr Margaret Oates and Dr Marks all expressed concern that neonaticide cases must be covered by a special defence because the mother's culpability is very low. Further, the mother is in a particularly difficult position with regard to discharging the burden of proof.

8.38 The offence/defence of infanticide has caused very few problems in practice, as evidenced by the lack of case law in this area. Further, it involves very few cases. As stated in the CP, 'it does not seem worth countenancing the perhaps unforeseeable changes that would result from an insistence that such cases be dealt with under section 2 of the Homicide Act 1957'.

8.39 Finally, we do not believe that the offence/defence of infanticide 'pathologises' women or motherhood. Nor does it reflect or reinforce a perception in law that women are less responsible for their actions. Rather, the offence/defence of infanticide recognises that some women do suffer from psychiatric disorders triggered by childbirth (and very possibly lactation), and as a result may kill their infants. We do not believe it serves the feminist

or other causes to increase the severity of the offence these mothers have committed, nor the sentence that they may face, by merging infanticide with diminished responsibility. In this unique situation there is only the surface appearance of discrimination: the substantive offence ensures substantive justice.

The Commission's unease with applying the label 'murder' to infanticide is in contrast to its recommendations for upgrading successful pleas of partial defences to second degree murder. We now turn to consider the difficulties of accommodating pleas of provocation within the law of homicide.

### Provocation

Provocation, like diminished responsibility, is a partial defence to murder, so that a successful plea results in a conviction of manslaughter. The culmination of the reform process which began with the Law Commission's review has led to the abolition and replacement of provocation with a partial defence of 'loss of control' in sections 54–55 of the Coroners and Justice Act 2009. Before examining the re-designed defence, we will begin by tracing the problems which provocation has posed for the common law which amply demonstrates the case for reform.

Historically, provocation existed at common law but is now partially defined by statute, which makes clear that there are two separate questions – did the provocation cause the defendant to lose her self-control (the subjective element) and was the provocation such that a reasonable person would have acted similarly (the objective element).

### Common Law (1922, s. 3)

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

Section 3 supplements rather than replaces the common law of provocation, and this hybrid construction has contributed to the uncertainty surrounding its operation. As Norrie (2002, p. 547) explains, provocation:

has both a factual and regulative aspect. The factual aspect concerns whether the accused in fact lost his self-control... [and] the regulative aspect is the requirement that what was said or done should have been enough to make the reasonable person do as the accused did.

Two contentious questions are thus posed. First, does the loss of self-control have to be sudden? Secondly, who is the reasonable person against whom the defendant's actions have to be compared? Much debate has surrounded Lord Diplock's suggested direction in *Camplin* (1978) that the reasonable man is 'a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but on other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him'. Some have doubted whether these two issues of 'provocability' (one's self-control) and 'provocativeness' (the gravity of the provocation) are susceptible to such neat separation (Norrie 2002).

The discussion below focuses on the gendered nature of the defence, but it should be noted that the intense debate about provocation, which these arguments have set in train, has touched a raw nerve in the delicate balance between sense and nonsense on which the defence rests.

Female victims are far more likely to have known their killer: 73 per cent of female victims knew the suspect at the time of the offence, with 48 per cent being killed by their partner or ex-partner. This compared with 48 per cent of males who knew the main suspect and 13 per cent who were killed by their partner or ex-partner (Home Office 2009b, p. 11).

In the case of partner killings there has nearly always been a history of marital discord and violence, particularly male violence. However, this does not mean that the killings represent an incident of 'normal' violence gone wrong. One characteristic of the male killers is that they are often separated from their partner and the killings arise from disputes about exclusivity and child custody. Women, on the other hand, do not usually kill from jealousy or following the termination of a relationship. When they kill, there has usually been a high degree of violence within an ongoing relationship.

Fiona Brookman and Mike Maguire (2003) 'Reducing homicide: Summary of a Review of the Possibilities' RDs Occasional Paper No 84 (Home Office)

Researchers have consistently found that a high proportion of female victims of domestic homicide have previously experienced domestic violence. It has therefore been suggested that one important avenue for reducing domestic homicide is to identify and intervene with female victims of domestic violence. However, in practice the proportion of reported cases of domestic violence which ultimately result in a homicide is very small. Researchers have therefore focused on identifying those groups of domestic violence victims which appear to be associated with fatal outcomes. From the available evidence, much of which emanates from North America, a number of indicators can be identified as most appropriate to assessing risk of homicide within the domestic setting. The following list, which is adapted from Campbell (1995:111), includes some which are undoubtedly more applicable to the US

than the UK, such as access to guns. Most are likely to be as important in the UK context as in the US, although this cannot be confirmed without further research.

- Access to/ownership of guns
- Displaying weapons such as knives within the household
- Threats with weapons
- Threats to kill
- Serious injury in prior abusive incident
- Threats of suicide by male partner (in response to female partner's threats to leave)
- Drug and alcohol abuse by male partner
- Forced sex of female partner
- Obsessiveness/extensive jealousy, extensive dominance

From other research, we might add to this list:

- Women's (survivors') predictions of future risk and its likely severity
- Evidence of stalking
- Recent ending of a relationship instigated by female partner

The research findings suggest that predictions of serious domestic violence can be refined to a sufficient extent to allow targeted interventions, but that the scope for predicting domestic homicide – and hence for specific interventions – seems much more limited. Even so, there is evidence of some links between the two, suggesting that a significant reduction in the overall frequency of domestic violence (especially that involving serious and repeated assaults) would be accompanied by at least a small reduction in the number of homicides. The research literature on reducing levels of domestic violence has tended to advocate changes within the criminal justice system (e.g. through encouraging prosecutions and specific pieces of legislation, for instance to deter stalking), and effective joint working with other agencies such as the police, probation service, social services and voluntary sector providers. If these approaches are informed by a better understanding of the risk factors associated with serious harm within a domestic setting, they would appear to be the most effective means of achieving these double aims.

Through a series of high-profile cases in the 1980s, appellate courts struggled to accommodate the newly discovered social reality of domestic violence, including the fact that women sometimes kill their abusive partners, and of the gendered basis of legal constructions of provocation as a partial defence. Contemporary understanding of the phenomenon of domestic violence has been influenced by the emergence of Battered Wife Syndrome (BWS). This was developed by a psychologist to map the stages through which a woman subjected to long-term physical abuse within a relationship might pass (Walker 1984). The syndrome postulates that, after repeated violence, a woman is likely to become immobilised, passive and unable to act to escape the oppression of



her situation. It is often remarked that a woman should leave a violent relationship rather than endure it; BWS offers one explanation as to why she might not. The advantage of BWS is that it is a medicalised specialist term and as such might be admitted as expert evidence. It is difficult otherwise to bring before a court generalised evidence about domestic violence or social and economic disadvantage – courts are assumed to need no help in understanding the ‘normal’ world. Yet the acceptance of evidence of BWS carries with it all sorts of problems. For example, by rendering matters into the rarefied sphere of the expert, domestic violence is seen as unusual; the woman’s own experiences are taken over by the expectations of others; the issue is driven towards the ‘psychological/iatric’ professions and discourses and thus may appear more suitable for diminished responsibility with all the unfortunate associations of ‘only women who are mad commit offences’; the approach is internally inconsistent because BWS at once speaks of the woman’s helplessness while explaining the fact that she has killed; and it distracts attention from all sorts of other valid reasons why a woman might stay in a violent relationship, or ignore the fact that she might well have made many attempts to leave (Sheehy, Stubbs and Tolmie 1992).

Evidence of a woman’s mental state, including that she was suffering from BWS, is admissible in order to assess both the ‘subjective’ and ‘objective’ aspects of the provocation defence. In other words, the evidence can be used to help support the claim that she lost her self-control and that a reasonable woman would have also lost hers in the circumstances (*Ahluwalia* (1992)).

Most commentators agree that the provocation defence is applied inconsistently by juries and judges (Ashworth 2003, p. 272; McColgan 1993, p. 509, amongst many). Nicolson analyses (below) the way the Court of Appeal represented the ‘stories’ of Sara Thornton and Kiranjit Ahluwalia, whose cases dominated the debate about battered women who kill in the UK. The article was written before Sara Thornton’s second appeal (1996), which was allowed on the grounds that fresh medical evidence of personality disorder and BWS would have led to different directions to the jury. A retrial was ordered and a verdict of manslaughter was returned. Apart from the observations that Nicolson makes, the *Thornton* and *Ahluwalia* cases underline the difficult choices facing defence lawyers as to whether to concentrate on diminished responsibility (as in Thornton’s first trial) or on provocation. If diminished responsibility is not raised by the defence, no direction will be given to the jury, whereas a judge is obliged to direct the jury on provocation if there is evidence on which to base such a verdict. New rules on disclosure both restrict the prosecution’s duty of disclosure and introduce for the first time a defence duty to disclose (Criminal Procedure and Investigations Act 1996, ss. 3 and 5). This may relieve the prosecution of a duty to disclose evidence relevant to provocation where the defence has indicated a different line of defence. The Act compounds the difficulties already faced in choosing the line of defence on which to concentrate. Going for a full defence, such as alibi or self-defence, might undermine a claim of provocation.

The 1996 Act allows adverse inferences to be drawn where the defence fails to satisfy the disclosure duty in one of the following ways: by defaulting altogether; by setting out inconsistent defences; or by putting forward a different defence at trial (s. 11) (see Sprack 1997).

Donald Hudson (the following material originally appeared in *Telling Tales: Gender Discrimination, Gender Construction and Battered Women Who Kill* (1995); *Feminist Legal Studies* 1(1/2) 185–206, 187–96, and is here reprinted by permission of Ann Arbor: Charles Publishers)

For some time now the inaccessibility of criminal law defences to battered women who kill their batterers has received much attention. This inaccessibility has been shown to stem from two forms of gender discrimination. In terms of 'double standard' discrimination, women are expected to conform to standards of behaviour not expected of men. More subtly, 'formal equality' discrimination involves the application of standards of behaviour which, albeit formally gender neutral, are premised upon the experiences and behavioural patterns of men.

Recently feminist analysis has also begun to focus on the legal construction of women. Even when not directly discriminatory, law, and its personnel are said to disseminate frequently sexist and oppressive ideas of what it means to be a 'real woman', how she behaves and what social role she performs. These constructs are reinforced by rewarding women who match them and punishing those who do not. This educative process helps to shape the thoughts and actions of women, if not to construct their very being.

[The cases of] Sara Thornton and Kiranjit Ahluwalia . . . illustrate the complex relationship between gender construction and gender discrimination: how discrimination may flow from and reinforce gender constructions; and how the eradication of gender neutral bias may be replaced by a subtle process of gender construction in which female experiences and differences are considered, but in the form of sexist stereotypes which reinforce the oppression and control of women in general.

[Their] stories are sufficiently similar to justify comparison. Both suffered numerous beatings and death threats from jealous and possessive husbands, although Kiranjit's ordeal lasted much longer, and included rape and sexual abuse . . . Deepak Ahluwalia had started an affair and was about to leave Kiranjit. Malcolm Thornton, on the other hand, was a chronic alcoholic. Both women killed their husbands following provocative conduct. Sara stabbed Malcolm after he had made wounding remarks, threatened to kill her and taunted her with her own helplessness. Kiranjit set Deepak alight a few hours after he had declared their marriage to be over, threatened to beat her and placed a hot iron against her face.

At both murder trials, their defences alleging no mens rea, provocation and diminished responsibility were rejected. On appeal, both appellants attacked the law on provocation, which requires that defendants actually lose their self-control – the subjective condition – and that a reasonable person sharing the defendant's age, sex, and any other characteristics relevant to the type of provocation would have done so – the objective condition. In particular, both appeals alleged that the *Duffy* [1949] interpretation of the subjective condition,

which required a 'sudden and temporary loss of self-control' and barred the defence whenever there is 'time for cooling' between provocation and the killing, discriminates against battered women since they rarely act instantaneously following provocation, but after a 'slow burn' of fear and desperation.

But there the similarities between the two cases end. Whereas, in *Thornton* the Court of Appeal upheld the *Duffy* interpretation as authoritative and comprehensible to a jury, in *Ahluwalia* it subtly and surreptitiously rendered the law more amenable to battered women by holding, albeit obiter, that a 'cooling time' was no longer an absolute legal bar to the defence, merely evidence that self-control had not been suddenly lost. In addition, the *Ahluwalia* court also amended – again obiter – the objective condition of provocation so as to include the perspective of defendants suffering from so-called battered woman syndrome.

Both reforms are limited. Nevertheless, the *Ahluwalia* decision stands in stark contrast to the unsympathetic *Thornton* judgment... By contrast Kiranjit Ahluwalia's appeal was upheld on the grounds of fresh evidence of diminished responsibility... [and at] her retrial she was freed.

... [A]n important factor in the two courts' differing sympathies... was their judgments of Sara Thornton and Kiranjit Ahluwalia as women.

The dominant societal standard against which women are judged can be termed that of 'appropriate femininity'... [which] is constructed by a number of disparate discourses clustered around three core ideas: domesticity, sexuality and pathology, each of which is defined not so much in the abstract, but in contrast to their masculine corollaries... [T]hese binary oppositions involve hierarchies, with the masculine side constructed as superior and as the norm against which femininity is measured, thus rendering the 'normal' woman always already abnormal.

The notion of domesticity requires women to be good and caring mothers, loyal and supportive wives, competent housewives and to remain in the private domain of the nuclear family, economically and emotionally dependent upon their husbands who bestride the public sphere of society. Feminine sexuality is neither promiscuous nor frigid. The single woman is chaste and demure. On marriage, her sexuality is unlocked by her husband upon whom her sexual fulfilment depends. Unlike male sexuality which is driven by physical needs, female sexuality is constructed in terms of love, marriage, the family and children. Finally, there are a number of disparate discourses united by the idea of women as the pathological Other. By contrast to men who are rational and whose minds control their bodies, women are portrayed as powerfully subject to the control of nature via their reproductive cycle and role, and their 'raging hormones'. Consequently, they are emotional, irrational, compulsive, unstable, fickle and contrary. Moreover, women are weak, neurotic and prone to illness, both physical and mental. But they can also be calculating and deceitful when they wish...

The Court of Appeal's judgments of Sara Thornton and Kiranjit Ahluwalia as women emerge from its descriptions of 'the facts' of their cases. These 'facts' did not exist pre-packaged for judicial recital. 'Reality' is unbounded... multi-faceted, and subject to varying interpretations. Facts have to be selected, interpreted and communicated. This process is



neither mechanical nor neutral, but is aimed at persuading the reader of the legal and emotional force of the judge's decision in much the same way that advocates persuade courts...

The tone of the two stories are clearly set by their opening sentences. The detached listing of Sara Thornton's personal details anticipates the court's lack of sympathy for her... Beldam LJ distanced himself from the emotive aspects of the case... This attempt at objectivity is markedly absent in the *Ahluwalia* judgment. Its opening words 'This is a tragic case...' portend the sympathy for Kiranjit which pervades the judgment...

The intimation that Sara ungratefully threw away a promising start to life is expanded into the more damning suggestion that she was responsible for her battered experience. Thus we are told that her previous husband drank and was violent, and that '[f]rom the start she realised that [Malcolm] was a heavy drinker and was jealous and possessive.' This echoes both the idea that sexual offence victims 'ask for it', and the equally absurd 'women who love too much' thesis, which portrays battered women as pathologically needing and even enjoying male violence...

The most striking and significant aspect of the judgment is that it drastically downplayed the single most important feature of the case: Sara's experience as a battered woman. Whereas a total of 161 lines were devoted to describing 'the facts' which led to the deceased's death, only five dealt with his violence and abusive behaviour...

By contrast 41 out of 100 lines describing Kiranjit Ahluwalia's story were devoted to her 'many years of violence and humiliation'...

[U]nlike Sara Thornton's, [her story] was not told in the classical dramaturgic tradition, in terms of which the tragedy stems from the protagonist's own character flaws. Kiranjit's tragedy was presented as that of a passive victim of harsh fate...

Throughout... the focus is on what was done to Kiranjit rather than on her own actions... The caring mother theme was most effectively used by immediately following the description of the killing with the sentence: 'She then went to dress her son'. The picture of passive femininity disrupted by Kiranjit's violence is thus partly restored by an image of domesticity and caring.

... The appellants' agency in the killing could not be denied. Nor could the jury findings that they intended to kill be challenged. What was relevant on appeal was whether they had acted rationally and in cold-blood (murder) or irrationally due to a sudden and temporary loss of self-control (provocation) or to impaired mental responsibility (diminished responsibility)...

The *Thornton* and *Ahluwalia* cases illustrate the long-standing tendency for the prosecution of women to be transformed into trial of their character, with their perceived conformity or non-conformity with the standards of appropriate femininity determining their treatment. Having been perceived as unfeminine, Sara Thornton's biography and actions were presented so as to construct her as having rejected demure sexuality and submissive domesticity, and as aggressive, fickle and devious. As such she was shown no sympathy. Her experience as a battered woman was downplayed almost to the point of invisibility, while her agency and intention was highlighted. By contrast, Kiranjit Ahluwalia's conformity with women's allotted role as passive and submissive wives and mothers appeared to encourage the Court



of Appeal to give due regard to her role as victim of conjugal violence and to erase her agency in killing...

The construction of women who kill as either pathologically mad or doubly bad pushes the battered female defendant towards the option of mental abnormality. Otherwise she risks being reconstructed as an evil woman taking revenge. As neither image comes close to matching their experiences, battered women tend either to receive mandatory life sentences for murder or to be regarded as mentally ill following a finding of diminished responsibility...

Nicolson's powerful analysis of these two cases emphasises the unpredictability and contradiction inherent in the constructions of 'woman' which infuse legal standards. Women, as defendants and as victims, always seem to be caught at the wrong end of the swing between excuse and justification. For example, the difficulties referred to earlier with the use of provocation as a vehicle for a PMS defence can now be seen more clearly. The question whether a 'reasonable woman' with pre-menstrual tension would have lost her self-control would be even more difficult to apply than the 'reasonable man' test often is. If what lies behind the 'reasonable man' test is an attempt to limit the scope of the defence to those situations where the loss of self-control was understandable or even deserving of sympathy, then pre-menstrual tension could be relevant. However, outside the issue of taking PMS specifically into account there is nonetheless a failure to accommodate women in the very way provocation is conceived:

L. J. Taylor, 'Provoked Reason in Men and Women: Heat of Passion, Manslaughter and Imperfect Self-Defense' (1986) *UCLA Law Review* 1679, 1689-97

Although women's use of violence scarcely figured in the definition of the 'reasonable man' in provocation, women have been present as victims or provokers of homicide. Women are almost always killed by men, often by those with whom they have had an intimate relationship. Therefore, it is not surprising that in heat-of-passion killings of women, the passion often is connected to the victim's sexuality. Many defendants in the early English cases that define voluntary manslaughter were men who had killed their wives or their wives' lovers upon discovering them in the act of adultery... While the law sympathised with the jealous rage of men, it assumed that wives did not experience similar rage. In 1946, 275 years after a court first announced the defence of provocation, an English court finally stated that wives who killed their husbands or their husbands' lovers could also avail themselves of the defence [*Holmes v. DPP* (1946)].

The law of provocation endorses men's ownership of women's sexuality by expressly sanctioning violent reactions by husbands to their wives' infidelity. Although the defence of provocation upon the discovery of adultery now applies to women as well as to men, it is a shallow concession to equality that bears little legitimacy or meaning. Cases and social studies show that women rarely react to their husband's infidelity with deadly violence. In

contrast, men who kill their wives or lovers frequently act after accusing them of infidelity. Female homicide defendants may be exceptional because they are rare, but they may not be exceptional women; they may be ordinary women pushed to extremes. Yet the law has never incorporated these 'ordinary' women into its standards for assessing the degree of criminality in homicide, as it has done with 'ordinary' men.

The study of violent crime and homicide in particular must confront the two cultures in which men and women live, acknowledge that criminal law has been the product of a dominant male culture, and work towards an understanding of how the law might change through an integration of women's experience – an integration crucial to the analysis of intersexual homicide.

The debate surrounding provocation has been driven by cases involving killings by women who have been subjected to long-term abuse by their husbands or partners. These cases have brought to the fore the 'hidden gender' in the development of the provocation defence and the belated realisation of this has triggered the reforms which we will examine below. Attempts to explain some women's responses through the use of the psychological construct 'Battered Wife Syndrome' have disrupted previous understandings. Notably, appeal courts have struggled to contain the 'reasonable man', veering between a version which all but emasculates him as he merges into the defendant and rebuilding him into the 'straight citizen'. Two sets of cases thus sat either side of the interpretation of *Camplin*. *Morhall* (1995) and a majority of the Privy Council in *Luc Thiet Thuan* (1997) favouring the restrictive objective approach, with *Humphreys* (1995), *Thornton* (1996) and *Dryden* (1995) exemplifying the broader approach. This division reached its climax in *Smith* (2000), where a majority of the House of Lords preferred the more personalised approach to provocation.

#### *R v. Smith (Morgan) [2000] 1 All ER 820*

[Smith was charged with murder after fatally stabbing the deceased. At trial he sought to rely on the defence of provocation and adduced psychiatric evidence that he was suffering from clinical depression which reduced his powers of self-control. The trial judge directed the jury that his mental state was a characteristic relevant in considering the gravity of the provocation (provocativeness) but was not relevant to loss of self-control (provocability). He was convicted of murder but the Court of Appeal allowed his appeal, substituting a manslaughter conviction. The Crown appealed after the Court of Appeal certified the following question of general public importance:

Are characteristics other than age and sex, attributable to a reasonable man, for the purpose of section 3 of the Homicide Act 1957, relevant not only to the gravity of the provocation to him but also to the standard of self-control to be expected?

By a 3 to 2 majority, the House dismissed the appeal holding that all of the particular defendant's characteristics were relevant to both whether he was in fact provoked and to the issue of self-control.]

**Lord Hoffmann:** My Lords, it is impossible to read even a selection of the extensive modern literature on provocation without coming to the conclusion that the concept has serious logical and moral flaws. But your Lordships must take the law as it stands. Whatever your decision in this case, the result is not likely to be wholly satisfactory. The doctrine of provocation has always been described as a concession to human frailty and the law illustrates Kant's dictum that, from the crooked timber of humanity, nothing completely straight can be made. Nevertheless, I shall suggest to your Lordships that this appeal offers an opportunity, within the constraints imposed by history and by Parliament, to make some serviceable improvements.

[Lord Hoffmann went on to interpret Lord Diplock's judgment in *Camplin*.]

But the actual facts in *Camplin*'s case were not primarily concerned with a characteristic which affected the gravity of the provocation. It is true that the gravity of the alleged taunts and sexual abuse may have been affected by the accused's consciousness of his physical and intellectual inferiority in relation to the deceased. But the main case for the defence was that a 15-year-old boy could not be expected to have the same powers of self-control as an adult. Lord Diplock acknowledged that –

'in strict logic there is a transition between treating age as a characteristic that may be taken into account in assessing the gravity of the provocation addressed to the accused and treating it as a characteristic to be taken into account in determining what is the degree of self-control to be expected of the ordinary person with whom the accused's conduct is to be compared. But to require old heads on young shoulders is inconsistent with the law's compassion of human infirmity to which Sir Michael Foster ascribed the doctrine of provocation more than two centuries ago. The distinction as to the purposes for which it is legitimate to take the age of the accused into account involves considerations of too great nicety to warrant a place in deciding a matter of opinion, which is no longer one to be decided by a judge trained in logical reasoning but by a jury drawing on their experience of how ordinary human beings behave in real life.'

This is a most important passage and I invite your Lordships' attention to the following points.

- (1) Lord Diplock says that youth may be taken into account because the principle of compassion to human infirmity, as a jury drawing on their experience may apply it, requires one to do so. He does not say that the same principle of compassion is incapable of applying to any other characteristics which a jury might on similar grounds think should be taken into account. It would have been easy for him to have said that youth was for this purpose unique.
- (2) Lord Diplock expressly rejects the distinction between the effect of age on the gravity of the provocation and on the power of self-control on the grounds that it is 'of too great nicety' for application by a jury. Again, there is nothing to suggest that this

comment is not equally true of other characteristics. Since Camplin's case, there is a great deal of material which demonstrates that Lord Diplock's scepticism about whether the distinction could be made to work in practice was well founded.

- (3) If age were to be the only case in which a particular characteristic could be taken into account as relevant to the expected power of self-control, it would be necessary to explain why it should be so singled out. The High Court of Australia, in *Stingel v. R* (1990) 171 CLR 312 at 330, said that it was because age is a normal characteristic 'the process of development from childhood to maturity is something which, being common to us all, is an aspect of ordinariness'. This explanation was embraced by Lord Goff of Chieveley in *Luc Thiet Thuan v. R* [1996]. It had, as I have said, been relied upon in Camplin's case by the Court of Appeal to distinguish Bedder's case. But the distinction between normal and abnormal characteristics was expressly rejected by Lord Diplock. He said that:

'The reasoning in *Bedder* would, I think, permit of this distinction between normal and abnormal characteristics, which may affect the powers of self-control of the accused; but for reasons that I have already mentioned the proposition stated in *Bedder* requires qualification as a consequence of the changes in the law effected by the 1957 Act. To try to salve what can remain of it without conflict with the Act could in my view only lead to unnecessary and unsatisfactory complexity in a question which has now become a question for the jury alone.'

[This passage in Lord Diplock's speech] provides in my view no support for the theory, widely advanced in the literature, that he was making a clear distinction between characteristics relevant to the gravity of the provocation and characteristics relevant to the power of self-control, with age (and possibly sex) as arbitrary exceptions which could be taken into account for the latter purpose.

This, in my view, goes to the heart of the matter and is in accordance with the analysis of the effect of s 3 which I have made earlier in my speech. The jury is entitled to act upon its own opinion of whether the objective element of provocation has been satisfied and the judge is not entitled to tell them that for this purpose the law requires them to exclude from consideration any of the circumstances or characteristics of the accused.

The difficulty about the practical application of this distinction in the law of provocation is that in many cases the two forms of claim are inextricably muddled up with each other. A good example is the recent New Zealand case of *R v. Rongonui* (13 April 2000, unreported). The accused was a woman with a history of violence against her, suffering from post-traumatic stress disorder. The alleged provocation was that a neighbour she was visiting to ask for help in babysitting her children had produced a knife – not in a threatening way, but sufficient to make her lose control of herself, seize the knife and stab the neighbour to death. The Court of Appeal agreed that it was very difficult in such a case to distinguish between the gravity of the provocation (the accused's previous experience of violence making the mere production of a knife a graver provocation than it would be to someone who had led a more sheltered life) and the accused's capacity for self-control which had been affected by the psychological stress of the violence she had suffered. Tipping J, giving



one of the majority judgments which held that the New Zealand statute on provocation (s 169 of the Crimes Act 1961) mandated the application of the distinction, said that it required 'mental gymnastics'. Thomas J, who thought that the statute did not have to be construed so rigidly, said that most trial judges had seen –

'the glazed look in the jurors' eyes as, immediately after instructing them that it is open to them to have regard to the accused's alleged characteristic in assessing the gravity of the provocation, they are then advised that they must revert to the test of the ordinary person and disregard that characteristic when determining the sufficiency of the accused's loss of self-control.'

Professor Stanley Yeo, in his recent book *Unrestrained Killings and the Law* (1998), points out (at p 61) that the reason why jurors find the distinction so difficult is that it –

'bears no conceivable relationship with the underlying rationales of the defence of provocation. The defence has been variously regarded as premised upon the contributory fault of the victim and, alternatively, upon the fact that the accused was not fully in control of his or her behaviour when the homicide was committed. Neither of these premises requires the distinction to be made between characteristics of the accused affecting the gravity of the provocation from those concerned with the power of self-control.'

There is however one really serious argument in favour of the distinction between characteristics affecting the gravity of the provocation and characteristics affecting the power of self-control. This is the claim that, despite all its difficulties of application, it is the only way to hold the line against complete erosion of the objective element in provocation. The purpose of the objective element in provocation is to mark the distinction between (partially) excusable and inexcusable loss of self-control. As Lord Diplock said in *Camplin*... the conduct of the accused should be measured against 'such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today'. If there is no limit to the characteristics which can be taken into account, the fact that the accused lost self-control will show that he is a person liable in such circumstances to lose his self-control. The objective element will have disappeared completely.

My Lords, I share the concern that this should not happen. For the protection of the public, the law should continue to insist that people must exercise self-control. A person who flies into a murderous rage when he is crossed, thwarted or disappointed in the vicissitudes of life should not be able to rely upon his anti-social propensity as even a partial excuse for killing. In *R v. Stingel* (1990) 171 CLR 312, for example, the accused was obsessively infatuated with a woman who had terminated their relationship. He became a stalker, following her about. She obtained a court order restraining him from approaching her. One evening after a party he found the woman in a car with another man. According to his own account, they were having sex. He went back to his own car, fetched a butcher's knife and came back and killed the man. His evidence conformed to the standard narrative which the legal requirement of 'loss of control' imposes on such defences:

'I was all worked up and feeling funny. It was like I was in a rage, almost to the stage where I felt dazed. It was like I really didn't know what happened until the knife went into him.'

The High Court of Australia held that the judge was right to withdraw the issue of provocation from the jury on the ground that such conduct could not raise even a reasonable doubt as to whether the objective element in the defence had been satisfied. I respectfully agree. Male possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide, whether inflicted upon the woman herself or her new lover. In Australia the judge was able to give effect to this policy by withdrawing the issue from the jury. But s 3 prevents an English judge from doing so. So, it is suggested, a direction that characteristics such as jealousy and obsession should be ignored in relation to the objective element is the best way to ensure that people like Stingel cannot rely upon the defence.

My Lords, I do emphasise that what has been rendered unworkable is not the principle of objectivity which (subject to the changes noted in *Camplin* case) s 3 was plainly intended to preserve, but a particular way of explaining it. I am not suggesting that your Lordships should in any way depart from the legal principle embodied in s 3 but only that the principle should be expounded in clear language rather than by the use of an opaque formula.

In my opinion, therefore, judges should not be required to describe the objective element in the provocation defence by reference to a reasonable man, with or without attribution of personal characteristics. They may instead find it more helpful to explain in simple language the principles of the doctrine of provocation. First, it requires that the accused should have killed while he had lost self-control and that something should have caused him to lose self-control. For better or for worse, s 3 left this part of the law untouched. Secondly, the fact that something caused him to lose self-control is not enough. The law expects people to exercise control over their emotions. A tendency to violent rages or childish tantrums is a defect in character rather than an excuse. The jury must think that the circumstances were such as to make the loss of self-control sufficiently excusable to reduce the gravity of the offence from murder to manslaughter. This is entirely a question for the jury. In deciding what should count as a sufficient excuse, they have to apply what they consider to be appropriate standards of behaviour; on the one hand making allowance for human nature and the power of the emotions but, on the other hand, not allowing someone to rely upon his own violent disposition. In applying these standards of behaviour, the jury represent the community and decide, as Lord Diplock said in *Camplin*'s... what degree of self-control 'everyone is entitled to expect that his fellow citizens will exercise in society as it is today'. The maintenance of such standards is important. As Viscount Simon LC said more than 50 years ago in *Holmes v. DPP*... 'as society advances, it ought to call for a higher measure of self-control'.

The general principle is that the same standards of behaviour are expected of everyone, regardless of their individual psychological make-up. In most cases, nothing more will need to be said. But the jury should in an appropriate case be told, in whatever language will best convey the distinction, that this is a principle and not a rigid rule. It may sometimes have to yield to a more important principle, which is to do justice in the particular case. So

the jury may think that there was some characteristic of the accused, whether temporary or permanent, which affected the degree of control which society could reasonably have expected of him and which it would be unjust not to take into account. If the jury take this view, they are at liberty to give effect to it.

Lord Hoffmann notes the flawed basis of provocation, and this is reflected in the sharp division within the House, with Lords Millett and Hobhouse dissenting. The latter criticised the majority for introducing a variable standard of self-control which subverted the moral basis of the defence. That such a schism surrounding provocation presents itself a mere six years after the unanimity in *Morhall* arguably provides another reason for its abolition. The position became ridiculous when a nine person panel of the Privy Council adopted the *Camplin* position in *AG Jersey v. Holley* (2005), which despite the rules of precedent dictating otherwise, effectively overruled the decision in *Smith*. The call for reform was succinctly put by Lord Nicholls:

***AG for Jersey v. Holley* [2005] 2 AC 580, 594-5**

In expressing their conclusion . . . their Lordships are not to be taken as accepting that the present state of the law is satisfactory. It is not. The widely held view is that the law relating to provocation is flawed to an extent beyond reform by the courts . . . Their Lordships share this view. But the law on provocation cannot be reformulated in isolation from a review of the law of homicide as a whole.

Of course, one option lies in abolishing the defence altogether:

Celia Wells 2000 'Provocation: The Case for Abolition' in Andrew Ashworth and Harry Mitchell (eds.) *Rethinking English Homicide Law* (Oxford University Press), pp. 85-106. Reprinted with permission of Oxford University Press.

The debates about the characteristics of the ordinary person lead to the inexorable conclusion that it is the nature of the provocation defence which needs questioning, not its finer contours. It is precisely because assessments of provocativeness are culturally relative, and the need to have regard for 'equality' for the victim as well as equity for the accused, that we need to move beyond provocation as an organizing concept in excusing or mitigating homicide.

Much has been written about the mixed message which provocation seeks to carry. On the one hand it is a concession to human frailty, on the other it is based on wrongdoing by the victim, or someone other than the defendant. The moral equation that the circumstances arose from another's wrongdoing is attractive at an intuitive level. But beyond the superficial the cracks appear. Excuses such as provocation can be accommodated at a general level because they respond to particularized events rather than general conditions, such that the empirical question of whether others would succumb can be incorporated in the defence

itself, into a prescriptive inquiry as to whether a person of reasonable firmness would have acted similarly.

It is full of internal contradiction – the loss of self-control posited against the reasonable man, ordinary person test. There are three broad options: clarify the objective standard, abandon the objective standard, or abolish the defence altogether. Attempts to take account of specific characteristics which might affect either the provocation itself or the reaction to it have proved problematic, as has the accommodation of hitherto ignored differences, such as gender, race, and sexuality...

The option of abolition has in fact been taken up in provisions resulting from the Law Commission's recommendations, albeit in the form of a replacement partial defence of 'loss of control', which if successfully pleaded, would continue to lead to a manslaughter conviction:

**Coroners and Justice Act 2009, s. 54 (Partial defence to murder: loss of control)**

- (1) Where a person ('D') kills or is a party to the killing of another ('V'), D is not to be convicted of murder if –
  - (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
  - (b) the loss of self-control had a qualifying trigger, and
  - (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.
- (2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.
- (3) In subsection (1)(c) the reference to 'the circumstances of D' is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.
- (4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.
- (5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.
- (6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.
- (7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of Manslaughter.
- (8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.



Subsection 1(a) responds to the gender bias criticism of the defence set out earlier in this chapter by removing the need to establish a *sudden* loss of self-control, which of course was a product of the common law (*Duffy* (1949)). It remains to be seen whether or not lapse of time retains any relevance in practice, and also where the line will be drawn between non-sudden loss of control and a 'considered desire for revenge' in subsection 4. The Law Commission do not envisage that revenge would capture killings by battered women where there may be an element of premeditation (2006, para. 5.24), and surely it should not given that this was a prominent driver for reform in the first place. Subsection 3 returns us to a modified version of the *Camplin* position whereby the defendant's characteristics are only relevant to provocativeness, not provocability, although the new defence shuns any reference to the term provocation itself. The issue of reasonable characteristics is likely to remain a legal battleground calling for judicial regulation, and foreseeing this, the Commission sets out its guidance:

*The Law Commission (2006) Murder, Manslaughter and Infanticide (Law Com No 304), pp. 85–6*

5.38 In our view, the function of the reasonable person requirement is to test D's own reaction against the standards of someone of his or her age possessed of an ordinary temperament: someone who is neither intolerant nor lacking in a reasonable measure of self-restraint when facing provocation. Unless the jury concludes that D's reaction might have been that of such a person, the defence ought to fail, even if D only killed as a result of a provoked and momentary loss of temper.

5.39 We are reluctant to speculate on how the courts would interpret the provisions in 1(b) and (2) in paragraph 5.11 above. Still less would we wish to insist that they interpret them in a given way. None the less, the following examples may provide some guidance on the kinds of distinctions we think that it would be helpful to draw.

5.40 Our provisions impose a duty on the judge to instruct the jury to ignore factors that affect D's general capacity to exercise self-control. Alcoholism, for example, or another mental deficiency or disorder that is liable to affect temper and tolerance are obvious examples. A person who has killed because his or her capacity for self-control was reduced by such a characteristic must look to the defence of diminished responsibility for a partial defence, because such characteristics constitute an abnormality of mental functioning, unlike, for example, D's age.

5.41 Abnormal states of mind, such as intoxication or irritability, should also be left out, as should other factors that affect a general capacity to exercise adequate self-control, like a claim that D is 'more jealous or obsessive than most'. This approach to the general capacity to exercise adequate self-control will produce some hard cases. Examples might be ones in which, at the time of the provoked killing, D's general capacity for self-control was temporarily impaired by the effect of taking prescribed medicine, by having suffered a

stroke, by involuntary intoxication, by an allergic reaction of some kind or by a bang on the head.

5.42 In such cases, the individual might well be accurately described in general terms as someone with adequate powers of self-restraint. It is just that their reaction could (albeit for good reason) not be expected to be the reaction of such a person in the particular circumstances. We believe that if their reaction was not one that might have been the reaction of a person exercising ordinary powers of self-restraint in the particular circumstances, that very fact means the provocation defence must fail. The fact that the individual in question could, putting on one side their reaction in the circumstances, be described as someone with adequate powers of self-restraint is quite irrelevant to the provocation plea. They must instead look to diminished responsibility for a defence.

Section 55 sets out the qualifying triggers for loss of self-control:

- (3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.
- (4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which –
  - (a) constituted circumstances of an extremely grave character, and
  - (b) caused D to have a justifiable sense of being seriously wronged.
- (5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

This introduces a new trigger of fear of serious violence and sets a more exacting test in relation to 'things done or said'. In relation to fear of serious violence, this recognises the close connection between provocation and self-defence given the relationship between the emotions of anger and fear. And of course, this is clearly designed with battered women cases in mind. Reference to 'extremely grave' and 'seriously wronged' reflects the current ease by which provocation is available, and the inappropriate accommodation of numerous undeserving factors as relevant to provocation (jealousy, disobedience etc.). It thus seeks to prevent illegitimate uses of the defence, and should result in easing the prosecution's task in disproving the defence. And its availability will be subject to judicial control, i.e. only if the trial judge considers that a jury might reasonably conclude that the defence applies (s. 54(6)). The defence is barred when the defendant incited the fear of serious violence or a sense of being seriously wronged for the purpose of providing an excuse to use violence, and where the thing done or said constitutes sexual infidelity (s. 55(6)).

To conclude, the provocation defence has been too readily available to men who lose their tempers and kill women, and too slow to apply to battered women who react after the slow burn of domestic abuse. This deflects attention from the

seriousness and prevalence of male violence against women, and risks blaming women who respond to domestic violence by pleading provocation for their own victimisation. We noted in the last edition that since its conceptual basis is fundamentally unsound, any expansion of the provocation defence should then be treated with caution. The modifications reflected in the redesigned defence of 'loss of self-control' go some way to meeting these criticisms and in theory provide for a more philosophically pleasing result. But it remains to be seen how they play out with reference to the wider context of criminal justice, discretionary charging decisions, the conduct of trials, including the role of defence lawyers and expert witnesses.

#### VI.21.c.iii. Involuntary manslaughter

The category of homicide known as 'manslaughter' has been used to mop up killings which are not perceived, for one reason or another, as sufficiently heinous to deserve the label 'murder'. The foregoing section has already shown how reliance on the concept of intention has caused much difficulty in the delineation of murder. Manslaughter comprises both those unlawful killings where that intention is lacking, which we consider here, and those intentional killings for which there is a defence such as provocation or diminished responsibility, which we have already considered.

Manslaughters of the type where the intention for murder is lacking are sometimes referred to as 'involuntary' manslaughters. What is needed to convert these non-intentional killings into manslaughter is extraordinarily vague and potentially far-reaching. These requirements have already been touched on in the discussion of corporate liability (see Chapter 19.c. above). There are essentially two different routes to this type of manslaughter. The first is via an unlawful act: if the death is the result of a crime, and if that crime is one which carries with it the objective risk of physical harm of any kind, then this will be sufficient for manslaughter. The other route does not require an initial unlawful act and is satisfied by proof of gross negligence. Returning to a simple formulation, after an interregnum influenced by the *Caldwell* (1982) definition of recklessness (via *Lawrence* (1982) and *Seymour* (1983)) in *Adomako* (1995), Lord Mackay summed up the test in this way: 'The jury will have to decide whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him... was such that it should be judged criminal.'

This formulation has been criticised for the obvious circularity and vagueness of saying that 'it is a crime if the jury think it *ought* to be a crime'. In the case of *R v. Misra and Srivastava* (2005) gross negligence manslaughter was challenged for its compatibility with two human rights: namely the Article 6 right to a 'fair trial' and the Article 7 prohibitions on 'retrospective criminalisation'. Amit Misra and Rajeev Srivastava were senior house officers at Southampton General Hospital. They mismanaged the care of a 31-year-old man who developed toxic



shock syndrome after a routine knee operation, a rare complication with a fairly low mortality rate of about 5 per cent. Specifically, they responded inadequately to obvious signs of infection, such as raised temperature and pulse rate, and failed to chase up blood test results that would have prompted the antibiotic care which would probably have averted disaster. The jury convicted and their appeals were rejected.

Article 7 of the European Convention on Human Rights prohibits retrospective criminalisation:

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

The doctors argued that the vagueness of gross negligence was incompatible with the certainty requirements of Article 7. The Court of Appeal dismissed this on the basis that Article 7 demanded *sufficient*, rather than *absolute*, certainty and that the degree of vagueness here was acceptable. Vagueness must have been in vogue as the Court of Appeal decided not to elaborate further on this. The certainty argument was connected to the argument under Article 6, which requires a 'fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. The jurisprudence surrounding Article 6 suggests that a fair hearing implies a reasoned decision, and it was argued that as juries here are effectively deciding a question of law (that is, the *meaning* of the offence – the meaning of gross negligence) and because they do not give reasons for their decisions, this contravened Article 6. Again, the Court of Appeal did not agree:

*R v. Misra and Srivastava* [2005] 1 Cr App R 71 at p. 348 (CJ judge)

'On proper analysis, therefore, the jury is not deciding whether the particular defendant ought to be convicted on some unprincipled basis. The question for the jury is not whether the defendant's negligence was gross, and whether, *additionally*, it was a crime, but whether his behaviour was grossly negligent and *consequently* criminal. This is not a question of law, but one of fact, for decision in the individual case.'

'In our judgment the law is clear . . . The hypothetical citizen, seeking to know his position, would be advised that, assuming he owed a duty of care to the deceased which he had negligently broken, and that death resulted, he would be liable to conviction for manslaughter if, on the available evidence, the jury was satisfied that his negligence was gross. A doctor would be told that grossly negligent treatment of a patient which exposed him or her to the risk of death, and caused it, would constitute manslaughter.'

This attempt to neatly separate out the question of law from the question of fact fails to convince. Surely, it is plausible that juries *do* on occasion accept that conduct *was* grossly negligent but decide *against* convicting the defendant of



manslaughter. The relatively low conviction rate of around 35 per cent supports this (Quick 2010). Regrettably, an application for leave to appeal to the House of Lords was rejected. This represents a lost opportunity for a possible (and rare) declaration of incompatibility which would prompt a re-think about this offence. Prosecutors, experts, judges and juries are thus left to grapple with a difficult and circular concept.

The number of cases of gross negligence manslaughter appears to be rising. The breadth of this sub-type, coupled with mounting public pressure for prosecution helps explain the increase of such cases. The rise of manslaughter prosecutions against healthcare professionals is a notable example of this (see Quick 2006). The ability of the duty of care concept to embrace a wide range of conduct is evident in the next two cases. In *Sinclair and Johnson* (1998), the Court of Appeal was prepared to recognise a duty of care where a drug addict fails to look after a fellow addict who has overdosed:

***R v. Sinclair* [1998] NIJR 1353**

[At trial, the judge ruled that it was for the jury to decide whether the defendants had voluntarily assumed a duty of care to him, and that there was sufficient evidence on causation (omission to seek medical attention) to be left to the jury. Although ultimately considering that the evidence on causation was unsafe to leave to the jury, nevertheless, the court recognised the possibility of a duty of care.]

Sinclair was in a different position. The evidence was that he was a close friend of the deceased for many years and the two had lived together almost as brothers. It was Sinclair who paid for and supplied the deceased with the first dose of methadone and helped him to obtain the second dose. He knew that the deceased was not an addict. He remained with the deceased throughout the period of his unconsciousness and, for a substantial period, was the only person with him. In the light of this evidence, there was in our judgment material on which the jury properly directed, could have found that Sinclair owed the deceased a legal duty of care. The judge was therefore correct to leave Sinclair's case to the jury on this aspect. We do accept however, that there is force in Mr Carter's [counsel for the appellant] submission that, in the law of manslaughter, it is important to distinguish between acts of commission and omission and that, even if it is appropriate, in criminal as well as in civil law, for the circumstances in which a duty of care exists to expand incrementally, it is undesirable there should be such elasticity in that expansion that potential defendants are unaware until after the event whether their conduct is capable of being regarded as criminal. We say this by reference to the circumstances in which a duty of care should arise in criminal law: we do not seek to deviate from the observations of Lord Mackay in *Adomako* that it is for the jury to determine whether an accused's conduct is so grossly negligent as to be criminal. We are inclined to the view that Mr Cassell's submission, that Lord Mackay's speech in *Adomako* was not concerned with whether a duty of care exists, is correct. But for the purposes of the present appeal it is unnecessary to say anything further on this aspect of the case.

It was for these reasons that we allowed the appeals of Sinclair and Johnson and quashed their convictions.

The malleability of gross negligence manslaughter was also reflected in the different context of the deaths of illegal immigrants during their transportation into the UK. The extracts below illustrate the refusal to allow the use of other legal concepts (in this case joint illegal enterprise) to prevent a manslaughter conviction.

### ***R v. Wacker* [2003] 1 Cr App R 22**

[The appellant was stopped driving a lorry disembarking from a ferry at Dover. The bodies of 58 illegal immigrants were found in the trailer together with two surviving illegal immigrants. They suffered death by suffocation following inadequate ventilation in the lorry. The appellant was convicted of conspiracy to facilitate the entry into the UK of illegal immigrants and 58 offences of manslaughter on the basis of gross negligence, and sentenced to 14 years' imprisonment. He appealed against the convictions for manslaughter. It was submitted on his behalf that because the deceased illegal immigrants shared the same illegal purpose as the appellant, namely to gain entry for the illegal immigrants into the UK, there was no duty of care owed by the appellant to the deceased; and that the principle that the law of negligence does not recognise the relationship between those involved in a criminal enterprise as giving rise to a duty of care owed by one participant to another (*ex turpi causa non oritur actio*) applied.]

There are occasions when it is helpful when considering questions of law for the court to take a step back and to look at an issue of law that arises without first turning to, and becoming embroiled in, the technicalities of the law. This is such a case. We venture to suggest that all right minded people would be astonished if the propositions being advanced on behalf of the appellant correctly represented the law of the land. The concept that one person could be responsible for the death of another in circumstances such as these without the criminal law being able to hold him to account for that death even if he had shown not the slightest regard for the welfare and life of the other is one that would be unacceptable in civilised society. Taking this perspective of the case causes one immediately to question whether the whole approach adopted by both counsel and the judge in the court below can be correct, and we must, therefore, examine this matter.

In other situations, it is clear that the criminal law adopts a different approach to the civil law in this regard. A person who sold a harmless substance to another pretending that it was an unlawful dangerous drug could not be the subject of a successful civil claim by the purchasers for the return of the purchase price. However the criminal law would, arising out of the same transaction, hold that he was guilty of the offence of obtaining property by deception. Many other similar examples readily come to mind.

Why is there, therefore, this distinction between the approach of the civil law and the criminal law? The answer is that the very same public policy that causes the civil courts to refuse the claim points in a quite different direction in considering a criminal offence.

The criminal law has as its function the protection of citizens and gives effect to the state's duty to try those who have deprived citizens of their rights of life, limb or property. It may very well step in at the precise moment when civil courts withdraw because of this very different function. The withdrawal of a civil remedy has nothing to do with whether as a matter of public policy the criminal law applies. The criminal law should not be disapplied just because the civil law is disapplied. It has its own public policy aim which may require a different approach to the involvement of the law.

Further the criminal law will not hesitate to act to prevent serious injury or death even when the persons subjected to such injury or death may have consented to or willingly accepted the risk of actual injury or death. By way of illustration, the criminal law makes the assisting another to commit suicide a criminal offence and denies a defence of consent where significant injury is deliberately caused to another in a sexual context (*Brown* (1993) [above Chapter 5.III.a.ii.]). The state in such circumstances has a overriding duty to act to prevent such consequences.

The next question which is posed is whether it is right to say in this case that no duty of care can arise because it is impossible or inappropriate to determine the extent of that duty. We do not accept this proposition. If at the moment when the vent was shut, one of the Chinese had said 'you will make sure that we have enough air to survive', the appellant would have had no difficulty understanding the proposition and clearly by continuing with the unlawful enterprise in the way that he did, he would have been shouldering the duty to take care for their safety in this regard. The question was such an obvious one that it did not need to be posed and we have no difficulty in concluding that in these circumstances the appellant did voluntarily assume the duty of care for the Chinese in this regard. He was aware that no one's actions other than his own could realistically prevent the Chinese from suffocating to death and if he failed to act reasonably in fulfilling this duty to an extent that could be characterised as criminal, he was guilty of manslaughter if death resulted.

One further issue merits consideration, namely is it any answer to a charge of manslaughter for a defendant to say 'we were jointly engaged in a criminal enterprise and weighing the risk of injury or death against our joint desire to achieve our unlawful objective, we collectively thought that it was a risk worth taking'. In our judgment it is not. The duty to take care cannot, as a matter of public policy, be permitted to be affected by the countervailing demands of the criminal enterprise. Thus, in this case, the fact that keeping the vent shut increased the chances of the Chinese succeeding in entering the United Kingdom without detection was not a factor to be taken into account in deciding whether the appellant had acted reasonably or not.

We have chosen to use involuntary manslaughter as an area in which to illustrate and discuss the Law Commission's proposed Criminal Code, and also its detailed proposals for involuntary manslaughter. This represents the aspirations for codification which underpin many of the ideological values (the rule of law, certainty, consistency, etc.) central to criminal law doctrine. The background to this Code is explained in the following extract:



*Law Commission 1989 Report No 172: A Criminal Code for England and Wales (HMSO) paras. 1.3, 1.4, 2.1, 2.2, 3.30, 3.31, 3.34*

- 1.3 English criminal law is derived from a mixture of common law and statute. Most of the general principles of liability are still to be found in the common law, though some, for example the law relating to conspiracy and attempts to commit crime, have recently been defined in Acts of Parliament. The great majority of crimes are now defined by statute but there are important exceptions. Murder, manslaughter and assault are still offences at common law, though affected in various ways by statute. There is no system in the relative roles of common law and legislation... Whether an offence is defined by statute has almost always been a matter of historical accident rather than systematic organisation... The legislation in force extends over a very long period of time. It is true that only a very small amount of significant legislation is earlier than the mid-nineteenth century, but that is quite long enough for the language of the criminal law and the style of drafting to have undergone substantial changes.
- 1.4 There has been a steady flow of reform of the criminal law in recent years but it has been accomplished in somewhat piecemeal fashion. Some of it is derived from our own reports, where in recent years we have been pursuing the policy of putting common law offences into statutory form, and some from reports of the Criminal Law Revision Committee and committees, like the Heilbron Committee, appointed to deal with particular problems. Other reforms have resulted from the initiative of Ministers or private Members of Parliament in introducing Bills. As there is no authoritative statement of general principles of liability or of terminology to which we or these other bodies, or their draftsmen, can turn it would be surprising if there were not some inconsistencies and incongruities in the substance and language of the measures which are proposed and which become law... This Report addresses the question whether it is desirable to replace the existing fluctuating mix of legislation and common law by one codifying statute.

[The Code was prepared for the Law Commission by a team drawn from members of the Society of Public Teachers of Law from whom the initiative came in 1981.]

- 2.1 The Code team identified the aims of codification at the present time as being to make the criminal law more accessible, comprehensible, consistent and certain... We believe, however, that there are also fundamental constitutional arguments of principle in favour of codification which we consider first...
- 2.2 ... 'Due notice' or 'fair warning' - by which is meant the idea that the law should be known in advance to those accused of violating it - should clearly be regarded as a principle of major importance in our criminal justice system. While there is room for argument as to how much or how little of the content of the criminal law should be left to be developed by the common law, codification provides the opportunity for ensuring that this principle is followed over a substantial part of the criminal law. Moreover, since the criminal law is arguably the most direct expression of the relationship between a State and its citizens, it is right as a matter of constitutional principle that the



relationship should be clearly stated in a criminal code the terms of which have been deliberated upon by a democratically elected legislature.

- 3.30 A substantial part of the draft Bill appended to this Report limits itself to a restatement of existing principles. The Code team's assertion that '[t]he fundamental principles of the law are well settled and it would be neither politically feasible nor desirable to depart from them' is, in our view, correct. As they argued, however, there are several reasons why the proposed Code Bill cannot be a mere restatement and the draft clauses embody a substantial body of proposed reform.
- 3.31 The Code cannot reproduce inconsistencies. Where the inconsistency represents a conflict of policies, a choice has to be made to produce a coherent law . . .
- 3.34 More importantly, we have thought it right, as the Code team did, to incorporate into the Code recommendations for the reform of the law made in recent years by official bodies such as the Criminal Law Revision Committee and ourselves, and ad hoc committees such as the Butler Committee on Mentally Abnormal Offenders, which have not yet been implemented by legislation . . .

Neither codification nor law reform is an unproblematic exercise. There are some questions which need to be asked before it is possible to consider whether the proposals are good ones. As we argue in Section I, the liberal ideology which underlies most representations of criminal law makes various assumptions about the socio-economic-political world in which it operates. In order to assess the draft Code we need criteria by which to judge it. Although the Report gives some, such as certainty, consistency and accessibility, these are procedural rather than substantive values. On the Report's own admission, they cannot be achieved without entering the territory of law reform. Yet the Report is keen to deny that any political choices have been made in the process of restatement, rationalisation and systematisation. The Report fails to acknowledge that the status quo is a political choice or that general principles are not nearly so well established as it is keen to assert. The Report appears to say that in so far as the Commission agrees with the current state of the law it is well settled but when it disagrees it can dub that part inconsistent with the rest.

In the search for accessibility and certainty, the Report has a particular view of the power of the written word (see the discussion of codification of theft in Chapter 12.a.ii.). It is certainly difficult to justify the present chaotic state of sources of law in the classic common law system. But it would be a mistake to believe that codification would suddenly transform law into a readily accessible form. It may improve accessibility for lawyers, and it may be an improvement, but that is very far from claiming accessibility. The form is a charade. Similarly, the notion of certainty is a firmly entrenched one in the legal tradition. The history of the codification of particular offence areas, such as theft and criminal damage (see the critique of 'ordinary language' legislation in Chapter 12.a.ii.), itself bears witness to the malleability of language. Words lack

'self-evident reference' and law, whether enshrined in a code or not, is available for exploitation by those with power.

In 1996, the Law Commission published its report into the law of involuntary manslaughter. The extracts below neatly summarise the common law and identify the philosophical problem of carving out culpability for unintended consequences. The difficulties of this task are reflected in the Commission's revision of its recommendations in its homicide report a decade later, which follow below.

*Law Commission 1996 Report No. 223, Involuntary Manslaughter (HMAO), paras. 1.22, 2.1, 2.3-2.8, 2.14, 2.16, 2.21, 2.23, 2.26, 2.27, 2.1, 2.2-2.6, 2.9, 2.12-2.14, 2.17-2.20, 2.41, 2.6, 2.11, 2.16, 2.17, 2.24, 2.42, 2.49.*

1.22 In 1989 we published our report on a Criminal Code for England and Wales. This represented the culmination of eight years of work which had the central purpose of making the criminal law more accessible, comprehensible, consistent and certain.

...

2.1 As we have observed, 'involuntary manslaughter' is the name given to those unintentional killings that are criminal at common law: causing death in the course of doing an unlawful act, and causing death by gross negligence or recklessness. 'Involuntary manslaughter' is not recognised as a separate crime in its own right: it is simply a label used to describe certain ways of committing the very broad common law crime of manslaughter.

[The Report considered unlawful act manslaughter first.]

2.3 The basis of this type of manslaughter is that the defendant caused the death of another by or in the course of performing an act which would have been unlawful whether or not death was caused. As Lord Parker CJ put it:

A man is guilty of involuntary manslaughter when he intends an unlawful act and one likely to do harm, to the person and death results which was neither foreseen nor intended. It is the accident of death resulting which makes him guilty of manslaughter as opposed to some lesser offence.

2.4 The alternative name of this type of crime, 'constructive manslaughter', draws attention to the fact that although the accused did not intend to cause serious harm or foresee the risk of doing so, and although an objective observer would not necessarily have predicted that serious harm would result, the accused's responsibility for causing death is 'constructed' from her fault in committing a quite unconnected and possibly minor unlawful act. Because of this feature of the offence, the accused's mental state is not assessed with reference to the death that she has accidentally caused, but only in relation to her unlawful act.

2.5 Over the years judges have tried in various ways to limit the scope of unlawful act manslaughter. Two ways in which they attempted to restrict liability were, first, by

imposing stricter tests of causation than the test normally applied in criminal law, and, secondly, by requiring that the accused's act must have been 'directed at' the deceased. Neither of these two approaches, however, has been consistently applied. A more lasting modification was the rule that the accused must have committed a crime of some sort in order to incur liability; at one time it was thought that the commission of a tort, if it caused death, was sufficient. In 1937 the House of Lords restricted the offence still further by holding that negligent acts, even those that were capable of constituting statutory criminal offences (such as dangerous driving), would not automatically be sufficient to found a conviction for manslaughter where death was caused. Instead, it became necessary to prove that the defendant's negligence had been of a very high level. In such a case the prosecution would have to proceed under the second head of involuntary manslaughter, gross negligence manslaughter.

2.6 Another rule that judges have introduced relatively recently to limit the width of unlawful act manslaughter is the rule that the act that causes the death, in addition to being unlawful, must also have been 'dangerous', in the sense that 'all sober and reasonable people would inevitably recognise [that it] must subject the other person to, at least the risk of some harm resulting there from, albeit not serious harm'. When applying this test, the 'sober and reasonable person' is accredited with any special knowledge that would have been available to the defendant, but no more. However, the reasonable observer will not have attributed to her any mistaken belief held by the accused.

2.7 It is unlawful manslaughter, then, if D slaps V in the face, V loses her balance, falls to the ground and dies as a result of brain injury caused by hitting her head on the pavement; if D breaks into a house with intent to steal, and terrifies the occupant into a heart attack; or if D unlawfully carries a knife for self-defence, with which she accidentally stabs V. It is, of course, possible to think of numerous other examples.

[The Report then moved on to consider the second sub-type of involuntary manslaughter:]

2.8 Where a person causes death through extreme carelessness or incompetence, the law of gross negligence manslaughter is applied. Frequently the defendants in such cases are people carrying out jobs that require special skills or care, such as doctors, police or prison officers, ships' captains or electricians, who fail to meet the standard which could be expected from them and cause death; however, an ordinary person who carries out a lawful activity, such as hunting or driving, without due caution, or who fails properly to look after a dependent person in her care, may be the subject of such a charge. The categories of unlawful act and gross negligence manslaughter are not mutually exclusive; for example, a defendant who unlawfully shoots at a trespasser may be guilty on both counts.

2.14 . . . [In *Adomako*] which was decided after the publication of Consultation Paper No. 135, the accused, an anaesthetist, was acting as such during an eye operation which involved paralysing the patient. A tube became disconnected from the ventilator, the accused failed to notice the warning signs and the patient suffered a cardiac arrest and died. The House was asked to answer the following certified question: in cases of

manslaughter by criminal negligence not involving driving but involving a breach of duty is it a sufficient direction to the jury to adopt the gross negligence test set out in the Court of Appeal in [*Prentice*]... without reference to the test of... [*Caldwell* recklessness] or as adapted to the circumstances of the case?

- 2.16 This decision resolved the principal uncertainty in the law – whether the test of *Bateman* gross negligence or of *Caldwell* recklessness should be applied. It also restored to the law the flexibility of the *Bateman* gross negligence test, which allowed the jury to consider the accused's conduct in all the surrounding circumstances, and only punished her if her negligence was very serious. There are, however, still some remaining difficulties, which we consider in Part III below.
- 2.22 It is clearly established that the crime of involuntary manslaughter can be committed by omission, but only where the accused owes the deceased a duty to act. The circumstances in which a positive duty to act arises are uncertain, but we set out the common law position, so far as we were able to determine it, in Consultation Paper No.135, and no-one on consultation dissented from our view, which we summarise in the paragraphs that follow.
- 2.23 There is no general rule in the criminal law imposing a duty to act. However, in the law of manslaughter a number of discrete cases have become established in which there is a duty to act; if the duty is neglected and the person to whom it is owed dies, the person subject to the duty may be guilty of manslaughter. First, there is a duty to care for certain defined classes of helpless relatives: for example, spouses must take care of each other, and parents must look after their dependent children. A duty to act can also arise as a result of a contract, and a contractual duty can give rise to criminal liability if persons outside the contractual relationship, who are nonetheless likely to be injured by any failure to perform the contractual duty, are killed.
- 2.26 Apart from unlawful act manslaughter and gross negligence manslaughter, there is one further way in which manslaughter may now be committed in the absence of intention to kill or cause serious injury. This arises when the accused is aware that her conduct involves a risk of causing death (or, probably, serious injury) and she unreasonably takes that risk. This combination of awareness of risk and unreasonable risk-taking is called 'subjective' recklessness. Again, this type of mental state does not exclude liability for gross negligence or unlawful act manslaughter; a defendant may be guilty on all three counts.
- 2.27 Until ten years ago many cases of this type were treated as falling within the definition of murder. However, in a murder case in 1985 the House of Lords held that cases in which the defendant may have foreseen that death or really serious injury were highly probable to result from her act, without intending such consequences, would no longer constitute murder. These cases must then have fallen, by default, into the scope of the offence of manslaughter. There is little or no separate authority, however, about this type of manslaughter, since such cases are dealt with in practice as cases of unlawful manslaughter, and the accused's awareness of the risk is taken into account only as an aggravating factor when it comes to sentencing.



[The Commission proceeded to discuss the principles which should inform any reform of this area:]

3.1 We now turn to consider the problems created by the present law. The two major problems relate to the very wide range of conduct falling within the scope of involuntary manslaughter. As we explained in Part II, the offence encompasses, first, cases involving conduct that falls only just short of murder, where the accused was aware of a risk of causing death or serious injury, although he did not intend to cause either; second, cases where the accused is a professional person who makes a very minor mistake that results in death; and third, cases where a relatively minor assault ends in death. This leads to problems in sentencing and labelling, including the fundamental problem that many cases currently amounting to unlawful manslaughter involve only minor fault on the part of the perpetrator, and therefore ought not, perhaps, to be described as manslaughter at all. There are also a number of more specific problems which we consider below.

...

4.2 The extent to which a person is responsible for the unintended results of her actions is a question that has puzzled legal philosophers for years. We have had to consider this question again because we believe that it is essential that any new law of involuntary manslaughter that we may propose should be founded on just, coherent and logical principles.

4.3 We are also aware that our proposed new homicide offences ought, in time, to form part of a complete criminal code. It is evident that, in the interests of justice, logic and consistency, the same fundamental principles should, so far as possible, influence all the parts of this growing code. In this part, then, we begin by describing the philosophy that this Commission has traditionally applied in our criminal law reform work; it is known as 'subjectivist legal theory'. We will then consider how this philosophy has shaped the work we have already done on the reform and codification of the law of offences against the person. Finally, we undertake a thorough examination of this philosophy, in order to decide whether it should apply in the present subject.

4.4 The legal philosophy traditionally applied in mainstream English criminal law and by this Commission is known as 'subjectivist theory'. It rests on the principle that moral guilt, and hence criminal liability, should be imposed only on people who can be said to have chosen to behave in a certain way or to cause or risk causing certain consequences. The roots of subjectivism lie in a liberal philosophy that regards individuals as autonomous beings, capable of choice, and each deserving of individual respect. It is called 'subjectivism' because of the significance it accords to the individual's state of mind at the time of the prohibited conduct.

4.5 Three principles have been identified as inherent in this basis of liability. The first of these is the 'mens rea' principle, which imposes liability only for outcomes which were intended or knowingly risked by the alleged wrongdoer. The second principle, the 'belief principle', judges a defendant according only to what she believed she was doing or risking. Thirdly, according to the 'principle of correspondence', subjectivists

insist that the fault element of a crime correspond to the conduct element; for example, if the conduct element is 'causing serious injury', the fault element ought to be 'intention or recklessness' as to causing serious injury. This ensures that the defendant is punished only for causing a harm which she chose to risk or bring about.

- 4.6 Subjectivist philosophy applies widely in the criminal law today. A man cannot be convicted of rape, for example, if he genuinely believed, albeit unreasonably, that his victim consented to sexual intercourse, because this belief would be incompatible with the intention to have intercourse with a woman without her consent, or recklessness as to that possibility, which are the mental states required for rape [although see now Chapter 15.b.iv.].

- ...
- 4.11 The difficult question is whether, and in what circumstances, a person should be held criminally liable for causing death unintentionally when she was not aware that her conduct created such a risk. We consider this question in the following paragraphs.
- 4.12 Orthodox subjectivist theory, then, requires the defendant to have been, at least, aware of the risk of causing the prohibited harm. However, there is a body of criticism, from very distinguished commentators, of the orthodox subjectivist *mens rea* principle. One ground of criticism is that it is based on a simplistic view of what constitutes knowledge or awareness of risk: ... while we do indeed sometimes make our knowledge of what we are doing explicit to ourselves in ... silent mental reports, it is absurd to suggest that such knowledge can be actual only if it is made this explicit. When I drive my car, my driving is guided by my (actual) knowledge of my car and of the context in which I am driving: but my driving is not accompanied by a constant silent monologue in which I tell myself what to do next, what the road conditions are, whether I am driving safely or not, and all the other facts of which I am certainly aware while I am driving ... The occurrence or the non-occurrence of certain explicit thoughts is irrelevant to whether I am actually aware of what I am doing: my actions can manifest my awareness even if no explicit thoughts about the relevant facts pass through my mind at the time [Duff 1990, p. 160].
- 4.13 On this view of what constitutes a mental state, the contrast between awareness and lack of awareness of risk is not as stark as in conventional subjectivist accounts, and it is less clear why inadvertence ought not to be classified as *mens rea* in certain circumstances.
- 4.14 The main argument in favour of criminalising some forms of inadvertent risk-taking, however, is that in some circumstances a person is at fault in failing to consider the consequences that might be caused by her conduct. The example given by R.A. Duff is that of a bridegroom who misses his wedding because it slipped his mind when he was in the pub. An orthodox subjectivist would point to his lack of intention or awareness, and deem him consequently less culpable. The bride, however, would rightly condemn him, because it is plain from his conduct that he did not care, and this attitude is sufficient to make him blameworthy. Duff argues that this account retains a subjective element, because attitudes are subjective.

...

- 4.17 In all the sources cited in paragraphs 4.12-4.16, the view is taken that it may be justifiable to impose criminal liability for the unforeseen consequences of a person's acts, at any rate where the harm risked is great and the actor's failure to advert to this risk is culpable. We are persuaded by this reasoning. In the following paragraphs, therefore, we consider the criteria by which culpable inadvertence should be judged if it is to attract the sanctions of the criminal law when death results.
- 4.18 The first criterion of culpability upon which we must insist is that the harm to which the accused failed to advert was at least foreseeable, if not strikingly foreseeable or obvious. If the accused is an ordinary person, she cannot be blamed for failing to take notice of a risk if it would not have been apparent to an average person in her position, because the criminal law cannot require an exceptional standard of perception or awareness from her. If the accused held herself out as an expert of some kind, however, a higher standard can be expected from her; if she is a doctor, for example, she will be at fault if she fails to advert to a risk that would have been obvious to the average doctor in her position.
- 4.19 As a matter of strict principle, the accused ought only to be held liable for causing death if the risk to which she culpably failed to advert was a risk of death. In practice, however, there is a very thin line between behaviour that risks serious injury and behaviour that risks death, because it is frequently a matter of chance, depending on such factors as the availability of medical treatment, whether serious injury leads to death. Admittedly it is possible for conduct to involve a risk of serious injury (such as a broken limb) though not a risk of death; but intention to cause serious injury constitutes the mens rea of murder although the actus reus is the causing of death, and we see no compelling reason to distinguish between murder and manslaughter in this respect. We consider, therefore, that it would not be wrong in principle if a person were to be held responsible for causing death through failing to advert to a clear risk of causing death or serious injury – subject of course to a second criterion, to which we now turn.
- 4.20 The second criterion of culpability which we consider to be essential is that the accused herself would have been capable of perceiving the risk in question, had she directed her mind to it. Since the fault of the accused lies in her failure to consider a risk, she cannot be punished for this failure if the risk in question would never have been apparent to her, no matter how hard she thought about the potential consequences of her conduct. If this criterion is not insisted upon, the accused will, in essence, be punished for being less intelligent, mature or capable than the average person.
- 4.43 In conclusion, we consider, as a matter of principle, that the criminal law ought to hold a person responsible for unintentionally causing death only in the following circumstances:
- (1) when she unreasonably and advertently takes a risk of causing death or serious injury; or
  - (2) when she unreasonably and inadvertently takes a risk of causing death or serious injury, where her failure to advert to the risk is culpable because

- (a) the risk is obviously foreseeable, and
- (b) she has the capacity to advert to the risk.

...

[And, finally, the Report proposed the following tier of offences to replace the existing sub-types:

...

5.13 We recommend the creation of a new offence of reckless killing, which would be committed if

- (a) a person by his or her conduct causes the death of another;
- (b) he or she is aware of a risk that his or her conduct will cause death or serious injury; and
- (c) it is unreasonable for him or her to take that risk, having regard to the circumstances as he or she knows or believed them to be. (Recommendation 2)

...

5.16 For this reason we recommend the abolition of unlawful act manslaughter in its present form. This would not of course mean that all those who would be convicted under the present law of unlawful act manslaughter would escape criminal liability altogether. The overwhelming majority of such cases would fall within one of the offences that we do propose: even if the defendant was not aware of the risk of death or serious injury (in which case he would be guilty of reckless killing) it would usually be possible to say that that risk was obvious and that he should have been aware of it – in which case he would be guilty of the offence of killing by gross carelessness that we propose below. In the minority of cases where this is not so, he could be prosecuted for the appropriate non-fatal offence. (Recommendation 3)

5.17 The second new offence which we recommend ought to be created is 'killing by gross carelessness'. This offence is set out in clause 2(1) of the attached Bill.

...

5.34 For all these reasons, we recommend the creation of a new offence of killing by gross carelessness, which would be committed if

- (1) a person by his or her conduct causes the death of another;
- (2) a risk that his or her conduct will cause death or serious injury would be obvious to a reasonable person in his or her position;
- (3) he or she is capable of appreciating that risk at the material time; and
- (4) either
  - (a) his or her conduct falls far below what can reasonably be expected of him or her in the circumstances, or
  - (b) he or she intends by his or her conduct to cause some injury, or is aware of, and unreasonably takes, the risk that it may do so, and the conduct causing (or intending to cause) the injury constitutes an offence. (Recommendation 4)

Two important changes emerge from the Commission's 2006 *Homicide* report. First, it has recanted on its proposal to abolish unlawful act manslaughter (2006,



p. 51, para 2.164), on the pragmatic grounds that the government was unwilling to support this (Home Office 2000e). Secondly, it has decided to drop its proposed offence of reckless manslaughter, on the basis that the worst type of cases will step up the ladder to second degree murder, with the rest being swept up by the broad brush of gross negligence. This sounds plausible enough but the reasoning is a little less so. Part of this rests on the Commission's lack of faith in evaluative terms such as recklessness, yet it is willing to trust the equally if not more troublesome term 'gross carelessness'. This proposed upgrading and downgrading is also hard to square with fair labelling requirements. And of course, with its proposed offence of 'killing by gross carelessness' the Commission betrays its previous adherence to subjectivism.

#### VI.21.d. Self-defence

Homicide is sometimes justified on the grounds of self-defence. As with provocation, self-defence also relies on using the notion of reasonableness, a concept which is apparently gender neutral but in reality discriminates against women who are provoked and/or attempt to defend themselves against persistent male violence or indeed anyone who is physically vulnerable. Two points need to be emphasised, however: (1) self-defence, unlike provocation (and diminished responsibility), is not confined to homicide – it can also justify lesser forms of violence; and (2) self-defence, unlike provocation (and diminished responsibility), is a complete defence; when invoked successfully it results in acquittal. Self-defence goes to an essential element in the definition of crime. Murder and manslaughter involve the unlawful killing of another person. A successful plea of self-defence leads to an acquittal because it renders the defendant's actions lawful. In pleading self-defence, the defendant is arguing that her action was entirely appropriate in the circumstances. Self-defence covers both the common law right to defend oneself against invasion of person and property, and the public right to use reasonable force in the prevention of crime. In most cases of course the two will overlap.

#### *Criminal Law Act 1967, s. 3*

- (1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.
- (2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.

The decision whether force is required is a subjective question, whereas the reasonableness of the response, as with the loss of self-control in provocation, is entirely a matter for the jury (*A-G for Northern Ireland's Reference (No. 1 of 1975)* (1977)). But the judge will indicate factors to be taken into account in

determining whether the retaliation was necessary, such as the imminence of the attack. In addition, the force used is expected to be proportional to that used in the attack. However, it has been said that:

If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken [Lord Morris in *Palmer* [1971] 1 All ER 1077 at 1078].

Mistaken belief in relation to acting in self-defence is subjectively assessed. In *Beckford* (1987) the Privy Council approved the following passage from the judgment of Lord Lane CJ in *R v. Williams (Gladstone)* (1987) as correctly stating the law of self-defence:

The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant... In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent crime, then the prosecution have not proved their case... Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.

In *Scarlett* (1993) a mistake as to the circumstances leading to the use of more force than necessary was tolerated. However, in *Owino* (1996) the Court of Appeal has re-affirmed that the question of the appropriate degree of force used is objectively evaluated. None of this applies to a defendant whose mistake, whether as to the need for self-defence or as to the amount of force required, was caused by self-induced intoxication (*R v. O'Grady* (1987), *R v. Hatton* (2006)).

The trial and appeal of Tony Martin, convicted of murder and wounding with intent after shooting two burglars who had broken into his farmhouse, offers an interesting insight into the procedural and substantive operation of defences. The intruders were retreating when Martin open fired with an unlicensed pump action shotgun, killing one and injuring the other. At trial, his defence lawyers failed to persuade the jury that his acts were justified as self-defence. The case re-opened the public debate about the appropriateness of using violence in defending one's person and property, and there was no shortage of populist sympathy for Martin. It also provides an insight into the context and circumstance that surround defences, as well as the interplay between complete and partial defences. On appeal, a newly instructed legal

team adduced fresh evidence suggesting that Martin suffered from a paranoid personality disorder and depression which heightened his sense of fear of threats. Something of a scatter-gun strategy was adopted whereby this evidence was used in relation to both self-defence and diminished responsibility. Counsel also sought to persuade the court that the more personalised approach to provocation confirmed in *Smith* (2000) also applied to self-defence.

***R v. Martin (Anthony)* [2002] 1 Cr App R 27**

**Lord Woolf:** There are policy reasons for distinguishing provocation from self-defence. Provocation only applies to murder, but self-defence applies to all assaults. In addition, provocation does not provide a complete defence; it only reduces the offence from murder to manslaughter. There is also the undoubted fact that self-defence is raised in a great many cases resulting from minor assaults and it would be wholly disproportionate to encourage medical disputes in cases of that sort. Lord Hobhouse in his dissenting speech in *Smith* recognised that in relation to self-defence, too generous an approach as to what is reasonable could result in an 'exorbitant defence'. Lord Hoffmann also appeared conscious of this. As a matter of principle we would reject the suggestion that the approach of the majority in *Smith* in relation to provocation should be applied directly to the different issue of self-defence.

We would accept that the jury are entitled to take into account in relation to self-defence the physical characteristics of the defendant. However, we would not agree that it is appropriate, except in exceptional circumstances which would make the evidence especially probative, in deciding whether excessive force has been used to take into account whether the defendant is suffering from some psychiatric condition.

Martin's appeal against his murder conviction was allowed, and was substituted by a verdict of manslaughter by reason of diminished responsibility. A few noteworthy points arise from the case. On one level, the rejection of self-defence seems inconsistent with the accepted law on mistaken self-defence (see above). The Court of Appeal appear to be making a distinction between cases of mistaken facts (*Beckford and Williams (Gladstone)*) and those where the mistake lies in over-estimating the dangerousness of threats (*Martin (Anthony)*). Whilst belief in facts is judged subjectively, objectivity is allowed to creep in to the risk assessments based on such facts. To what extent are such artificial distinctions explained by the underlying notion of moral contextualism (see Norrie 2002)? In this case, perhaps a strong sense that Martin had taken the law into his own hands and ought not be afforded an acquittal that successful self-defence would bring. The final outcome also illustrates the interplay between defences, with diminished responsibility on hand to step in and partially excuse Martin's violence.

Cases where individuals take the law into their own hands inevitably capture public attention, and in the case of Tony Martin, re-opened the debate about the use of force in protecting one's person and property. In January 2004 listeners of

BBC Radio 4 singled out reform to strengthen the law of self-defence as their first choice for a private members' bill (*The Times*, 2 January 2004). Yet, this apparent public anxiety is at odds with the reality that cases of householders struggling to plead self-defence are few and far between. In 2005, the Director of Public Prosecutions revealed that during the previous 15 years only 11 prosecutions were brought against householders for attacking their intruders (*The Times*, 3 October 2007). This was hardly the evidence to justify legislative intervention in the form of section 76 of the Criminal Justice and Immigration Act 2008, which consolidates, somewhat elaborately, the status quo in relation to the use of reasonable force in self-defence and prevention of crime:

*Criminal Justice and Immigration Act 2008, s. 76: Reasonable force for purposes of self-defence etc.*

...

- (3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.
- (4) If D claims to have held a particular belief as regards the existence of any circumstances –
  - (a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but
  - (b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not –
    - (i) it was mistaken, or
    - (ii) (if it was mistaken) the mistake was a reasonable one to have made.
- (5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.
- (6) The degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.
- (7) In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case) –
  - (a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and
  - (b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.
- (8) Subsection (7) is not to be read as preventing other matters from being taken into account where they are relevant to deciding the question mentioned in subsection (3).
- (9) This section is intended to clarify the operation of the existing defences mentioned in subsection (2).



(10) In this section –

(a) ‘legitimate purpose’ means –

- (i) the purpose of self-defence under the common law, or
- (ii) the prevention of crime or effecting or assisting in the lawful arrest of persons mentioned in the provisions referred to in subsection (2)(b);

(b) references to self-defence include acting in defence of another person; and

(c) references to the degree of force used are to the type and amount of force used.

It is hard to see how listing well-established common law rules together in one overly long legislative section serves to truly clarify the law. Arguably, it expands the potential application of self-defence and thus satisfies the public demand for greater protection – or at least for listeners of Radio 4! The reference in subsection 7(a) that a person may not be able to weigh to a nicety the exact measure of any action is an invitation to further subjectivise the decision to use force. And subsection 8 broadens this even further by allowing unspecified ‘other matters’ to be taken into account. It would be surprising if this did not lead to an increase in pleas of self-defence. And of course in homicide cases, defendants will be able to choose between gambling outright in pleading this complete defence, or with hedging their bets on the partial provocation cum use of force defence of ‘loss of self control’ in the Coroners and Justice Act 2009 (see section 21.c.ii).

In *Re A* (2000) the Court of Appeal turned to self-defence in the unlikely context of conjoined twins in order to justify the killing of one of the twins, Mary (see also above at Chapter 12.f.). Ward LJ reasoned that Mary was killing the other twin, Jodie, by draining her life-blood and that the doctors would be justified in removing this threat of fatal harm. However, this elasticity is probably not enough on its own to ensure that self-defence is available to the battered woman who eventually retaliates. An image underlying all discussions of self-defence is that these are one-off occurrences which can be responded to or repelled. It is important to consider more closely how the notions of necessary and proportional force should apply to the long-term battered wife. Part of the requirement that the force used has to be necessary is the (so-called) duty to retreat (*Bird* (1985)). A woman who has been battered will probably have retreated time and time again. Should she be required to go on retreating forever? Should we not take into account on the one occasion when she does not retreat that she has indeed retreated before?

Another strategy which could be used on her behalf would be to recall the right of the property owner to repel an intruder. The right to ‘stand fast’ in defending one’s home is itself a qualification of the duty to retreat (Ashworth 1975, p. 294). By analogy, should not a woman be able to defend her right to occupy her home without fear of attack? Where she eventually does retaliate, the jury could be encouraged to take into account that it is not only her physical integrity which has been threatened by the violence, but also her right to peaceful occupation of her home.

Similarly, she could benefit from the decision in *Field* (1972). This was a case in which the Court of Appeal rejected the argument that a victim had to avoid places where he knew, because of threats and previous experience, that he might be attacked. Although we might share Ashworth's caution about this and require a *prima facie* duty to inform the police (1975, p. 296), it might nonetheless be invoked by women. She may have attempted to get police help in the past. Even if she had not sought police help it would seem wrong to blame her for having absorbed so well the social message that this is really a private matter. In any case, the place she would be being asked to avoid is her own home. By combining the right to remain on one's own property with the *Field* principle, she would have a better chance of arguing that the force was necessary. At a wider level, the prevalence of domestic violence makes something of a nonsense of the idea that she can be expected to avoid it!

The requirement of proportionality could also be rethought in terms of its applicability to the battered wife situation. The argument for proportionality is based on what Ashworth calls the 'human rights' approach – that is, respect for the attacker's right to life and physical security (1975, pp. 296, 297). The problem lies in knowing where that balance should be struck in a situation where lethal force is used to prevent persistent, but not lethal, physical bullying and violence.

McColgan argues that the Canadian decision of *Lavallee* could be used as a model:

Aileen McColgan, 'The Killings of Battered Women Who Kill' (1993) 13 OJLS 504, 519 [reproduced with permission of Oxford University Press]

A movement towards the use of self-defence... started about ten years ago in the United States... In some respects the current UK law of self-defence avails itself more readily to such an application than does the law in Canada or in many US jurisdictions... An attempt will be made here to transpose some of the Canadian and US reasoning into the UK context... Research suggests that many battered women kill in order to escape the threat of death or serious injury, or to protect their children. Insofar as this is the case, they should be afforded the same defence as is available to men who kill for the same reasons although, given their relative safety in the private sphere and the greater likelihood of physical parity with potential attackers, in different circumstances...

Even where women kill in the course of a violent attack on them, defence lawyers and the courts are apparently blind to the possibilities of a self-defence plea...

Given the current model of self-defence, it is clear that attention has to be drawn to its inequitable application to women who kill to protect themselves... In the absence of challenges to the common assumptions about when force is necessary in response to actual or threatened violence, and about the level of force which a woman might reasonably use against an unarmed man, such women will be unable to successfully plead self-defence. Judicial resistance... is evident from US cases such as *State v. Stewart* [243 Kan 639 (1988)] where the court ruled that, as a matter of law, the defendant could not plead self-defence

when she killed her sleeping husband, taking the view that to allow such a plea would be to 'leap into the abyss of anarchy' . . . [T]he reluctance of the courts to categorize women's killings as self-defence is rooted partly in the ideology of family life . . .

It was not until 1991 that the English courts . . . removed husbands' freedom to rape their wives, and the financial dependency historically forced upon women by their husbands' automatic ownership of their goods still finds its existence in women's loss of entitlement upon cohabitation or marriage to most social security benefits. It is therefore essential, where women kill in response to a perceived threat from an abusive partner to their life or the lives of their children, that juries are made aware of the circumstances of the case, including the history of violence and its effects on the woman's perceptions of the threat of violence, as well as to the effect of the relative disadvantages of many women in terms of passive socialization and physical size, strength and training. This approach would not afford women defendants favourable legal treatment; it would, rather, go some way to addressing the prejudice against them that is built into the system by virtue of its development through typically male cases of self-defence. In the context of self-defence, then, the male standards of necessity and proportionality, together with the current failure adequately to address the reality of extreme violence under which many women exist, must be recognized and compensated for in the application of the self-defence standard to battered women who kill . . . Early US theorists such as Elizabeth Schneider argued that evidence of the psychological effects of repeated assaults could be utilized, together with lay evidence about the history of defendant and deceased, in order to combat the prejudice inherent in the traditionally male model of self-defence and to allow the question of reasonableness to be assessed in the light of all the circumstances relevant to the defendant. In the event, however, decisions about whether or not to admit such evidence have often been based on the courts' assessment of the reasonableness of the defendant's actions, testimony often being excluded in the non-traditional confrontation cases on the basis that the battered woman's behaviour was unreasonable . . . [E]xpert evidence on the effects of prolonged abuse . . . has frequently been used to construct a stereotypical battered woman . . . When women failed to fit the stereotype (here for example they had fought back before) the evidence would often then be put to one side and their conduct judged against the standard of the 'reasonable man' without consideration of the fact that a woman's, especially a battered woman's, perceptions of danger might reasonably differ from those of a man . . .

English law creates no duty in the defendant to avoid places where she may lawfully be, and she may arm herself against an anticipated attack . . . [I]t is inappropriate that a woman's failure to leave her own home should be used to cast doubt on her plea of self-defence. This was explicitly recognized by the Supreme Court of Canada in *Lavallee*, where Wilson J, delivering the unanimous decision of the court, stated [1990] 1 SCR 852:

it is not for the jury to pass judgment on the fact that an accused battered woman stayed in the relationship. Still less is it entitled to conclude that she forfeited her right to self-defence for having done so . . . the traditional self-defence doctrine does not require a person to retreat from her home instead of defending herself . . .



One argument that could be raised against allowing women to benefit from self-defence in this way is that self-defence is the paradigm justification. It is said that no offence is committed because in the circumstances it was the right act. This way of conceptualising it is difficult to sustain, however, in the light of recent developments which extend the defence to cover situations where the defendant mistakenly believed (whether reasonably or not) that she was under attack (see below).

Any argument for a qualified defence where excessive force was used would also encounter the 'right act' analysis (Dressler 1984). The Australian High Court adopted an excessive defence solution for a time, but later abandoned it (Zecevic (1987)). The House of Lords has confirmed that no such half-way house exists in English law, but gave the proposal its strong support (Clegg (1995)). Once again, the argument was connected with the continuation of the mandatory penalty for murder. While superficially attractive, the notion that all the problems associated with distinguishing murder from manslaughter or lawful homicides from unlawful homicides would be solved by the introduction of a discretionary penalty for murder, needs careful thought. One argument against the partial defence is that, rather than giving an option to those caught by the severity of the current all-or-nothing self-defence doctrine, it would bring back into the criminal frame those who would otherwise have been acquitted. It is easy to imagine women who kill their violent partners being caught this way. Just as at present they appear to be deprived of self-defence and, through defence tactics or ignorance, led to a choice between murder and manslaughter by diminished responsibility or provocation, so the availability of a partial self-defence would tend to reinforce their culpability. The subjectivising of self-defence described below may be a far more useful development although its application to women in these situations has yet to be exploited. We have shown in this chapter how a seemingly straightforward concept such as violence is deceptively complex. Our conception of violence is a product of social and legal construction. Legal definitions do not capture neatly the areas over which the net of legal enforcement is cast. Social and cultural forces exercise at least as strong and pervasive an influence. Family violence is a good example of this thesis. The increased emphasis on corporate liability for conventional crime is a development highlighting the fluidity of legal constructions of crime which have been stressed throughout this book.

But it is not just the landscape over which criminal law ranges, not just the nature of the behaviour that might be regarded as included in criminal proscription, that is subject to shifts over time. This does change at a formal level of course, as we have seen in the abolition of offences of buggery, as well as at the constructed level, as changing attitudes both to domestic violence and road safety demonstrate. Social forces also affect 'internal' legal conceptions as well. We have seen clearly in the last two sections how the tectonic plates of 'mens rea' are moving in different directions. The patterns of this movement are not uniform: it is not all in the direction of subjectivisation or individualisation.



In relation to sexual offences, a clear line is being drawn between the ideals of subjective 'mens rea' and of acceptable behaviour and respect for others. At the same time, there has been a move towards individualising the partial defence of provocation, although the proposals in the Coroners and Justice Act reinstates the objective sense of reasonableness into the defence, and a willingness to develop other defences such as necessity and self-defence.

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# § Law in Context

Since the publication of the first edition, this textbook has offered one of the most distinctive and innovative approaches to the study of criminal law. Looking at both traditional and emerging areas, such as public order offences and corporate manslaughter, it offers a broad and thorough perspective on the subject. Material is organised thematically and is clearly signposted at the beginning of each section to allow the student to navigate successfully through the different fields.

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